RESOLVING CONFLICTS BETWEEN HUMAN RIGHTS:
A LEGAL THEORETICAL ANALYSIS IN THE CONTEXT OF THE ECHR

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Voor mijn oma

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PREFACE

At first glance, there appears to be ample room for human rights to enter into conflict with one another. Freedom of expression, for instance, is often said to clash with the right to privacy or reputation. Likewise, the freedom to manifest one's religion (*forum externum*) sometimes appears to conflict with other persons' freedom from religion (*forum internum*). Such apparent human rights conflicts raise particular concerns and questions. Certain scholars and judges for instance question the very possibility of human rights conflicts, *inter alia* motivated by a perceived need to preserve the integrity and harmony of the human rights system. Even if one acknowledges that human rights may clash in certain situations, answering the ensuing questions regarding the conceptualisation and resolution of human rights conflicts is not an easy feat. This dissertation nevertheless endeavours to answer the relevant questions: (i) can human rights conflict; (ii) if so, are conflicts between human rights problematic; (iii) how can such conflicts be conceptualised; and (iv) how can they be resolved?

The research presented in this dissertation was undertaken in the specific context of the European Convention on Human Rights (ECHR) and the case law of its court, the European Court of Human Rights (ECtHR; the Court). In recent decades, the ECtHR has been increasingly confronted with cases that appear to involve a conflict between human rights. Yet, the Court has by and large failed to adequately respond to the challenges posed by such cases.

The Court has, in its case law, firstly exhibited an inconsistent approach to the identification of conflicts between human rights. Although the Court has on many occasions accepted the existence of human rights conflicts, it has also explicitly denied the very possibility of such conflicts in certain judgments. The Court thus appears to be struggling with the conceptual questions: can human rights conflict and, if so, how can conflicts between human rights be conceptualised? In order to tackle these questions in a systematic manner, this dissertation presents an argument in favour of the idea that human rights *can* and *do* conflict in particular situations. It is argued that, in the ECHR context, the existence of human rights conflicts flows directly from a certain conception – defended in this dissertation – of the human rights enumerated in the Convention.

The Court has secondly tended to treat cases that entail a conflicts between human rights, as identified by the Court, identical to cases in which a human right is opposed by a public interest. The Court has thereby suggested that human rights conflicts are not problematic, in that they do not pose particular challenges for their judicial resolution. This dissertation takes issue with that argument. It is argued that conflicts between human right pose challenges that are fundamentally different from those that arise in 'traditional' human rights adjudication and that, as a result, distinct resolution methods are needed.

Finally, the Court has failed to develop a consistent approach to the resolution of conflicts between human rights. As already indicated, it has by and large applied the same test (the proportionality test) it applies to cases involving opposition of a human right and a public interest. Usually, the application of the proportionality test by the Court, also in conflicting human rights cases, boils down to a balancing test. However, due to its *ad hoc* and open ended nature, the Court's current balancing test is unable to function as a rational, objective, coherent and transparent methodology for the resolution of conflicting human rights cases. This dissertation argues that the Court's current approach to the resolution of conflicts between human rights is defunct and its legal reasoning in dire need of improvement. In order to ameliorate said reasoning, this dissertation proposes a comprehensive framework for the resolution of conflicts between human rights in the ECHR context. Application of the framework is intended and expected to contribute to a drastic improvement in the rationality, objectivity, coherence and transparency of the Court's reasoning in conflicting human rights cases.

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Op het eerste zicht bestaat er veel ruimte voor mensenrechten om met elkaar in conflict te komen. Vrijheid van meningsuiting wordt bijvoorbeeld dikwijls bestempeld als conflicterend met het recht op privacy of reputatie. In gelijkaardige termen kan de vrijheid om een godsdienst te uiten (*forum externum*) soms schijnbaar conflicteren met de vrijheid *van* godsdienst van anderen (*forum internum*). Dergelijke schijnbare conflicten tussen mensenrechten doen bijzondere vragen rijzen. Bepaalde academici en rechters, onder andere deze die de nadruk leggen op de integriteit en het harmonieus voortbestaan van het mensenrechtensysteem, betwijfelen bijvoorbeeld dat mensenrechten echt kunnen conflicteren. Zelfs indien men aanvaardt dat mensenrechten in bepaalde situaties kunnen conflicteren, is het beantwoorden van de daaruit volgende vragen aangaande de conceptualisering en oplossing van conflicten tussen mensenrechten geen eenvoudige taak. Deze dissertatie tracht niettemin de relevante vragen te beantwoorden: (i) kunnen mensenrechten conflicteren; (ii) zo ja, zijn conflicten tussen mensenrechten problematisch; (iii) hoe kunnen dergelijke conflicten geconceptualiseerd worden; en (iv) hoe kunnen ze opgelost worden?

Het onderzoek voor deze dissertatie werd ondernomen in de specifieke context van het Europees Verdrag voor de Rechten van de Mens (EVRM) en de rechtspraak van het Europees Hof voor de Rechten van de Mens (EHRM; het Hof). In de afgelopen decennia werd het EHRM steeds meer geconfronteerd met zaken die een conflict tussen mensenrechten lijken in te houden. Echter, het Hof heeft grotendeels nagelaten om adequaat tegemoet te komen aan de uitdagingen die dergelijke zaken met zich meebrengen.

Het Hof heeft, in haar rechtspraak, vooreerst een inconsistente benadering ten aanzien van de identificatie van conflicten tussen mensenrechten tentoongespreid. Hoewel het Hof meermaals aanvaard heeft dat mensenrechten kunnen conflicteren, heeft het tevens – in

bepaalde arresten – uitdrukkelijk het bestaan van conflicten tussen mensenrechten ontkend. Het Hof lijkt dus te worstelen met de conceptuele vragen: kunnen mensenrechten conflicteren en, zo ja, hoe kunnen conflicten tussen mensenrechten geconceptualiseerd worden? Teneinde deze vragen op systematische wijze te beantwoorden biedt deze dissertatie een argument aan in steun van het idee dat mensenrechten wel degelijk kunnen conflicteren in bepaalde situaties. Er wordt geargumenteerd dat, in de context van het EVRM, het bestaan van conflicten tussen mensenrechten rechtstreeks voortvloeit uit een bepaalde benadering – verdedigd in deze dissertatie – van de mensenrechten opgesomd in het Verdrag.

Het Hof heeft, ten tweede, de neiging vertoond om zaken die een conflict tussen mensenrechten inhouden, zoals geïdentificeerd door het Hof zelf, identiek te behandelen als zaken waarin een mensenrecht strijd met een publiek belang. Het Hof geeft daarmee de indruk dat conflicten tussen mensenrechten niet problematisch zijn, in de zin dat de rechterlijke oplossing ervan geen bijzondere uitdaging zou vormen. Deze dissertatie trekt deze benadering in twijfel. Er wordt geargumenteerd dat conflicten tussen mensenrechten wel degelijk uitdagingen doen rijzen die fundamenteel verschillen van degene die zich stellen in 'traditionele' mensenrechten rechtspraak en dat, bijgevolg, bijzondere oplossingsmethoden noodzakelijk zijn.

Het Hof heeft tenslotte gefaald om een consistente benadering voor de oplossing van conflicten tussen mensenrechten te ontwikkelen. Zoals reeds aangegeven heeft het Hof grotendeels dezelfde test (de proportionaliteitstest) toegepast die het hanteert voor de oplossing van zaken die een strijd tussen een mensenrecht en een publiek belang inhouden. De toepassing van deze proportionaliteitstest door het Hof neemt in de meeste gevallen, ook in zaken van conflicterende mensenrechten, de vorm aan van een afwegingstest. Echter, tengevolge van haar *ad hoc* en open aard is de huidige afwegingstest van het Hof niet in staat om als rationele, objectieve, coherente en transparante methodologie voor de oplossing van conflicten tussen mensenrechten te functioneren. Deze dissertatie argumenteert dat de huidige benadering van het Hof tekortschiet en dat haar juridische redenering dringend nood heeft aan verbetering. Teneinde deze verbetering te voorzien stelt deze dissertatie een allesomvattend kader voor de oplossing van conflicten tussen mensenrechten in de context van het EVRM voor. De bedoeling en verwachting is dat toepassing van het kader zal bijdragen tot een drastische verbetering van de rationaliteit, objectiviteit, coherentie en transparantie van de redenering van het Hof in zaken van conflicterende mensenrechten.

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GENERAL INTRODUCTION

Two shipwreck victims are holding on for life to the same piece of wood, which cannot support their combined weight. A person caught in a snowstorm breaks into someone else's cabin to save her life. A woman in search of her origins requests disclosure of information about her biological mother, who gave birth to her anonymously.[1] Police officers threaten to torture the suspect in an abduction case to discover the whereabouts of the suspect's victim, hoping to be able to save his life.[2] And a newspaper publishes photographs of a celebrity seen outside a Narcotics Anonymous meeting.[3] These cases – some hypothetical, others real life ECtHR cases – share a common characteristic: they all appear to involve a conflict between different persons' human rights. But can human rights really conflict with one another? If so, how can such conflicts be conceptualised? Are they problematic? And how can they be resolved?

In this dissertation, I aim to answer these questions in the specific context of the European Convention on Human Rights (ECHR) and the case law of its court, the European Court of Human Rights (ECtHR; the Court).

In Part I, I will answer three research questions in relation to the existence, problematisation and conceptualisation of conflicts between human rights in the ECHR context:

> *Can human rights really conflict, in the sense of being incompatible with one another?*
>
> *If so, are conflicts between human rights problematic in the ECHR context (*i.e. *do they raise different issues from the ones raised by 'traditional' human rights adjudication)?*
>
> *And how can conflicts between human rights be conceptualised in the ECHR context?*

I will answer the first and second question in the affirmative. In relation to the first question, I will argue that conflicts between human rights are not only a conceptual possibility under the ECHR system, but also an inherent feature thereof. In terms of the second question, I will argue that conflicting human rights cases should be treated differently from 'traditional' human rights cases, both at the level of principle and at the procedural level. In answering the third question, I will provide a definition of conflicts between Convention rights, *i.e.* the human rights enumerated in the ECHR or developed by the ECtHR in its case law. I will moreover propose a double test to assist the Court in correctly identifying such conflicts.

[1] ECtHR, *Odièvre v. France*, app. no. 42326/98, 13 February 2003.
[2] ECtHR, *Gäfgen v. Germany*, app. no. 22978/05, 1 June 2010.
[3] ECtHR, *MGN Limited v. the United Kingdom*, app. no. 39401/04, 18 January 2011.

In Part II, I will then turn my attention to the resolution of conflicts between Convention rights by the ECtHR. I will specifically answer the following research question:

How can (apparent) conflicts between Convention rights be resolved by the ECtHR?

In answering that question, I will develop a framework for the resolution of (apparent) conflicts between Convention rights. The framework will be geared towards providing the most optimal way to deal with a conflict, under the concrete circumstances of the case at hand. The steps of the framework will, in their given order, be concerned with (i) defusing the conflict as fake; (ii) achieving a compromise between the conflicting Convention rights through *praktische Konkordanz*; and (iii) determining which of the conflicting Convention rights should prevail under the concrete circumstances. In terms of the last step, I will differentiate between three different types of conflicts and suggest the use of a different resolution technique for each: balancing in case of conflicts between relative Convention rights, subsumption in case of conflicts between an absolute and a relative Convention right, and deontological reasoning in case of conflicts between absolute Convention rights.

Before I present the results of my research, however, a number of important methodological remarks are in order.

METHODOLOGY

Scope of the Research

The current research was conducted in the context of the European Research Council-funded project "Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning". The central aim of the project is to develop innovative tools and frameworks to assist the ECtHR in improving its legal reasoning in a variety of areas, including in the domain of conflicts between human rights.

The research presented in this dissertation contributes to achieving the project's aim by developing a framework for the resolution of conflicts between human rights by the ECtHR. For methodological purposes, it is vital to clarify that the current research is primarily concerned with how such conflicts present themselves to the ECtHR. Since the aim is to improve the legal reasoning of the ECtHR in conflicting rights cases, the research assumes the perspective of the Court. This choice of focus on the perspective of the ECtHR has two important consequences.

It firstly has an impact on the identification of conflicts between human rights in the ECHR context. Most importantly, the current research zeroes in on conflicts between *Convention* rights, *i.e.* the human rights enumerated in the Convention or developed by the ECtHR in its case law. Nevertheless, I will also present some preliminary ideas on how the Court should tackle different types of conflicts, for instance those between Convention rights and constitutional rights or international human rights.

Secondly, the focus on the perspective of the ECtHR also has an impact on the resolution of conflicts between Convention rights that appear before the Court. The current research is primarily concerned with determining how the Court's legal reasoning in this area can be improved. It is less concerned with how conflicts between human rights present themselves to the legislator or national judge in the Contracting States. Nevertheless, some insights will be presented throughout this dissertation on the relationship between the ECtHR, the national legislator and the national judge in tackling (potential) conflicts between Convention rights.

In respect of the latter, *i.e.* the national judge, the case law of the Court – including its legal reasoning in conflicting Convention rights cases – plays an important guiding function. When applying human rights reasoning, the national judge generally aims to correctly apply the Court's standards, tests and principles, lest her judgments be 'overruled' at the supranational level. Whenever the Court's guidance is murky, however, the national judge risks proceeding blindly. Therefore, she stands to benefit from much needed improvements in the rationality, objectivity, coherence and transparency of the Court's legal reasoning in conflicting Convention rights cases, which this dissertation aims to provide. However, the national judge is by no means to be regarded as nothing more than the servants of the Court, loyally applying the Court's tests, standards and principles to the letter, at each and every turn. Instead, she often retains a great deal of freedom in adjudicating human rights cases. Indeed, the

Convention's subsidiarity principle – which entails that the domestic authorities, including the national judge, carry the primary responsibility for the protection of the human rights enumerated in the Convention – and the Court's margin of appreciation doctrine guarantee that the relationship between the ECtHR and the national judge is one of dialogue, not of subordination. This dialogical aspect of the Court's case law will surface at various stages throughout this dissertation, most importantly in the discussion of the role of the Court's margin of appreciation doctrine in conflicting Convention rights cases.

In respect of the relationship between the ECtHR and the national legislator, a few important remarks are in order. I submit, in particular, that conflicts between Convention rights take on a different form at both levels, *i.e.* before the Court and at the level of the national legislator. Indeed, the national legislator's primary concern is to resolve any *potential* conflict in the *abstract* and thus *ex ante*, while the Court's task is to determine - *ex post* - whether it is confronted with a *genuine* conflict in the *concrete* circumstances of the case in front of it and, if so, to resolve it. Consequently, a legislator may correctly treat a certain abstract situation as involving a potential question of conflicting Convention rights, while application of the resulting legislation will lead to a particular case in front of the Court that does not involve a genuine conflict between Convention rights. In recognition of that possibility, I first determine, in Part I of this dissertation, when exactly the Court is confronted with a genuine conflict between Convention rights. I identify two factors - individualisation of rights and the question of speculation - as being central to that determination. Importantly, both factors do not, however, play a role in how the legislator deals with conflicting Convention rights in passing legislation. Instead, the legislator is concerned with preventing and/or resolving abstract situations of conflict between abstract right holders.

Nevertheless, it is vital to emphasise that both levels – the legislative and the supranational judicial – do *not* deal with conflicts between Convention rights in a vacuum. On the contrary, they are interconnected and are best viewed as having a mutual influence on each other. In applying the margin of appreciation doctrine, the ECtHR may for instance let its analysis of a concrete conflict between Convention rights be informed by the general legislation in place at the domestic level, dealing with the conflict at the abstract level. Conversely, the legislator may (have to) adapt its legislative framework to conform to judgments the Court has delivered in concrete conflicting Convention rights cases (for instance in the case of anonymous witnesses, where the Court may indicate which types of safeguards should be provided in order to ensure the right to a fair trial of a suspect, while also protecting the right to life and physical integrity of certain witnesses).

The distinct roles of the legislator and the ECtHR in tackling conflicts between human rights will not be dealt with extensively in the current research, which is primarily concerned with the identification and resolution, in concrete cases, of conflicts between Convention rights by the ECtHR. Nevertheless, the role of the legislator will surface briefly in Part II of this dissertation, particularly in the sections in which I analyse the impact of the margin of appreciation and the role of categorical balancing in resolving conflicting Convention rights cases.

Research Focus and Selection of Sources

The current research is interdisciplinary. The primary research foci are located in the areas of legal theory and European human rights law. More particularly, the research applies legal theoretical methodologies and arguments to a specific issue in European human rights law, namely conflicts between human rights in the ECHR context. Although the primary focus of the research is legal theoretical, the analysis is at times complemented by insights from legal and moral philosophy, as well as from developmental and cognitive psychology.

The literature review conducted for the current research reflects the interdisciplinary nature of the research. The consulted literature sources - listed in the Bibliography at the end of this dissertation - are primarily taken from the fields of legal theory and European human rights law. However, important complementary literature sources from the fields of moral and legal philosophy, as well as developmental and cognitive psychology were also employed.

Since this dissertation is geared towards improving the legal reasoning of the ECtHR in conflicting Convention rights cases, extensive case law analysis formed a large part of the conducted research. For methodological purposes, it is particularly important to explain how the relevant cases were selected. The primary challenge in the selection of cases was to identify those cases that may entail a conflict between human rights. I tackled that challenge in a variety of ways. I laid the basis for my case law selection by relying on earlier scholarly research on conflicting rights in the case law of the ECtHR, which allowed me to identify a large number of potentially relevant ECtHR cases leading up to 2008.[4] From the start of my research in October 2009 onwards, I systematically reviewed all released ECtHR judgments in order to determine whether they might entail a conflict between human rights (regardless of the ECtHR's characterisation of the case). I complemented both ways of identifying relevant cases with specific searches in the HUDOC-database of the Court.[5] This not only allowed me to identify any cases I and other scholars may have missed, but also enabled me to fill the gap in the case law selection between 2008 and October 2009. In HUDOC, I searched for a variety of key words, all variations on "conflicting rights". In particular, I used the following key words: "conflicting rights"; "conflicts between rights"; "conflicting Convention rights"; "conflicts between Convention rights"; "conflicting human rights"; "conflicts between human rights"; "conflicting values"; "conflicts between values"; and "come into conflict".[6] I further conducted specific searches in terms of the "rights and freedoms of others", one of the legitimate aims listed among those that may justify restriction of several of the Convention's rights (most notably those listed in arts. 8 (2), 9 (2) and 11 (2) of the Convention). I finally

[4] Most notably P. Ducoulombier, *Les Conflits de Droits Fondamentaux devant la Cour Européenne des Droits de l'Homme*, Ph.D. dissertation (University of Strasbourg, 2008); E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008).

[5] http://hudoc.echr.coe.int/. All ECtHR decisions and judgments cited in this dissertation can be found with use of the HUDOC database.

[6] I added the last term to the search in order to locate those judgments in which the Court held that it "may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases" See, for instance ECtHR, *Axel Springer AG v. Germany*, app. no. 39954/08, 7 February 2012, para. 84.

also conducted a search for limitations in pursuit of the specific clause "for the protection of the reputation or rights of others" under art. 10 (2) ECHR.

The combination of the above selection methods allowed me to identify a large number of ECtHR cases that may entail a conflict between Convention rights. However, the imperfections and inevitable need for interpretation involved in the employed methods prevented me from ensuring exhaustive case law selection. Nevertheless, I am confident that the present selection – which can be found in the Bibliography at the end of this dissertation – represents the vast majority of cases that may entail a conflict between Convention rights. I am moreover confident that the selection methods were sufficiently accurate to allow selection of all important cases from the viewpoint of the aim of the current research, *i.e.* improving the legal reasoning of the ECtHR in conflicting rights cases. In particular, I am confident that any cases that I may have missed will not be leading cases or cases in which the Court develops its approach to identifying and resolving conflicts between Convention rights. Instead, any judgments that I may have missed are expected to be applications of judgments that are included in my selection.

It is finally also important to note that I complemented the case law selection with a large number of leading judgments in the area of 'traditional' human rights adjudication, *i.e.* concerning restrictions of human rights in pursuit of the public interest, in order to answer the research question concerning the problematisation of conflicts between Convention rights. Therefore, not all judgments listed in the bibliography are concerned with conflicting rights.

The final selection of 430 cases includes a healthy mix of Grand Chamber judgments, Chamber judgments (of all three levels of importance, as classified by the Registry) and admissibility decisions. The selection also represents a wide variety of ECHR articles, namely arts. 2, 3, 5, 6, 7, 8, 9, 10, 11, 14 and 17 ECHR and arts. 1, 2 and 3 of Protocol 1 to the ECHR.

A final important methodological remark on the case law of the ECtHR relates to the manner in which I employ the Court's judgments, *i.e.* as a source of authority that is accepted as a given or as empirical material that is open to critical analysis. In recognition of the limitations of my research, I combine both approaches in this dissertation.

Whenever I analyse the case law in relation to my research topic – *i.e.* the identification and resolution of conflicts between human rights – I use the Court's judgments as empirical material, which I critically assess against the backdrop of my own legal theoretical arguments. I thus, for instance, autonomously determine whether or not a case really involves a conflict between Convention rights. To that end, I develop an autonomous definition of genuine conflicts between Convention rights, the application of which leads me to conclude that certain cases that were characterised by the Court as entailing a conflict between Convention right did not – upon closer examination – involve a genuine conflict, while other cases did entail a genuine conflict despite the Court's reluctance or failure to identify it as such. Similarly, in relation to role of the margin of appreciation, I critically assess the Court's use of the doctrine insofar as the Court directly relates it to the presence of conflicting Convention rights. However, in relation to other elements – *e.g.* the absence of a European consensus or the importance of the right at stake – I employ the Court's use of the margin of appreciation as

an authority, as a given. Also in other areas that are wholly unrelated to my specific research topic, for instance in respect of the definition of the scope of Convention rights, I employ the Court's case law as a source of authority. I thus, for instance, do not question the Court's inclusion of the right not to be insulted in one's religious feelings under art. 9 ECHR or the right to protection of one's reputation under art. 8 ECHR.

The primary reason that has led me to employ part of the Court's case law as a source of authority is related to the inevitable limitations of (the scope of) my research. I simply do not have the time or space to – in addition to a detailed analytical and normative account on conflicts between human rights in the ECHR context – also elaborate normative arguments on the scope of the Convention's rights and the Court's use of the margin of appreciation doctrine. Instead, I necessarily take the Court's position in the latter areas as a given, insofar as they do not directly relate to my research topics. In that sense, the normative arguments presented in the current dissertation would need to be combined with scholarly research on the scope of the Convention's rights and on the role of the margin of appreciation, before a truly holistic picture on conflicts between human rights in the ECHR context would emerge.[7]

Background of the Research

I should finally also clarify that the research presented in this dissertation has a background, in that it builds upon the research of Eva Brems (promoter of the current research) in the area of conflicting human rights. It particularly builds upon the ideas[8] Brems presented in an article published in a 2005 issue of *Human Rights Quarterly*.[9]

In the publication at issue, Brems proposes "some general guidelines" in approaching conflicts between human rights.[10] She argues that one should first attempt to avoid an apparent conflict by finding a solution that leaves both rights intact.[11] If that attempt fails, she goes on, "there is a real conflict between ... human rights".[12] In resolving such real conflicts, Brems argues, "it is important to attempt to avoid having to sacrifice one right for the sake of the other".[13] Instead, she insists, "the challenge is to find ... a compromise with concessions

[7] In respect of the former aspect, I gladly refer to the Ph.D. research of my colleague, Maris Burbergs, on the scope of art. 8 ECHR. In respect of the latter, a wide variety of relevant publications are available. See, for instance, G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 80-98; E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996), 240-314; J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal* (2011), 80-120.

[8] See also E. Brems, 'Introduction', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 1-16; E. Brems, S. Ouald Chaib and S. Smet, 'Les droits fondamentaux conflictuels', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels en Belgique – Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'Etat et de la Cour de cassation* (Brussels: Bruylant, 2011), 292-323.

[9] E. Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', 27 *Human Rights Quarterly* (2005), 294-326.

[10] Ibid. at 302.

[11] Ibid. at 302-303.

[12] Ibid. at 303.

[13] Ibid.

from both sides for the purpose of guaranteeing maximum protection of both rights".[14] She finally also proposes a number of criteria that may be applied when "a compromise solution cannot be found, and a choice between the conflicting rights has to be made", in order to determine which of the conflicting rights should prevail under the concrete circumstances of the case at hand.[15] Building on the work of Donna Sullivan,[16] Brems suggests that the following criteria may be useful in determining which of both conflicting human rights should prevail. Firstly, a criterion "that identifies a core and a periphery in each right" and according to which "[w]hen an essential aspect of one right enters into conflict with a more peripheral aspect of another right, it may be justified to give priority to the first over the latter."[17] Secondly, a criterion that looks at "the severity of the interference caused by the exercise of one right in the exercise of the other and vice versa."[18] Under this criterion, Brems argues, "[i]f the exercise of the right is rendered utterly impossible, this will carry more weight than if it is merely made more difficult."[19] A third criterion suggested by Brems looks at "whether apart from the two conflicting human rights, other human rights are indirectly implicated."[20] According to her, "[t]he restriction of a human right carries more weight if it results in practice in the additional restriction of another right."[21] She furthermore argues that "courts should focus on the cumulative effect of the restrictions on the values underlying the human right in question".[22] Brems consequently argues in favour of a final criterion, which "takes into account the general interest underlying many individual rights." She gives the example of a measure restricting political expression, which "not only touches upon an individual right, but also upon the underlying value of democracy".[23]

From the outset of my research, I found Brems' ideas on conflicting human rights and her proposed resolution methods to be intuitively appealing. I therefore decided to use them as the basis of my research. Given that Brems' research in the area of conflicting human rights was, as indicated by the title of her publication, of an exploratory nature, it of course required much deepening. In this dissertation, I firstly complement her account by answering prior questions on the existence and conceptualisation of conflicts between human rights in the ECHR context, as well as on their problematisation. Brems left especially the first question entirely aside. Instead, she based her analysis on the empirical finding that the ECtHR was increasingly characterising cases as entailing a conflict between Convention rights.[24] However, I consider it vital to first examine the question as to whether such conflicts are at all a conceptual possibility under the ECHR system. To that end, I start my analysis, in Part I, by engaging with legal theoretical arguments to the effect that (human) rights cannot conflict with each other. In negating those arguments, I argue that conflicts between human rights are

[14] Ibid.
[15] Ibid.
[16] D.J. Sullivan, 'Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution', 24 *New York University Journal of International Law and Politics* (1992), 765-856.
[17] Brems, *supra* note 9 at 303-304.
[18] Ibid. at 304.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid. at 299-300.

not only a conceptual possibility of the ECHR system, but also an inherent feature thereof. Having established that conflicts between human rights exist, I go on to examine the question as to whether they pose particular challenges in terms of their adjudication by the ECtHR, different from the challenges the Court faces in 'traditional' cases involving opposition between a Convention right and the public interest. I answer that question in the affirmative as well, thereby laying the groundwork for the specific resolution methods I develop in Part II. In the remainder of Part I, I propose a definition of genuine conflicts between Convention rights as well as a double test that can be used to identify them.

In Part II, I return to Brems' work by using her ideas as the skeleton for my own framework for the resolution of conflicts between Convention rights by the ECtHR. Crucially, I keep both prior steps of the framework, *i.e.* avoiding conflicts and reaching a compromise between both rights. However, I thoroughly develop our understanding of both steps. Particularly in relation to the first step, which Brems has labelled the search for "fake conflicts" in her later work,[25] I significantly deepen her insights. I for instance demonstrate that there are many variations of fake conflicts, but that not all of them provide an optimal 'solution' to conflicts between Convention rights. I also propose two tests that may assist the Court in defusing apparent conflicts between Convention rights as what I term 'positive instances of fake conflict'. In relation to the second step of Brems' framework, I deepen our understanding of the German concept of *praktische Konkordanz* and illustrate how it is a useful tool for reaching compromises between conflicting Convention rights.

When moving to the third step of the framework, I insist on the use of different resolution methods for the three possible types of conflicts, *i.e.* conflicts between relative Convention rights, conflicts between an absolute and a relative Convention right, and conflicts between absolute Convention rights. I lay the basis for this distinction in Part I and further develop it in Part II. There, I propose different tests that will allow the Court to determine which of the conflicting rights should prevail under the concrete circumstances of the case at hand. I specifically argue in favour of the application of a structured balancing test for the resolution of conflicts between relative Convention rights, of subsumption in cases of conflict between an absolute and a relative Convention right, and of deontological reasoning in resolving conflicts between absolute Convention rights.

Only in relation to the first type of conflict and its resolution method of balancing do I build upon Brems' ideas. However, before doing so, I first present legal theoretical arguments on the feasibility of balancing as a rational judicial tool and offer a critical analysis of the practical shortcomings of the ECtHR's current approach to balancing conflicting Convention rights. In doing so, I lay the groundwork for the introduction of a structured balancing test, demonstrating both its feasibility and its necessity. In developing the test, I adopt the four criteria suggested by Sullivan and Brems. However, I split one criterion - the one that looks at the severity of the interference - into two relevant factors: the severity of the damage and the risk that the damage will actually occur. I also add three new criteria to the balancing test, namely a value criterion, a purpose criterion and a responsibility criterion. I moreover deepen

[25] Brems, *supra* note 8 at 4.

our understanding of how each of the criteria functions, taken separately, and explain how - through the construction of nets of arguments - the criteria can be combined to rationally determine which of the conflicting relative Convention rights should prevail. I furthermore explain the role of the margin of appreciation in the application of the structured balancing test and finally also explore the limitations of the test by applying it to dilemmas in the Court's case law.

In the last two chapters of Part II, I move away from the structured balancing test and towards the kind of subsumptive and deontological reasoning required to resolve, respectively, conflicts between an absolute and a relative Convention right and conflicts between absolute Convention rights.

PART I – THE IDENTIFICATION OF CONFLICTS BETWEEN HUMAN RIGHTS IN THE CONTEXT OF THE ECHR

CHAPTER I – FRAMING THE QUESTION

Although human rights law scholarship has taken an increased interest in conflicts between human rights over the past few years, debates on the *existence* of such conflicts remain situated at the fringes of the discipline. The handful human rights law scholars who have substantively engaged with conflicting human rights, have tended to move straight to their categorisation and resolution, glossing over the prior question of their existence.[26] Yet, ample reasons exist to examine those prior questions: can human rights really conflict?[27] And if so, how can such conflicts be conceptualised?

Certain legal theorists and legal philosophers deny the existence of conflicts of rights.[28] They do so for several reasons. Some insist that a coherent theory of rights needs to comply with the Kantian principle that each individual's freedom is part of a system of equal freedom for all.[29] Acknowledging that the rights of different individuals may conflict is on that view tantamount to accepting that a theory inspired by a Kantian understanding of rights is inconsistent.[30] To avoid this conclusion, several legal theorists deny the possibility of conflicts of rights and instead emphasise their harmonious compatibility.[31] Others deny the existence of conflicts between rights for different reasons, *e.g.* because they consider such

[26] Brems, *supra* note 4; L. Zucca, *Constitutional Dilemmas – Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007); Ducoulombier, *supra* note 4; P. Ducoulombier, 'Conflicts between Fundamental Rights and the European Court of Human Rights: An Overview', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 217-247; X. (ed.), *Annuaire international des droits de l'homme – Volume IV/2009* (Brussels: Bruylant, 2009); S. Van Drooghenbroeck, 'Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes', in J-L. Renchon (ed.), *Les droits de la personnalité. Actes du Xe Colloque de l'Association « Famille & Droit », Louvain-la-Neuve, 30 Novembre 2007* (Brussels: Bruylant, 2009), 299-346.

[27] The question of whether rights can conflict was the subject of a 1999 legal theory symposium at the University of Pennsylvania. The papers presented at that conference are available in a special issue of *Legal Theory*. See 7 *Legal Theory* (2001) at 235 and following.

[28] J. Hasnas, 'From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights', 89 *Northwestern University Law Review* (1995) at 921-922 and 940-941; C. O. Finkelstein, 'Introduction to the Symposium on Conflicts of Rights', 7 *Legal Theory* (2001) at 235. In the particular context of the ECHR, see A. Green, 'An Absolute Theory of Convention Rights: Why the ECHR Gives Rise to Legal Rights that Cannot Conflict with Each Other', 16 *UCL Jurisprudence Review* (2010), 75-93 (defending the position that the legal rights enumerated in the ECHR cannot conflict with each other).

[29] J. Habermas, *Between Facts and Norms*, (Cambridge: Polity Press, 1996) at 93; N. E. Simmonds, 'Rights at the Cutting Edge', in M.H. Kramer et. al., *A Debate over Rights* (Oxford: Oxford University Press, 1998) at 135-136 and 138; J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) at 58-59 (arguing in favour of the Kantian principle, but adding that, although its acceptance considerably reduces the amount of real conflicts, there nevertheless "remain conflicts of rights that resist such dissolution").

[30] C. O. Finkelstein, 'Two Men and a Plank', 7 *Legal Theory* (2001) at 280-281; Griffin, *supra* note 29 at 58-59; Zucca, *supra* note 26 at 61.

[31] See most notably H. Steiner, *An Essay on Rights* (Oxford – Cambridge, Massachusetts: Blackwell, 1994) at 2-3 and 80 (presenting his views on a set of "compossible" rights)

conflicts to undermine the peremptory force of rights or because they wish to avoid what they perceive to be a threat to the rights system: proliferation of rights.[32]

Thus, while human rights law scholars have generally accepted the existence of conflicting rights on the basis of empirical findings (*i.e.* increased reference to conflicting rights in court judgments), legal theorists who deny their existence have largely focused on normative arguments as to why rights *should not* (be allowed to) conflict.[33] Currently missing from the equation is an analytical theory that conceptualises rights conflicts. Part I of this dissertation aims to present the cornerstones of such a theory. Throughout Part I, I will tackle the following questions. Can human rights really conflict in the sense of being incompatible with one another? If so, how can these conflicts be conceptualised? Are they problematic? And when does a genuine conflict arise? I will answer these questions in the specific context of the European Convention on Human Rights and the case law of the European Court of Human Rights.[34]

My argument consists of several stages, each building on the previous one. I will start off, in Chapter II, by tackling the questions as to whether conflicts between human rights exist and, if so, how they can be conceptualised. I will answer those questions by presenting a largely analytical argument, demonstrating that conflicts between human rights are an inherent feature of the ECHR system. I will further argue that such conflicts can best be understood by looking at the – conflicting – duties of the State.

Having argued that conflicts between human rights are an inherent feature of the ECHR system, I will proceed to tackle the question as to whether such conflicts are problematic, in Chapter III. I will particularly aim to ascertain whether conflicts between Convention rights pose challenges to the Court that are different from those it faces in 'traditional' human rights adjudication, where a Convention right is opposed by a public interest. I will answer this question in the affirmative. I will argue that 'traditional' human rights adjudication by the Court relies on a view of Convention rights as holding principled, but inconclusive, priority over the public or private interests invoked to justify their restriction. I will insist that conflicting Convention rights, conversely, should be treated with equal respect, *i.e.* on principled equal footing.

In Chapter IV, I will tackle the final question: when exactly can we speak of a genuine conflict between Convention rights? I will argue that speculation and individualisation of rights are the primary tools that allow us to determine when the Court is confronted with a

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[32] J. Waldron, 'Rights in Conflict', 99 *Ethics* (1989) at 507; J. L. Mackie, 'Can there be a Right-based Moral Theory?', in Waldron, J. (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) at 177; Green, *supra* note 28 at 78.

[33] See also Zucca, *supra* note 26 at 19.

[34] Note that Lorenzo Zucca, one of the few legal scholars that has thoroughly engaged with conflicts between fundamental rights, deliberately avoided dealing with the ECHR and the case law of the ECtHR. See Zucca, *supra* note 26 at xiv: "I devote relatively little attention to international or regional jurisdictions such as the European Court of Human Rights because I believe that its use of the doctrine of the margin of appreciation blurs the question of [rights] conflicts. That, however, is such a complex issue that it can only be dealt with properly in a separate study." My project is thus complementary to Zucca's. It deals with conflicts between human rights in the context of a human rights system that Zucca deliberately left unexplored (or at least underexplored).

genuine conflict, as opposed to a merely apparent one. I will also offer a definition of genuine conflicts between Convention rights and provide a double test to determine when the Court is confronted with such a conflict. I will further suggest a rudimentary categorisation of the various possible types of conflicts that the Court may face.

CHAPTER II – ON THE EXISTENCE AND NATURE OF CONFLICTS BETWEEN HUMAN RIGHTS

Section I – The Court's Track Record on Conflicting Rights

Just as legal theorists have not been able to agree on the existence of conflicts between human rights, the ECtHR has not been able to provide a clear picture on the matter either. In the first case in which the Court substantially engaged with the problems posed by conflicting rights, it explicitly recognised the possibility that such conflicts might arise between the human rights enumerated in the Convention:

> "[w]here [the] "rights and freedoms" [invoked by the Government to justify interference with Convention rights] are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"."[35]

However, the Court has not consistently applied this principle. In several other judgments it has instead insisted that "[t]he Convention must [...] be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions".[36] This reasoning echoes concerns within the international law system over the fragmentation of public international law and the need for its harmonisation.[37] Calls for such harmonisation

[35] ECtHR, *Chassagnou and Others v. France*, app. nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, para. 113.

[36] The principle was originally developed as a principle for the interpretation of the provisions of the Convention. See, with further references, ECtHR, *Stec and Others v. The United Kingdom*, app. no. 65731/01, 12 April 2006, para. 48; ECtHR, *Demir and Baykara v. Turkey*, app. no. 34503/97, 12 November 2008, para. 66; ECtHR, *Schalk and Kopf v. Austria*, app. no. 30141/04, 24 June 2010, para. 101. Later on, the Court extended its application to cases that it characterised as involving a conflict between Convention rights. See, for instance, ECtHR, *Otto-Preminger-Institut v. Austria*, app. no. 13470/87, 20 September 1994, para. 47; ECtHR, *Pretty v. the United Kingdom*, app. no. 2346/02, 29 April 2002, para. 54. The principle finally also rules the relationship between the ECHR and other instruments of international law. See, most notably, ECtHR, *Al-Jedda v. the United Kingdom*, app. no. 27021/08, 7 July 2011, paras. 101-102; ECtHR, *Nada v. Switzerland*, app. no. 10593/08, 12 September 2012, paras. 170 and 197).

[37] International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law',

have not so much led to an outright denial of the existence of conflicting rights, but to a quest for harmonious interpretation of norms so as to make them compatible in cases that *appear* to involve conflicting rights. In its essence though, such a strategy is akin to a denial of the possibility of rights conflicts. Rights may sometimes seem to conflict, but that is appearance only: when interpreted correctly and in harmony with other rights, the conflict can be made to disappear.

The difficulties the ECtHR has experienced in coming up with a satisfactory reply to the challenge posed by (apparent) conflicts between human rights is perhaps best reflected in its defamation case law.[38] While the Court openly acknowledges the existence of a conflict between the right to freedom of expression and the right to reputation in several defamation judgments,[39] most defamation judgments contain no explicit reference to conflicting rights.[40] Moreover, one particular defamation judgment demonstrates that the Court is struggling to come to grips with the intricacies of conflicting Convention rights.[41] Having noted that conflicts between Convention rights would cause principled problems of human rights adjudication, the Court attempted to deny their existence in *Karakó v. Hungary*:

> "the purported conflict between Articles 8 and 10 of the Convention ... in matters of protection of reputation, is one of appearance only ... [reiterating] that paragraph 2 of Article 10 recognises that freedom of speech may be restricted in order to protect reputation ... [t]he Court is … satisfied that the inherent logic of Article 10, that is to say, the special rule contained in its second paragraph, precludes the possibility of conflict with Article 8."[42]

In trying to make sense of the Court's position in *Karakó*, Dean Spielmann and Leto Cariolou have argued that it

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A/CN.4/L.702 18 July 2006, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702 (last accessed 7 October 2013); A. E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 *International and Comparative Law Quarterly* (2007) at 626; L. Garlicki, 'Relations between Private Actors and the European Convention on Human Rights', in A. Sajó and R. Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International Publishing, 2005) at 142; M. Milanović, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009) at 73. See *contra*, M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002), 553-579; J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law* (Cambridge – New York: Cambridge University Press, 2003) (arguing that the presumption against conflict motivated by a desire for harmonisation cannot do away with all conflicts of norms in international law).

[38] See S. Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict', 26 *American University International Law Review* (2011), 183-236.

[39] See for instance ECtHR, *Chauvy and Others v. France*, app. no. 64915/01, 29 June 2004, para. 70; ECtHR, *Pfeifer v. Austria*, app. no. 12556/03, 15 November 2007, para. 38; *Axel Springer*, *supra* note 6 at paras. 84 and 87-88. For more examples, see the cases listed in Smet, *supra* note 38 at footnote 42.

[40] Smet, *supra* note 38 at 195 (stating that, out of 90 examined defamation judgments, 24 contain an explicit reference to the conflict between freedom of expression and the right to reputation). For examples of defamation judgments in which the Court did *not* reference the existence of a conflict, see ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, app. nos. 21279/02 and 36448/02, 22 October 2007; ECtHR, *Alves da Silva v. Portugal*, app. no. 41665/07, 20 October 2009; ECtHR, *Dąbrowski v. Poland*, app. no. 18235/02, 19 December 2006.

[41] See ECtHR, *Karakó v. Hungary*, app. no. 39311/05, 28 April 2009.

[42] Ibid. at paras. 17 and 24-25.

> "can be explained by the Court's adoption of a particular theory of rights guaranteed by the Convention that, effectively, interprets such rights as not capable of coming into conflict with each other because by their nature or limits either one or the other is not really at stake in a particular set of circumstances."[43]

It is, however, not possible to draw any general conclusions to this effect from a single case, especially given the large number of cases in which the Court explicitly acknowledges the existence of a conflict between Convention rights.[44] Nevertheless, the findings of Spielmann and Cariolou do find some resonance in the Grand Chamber judgment in *Gillberg v. Sweden*.[45] *Gillberg* concerned the destruction of research material by a professor at the University of Gothenburg. The Swedish courts had ordered the university to grant a researcher at Lund University and a paediatrician (K and E) access to the research material, which was the property of the university. However, professor Gillberg considered that granting such access would infringe the right to privacy of the children who had participated in the study. To prevent K and E from obtaining access, he destroyed the material. Before the ECtHR, Gillberg claimed that his actions were covered by his negative right to freedom of expression. In its judgment, the Court disagreed. It held instead that Gillberg did not have a "negative right within the meaning of Article 10 of the Convention not to make ... research material available."[46] Leading up to its unanimous conclusion, the Court ruled as follows:

> "finding that the applicant had such a right under Article 10 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned, and on their rights under Article 6 to have the final judgments of the Administrative Court of Appeal implemented."[47]

The Court thus opted to avoid any possibility of conflict in *Gillberg* by taking the unusual step of denying that the applicant could rely on the protection of art. 10. This move is all the more remarkable when contrasted to the ease with which the Court generally accepts that the applicant's rights have been interfered with. The Grand Chamber's inclination to avoid the conflict in *Gillberg* offers another important illustration of how the Court sometimes interprets the Convention rights "as not capable of coming into conflict with each other".

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[43] D. Spielmann and L. Cariolou, 'The Right to Protection of Reputation under the European Convention on Human Rights', in D. Spielmann et. al. (eds.), *The European Convention on Human Rights, A Living Instrument – Essays in Honour of Christos L. Rozakis* (Brussels: Bruylant, 2011), 584.

[44] See, among many other authorities, ECtHR, *Von Hannover v. Germany*, app. no. 59320/00, 24 June 2004, para. 58; ECtHR, *Von Hannover (No. 2) v. Germany*, app. nos. 40660/08 and 60641/08, 7 February 2012, para. 100; ECtHR, *Evans v. the United Kingdom*, app. no. 6339/05, 10 April 2007, para. 73; *Odièvre v. France*, *supra* note 1 at para. 44; ECtHR, *Osman v. the United Kingdom*, app. no. 23452/94, 28 October 1998, para. 116; ECtHR, *Appleby and Others v. the United Kingdom*, app. no. 44306/98, 6 May 2003, para. 43; ECtHR, *Schüth v. Germany*, app. no. 1620/03, 23 September 2010, para. 57; ECtHR, *Fáber v. Hungary*, app. no. 40721/08, 24 July 2012, para. 42; ECtHR, *Ashby Donald and Others v. France*, app. no. 36769/08, 10 January 2013, para. 40.

[45] ECtHR, *Gillberg v. Sweden*, app. no. 41723/06, 3 April 2012.

[46] Ibid. at paras. 92 and 94.

[47] Ibid. at para. 93.

It should be sufficiently clear from the foregoing that the track record of the ECtHR on conflicts between human rights is a mixed one. The Court readily accepts the existence of conflicting human rights – without further explanation – in certain judgments, while it refrains from referencing them in others. It even denies the very possibility of conflicts in a few cases. Rather than demonstrating how the Court adheres to one particular theory of rights with one particular position on the possibility of conflicting rights, the Court's mixed track record indicates that it is struggling to find a way to deal with the challenges posed by (apparent) conflicts between human rights. The analytical argument presented in this chapter aims to address these challenges.

Section II – Analysing the Hypothesis

In this section I set out to examine the very possibility of conflicts between human rights. I do so on the basis of a hypothesis that explains one of the main arguments raised against rights conflicts in legal theory: the logical inconsistency they allegedly bring into rights systems.

The hypothesis goes as follows:

(1) If human rights can conflict; and

(2) Human rights are rules; and

(3) Rules are logically distinct from principles; and

(4) Conflicts between rules are to be resolved by declaring one of the rules invalid;

then at least one of the above statements must be false. To hold otherwise would result in a logical inconsistency: of any two apparently conflicting human rights to which the hypothesis is applied, one is necessarily invalid; it does not in fact exist.[48] It is precisely to prevent that conclusion from being reached that several legal theorists insist that (human) rights *cannot* conflict.[49] They thus negate step (1) of the hypothesis.

I of course employ the hypothesis merely as a tool, as a means to an end. Nevertheless, it is useful insofar as it provides me with an interesting entry point to critically assess a particular view of legal systems and of (human) rights, namely the view under which legal systems are composed of harmoniously compatible rules and under which (human) rights can – therefore

[48] Of course there are theorists, most prominently among them John Rawls, who have followed exactly that path: eliminating all liberties from their theory that lead to incompatible claims. See J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999). However, the consequence of such an approach is an unrealistically short list of basic rights that does not correspond to the lists of legally enacted human rights of the post World War II era (most notably the ICCPR, ICESCR, ACHR, ACHPR and ECHR). See also P. G. Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law', 49 *Harvard International Law Journal* (2008) at 309-310. Rawls' approach moreover treats the perceived disease (inconsistency) in a counterintuitive and overly drastic manner: by cutting away vital organs (certain basic rights), rather than by attempting to find a cure for the disease that would keep all organs intact.

[49] See for instance P. Montague, 'When Rights Conflict', 7 *Legal Theory* (2001) at 261 and 277.

– not conflict. Indeed, if one insists that (human) rights are rules and that conflicts between rules are to be resolved through (re)definition of those rights, one is necessarily driven to the conclusion that conflicts between (human) rights are always only apparent and never real. On this – specificationist – view, the task of the adjudicator faced with an apparent conflict between (human) rights is to specify the precise content of each right, *i.e.* to more closely define the right, until it becomes clear which of both rights is applicable to the situation at hand. The other right is simply inapplicable and, as a result, *real* conflicts between both rights cannot exist. Instead, rights harmoniously co-exist.

The specificationist argument thus starts from the idea that conflicts between rules are to be resolved through (re)definition (step (4) of the hypothesis), adding to that a view of (human) rights as rules (step (2) of the hypothesis) in order to posit – by way of conclusion – that genuine conflicts between (human) rights cannot exist (the negation of step (1) of the hypothesis). As I will explain below, the inclusion of step (3) of the hypothesis – rules are logically distinct from principles – is necessary in order for the inconsistency, indicated by the hypothesis, to have real bite.[50]

In what follows, I will critically discuss each step of the hypothesis in reverse order, in keeping with the specificationist argument. In the process, I will dispute the specificationist view of (human) rights. Instead, I will demonstrate that – in the ECHR context – genuine conflicts between human rights *do* exist. I will further submit that the reason for their existence is that the Convention's human rights, insofar as they are formulated as relative rights, function as *principles*, not rules.

1. On Invalid Rules

Step (4) of our hypothesis – conflicts between rules are to be resolved by declaring one of the rules invalid[51] – finds its inspiration in the orthodox legal argument of Jeremy Bentham, John Austin and, more recently, Hans Kelsen to the effect that valid norms cannot conflict: norms are only valid to the extent that they do not conflict.[52] When two rules contradict one another, for example two separate rules on speed limits, one of the rules may thus need to be declared invalid to resolve the contradiction.[53] But that is not necessarily the case. Invalidation of one of the conflicting rules will only be required if both rules share the same field of application. If one of the rules has a broader field of application than the other, it remains valid for those situations that are not covered by the other rule. It thus need not – indeed, should not – be invalidated. The attentive reader will already have spotted that, therefore, step (4) of the

[50] See *infra* '2. On Rules and Principles'.
[51] R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 27.
[52] H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1970) at 205-206; J. Raz, 'Legal Principles and the Limits of Law', 81 *Yale Law Journal* (1972) at 829 (explaining Bentham's and Austin's position). See also H. Steiner, 'Working Rights', in M. H. Kramer et. al., *A Debate over Rights – Philosophical Enquiries* (Oxford – New York: Oxford University Press, 1998) at 270-271 (insisting that when duties – the correlative of (claim)rights – appear to conflict, one of the duties cannot be a valid duty).
[53] Kelsen, *supra* note 52 at 205.

hypothesis presented above requires amending in order to take situations of *inapplicability* of rules into account, rather than only their *invalidity*.

The essential difference between both situations is captured in the adagios *lex posterior derogat legi priori* and *lex specialis derogat legi generali*. I will briefly illustrate both principles on the basis of the speed limit example. A certain rule may for instance impose a nation-wide speed limit on highways of 120 km/h, while a rule of a later date issued by the same authority reduces said speed limit to 100 km/h. In that case, the earlier rule necessarily becomes invalid, as it is incompatible with the later rule (*lex posterior*).[54] However, if the new rule does not reduce the speed limit to 100 km/h in all situations, but only under conditions of extreme weather, the general rule imposing the 120 km/h speed limit remains applicable to all other situations (*i.e.* under normal weather conditions). It is therefore not to be declared invalid, but merely inapplicable to situations of extreme weather (*lex specialis*).

Although both principles – *lex posterior* and *lex specialis* – function differently, their application leads to the same result: a denial of the possibility of a real conflict between both rules. In the case of *lex posterior* because one of the rules is declared invalid, in the case of *lex specialis* because one of the rules is declared – by definition – inapplicable to the extent that it would conflict with the other. In both cases it is thus not possible for both rules to conflict. This is crucial for our current concern with conflicting human rights, for even if statement (4) undergoes the necessary refinement to take situations of *inapplicability* of rules into account, rather than only their *invalidity*, the possibility of rights conflicts can still be denied on the basis of statements (1) to (3), with application of (something similar to) the *lex specialis* principle.

Principles such as *lex posterior* and *lex specialis* thus hold great promise for those who would deny the existence of conflicts between human rights, provided that those rights are to be understood as rules. In fact, *lex posterior* and *lex specialis* do play an important role in the conflicts of law approach in public international law.[55] Their application aims at maintaining the unity of international law by indicating the norm, of two norms that appear to be in conflict, that applies to the situation at hand, thus defusing the conflict. However, Joost Pauwelyn has convincingly demonstrated that *lex posterior* and *lex specialis* are not able to resolve each and every situation of norm conflict in international law.[56] Moreover, and more importantly for our current concerns, neither of the cited principles can be applied to conflicts between human rights in the context of the ECHR,[57] a confined treaty system that does not allow for any hierarchical ordering between its provisions on the basis of the date of their enactment,[58] nor on the basis of their level of specificity.[59] We must therefore put

[54] Ibid. at 206-207.
[55] See, for instance, International Law Commission, *supra* note 37; Pauwelyn, *supra* note 37; Koskiniemmi and Leino, *supra* note 37.
[56] Pauwelyn, *supra* note 37 at 178 and 419-421.
[57] See also F. Sudre, 'Les conflits de droits de l'homme', in X., *Annuaire international des droits de l'homme* (Brussels: Bruylant, 2009) at 371; Zucca, *supra* note 26 at 54 (arguing that rules of conflict, such as *lex specialis* and *lex posterior*, do not apply to conflicts of fundamental rights, generally).
[58] It would for instance be absurd to insist that the right to property (contained in Protocol 1 to the ECHR and therefore enacted on a later date than the Convention) always prevails over freedom of expression (contained in the Convention itself) in cases where both appear to conflict. The indivisibility of human rights has, logically,

considerations of *lex posterior* and *lex specialis* aside, as they cannot assist us in addressing the questions raised in this chapter.

i. The Specificationist Argument

There exists, however, another way to avoid conflict between human rights, when these rights are regarded as rules. One may – following Ronald Dworkin's insights – insist that all exceptions to a rule can be known and (at least theoretically) enumerated.[60] If this proposition is accepted, the existence of conflicts between human rights can be denied by insisting that a) human rights are rules and b) the content of each right has to be specified in cases where their simultaneous application would lead to incompatible results. This strategy thus aims at dissolving apparent conflicts between rights through specification. It is followed by a number of legal theorists who argue that, when rights *appear* to conflict, the precise content of each right should be specified to determine which right applies in the case at hand.[61] The other right is simply inapplicable. Once the content of each right is defined, an (implicit)[62]

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led the drafters of the Convention and its Protocol to prevent such perverse results by insisting that all provisions (of the Convention and its Protocols) are to be seen as part of one, indivisible, system of rights protection.

[59] *Lex specialis* does find limited application in the jurisprudence of the ECtHR. However, whenever it does, it is merely to determine the most relevant right under which to treat the case, not as a tool to explain apparent conflicts away. For an application of *lex specialis* in the Court's jurisprudence, see ECtHR, *Lautsi v. Italy*, app. no. 30814/06, 18 March 2011, para. 59 (in which the Court reiterated that in the area of education and teaching Article 2 of Protocol No. 1 – the right to education of children and the right of parents to ensure such education in conformity with their own religious and philosophical convictions – is in principle the *lex specialis* in relation to Article 9 of the Convention – freedom of religion).

[60] See also R. Alexy, *A Theory of Constitutional Rights* (Oxford – New York: Oxford University Press, 2002) at 49 (explaining that conflicts between rules can only be resolved by either declaring one of the rules invalid or by reading an exception into one of the rules); M. Borowski, 'The Structure of Formal Principles – Robert Alexy's "Law of Combination"', in M. Borowski (ed.), *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag – Nomos, 2010) at 21 (insisting, however, that the exception to one of the rules is to be determined through application of such principles as *lex posterior* and *lex specialis*). Borowski's argument would not find application in the context of conflicts between human rights, provided that they are to be understood as rules, since formal principles such as *lex posterior* and *lex specialis* would become useless in determining the precise content of each right (Borowski presumably would deny that human rights are rules and would insist that they are principles).

[61] See, for instance, T. M. Scanlon, 'Rights and Interests', in K. Basu and R. Kanbur (eds.), *Arguments for a Better World – Essays in Honor of Amartya Sen – Volume I: Ethics, Welfare and Measurement* (Oxford – New York: Oxford University Press, 2009) at 76 and 78; T. M. Scanlon, 'Adjusting Rights and Balancing Values', 72 *Fordham Law Review* (2004) at 1478-1479; C. Wellman, *Real Rights* (Oxford – New York: Oxford University Press, 1995) at 224; C. H. Wellman, 'On Conflicts between Rights', 14 *Law and Philosophy* (1995) at 277; J. Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights', 23 *Law and Philosophy* (2004) at 325-346; L. Cariolou, 'The Search for an Equilibrium by the European Court of Human Rights', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008) at 258.

[62] Occasionally, such an exception is explicitly inscribed into human rights treaties. See for instance art. 20 (2) of the International Covenant on Civil and Political Rights: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". See also art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination: "States Parties … undertake to adopt immediate and positive measures designed to eradicate all incitement to [racial hatred and racial discrimination] … and, to this end, … (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".

exception is thus inscribed into one of them to the effect that it finds no application to the situation at hand.[63] As a result, there can be no question of conflict between both rights.[64]

An example may serve to illustrate the specificationist's claim. Confronted with the famous 'Cabin Case'[65] – a hypothetical scenario involving a hiker who finds herself trapped in a snowstorm and breaks into someone else's cabin to save her life – the specificationist argument is that: (i) either the right to life does not entail the right to break into someone else's cabin to save one's life or (ii) the right to property over a cabin does not entail the right to see the cabin safeguarded against someone attempting to save her life by breaking into it. To hold otherwise would entail the recognition of a conflict between the cabin owner's right to property and the hiker's right to life, which is precisely what the specificationist hopes to avoid. The specificationist is of course most likely to pursue option (ii) in denying the existence of a conflict,[66] but both options essentially lead to the same result: the right to life and the right to property can, when specified, never conflict with one another. According to the specificationist, the same argument goes for all apparent conflicts of rights: once rights are fully specified, it becomes clear that they cannot conflict. Conflicts between rights are thus impossible. Before assessing the validity of the specificationist argument, let us first examine how it ties in with the human rights system of the ECHR.

Elements of specification, as well as its close cousin definitional balancing,[67] are certainly not alien to the ECHR system. Certain Convention provisions explicitly limit the scope of the human rights guaranteed therein. Article 11 for instance only grants "the right to freedom of *peaceful* assembly" (emphasis added). Other articles explicitly limit the possibility of conflict. Article 17, in particular, does so by prohibiting abuse of rights: "[n]othing in this Convention may be interpreted as implying ... any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein." The ECtHR has relied on Article 17 in, among others, Holocaust denial cases to deny the applicant the protection of article 10 ECHR (freedom of expression). The Court has repeatedly held that "there is a category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17".[68] As a result, any

[63] R. Poscher, 'Insights, Errors and Self-Misconceptions of the Theory of Principles', 22 *Ratio Juris* (2009) at 434. See similarly, R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton – Oxford: Princeton University Press, 2006) at 48-49.

[64] C. Wellman, *supra* note 61 at 210 and 215 (explaining how the US Supreme Court has used specification to render a conflict between rights apparent, rather than real, *inter alia* in Marsh v. Alabama); C. H. Wellman, *supra* note 61 at 273-274, 277 and 279; D. Shapiro, 'Conflicts and Rights', 55 *Philosophical Studies* (1989) at 269. For application of the specificationist argument in the context of the ECHR, see Green, *supra* note 28; A. Green, 'A Philosophical Taxonomy of European Human Rights Law', *European Human Rights Law Review* (2012), 71-80 (arguing that rights are akin to rules and operate on an "all or nothing" basis, which requires its concrete definition in order for it to be applied to the situation at hand).

[65] J. Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', 7 *Philosophy and Public Affairs* (1978) at 102.

[66] See, for instance, Oberdiek, *supra* note 61 at 342; G. C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) at 129 and 131.

[67] I. Leigh, 'Religously-Motivated Disciminatory Speech: the Case of Homophobia', in M. L. P. Loenen and J. E. Goldschmidt (eds.) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Antwerp – Oxford: Intersentia, 2007) at 262.

[68] For the principles, see ECtHR, *Lehideux and Isorni v. France*, app. no. 24662/94, 23 September 1998, paras. 47 and 53. For an application, see ECtHR, *Garaudy v. France* (adm.), app. no. 65831/01, 24 June 2003. For

possibility of conflict between freedom of expression and the right of Jews not to be discriminated against is removed from the Convention system.

The Court has also relied on reasoning that is remarkably similar to the specificationist strategy in its wider case law, particularly in cases that appear to involve conflicting rights.[69] The Court has for instance held that "if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests";[70] that some restrictions on access to court, such as those flowing from the doctrine of parliamentary immunity, are "inherent" to the right to a fair trial;[71] that "[a]n attitude which fails to respect [the principle of secularism in Turkey] will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention [because it threatens the rights of others]";[72] and that freedom of expression "does not bestow any freedom of forum for the exercise of that right" in the form of "rights of entry to private property".[73]

In sum, the specificationist puts forward a formidable argument against the existence of conflicts between human rights, an argument that is moreover reflected in some of the provisions of the ECHR as well as in certain strands of case law of its Court. Nevertheless, the specificationist strategy faces considerable objections that ultimately lead to its failure, as I will now demonstrate.

ii. The Failure of the Specificationist Argument and the Success of the Pro Tanto Model of Rights

The strategy employed by the specificationist to deny the existence of conflicts of rights implies a search for the precise content of each right to determine which one applies to any given situation. As a result, the validity of her argument stands or falls with the possibility and feasibility of knowing all exceptions to each right. Yet, it is highly doubtful whether the Herculean task of discovering all these exceptions can be achieved.[74] Even in the case of Holocaust denial, a situation that appears straightforward in light of the case law of the ECtHR, the exception cannot be as simple as "freedom of expression does not include the right to deny the Holocaust". It cannot be that simple because, to determine whether the exception will apply, one would have to define "speech" and determine precisely what

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criticism of the Court's approach, see H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression under the European Human Rights Convention: an Added Value for Democracy and Human Rights Protection?', 27 *Netherlands Quarterly for Human Rights* (2011), 54-83 (arguing against the application of article 17 in cases of hate speech and Holocaust denial).

[69] See also I. Ziemele, 'Other Rules of International Law and the European Court of Human Rights: A Question of a Simple Collateral Benefit?', in D. Spielmann et. al. (eds.), *The European Convention on Human Rights, a Living Instrument* (Brussels: Bruylant, 2011) at 756-757 (Ziemele, Judge for Latvia at the ECtHR, expresses her preference for defining the precise content of the right at stake when it appears to conflict with another right).

[70] ECtHR, *Vo v. France*, app. no. 53924/00, 8 July 2004, para. 80.

[71] ECtHR, *A. v. the United Kingdom*, app. no. 35373/97, 17 December 2002, para. 83.

[72] ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 93.

[73] *Appleby*, *supra* note 44 at para. 47.

[74] J. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987) at 43.

constitutes "denial of the Holocaust", elements that may vary both over time and from case to case.[75] The inability to discover all exceptions to all rights delivers a blow to the specificationist strategy: if it is impossible to know all exceptions to all rights, it is likewise impossible to know exactly which rights we have at any given moment.[76] Even if one were to concede that, if not practically feasible for any human being, it is at least *theoretically* possible to determine all exceptions to any given human right, specification would lose its practical value for human rights adjudication. Moreover, further devastating objections would remain.

Specification can for instance not assist us in resolving hard cases,[77] such as the case of two shipwrecked persons who are holding on for dear life to the same plank that cannot support their combined weight.[78] This case appears to involve a conflict between two instances of the right to life and has indeed been presented as a paradigm example of conflicting rights in the legal theoretical literature.[79] In order to deny the existence of a conflict between rights in the plank case, the specificationist must maintain that the content of each of the two rights can be specified in a manner that reveals which of the persons actually has a right and which one does not. However, since both rights are identical, it seems that the specificationist cannot do away with the conflict without insisting that, under the circumstances, *neither* of the shipwrecked persons has a right to life *vis-à-vis* the other person. This is a counterintuitive and troubling conclusion.

The specificationist can furthermore not explain the moral residue in cases of (apparent) conflicts between rights.[80] In the cabin example described above, for instance, the specificationist would most likely hold that the cabin owner's property rights do not include the right to see his property protected from damage caused by someone who, caught in a snowstorm, breaks into his cabin, lights the fire, drinks the available water and eats the food in order to survive. However, if this proposition were true, there would be no reason for the person who broke into the cabin to compensate its owner for damages caused.[81] Yet, our

[75] For an account that accepts this premise, but nevertheless defends a specificationist account of rights, see Webber, *supra* note 66 at 144-145 (arguing that the specification of rights is not static, but open to re-evaluation, and that rights can and should thus be "re-specified" in response to changing circumstances).
[76] Feinberg, *supra* note 65 at 101 (arguing that the cost of full factual specification is that we do not really know, and cannot agree on, which rights we exactly have).
[77] Montague, *supra* note 49 at 274-275.
[78] See, generally, Finkelstein, *supra* note 30.
[79] See, for example, ibid.
[80] E. Rice, 'Solving Human Rights Conflicts by Dissolving Them: The Failure of the Dissolution Strategy', 29 *Social Theory and Practice* (2003) at 550-551; Nickel, *supra* note 74 at 43. For an attempt to at explaining the existence of moral residue on a specificationist account of rights, see Oberdiek, *supra* note 61 at 332-334. For rebuttal of Oberdiek's argument, see A. Botterell, 'In Defence of Infringement', 27 *Law and Philosophy* (2008) at 278-283. See further, Oberdiek's reply in Oberdiek, 'What's Wrong with Infringements (Insofar as Infringements are Not Wrong)', 27 *Law and Philosophy* (2008) at 300-307.
[81] Christopher H. Wellman has attempted to rebut the charge that specificationists cannot account for the moral residue in cases that appear to involve conflicting rights. See C. H. Welmman, *supra* note 61 at 284-293. However, the expanded cabin case he develops fails to convince. In Wellman's example (at 286-287) the characters Philip, Matthew, Ruth and Lauren break into a cabin owned by another person (in this case Wellman himself) for different reasons. Wellman then 'specifies' each right he has against each character: a full right against Philip, a compensation right against Matthew, a latent compensation right against Ruth and no right against Lauren. These can, however, be explained by other – and better – reasons than those Wellman offers in defense of his specificationist approach. Philip, who broke into the cabin because he did not like Wellman's

intuition is that the cabin owner is due some form of (voluntary) compensation.[82] Indeed, a more natural understanding of the situation is that, while the person stuck in the snowstorm did have a right to save her life by breaking into the cabin, she thereby interfered with the owner's property rights and should compensate him for the damages caused.[83] Yet this involves recognising that the cabin case involves a conflict between rights, something the specificationist was hoping to deny.

Analysis of the plank case and the cabin case thus points us towards the primary objection to the specificationist argument. The specificationist strategy to deny the existence of conflicts between rights comes at a heavy price: it necessarily entails arguing that (at least) one of the parties to an apparent conflicting rights case did not have a right to begin with. Such thinking is not only out of touch with the natural and common use of rights language. It also diverges drastically from the manner in which human rights cases are adjudicated by the ECtHR.

To explain the latter point, we need to take a step back and look at cases in which human rights are opposed by non-rights considerations, rather than other human rights. In such cases, the specificationist does not have cause to argue that human rights and utility cannot conflict, for allowing such conflicts to exist would not lead to any logical inconsistency in the human rights system. Moreover, it is precisely in recognition of the fact that considerations of utility and individual interests continuously conflict that (legal) human rights systems have gained ground: to protect individuals from unfettered reliance on utility by authorities. It would in that respect be absurd to hold that, when a person's human right to φ is opposed by non-rights considerations and the ECtHR finds that no violation of the right has taken place, the person never had a human right to φ to begin with. Instead, in such circumstances the ECtHR acknowledges that, although the person has a human right to φ, it has been justifiably overridden. In ECtHR terms, the right has suffered an interference, but not a violation. This view, under which a right's interference needs to be distinguished from its violation, offers a better understanding of how human rights function under the ECHR system than the view put forward by specificationists.[84] The Convention allows, under certain conditions, restrictions of most of the human rights contained therein.[85] This has led the Court to distinguish between an

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furniture and wanted him to redecorate, did not rely on any right to break into the cabin. Therefore, no conflict exists with Wellman's property rights to the cabin and it is only logical that Philip owes Wellman full compensation for having *violated* his property rights. Matthew, who broke into the cabin to survive a storm and is wealthy, and Ruth, who did the same but is "an impoverished pregnant woman", both have a duty of compensation because they have *interfered* with Wellman's property rights, even if justifiably so. The fact that Wellman holds that he only has a latent compensation right against Ruth has to do with her dire financial situation and can therefore be explained in terms of Wellman waiving his right to compensation. Lauren finally, who is Wellman's wife with whom he purchased the cabin and who broke into the cabin to survive a storm, is co-owner of the cabin. Logically, she owes no compensation, since she cannot sensibly be said to have infringed her own property rights.

[82] Feinberg, *supra* note 65 at 102; Botterell, *supra* note 80 at 283. See *contra*, Oberdiek, *supra* note 61 at 336 (arguing, on the basis of a specificationist argument, that no compensation is due in the Cabin Case, because no right has been violated).

[83] Feinberg, *supra* note 65 at 102.

[84] J. Gerards and H. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009), 619-653.

[85] See for instance articles 8 to 11 ECHR.

interference with a right and its *violation*.[86] This distinction holds true for situations in which human rights conflict with utility and there is no logical reason to hold otherwise when they (appear to) conflict with each other.

As illustrated above, certain elements in the ECHR system remind us of the specificationist strategy. However, closer examination reveals that the Court does *not* follow a scheme whereby it moves from broadly defined *prima facie* rights (as described in the Convention) to narrowly tailored absolute rights that function as rules, through a process of specification. Rather, a proper understanding of human rights adjudication by the ECtHR requires us to factor in *pro tanto* rights – genuine rights which supply reasons for action that carry normative weight, but which may nevertheless be outweighed by other considerations.[87] I submit that the Court *does* start of by considering *prima facie* rights (for example freedom of expression in abstract terms), but subsequently follows a route that differs from the specificationist strategy. Instead of narrowly tailoring the invoked right to the particular circumstances of the case to determine its exact content, the Court broadly determines whether the interest relied on by the applicant is protected by the invoked Convention right. The Court may exceptionally determine that this is not the case (*e.g.* in cases of Holocaust denial or in reputation cases that do not reach the threshold set by the Court),[88] but it will generally approach the question of scope with great flexibility, allowing a wide variety of interests under the umbrella of the Convention rights.[89] Once the Court has determined that the interest relied on by the applicant is protected by the invoked Convention right, it has effectively moved on from a consideration of *prima facie* rights. It has accepted that the applicant's conduct is principally protected by a genuine – *i.e. pro tanto* – human right.

At that stage, two possibilities exist. The first is that the – still broadly defined – Convention right is considered to be absolute under the Convention and/or in the Court's case law. If that is the case, the Court will apply the absolute right to the situation at hand. Because the relevant consideration then becomes one of determining whether the facts of the case fall to be subsumed under the absolute right, the right will function as a rule: either the facts reveal that the absolute right has been breached or they reveal that it has not been violated.

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[86] This distinction corresponds to what has been termed in the literature as "the conventional terminology, pursuant to which rights are either satisfied or infringed, with only unjustified infringements being referred to as "violations"". See F. Schauer, 'A Comment on the Structure of Rights', 27 *Georgia Law Review* (1993) at 425, footnote 38 (with further references to the works of Alan Gewirth, Judith Jarvis Thomson and Robert Nozick).

[87] J. Crowe, 'Explaining Natural Rights: Ontological Freedom and the Foundations of Political Discourse', 4 *New York University Journal of Law & Liberty* (2009) at 87. See generally on *pro tanto* rights: J. J. Thomson, *The Realm of Rights* (Cambridge, Massachusetts – London: Harvard University Press, 1990) at 118-120; Feinberg, *supra* note 65 at 98; J. Nickel, 'Are Human Rights Utopian', 11 *Philosophy and Public Affairs* (1982) at 248. Note that these authors all use the terminology of *prima facie* rights. However, the term '*pro tanto* rights' appears to more accurately reflect the ideas they have in mind.

[88] Regarding Holocaust denial, see footnote 68 and accompanying text. Regarding the right to protection of reputation, the Court has indicated in a number of judgments that "[i]n order for Article 8 to come into play … an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life". See *Axel Springer*, *supra* note 6 at para. 83; ECtHR, *A. v. Norway*, app. no. 28070/06, 9 April 2009, para. 64.

[89] G. van der Schyff, *Limitation of Rights – A Study of the European Convention and the South African Bill of Rights* (Nijmegen: Wolf Legal Publishers, 2005). For criticism of this approach, see Webber, *supra* note 66 at 5-6.

However, and here lies the distinction with the specificationist model, when the invoked Convention right is a relative right under the ECHR – a right subject to possible limitations – the Court does *not* go on to track its precise content to determine whether it applies to the particular circumstances of the case, fashioning it into a more detailed right that is then able to function as an absolute rule.[90] Instead, the Court treats the invoked Convention right as a *pro tanto* right and determines whether – under the circumstances of the case – it is violated or whether it is outweighed by a public interest or another right.

Rather than insisting that rights cannot conflict, the *pro tanto* model accepts the possibility of conflicting rights.[91] Under the *pro tanto* model, when (relative) rights conflict, the relevant consideration is not one of determining the content of each right, but one of balancing in order to determine which right is to be given preference in the instant case.[92] This balancing exercise, once conducted, may of course lead to the formulation of a relatively straightforward rule that can then be applied to future cases.[93] However, the formulation of that rule only becomes possible *as a result of* a balancing exercise. The rule does not exist independently of that exercise. In other words, the rule cannot be discovered - as the specificationist maintains - through a more detailed definition of each of the rights that appear to be in conflict. Instead, its discovery *follows* an exercise in which both rights are balanced against each other.

This, of course, does not detract from the fact that the exercise may – under certain circumstances – be a straightforward and simple one. In that respect, and contrary to the specificationist's assumption, balancing also underlies one of the most notorious examples of specification, namely the idea that freedom of expression does not extend to the freedom to - knowingly and falsely - shout "fire!" in a crowded theatre.[94] This appears to be an example of how specification of the right in question (freedom of expression) defuses a potential conflict with other rights. Nevertheless, it falls to be more accurately described as a rule that is the *result of* an - admittedly simple and straightforward - balancing exercise between the rights at stake: the freedom of expression of the person who would knowingly and falsely shout "fire!" in a crowded theatre and the rights to life and physical integrity of the theatre-goers, who risk being trampled in the panic that would ensue if the person were to really shout "fire!". Under these concrete circumstances, it is beyond dispute that the rights of the theatre-goers prevail over the freedom of expression of the person who wishes to shout "fire!", given the limited damage that would be done to the person's freedom of expression if he were denied the opportunity to (falsely!) should "fire!", compared to the serious damage that would be done to

[90] For a contrary view, see Webber, *supra* note 66 at 5, 104 and 116 (rejecting the approach described in the text and arguing in favour of a system of narrowly defined rights under which genuine rights, *i.e.* properly defined or delimited rights, are always absolute).

[91] Ronald Dworkin appears to defend a third model, which lies somewhere in between the specificationist and the *pro tanto* model. Dworkin distinguishes between abstract rights and concrete rights and insists that, while abstract rights (such as the right to free speech and the right to privacy) can conflict, concrete rights (*i.e.* more precisely defined versions of the abstract rights that more definitively express their weight) cannot. See R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986) at 293; Dworkin, *supra* note 51 at 93 and 193; Dworkin, *supra* note 63 at 48-49.

[92] Alexy, *supra* note 60 at 50 and 181; R. Alexy, 'The Construction of Constitutional Rights', 4 *Law & Ethics of Human Rights* (2010) at 21 and 24; Mackie, *supra* note 32 at 177.

[93] A. Barak, 'Proportionality and Principled Balancing', 4 *Law and Ethics of Human Rights* (2010) at 12-14; P. McFadden, 'The Balancing Test', 29 *Boston College Law Review* (1988) at 598 and 600.

[94] Dworkin, *supra* note 51 at 204.

the rights to life and physical integrity of the theatre-goers if he were allowed to do so. However, if we modify the circumstances – for instance, if there really is a fire or if there are only a handful of persons present in the theatre – the balancing exercise would (or could) swing the other way. Suddenly, what was prohibited becomes permissible (even if, in the case of there being only a handful persons present in the theatre, it reveals bad taste). Such changes in permissibility, depending on the concrete circumstances of a case, are more successfully explained by the *pro tanto* model of rights: balancing determines which of the conflicting rights prevails under the concrete circumstances.

Yet the advantages of the *pro tanto* model of rights over the specificationist model do not end there. By distinguishing the violation of a right from an interference therewith,[95] the *pro tanto* model is also able to accommodate the other objections raised against the specificationist model.

Under the *pro tanto* model, no need exists to insist that, when the rights of more persons appear to conflict, all but one person never had a right to begin with. Instead, all persons get to 'keep' their rights, while all but one of them have to accept a legitimate interference with their rights, owing to the fact that it has been outweighed by the rights of others.[96]

Furthermore, the *pro tanto* model is more apt at dealing with hard cases than the specificationist model, since it need not lead to counterintuitive results. Unlike the specificationist model, the *pro tanto* model has no qualms in admitting that *both* shipwrecked persons in the plank case have a right to life and that their case truly represents a hard case, a gut wrenching dilemma. How it is to be resolved is, of course, an entirely different matter.[97]

Finally, under the *pro tanto* model room exists to accommodate moral residue, because rights that have not been violated have still been interfered with.[98] In the cabin case, for example, the person who saved her life by breaking into another person's cabin will have interfered with the latter's property rights. Even if she has legitimately done so to protect her own (right to) life and the cabin owner's property rights have thus not been violated, she may still need to offer the cabin owner compensation to address the interference.[99]

However, we should acknowledge, in line with Frederick Schauer,[100] that moral residue – which need not consist of a residual obligation of compensation, but may also take the form of sincere regret over the irredeemable loss of something important[101] – is *not* a general feature of human rights adjudication. As Schauer argues:

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[95] Alexy, *supra* note 60 at 180-181; A. Gewirth, 'Ethical Universalism and Particularism', 85 *The Journal of Philosophy* (1988) at 300; Feinberg, *supra* note 65 at 98-99 and 100-101.
[96] F. M. Kamm, *Morality, Mortality Volume I – Death and Whom to Save from It* (New York – Oxford: Oxford University Press, 1998) at 158. See, in a similar vein, C. Wellman, *supra* note 61 at 260.
[97] On dilemmas in the Court's case law, see *infra* 'Chapter V – The Limits of the Structured Balancing Test? Dilemmas in the Case Law of the ECtHR'.
[98] Finkelstein, *supra* note 30 at 304-305.
[99] Feinberg, *supra* note 65 at 102.
[100] Schauer, *supra* note 86 at 427-428.
[101] Ibid. at 428 (referring to both remorse and compensation).

> "it seems plausible to speculate that when a genuine right is overridden ... we as a society do not feel obliged to provide the right-holder ... with even an apology, let alone compensation."[102]

Nevertheless, moral residue *can* and *does* feature prominently in a number of ECtHR cases that have been labelled as classic examples of conflicting rights. *Evans v. the United Kingdom* is a prime example. The case involved Ms. Evans's last and only chance to become a genetic parent by using frozen embryos, fertilized with the sperm of her former partner. However, after their breakup, her former partner withdrew his consent for the use of the embryos. The case of Ms. Evans was described as a "dilemma" by the ECtHR.[103] In its judgment, the Court moreover recognised that "[i]n the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated".[104] The Court eventually ruled against the applicant.[105] Nevertheless, it emphasised that "in common with every other court which has examined this case, [it] has great sympathy for the applicant, who clearly desires a genetically related child above all else."[106] The Court thus acknowledged that there was something to regret, something which had been irredeemably lost, a moral residue.[107] The potential existence of moral residue in cases that appear to involve conflicting rights offers a strong indication that Convention rights can and do indeed conflict. The presence of moral residue is arguably explained by the existence of a particularly tragic – but, crucially, real – conflict that, no matter how it is resolved, leaves us with something to regret.[108]

By establishing the failure of the specificationist model and insisting that the *pro tanto* model of rights offers a better understanding of how human rights function, especially in the ECHR

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[102] Ibid.
[103] *Evans*, *supra* note 44 at para. 73.
[104] Ibid.
[105] Ibid. at para. 90.
[106] Ibid.
[107] Considerations of moral residue arguably also entered the Court's reasoning in ECtHR, *Aksu v. Turkey*, app. nos. 4149/04 and 41029/04, 15 March 2012. In *Aksu*, the Grand Chamber of the Court ruled that the Roma applicant's art. 8 rights had not been violated by publication and dissemination of a book entitled "The Gypsies of Turkey", which described the situation of Roma in Turkey, sometimes using pejorative language. After having determined that "in balancing the conflicting fundamental rights under Articles 8 and 10 of the Convention, the Turkish courts made an assessment based on the principles resulting from the Court's well-established case-law" (para. 74) in finding in favour of the freedom of expression of the author of the book, the Court nevertheless dedicated a separate paragraph to the remaining plight of the applicant. The Court held that "the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases" and insisted that "the Government should pursue their efforts to combat negative stereotyping of the Roma." (para. 75). Although the Court did not state so explicitly, moral residue is arguably also present in *Odièvre*, *supra* note 1. In *Odièvre*, the Grand Chamber of the Court was strongly divided (10-7) on the application by an adult adopted woman who had requested access to the identity and personal information of her biological mother, but was refused such access since her biological mother had indicated that she did not wish such information to ever be divulged to her daughter when she had given her up for adoption soon after her birth. The majority of the Court found against the applicant, but seven Judges voiced a strong dissent. The division in the Grand Chamber signals that, however the case would be decided, something would be lost, something to be regretted. Either the mother's privacy or the applicant's ability to know her origins.
[108] Thomson, *supra* note 87 at 84. Note, however, that one could argue that the moral residue has a different origin, unconnected to the existence of conflicting rights. I am grateful to Laurens Lavrysen and Eva Brems for making that point. However, to my knowledge, specificationists have not been able to successfully defend it.

context, I have already gone a long way towards demonstrating that human rights can indeed conflict.[109] However, to at this stage conclude that they *necessarily* conflict in the context of the ECHR would be premature. Further considerations are required. So let us move on to statement (3) – rules are logically distinct from principles.

2. On Rules and Principles

Statement (3) of our hypothesis claims that rules are logically distinct from principles. It is a crucial step of the hypothesis, since the latter only entails an inconsistency if (1) human rights can conflict; (2) human rights are rules; and (4) conflicts between rules are to be resolved by declaring one of the rules invalid (or inapplicable). The logics behind the hypothesis imply that there is a difference between rules and principles. Indeed, the hypothesis relies on the – contested – view that rules and principles are logically distinct, introduced by Ronald Dworkin and taken over by Robert Alexy. According to Dworkin and Alexy different methods apply when rules and principles conflict. Conflicts between rules are to be resolved through subsumption: one of the rules is to be declared invalid or inapplicable to the instant case. Conflicts between principles, conversely, are to be resolved through balancing or weighing, a process which keeps both principles intact.[110] Rules are thus amenable to exceptions, while principles are not.[111] Instead, principles have a dimension lacking in rules: the dimension of weight.[112] As a result, the hypothesis I presented at the outset of this section only entails an inconsistency if (i) rules truly operate through subsumption and (ii) human rights are considered to be rules. Therefore, if there exists no logical difference between rules and principles, there is no inconsistency: if conflicts between rules can (also) be resolved by weighing or balancing, the threat of inconsistency is removed. For that reason, statement (3) of the hypothesis insists that rules are logically distinct from principles. Let us now examine the implications of that claim.

The view that rules and principles are logically distinct knows considerable support.[113] However, it has also encountered heavy criticism.[114] A detailed analysis of the debate lies beyond the scope of this chapter. However, because it impacts on our hypothesis, it does require some examination.

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[109] See *contra* Crowe, *supra* note 87 (defending the specificationist model and rejecting the *pro tanto* model).
[110] R. Alexy, 'Constitutional Rights, Balancing and Rationality', 16 *Ratio Juris* (2003) at 134; Alexy, *supra* note 92 at 21; Alexy, *supra* note 60 at 44 and 49-50; Dworkin, *supra* note 51 at 26-27; R. Dworkin, 'The Model of Rules', 35 *The University of Chicago Law Review* (1967) at 27.
[111] Dworkin, *supra* note 110 at 25-26.
[112] Dworkin, *supra* note 51 at 26.
[113] See, for instance, several of the contributions in M. Borowski (ed.), *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag, 2010) and those in A. J. Menéndez and E. O. Eriksen (eds.), *Arguing Fundamental Rights* (Dordrecht: Springer, 2010).
[114] Raz, *supra* note 52; Poscher, *supra* note 63; A. Jakab, 'Re-Defining Principles as "Important Rules" – A Critique of Robert Alexy', in M. Borowski (ed.), *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag - Nomos, 2010), 145-158; J.-R. Sieckmann, 'The Theory of Principles – A Framework for Autonomous Reasoning', in M. Borowski (ed.), *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag - Nomos, 2010), 49-61; B. Verheij et. al, 'An Integrated View of Rules and Principles', 6 *Artificial Intelligence and Law* (1998), 3-26.

Dworkin's and Alexy's most notable critic, Joseph Raz, denies that rules and principles are *logically* distinct from one another. Instead, Raz argues, the distinction between both is one of degree.[115] Under his alternative understanding, both rules and principles can carry weight and, therefore, both can conflict without leading to inconsistency.[116] However, rules and principles still differ, also on Raz's account. They differ in the sense that "[r]ules prescribe relatively specific acts; [while] principles prescribe highly unspecific actions".[117] Rules are marked by certainty, while principles are characterised by flexibility.[118] Raz thus only denies the logical distinction between rules and principles. He keeps the different treatment of conflicts between rules (subsumption) and conflicts between principles (balancing) largely intact, with the understanding that elements of balancing may need to be brought into cases of conflicts between rules as well.[119]

For our present purposes, it is not necessary to take a stand in the above debate. If one follows Dworkin's and Alexy's argument, the hypothesis given at the outset of this paper remains intact, requiring us to move on to the remaining steps: (1) human rights can conflict and (2) human rights are rules. If, on the other hand, one finds Raz's argument more convincing, there is no reason to deny the existence of conflicts between human rights, even if they are considered to be rules. Statement (1) human rights can conflict, would no longer pose a problem, since the ability to also balance rules would lead to the removal of the inconsistency from our hypothesis. However, because many may and do disagree with Raz and since we are not taking a stance in the debate, let us move on to statement (1) human rights can conflict.

3. On Conflicting Human Rights

In arguing that the specificationist strategy to deny conflicts of rights fails and that the *pro tanto* model of rights is better tailored to the ECHR system, I have already indicated that conflicts between human rights can exist in the ECHR context. However, I have also clarified that this does not, in and of itself, entitle us to conclude that such conflicts *necessarily* exist. Nor have I explained how such conflicts can be understood. I will tackle these remaining concerns under statement (1) of our hypothesis – human rights can conflict – in this section.

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[115] Raz, *supra* note 52 at 838. See also Sieckmann, *supra* note 114 at 50; Verheij et. al., *supra* note 114 at 19; G. C. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (Oxford: Oxford University Press, 2011) at 94; M. Jestaedt, 'The Doctrine of Balancing – Its Strengths and Weaknesses', in M. Klatt (ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2011) at 162-163; R. Poscher, 'The Principles Theory: How Many Theories and What is their Merit?', in M. Klatt (ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2011), at 235. Note that certain scholars go even further and outright deny the existence of legal principles. See, most notably, L. Alexander, 'Legal Objectivity and the Illusion of Legal Principles', in M. Klatt (ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2011) at 117. I will not deal with the latter claim here.

[116] Raz, *supra* note 52 at 830-831. See also Verheij et. al., *supra* note 114 at 19; Poscher, *supra* note 115 at 236-237.

[117] Raz, *supra* note 52 at 838.

[118] Ibid. at 842.

[119] Ibid. See also Verheij et. al., *supra* note 114 at 19; Jestaedt, *supra* note 115 at 162-163.

i. The Relevance of Normative Theories to the ECHR?

All I have demonstrated thus far is that, under the *pro tanto* model of rights, acknowledging the existence of conflicts between human rights is not problematic. Yet, there may be further reasons that preclude their existence. These reasons are related to normative theories of rights: depending on which theory of rights one follows, it may simply prove impossible for rights to conflict.[120] Assessing the normative validity and feasibility of all existing theories of rights lies well beyond the scope of this chapter. Moreover, engaging with these theories in the abstract to determine whether rights can conflict would be an empty exercise, since the answer to the latter question is pre-determined by the theory of rights one prefers.[121] Therefore, all we would end up doing is going around in circles. In this section, I will instead examine some of the most influential normative theories in the light of the ECHR.[122] I will assess to what extent these theories correspond to the ECHR and the case law of its Court, in an attempt to determine whether the ECtHR has cause to be concerned about conflicts between Convention rights.

A first rights theory under which conflicts between rights are impossible relies on a conception of rights as negative and absolute. Robert Nozick, for example, understands rights as side constraints on action, thereby expressing the inviolability of persons.[123] Nozickian rights are not only absolute, they also only have a negative function.[124] They preclude interference, but do not require protection. The nature of Nozickian rights has led several legal theorists to argue that conflicts between them are simply not possible: "obligations of noninterference (sic.) do not conflict with each other ... [because] inaction does not conflict with inaction".[125] This conclusion is sound. However, Nozick's understanding of rights cannot help us in determining whether the legal human rights enumerated in the ECHR can conflict, since his theory is incompatible with the understanding of rights under the ECHR. Not only are most Convention rights relative rights, their function is moreover not limited to acting as side constraints, precluding only negative interferences. Through the development of the doctrine of positive obligations, the ECtHR has also given indirect horizontal effect to many Convention rights. The Convention thus also imposes duties of protection on the Contracting States: they should protect individuals against breaches of their human rights by other private

[120] Waldron, *supra* note 32 at 503 and 505.
[121] Ibid. at 503.
[122] See, generally, Letsas, *supra* note 7 at 21-26 and 99-119.
[123] R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 30-33.
[124] Ibid.
[125] Hasnas, *supra* note 28 at 921-922. See also Waldron, *supra* note 32 at 504. See *contra* F. M. Kamm, 'Conflicts of Rights: Typology, Methodology, and Consequentialism', 7 *Legal Theory* (2001) at 242 (giving the example of an agent who, under duress, has to send a trolley down one of two tracks, on each of which a person is standing. According to Kamm this situation gives rise to a conflict between negative rights, since each of the two persons has a negative right not to be killed).

actors.[126] Convention rights have thus also taken on a positive function. Consequently, conflicts between them have become a possible feature of the ECHR.[127]

Another influential theory of rights that specifically aims at denying the existence of rights conflicts is Hillel Steiner's theory of "compossible" rights.[128] Steiner argues that the duties which underlie rights need to be redefined whenever those duties are incompatible in concrete cases.[129] Through this redefinition, Steiner argues, one can create a list of "compossible" rights, rights which do not conflict.[130] However, his argument closely resembles the specificationist argument,[131] which has already been rejected above.[132] Moreover, Steiner's limited understanding of rights as essentially property rights is out of line with the broader manner in which rights function under the ECHR.[133] His theory can therefore also not be cause to reject the existence of conflicts between rights in the context of the ECHR.

Yet, Steiner is but one of the proponents of the Will theory of rights. Several other Will theorists have put forward similar understandings of rights that aim to offer protected private domains to their holders.[134] Under any version of the Will theory, the defining characteristic of rights is choice: right holders are free to determine how to use their rights, within their private domains. Because an essential feature of the Will theory is that the private domains of different right holders cannot intersect – they function, as it were, as separate islands of choice – Will theorists deny the possibility of rights conflicts.[135] Their position can be contrasted to that of Interest theorists. While Will theorists put choice at the centre of their conception of rights, proponents of the Interest theory claim that rights exist to protect certain interests of individuals, not their choices.[136] Because the interests of different individuals can and will often conflict, Interest theorists have no qualms in openly acknowledging the inevitably of conflicts between the rights that protect those interests.[137]

The debate between Will theorists and Interest theorists is a long standing one and appears irresolvable. Proponents of both theories have repeatedly pointed out the shortcomings of the other and neither has been able to successfully address all criticisms.[138] Examining the

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[126] S. Van Drooghenbroeck, 'L'horizontalisation des droits de l'homme', in H. Dumont et. al. (eds.), *La responsabilité, face cachée des droits de l'homme* (Brussels: Bruylant, 2005), 355-390. Note, however, that the doctrine of positive obligations also knows application beyond the so-called obligation to protect, for instance in the field of procedural obligations (*e.g.* the obligation to investigate under art. 2 and 3 ECHR).

[127] See also F. Ost and S. Van Drooghenbroeck, 'La responsabilité, face cachée des droits de l'homme', in H. Dumont et. al. (eds.), *La responsabilité, face cachée des droits de l'homme* (Brussels: Bruylant, 2005) at 34-35; Sudre, *supra* note 57 at 364-367.

[128] Steiner, *supra* note 31.

[129] Ibid. at 80-81.

[130] Ibid. at 89-90.

[131] Ibid. at 92-93.

[132] See *supra* '1. On Invalid Rules - *ii. The Failure of the Specificationist Argument and the Success of the Pro Tanto Model of Rights*'.

[133] Steiner, *supra* note 31 at 91 and 94-95.

[134] H. L. A. Hart, *Essays on Bentham – Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) at 183.

[135] Zucca, *supra* note 26 at 55.

[136] See for instance J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). Waldron, *supra* note 32.

[137] Waldron, *supra* note 32. See also Zucca, *supra* note 26 at 55.

[138] See for instance the discussion in M. H. Kramer at. al., *A Debate over Rights* (Oxford: Oxford University Press, 1998).

normative validity of each version of both theories lies far beyond the scope of this chapter.[139] Instead, I will assess which theory best fits the understanding of rights as featured in the ECHR and as utilised by the ECtHR. If this analysis would reveal that one side of the debate has a clear edge, it would also indicate the position the ECtHR should take on the possibility of conflicts between human rights.[140]

The Court's case law *prima facie* features a few elements that are closely related to the Will theory. The Court for instance allows for waiver of rights and generally denies that the deceased may be rights holders under the Convention. However, upon closer examination it becomes clear that those strands of jurisprudence are not entirely in line with how Will theorists would approach the issue. While the Court does allow for waiver of rights,[141] the mere finding that an applicant has waived his rights does not determine the outcome of the case.[142] Instead, the Court examines whether the waiver was given with full informed consent and whether it was acceptable under the specific circumstances of the case.[143] The Court has moreover held that certain Convention rights cannot be waived, as doing so would run

[139] For a discussion of both theories in relation to fundamental rights, see Zucca, *supra* note 26 at 32-39 and 59. In his work, Zucca proposes a third theory - the constitutional status theory - that aims to combine insights from the Will theory and the Interest theory. See Zucca, *supra* note 26 at 59-60 and 64. I will not discuss the constitutional status theory here, nor any other of the myriad supposed alternatives to the Will theory and Interest theory that have been proposed in the literature. It should first be noted that Zucca's constitutional status theory is not intended to cover the ECHR system, which Zucca explicitly excludes from the scope of his analysis. See Zucca, *supra* note 26 at xiv. Secondly, insofar as his constitutional status theory is potentially relevant to the ECHR, it appears to draw on a similar conception of rights as the one I employ to describe the ECHR rights further on, locating them somewhere in between Frederick Schauer's conception of rights as shields and Joseph Raz's conception of rights as protecting fundamental interests. See *infra* note 247 and accompanying text. See also Zucca, *supra* note 26 at 42 (arguing that fundamental legal rights function both as shields and as swords). On other alleged alternatives to the Will theory and the Interest theory, see, for instance, G. Sreenivasan, 'A Hybrid Theory of Claim-Rights', 25 *Oxford Journal of Legal Studies* (2005), 257-274; L. Wenar, 'The Nature of Rights', 33 *Philosophy & Public Affairs* (2005), 223-252; M. H. Kramer and H. Steiner, 'Theories of Rights: Is There a Third Way?', 27 *Oxford Journal of Legal Studies* (2007), 281-310 (arguing that Sreenivasan's and Wenar's theories of rights do not offer compelling alternatives to the Will theory and the Interest theory, in Wenar's case because his alleged alternative theory is in fact a (simplistic) version of the Interest theory and in Sreenivasan's case because his alternative theory leads to unacceptable results and therefore falls to be rejected).

[140] Zucca, *supra* note 26 at 55. Note that Hart accepts that his version of the Will theory is limited to private law rights and is not applicable to fundamental rights. See Hart, *supra* note 134 at 193. However, other proponents of the Will theory have argued that the Will theory *can* be successfully applied to human rights and constitutional rights. See for instance C. Wellman, *The Moral Dimensions of Human Rights* (Oxford: Oxford University Press, 2011) at 198; Steiner, *supra* note 31 at 73.

[141] For an analysis of the Court's case law on waiver of rights, see O. De Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights', 51 *Northern Ireland Legal Quarterly* (2000), 481-508. See also O. De Schutter and J. Ringelheim, 'La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l'échange', in H. Dumont et. al. (eds.), *La responasbilité, face caché des droits de l'homme* (Brussels: Bruylant, 2005), 441-481.

[142] ECtHR, *Hemri v. Italy*, app. no. 18114/02, 18 October 2006, para. 73.

[143] Ibid.; ECtHR, *D.H. and Others v. the Czech Republic*, app. no. 57325/00, 13 November 2007, para. 202. For an example of a case in which the Court accepted the waiver of a Convention right, see ECtHR, *Diriöz v. Turkey*, app. no. 38560/04, 31 May 2012, paras. 32 and 35 (in which the Court held at para. 32 that "ni la lettre ni l'esprit de l'article 6 de la Convention n'empêchent une personne de renoncer de son plein gré, que ce soit de manière expresse ou tacite, aux garanties d'un procès équitable ... Toutefois, pour être effective aux fins de la Convention, la renonciation au droit de prendre part au procès doit se trouver établie de manière non équivoque et être entourée d'un minimum de garanties correspondant à sa gravité" and at para. 35 that "le requérant avait droit à l'assistance d'un avocat pendant sa garde à vue et que, bien que ce droit lui ait été rappelé, il a refusé de se faire assister par un avocat. Partant, la renonciation du requérant à ce droit était non équivoque et entourée du minimum de garanties requis.").

"counter to an important public interest".[144] Finally, as argued by Olivier De Schutter, "there exists no *general right to waiver* in the European Convention on Human Rights", in the sense of a right "invoked by the individual, arguing against the paternalism of the State which intends to impose the benefit of an unwanted right against the very will of the right-holder."[145] As for the rights of the deceased, the Court has – in line with the Will theory of rights – generally refused to accord Convention rights to people who are no longer alive.[146] However, it has on occasion exhibited a somewhat ambiguous attitude towards the possibility of extending the status of rights holder to a deceased person.[147]

Matters are more clear-cut with regard to the relationship between the Interest theory and the Court's case law. The Court has interpreted the rights guaranteed by the Convention expansively, thereby often using the language of interests to broaden the Convention's reach.[148] Moreover, when determining the proportionality of an interference with any of the Convention rights, the Court has repeatedly used the language of balancing of interests, thereby suggesting that those rights exist to protect the relevant interests.[149] The Court has moreover extended rights protection to, among others, children;[150] the physically and mentally disabled;[151] and entities such as the press, political parties and private companies;[152] all of whom can be right holders under the Interest theory but are generally denied such status under the Will theory.

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[144] See, for instance, ECtHR, *Konstantin Markin v. Russia*, app. no. 30078/06, 22 March 2012, para. 150 ("in view of the fundamental importance of the prohibition of discrimination on grounds of sex, no waiver of the right not to be subjected to discrimination on such grounds can be accepted as it would be counter to an important public interest.").

[145] De Schutter, *supra* note 141 at 495 (emphasis in original). De Schutter distinguishing the *right* to waiver from "waiver as a *privilege* … invoked by the State, arguing that the individual has consented to the situation he denounces as a violation of his rights". For an example of the latter conception of waiver, see ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, app. nos. 26766/05 and 22228/06, 15 December 2011, para. 123 ("[t]o allow the defendant [in a criminal trial] to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way. Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3(d).").

[146] See, for instance, ECtHR, *Hachette Filipacchi Associés v. France*, app. no. 71111/01, 14 June 2007; ECtHR, *Jäggi v. Switzerland*, app. no. 58757/00, 13 July 2006, para. 42 (with dissenting opinion of Judges Hedigan and Gyulumyan to the effect that there exists a right of the dead to rest in peace under Article 8); ECtHR, *The Estate of Kresten Filtenborg Mortensen v. Denmark* (adm.), app. no. 1338/03, 15 May 2006; ECtHR, *Akpınar and Altun v. Turkey*, app. no. 56760/00, 27 February 2007, para. 82 (with dissenting opinion of Judge Fura-Sandström to the effect that "the gratuitous desecration of a corpse … is a clear affront to human dignity in breach of Article 3 of the Convention").

[147] ECtHR, *Éditions Plon v. France*, app. no. 58148/00, 18 May 2004, paras. 47 and 53; ECtHR, *John Anthony Mizzi v. Malta*, app. no. 26111/02, 12 January 2006, para. 40.

[148] See for instance ECtHR, *Anheuser-Busch Inc. v. Portugal*, app. no. 73049/01, 11 January 2007, para. 78 and joint dissenting opinion of Judges Caflisch and Cabral Barreto, para. 3.

[149] See, for instance, ECtHR, *Keegan v. Ireland*, app. no. 16969/90, 26 May 1994, para. 49; *Von Hannover*, *supra* note 44 at para. 79; *Evans*, *supra* note 44 at paras. 75-76 and 83; ECtHR, *A., B. and C. v. Ireland*, app. no. 25579/05, 16 December 2010, paras. 229-230.

[150] See for instance ECtHR, *T. v. the United Kingdom*, app. no. 24724/94, 16 December 1999; ECtHR, *Z. and Others v. the United Kingdom*, app. no. 29392/95, 10 May 2001.

[151] ECtHR, *Alajos Kiss v. Hungary*, app. no. 38832/06, 20 May 2010; *Pretty*, *supra* note 36. Note, however, that Will theorists may maintain that the applicants in these cases did not suffer from a disability serious enough to deprive them of their status as right holder.

[152] See, for instance, ECtHR *Financial Times Ltd. and Others v. the United Kingdom*, app. no. 821/03, 15 December 2009; *Refah Partisi*, *supra* note 72; *Anheuser-Busch*, *supra* note 148.

The above brief analysis indicates that the ECHR system exhibits more features of the Interest theory than of the Will theory. Accepting the possibility of conflicts between human rights should thus not cause the ECtHR all that much concern. However, because the ECHR system does not overlap entirely with either the Interest theory or the Will theory, it is not possible to definitively settle the debate on which normative theory best fits the ECHR system. Furthermore, it is arguably wise for the Court to not wander too far off into normative debates on the nature of rights.[153] With 47 Judges, each holding their own ideological position, and given that the Court is the ultimate interpreter of human rights for 47 Contracting States, it is not surprising that it prefers to act pragmatically, ruling on a case by case basis and using the instruments available to it – the legal human rights recognised in the ECHR – as its frame of reference.[154] It may at times be useful for the Court to pay increased attention to evaluative considerations, for instance to offer transparency and coherence when interpreting the scope of Convention rights.[155] Nevertheless, it appears sensible for the Court to limit normative considerations on the nature of Convention rights to those cases in which they are unavoidable, rather than getting bogged down in attempts to formulate its own deep normative theory of rights.

Against the above - pragmatic - backdrop, more can be gained by presenting an analytical argument on the existence and nature of conflicts between human rights in the ECHR context. It is to this analytical argument that I will now turn.

ii. The Usefulness of an Analytical Theory for the ECtHR

Although the ECHR provides that several of the rights enshrined therein may be limited for the protection of the "rights and freedoms of others",[156] its Court has, as indicated above, exhibited an ambiguous attitude towards the question of conflicts between human rights. It has, in particular, signalled its unease in recognising the existence of such conflicts in certain judgments.[157]

I have already argued that the *pro tanto* model of rights better fits the ECHR system than the specification model and that, therefore, recognising the existence of genuine conflicts need not trouble the Court.[158] In that respect, the Court's ambiguous attitude is presumably not dictated by a desire to deny the possibility of rights conflict, but rather fuelled by uncertainty

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[153] C. R. Sunstein, 'Beyond Judicial Minimalism', *University of Chicago John M. Olin Law & Economics Working Paper No. 432 / Public Law* and *Legal Theory Working Paper No. 237*, September 2008, available at http://www.law.uchicago.edu/files/files/LE432_0.pdf (last accessed 7 October 2013).

[154] M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', 4 *Law and Ethics of Human Rights* (2010) at 155.

[155] See Letsas, *supra* note 7 at 37-57.

[156] See for instance article 9 ECHR.

[157] See *supra* notes 42 and 47 and accompanying text.

[158] See *supra* '1. On Invalid Rules - *ii. The Failure of the Specificationist Argument and the Success of the Pro Tanto Model of Rights*'.

on how precisely to understand them.[159] The analytical argument on conflicting Convention rights presented here is aimed at alleviating those concerns.

Hohfeld's seminal article on fundamental legal conceptions, in which he explains how the generic term '"right" has historically been used to describe what are in reality different kinds of entitlements, offers a valuable starting point for the development of my analytical argument.[160] In his article, Hohfeld proposes a framework that aims to correct past mistakes by disentangling the different fundamental legal conceptions: claims (rights), privileges (liberties), powers and immunities, on the one hand, and their correlatives – duties, no-rights, liabilities and disabilities – on the other.[161]

Most relevant for our current concerns, I submit, are claims[162] and liberties,[163] and their correlatives: duties and no-rights.[164] Hohfeld defines a claim (right), through a concrete example, as follows: "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place."[165] Hohfeld defines a liberty (privilege) as "the opposite of a duty and the correlative of a "no-right"".[166] He clarifies that "[i]n the example last put, whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off."[167] Hohfeld summarises the difference between a claim (right) and a liberty (privilege) thusly: "the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter."[168]

Now, if we examine the possibility of conflicts between the fundamental legal conceptions as just described, we notice that, on a strict Hohfeldian framework, conflicts can only arise between claims. Conflicts between a claim and a liberty, and conflicts between liberties, are not possible on a strict Hohfeldian framework.

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[159] J. Bomhoff, '"The Rights and Freedoms of Others": The ECHR and Its Peculiar Category of Conflicts Between Individual Fundamental Rights', in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008) at 621 (describing the ECHR system as "a system that has had great difficulty in finding consistent and convincing ways in dealing with cases of conflicting rights").

[160] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913), 16-59. See further, on the use of Hohfeldian analysis, J. Finnis, 'Some Professorial Fallacies about Rights', 4 *Adelaide Law Review* (1972), 377-388.

[161] Hohfeld, *supra* note 160 at 30.

[162] To avoid the confusion against which Hohfeld aimed to warn in his seminal article, I will use the term "claim" throughout, instead of the term "right". See ibid. at 32: "[i]f, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best."

[163] Since it is the more established term in contemporary Hohfeldian analysis, I will use "liberty" throughout, instead of "privilege", although the latter is the term actually utilised by Hohfeld.

[164] See, *contra*, Zucca, *supra* note 26 at 41 and 47 (arguing that the incorporation of immunities is vital in extending Hofheld's scheme to fundamental rights). However, I consider the analysis given in the text - which solely relies on claims and liberties, and their correlatives: duties and no-rights - to offer a correct analysis of ECHR rights.

[165] Hohfeld, *supra* note 160 at 32.

[166] Ibid.

[167] Ibid. (emphases in original).

[168] Ibid. at 33.

Conflicts between Hohfeldian claims are possible, because two individuals who hold claims against each other are both under a duty to refrain from interfering with the claim of the other.[169] Whenever those duties cannot simultaneously be fulfilled, a conflict between the correlative claims arises.

Conflicts between a claim and a liberty, conversely, are not possible on a strict Hohfeldian framework, because the correlative of a claim is a duty of non-interference in others, while the correlative of a liberty is a no-right invested in others.[170] Indeed, Hohfeld himself has stated that, on his framework, a "claim and privilege ... could not be in conflict with each other."[171] The inability of a claim and a liberty to conflict, under a strict Hohfeldian framework, can be explained as follows. If A wishes to exercise her liberty in a manner that conflicts with B's claim, A has to concede that she is under a duty to not interfere with B's claim. A can therefore not exercise her liberty to the extent that it is incompatible with B's claim. B, on the other hand, may have no right that A not exercise her liberty, but he is *not* under a duty towards A. B can thus invoke the protection offered to him by his claim over A. However, outside the area of protection offered by his claim, B has no right that A not exercise her liberty. This rather abstract description may be illustrated by way of a concrete example. Let us assume that A wishes to play the saxophone (liberty), but she wishes to do so on the property of her neighbour B (claim). B may now demand that A leave and A must comply, since she is under a duty to not interfere with B's claim. However, B cannot use his property rights to do anything about A going back to her own home to play the saxophone there, because - outside the area of protection of his claim - B has no-right that A not exercise her liberty. Thus, two completely secluded areas of protection are formed, which cannot intersect. To the extent that B has a claim, A may not exercise her liberty in a manner that would be incompatible with her duty to respect B's claim. However, B's claim cannot extend to the remaining area beyond which his claim offers him no protection. In that remaining area, A can thus still exercise her liberty. As a result, no conflict between A's liberty and B's claim can exist on a Hohfeldian framework.[172]

When two persons both want to exercise a liberty, again no conflict can arise under a strict Hohfeldian framework. Both persons are able to exercise their liberty independently, since they are not under incompatible duties; in fact neither is under a duty to respect the other's liberty.[173] Instead, they each have a no-right that the other person not exercise his liberty and can thus not prevent each other from using their respective liberties. For instance, both A and B can freely play the saxophone on their own property. Similarly, when meeting in the streets

[169] See also Waldron, *supra* note 32 at 506; Christie, *supra* note 115 at 14.
[170] Feinberg, *supra* note 65 at 95.
[171] Hohfeld, *supra* note 160 at 37. Hohfeld came to this conclusion via a similar route than I have in the text. Applying his framework to what had been described by the courts as "an apparent conflict or antinomy between ... the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them", Hohfeld first clarifies that the characterisation of the latter legal entitlement as a "right" is erroneous: " by "the right of the defendants" in relation to the plaintiffs a legal privilege must be intended." Hohfeld then goes on to explain why the right and the privilege cannot be in conflict with each other: "[t]o the extent that the defendants have privileges the plaintiffs have no rights; and conversely, to the extent that the plaintiffs have rights the defendants have no privileges".
[172] See also Montague, *supra* note 49 at 271-272.
[173] Hohfeld, *supra* note 160 at 36-37.

both A and B can exercise their freedom of expression simultaneously. They may not be able to hear each other over their own shouting, but neither is under a duty to stop shouting.

The above theoretical exposé thus appears to drastically limit the potential for conflicting rights. However, Hohfeld's scheme was designed to be applied solely in relationships between individuals.[174] It was not intended to include human rights held against the State. Therefore, applying Hohfeldian analysis to the human rights enumerated in the ECHR requires us to make some adjustments. Precisely which kinds of adjustments are needed will become apparent when we illustrate Hohfeld's framework through specific examples, using Convention rights. In the process, it will become clear that, under the ECHR system, conflicts are not limited to claims. They can also arise between a claim and a liberty and between liberties.

An example of a conflict between claims would, in the ECHR context, for instance be a conflict between a suspect's right not to be tortured and the right to life of a child who he has kidnapped and whose location – the police assumes – can only be found by torturing the suspect.[175] Here we already notice that the premise we employed under the strict Hohfeldian framework – when two individuals hold claims, they are under a duty to refrain from interfering with the claim of the other – is not workable. We need to adjust the Hohfeldian framework, which only applies to relations between two persons, to make it useful to the ECHR context. It is particularly crucial to recognise that, under the ECHR, claims of individuals are correlative to duties, not of other individuals, but of the State. In our example, it is the *State* that is under a duty not to torture the first person, while at the same time being under a duty to *protect* the right to life of the child. Whenever both duties are incompatible – as is the case in our example – it remains fair to speak of a genuine conflict between human rights.

Matters get more complex when examining the other theoretical situations, *i.e.* conflicts between a claim and a liberty and conflicts between two liberties.

A conflict between a claim and a liberty may, under the ECHR system, for instance be a conflict between one person's (John) right to property to a piece of land and the freedom of expression of another person (Jane) who wishes to distribute leaflets on that land.[176] Here, employing a strict Hohfeldian framework causes problems because, under it, only Jane is under a duty to not interfere with the right to property (a claim) of John. John, however, is not under a duty to allow Jane to exercise her freedom of expression (a liberty) on his property. If we were to follow the theoretical exposé above, the solution would thus be simple: Jane cannot exercise her freedom of expression, because she is under a duty to not interfere with John's right to property. Yet, this solution is troubling when transposed to the ECHR system, because it would mean that a human right formulated as a liberty can under no circumstances trump a human right formulated as a claim. This finding is not in line with the case law of the

[174] Zucca, *supra* note 26 at 32.
[175] This example is inspired by *Gäfgen*, *supra* note 2.
[176] *Appleby*, *supra* note 44.

ECtHR.[177] What has gone wrong in this case is a failure to recognise the existence of complex rights, rights that are made up of several Hohfeldian entitlements.[178] Once we acknowledge that all Convention rights, whether formulated as claims or as liberties, are held against the State, it becomes clear that the liberties enumerated in the Convention are, to use Jeremy Bentham's terminology, "vested liberties".[179] H.L.A. Hart has clarified that Bentham's "vested liberties" are, in contrast to his "naked liberties", surrounded by a 'protective perimeter', which is composed of additional Hohfeldian entitlements.[180] Hart has particularly argued that, in the case of human rights, this protective perimeter includes a claim of non-interference.[181] The liberties enumerated in the Convention, for example freedom of expression, exhibit precisely this structure. They consist of a liberty to act, for example a liberty to express one's opinion, combined with a claim to non-interference, as well as a claim to protection.[182] In the context of the ECHR, these claims are held by the individual against the State. They thus impose correlative duties on the State. In our example, the Convention imposes two concurrent duties on the State: a *prima facie* duty to not interfere with Jane's freedom of expression and a *prima facie* duty to protect John's right to property.[183] The true nature of the conflict between John's right to property and Jane's right to freedom of expression thus once more comes to light when we examine the duties of the State. When called upon to intervene, the State is simultaneously under a duty to protect John's right to property and under a duty to refrain from interfering with Jane's freedom of expression.[184] Whenever the State cannot fulfil both duties, we are again faced with a genuine conflict between human rights.

Because all liberties in the Convention are complex rights, a similar argument to the above applies when we adjust Hohfeld's framework to apply to cases of conflicts between liberties enumerated in the ECHR. A conflict between liberties may, under the ECHR system, for instance arise between the right to decisional privacy of two individuals, the first wishing to use frozen fertilised embryos to get pregnant through IVF, while the other, whose sperm was used for the fertilisation, withdraws his consent for use of the embryos, since he is no longer

[177] See, for instance, the many cases in which the Court held that the freedom of expression of the applicant prevailed over the right to protection of reputation of another person. For an example, see ECtHR, *Romanenko and Others v. Russia*, app. no. 11751/03, 8 October 2009.
[178] See also Zucca, *supra* note 26 at 53. On the notion of complex rights, see for instance Wellman, *supra* note 140 at 18-19; J. Waldron, 'Introduction', in J. Waldron (ed.), *Theories of Rights* (Oxford – New York: Oxford University Press, 1984) at 10.
[179] Hart, *supra* note 134 at 172.
[180] Ibid. at 171-173.
[181] Ibid. at 172.
[182] See, *mutatis mutandis*, M. H. Kramer, 'Rights Without Trimmings', in M. H. Kramer et. al. (eds.), *A Debate over Rights – Philosophical Enquiries* (Oxford – New York: Oxford University Press, 1998) at 111; Wellman, *supra* note 140 at 24.
[183] ECtHR, *Plattform "Ärzte für das Leben" v. Austria*, app. no. 10126/82, 21 June 1988, para. 32. These duties are referred to as *prima facie* duties, because the rights they are correlated to are at the outset *prima facie* rights.
[184] The situation is phrased in terms of the State's "duty to refrain from interfering with the freedom of expression of the second person", because, if the State chooses to protect the right to property of the first person, it will do so by interfering with the freedom of expression of the second (either by preventive means or by imposing a sanction afterwards). This representation of the conflict is compatible with the test Dworkin developed in *Taking Rights Seriously* to determine when one is faced with competing rights: "The test we must use is this. Someone has a competing right to protection, which must be weighed against an individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual…". See Dworkin, *supra* note 51 at 194.

in a relationship with the first person.[185] In that case the State also finds itself under incompatible duties: a duty to respect or protect the decisional privacy of both individuals, whose decisions are incompatible. Once again the Court faces a genuine conflict between human rights.

4. On Human Rights as Principles

At the outset of this chapter, I offered a hypothesis composed of four cumulative steps, designed to illustrate the logical inconsistency that leads several legal theorists to deny the existence of conflicts between human rights.

The hypothesis went as follows:

(1) If human rights can conflict; and

(2) Human rights are rules; and

(3) Rules are logically distinct from principles; and

(4) Conflicts between rules are to be resolved by declaring one of the rules invalid;

then at least one of the above statements must be false, because the four statements combined entail a logical inconsistency.

In the preceding sections I have dealt with steps (1), (3) and (4) of the hypothesis. I have first demonstrated that, even if statement (4) is refined, the logical inconsistency inherent in our hypothesis persists. Therefore, at least one of the other statements – (1), (2), (3) – has to be false. I have then argued that statement (3) can be either true or false, depending on whether one follows Dworkin's and Alexy's insights on the logical distinction between rules and principles or Raz's negation thereof. I have consequently argued that, if one follows Raz's argument that the distinction between rules and principles is merely one of degree, statement (1) is no longer problematic, because the sting – the logical inconsistency – would be removed from the hypothesis. If one follows Dworkin and Alexy, on the other hand, statement (1) remains potentially problematic, provided that statement (2) were to be true. I have, however, demonstrated in the previous section that statement (1) is not false: I have argued that human rights, as *pro tanto* rights, can conflict; I have negated the relevance to the ECHR system of any normative theory of rights that would deny the existence of conflicting rights; and I have presented an analytical argument aimed at conceptualising conflicts between human rights in the ECHR context.

As a result of the above, if one follows Dworkin's and Alexy's understanding of rules and principles, statement (2) – human rights are rules – is necessarily false. To hold otherwise would lead to the logical inconsistency we set out to dispel. Human rights must on Dworkin's and Alexy's account therefore be understood as principles, not as rules.

[185] *Evans*, *supra* note 44.

However, if one follows Raz in negating Dworkin's and Alexy's views on the logical distinction between rules and principles, statement (2) is not necessarily false. Its validity therefore still needs to be examined here. In order to do so, we need a number of criteria that will allow us to distinguish rules from principles. These criteria cannot presuppose that the difference lies in the logically distinct manner in which rules and principles are applied, because this is precisely what Raz denies. [186] Instead, they must point towards a distinction of degree between rules and principles.

The criteria that allow us to distinguish between rules and principle relate to (i) the fundamental character of principles, which is lacking in rules;[187] (ii) their degree of generality: principles being more general, while rules are more precise;[188] (iii) the capacity of universal validity of principles, opposed to the particularity of rules;[189] and (iv) the fact that principles have the capacity to invalidate rules, change them or render them inapplicable in particular cases, while rules do not hold the same power over principles.[190] Now, let us examine those criteria as applied to the human rights enumerated in the ECHR.

That Convention rights exhibit a fundamental character is uncontested. As human rights they furthermore at least hold the capacity of universality.[191] Finally, the manner in which human rights are applied by the ECtHR demonstrates that their protection may lead to the invalidation of rules or may require changes to rules, whenever application of those rules leads to violation of Convention rights.[192]

However, the characteristic of generality is not a necessary feature of all Convention rights. I have already argued above that the human rights enumerated in the ECHR are to be understood as *prima facie* rights, which can then take the form of either absolute rights or *pro*

[186] Note that Alexy finds these criteria unhelpful, because on his account there exists a more fundamental distinction between rules and principles which can be found in the manner in which both are applied in legal reasoning: the application of rules taking the form of subsumption, while the application of principles requires weighing. However, what I aim to establish by using these criteria is to demonstrate that human rights still function as principles, even if one does not agree with Alexy's logical distinction between rules and principles.

[187] M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', 2 *International Journal of Constitutional Law* (2004) at 577.

[188] Ibid.; Raz, *supra* note 52 at 838 and 840 and 842; M. Andenas and S. Zleptnig, 'Proportionality: WTO Law: in Comparative Perspective', 42 *Texas International Law Journal* (2007) at 376; R. M. Hare, 'Principles', 73 *Proceedings of the Aristotelian Society* (1972) at 1 and 3; Poscher, *supra* note 115 at 235. *Cf.* Dworkin, *supra* note 110 at 26: "[w]e do not treat counter-instance [to principle] as exceptions … because we could not hope to capture these counter-instances simply by a more extended statement of the principle".

[189] Sieckmann, *supra* note 114 at 59 and 61; Hare, *supra* note 188 at 2

[190] Raz, *supra* note 52 at 840.

[191] On the universality of human rights, see for instance E. Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff, 2001).

[192] See, for example, ECtHR *Yordanova and Others v. Bulgaria*, app. no. 25446/06, 24 April 2012, para. 166 ("in view of its findings in the present case, the Court expresses the view that the general measures in execution of this judgment should include such amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where they may affect Convention-protected rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures to secure proportionality."). See further ECtHR, *Sürmeli v. Germany*, app. no. 75529/01, 8 June 2006, paras. 138-139; ECtHR, *Manole and Others v. Moldova*, app. no. 13936/02, 17 September 2009, para. 117; ECtHR, *Putintseva v. Russia*, app. no. 33498/04, 10 May 2012, paras. 64-67. See also the changes to legislation in, among other countries, Belgium, prompted by the judgment of the ECtHR in *Salduz v. Turkey*, app. no. 36391/02, 27 November 2008 (on the right of access to a lawyer during suspects' (first) police interrogation).

tanto rights, depending on whether they receive absolute or relative protection under the ECHR. A distinction thus falls to be made between two types of Convention rights: absolute and relative rights. Absolute Convention rights arguably function as rules.[193] Since the relevant question to be answered is whether the facts of the case can be subsumed under the right, not whether there are any countervailing considerations that may outweigh the right, the formulation of a specific rule becomes possible. Relative Convention rights, conversely, necessarily act as *pro tanto* rights, which are inherently characterised by generality: since they can be outweighed by other considerations, their precise application depends on the particular circumstances of each case. Whenever Convention rights take the form of *pro tanto* rights in the ECtHR's adjudication process, they therefore function as principles, not only on Dworkin's and Alexy's account, but also on Raz's.[194]

Section III – Conclusion

Throughout this chapter I have argued that conflicts between human rights exist, as an inherent feature of the ECHR system. I have insisted that such conflicts must be properly understood, rather than denied.[195] I have also argued that absolute rights function as rules, while relative rights function as principles.

The latter conclusion, in particular, invites further questions. I have chosen to characterise relative Convention rights as *functioning as* principles, instead of insisting that they *are* principles. What about the opposite argument? If relative human rights would be principles in themselves, what should we then say of the principles that ground them? Principles such as equality, freedom, autonomy and, as many insist, human dignity.[196] And how would these

[193] Kumm, *supra* note 154 at 144; Green, *supra* note 64 at 80.

[194] See also O. De Schutter, *International Human Rights Law – Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2010) at 54; Kumm, *supra* note 187 at 582; D. Bilchitz, 'Does Balancing Adequately Capture the Nature of Rights', 25 *SA Publiekreg / SA Public Law* (2010) at 442-443; T. R. S. Allan, 'Constitutional Rights and Common Law', 11 *Oxford Journal of Legal Studies* (1991) at 467-468; C. Chwaszcza, 'The Concept of Rights in Contemporary Human Rights Discourse', 23 *Ratio Juris* (2010) at 353; Dworkin, *supra* note 51 at 26 and 93; Alexy, *supra* note 60 at 70; A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 84, 87-88 and 234. See *contra* B. Schlink, 'German Constitutional Culture in Transition., 14 *Cardozo Law Review* (1993) at 717, 725 and 727; Poscher, *supra* note 63 at 441; Poscher, *supra* note 115 at 243 (arguing that "[f]rom the fact that fundamental rights are less likely to be the object of mere subsumption, one cannot conclude that they are principles"); Green, *supra* note 64 at 77-80 (arguing that, although relative Convention articles function as principles, the rights themselves, which come later on in the reasoning process, are more akin to rules); Zucca, *supra* note 26 at 47.

[195] See also Zucca, *supra* note 26 at x.

[196] J. Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* (2012) at 190; T. R. S. Allan, 'Constitutional Rights and the Rule of Law', in M. Klatt (ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2011) at 136-137 and 142. On the role of human dignity in the context of the ECHR, see *Pretty*, *supra* note 36 at para. 65 ("[t]he very essence of the Convention is respect for human dignity and human freedom"); *Vinter and Others v. the United Kingdom*, app. nos. 66069/09, 130/10 and 3896/10, 9 July 2013, para. 113 ("[s]imilar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity."). For a critical account of the usefulness of human dignity in human rights adjudication, see C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008), 655-724 (questioning whether human dignity can currently play the role of a universally accepted interpretative principle, underlying

rights, *qua* principles, relate to other principles that are part and parcel of the ECHR system, such as democracy, subsidiarity and proportionality? It is clear that human rights differ from all cited principles in that they operate at a more concrete level. It is for this reason that, rather than referring to the other cited principles as values,[197] meta-principles or second-order principles,[198] I have argued that human rights *function as* principles, rather than insisting that they *are* principles. In taking this position, I ultimately invite a four-way distinction between rules, principles, policies and human rights, where the latter provide a bridging function: human rights protect certain principles, such as freedom and autonomy, from uninhibited considerations of policy, such as protection of national security or public safety.

The distinction between absolute and relative Convention rights further leads to the conclusion that there exist three different types of conflicts between Convention rights. Conflicts between relative Convention rights, firstly, are to be resolved through balancing.[199] Conflicts between an absolute right and a relative right, secondly, are to be resolved through application of the absolute right. In an important sense, the outcome of the conflict is predetermined: since the absolute right cannot be outweighed by other considerations, including the relative rights of others, it prevails.[200] Finally, (the possibility of) conflicts between two absolute Convention rights merit our attention.

All three types of conflicts will be thoroughly explored in Part II, in which I focus on the resolution of conflicts between Convention rights. The argument that balancing is the appropriate method to resolve conflicts between relative Convention rights, in particular,

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human rights, instead emphasising the concept's "institutional" and rethorical function in contemporary human rights adjudication). See further Christie, *supra* note 115 at 93 (arguing that "general concepts like "human dignity" seem to vague and undefined to provide … guidance" in resolving conflicts between human rights).

[197] Alexy, *supra* note 60 at 93 and 99-100 (explaining the view of the German Constitutional Court that "the Basic Law ... has established an objective order of values in its constitutional rights catalogue ... centred on the dignity of the freely developing citizen within society..." and arguing that soft orderings of those values, such as liberty or equality, are possible). See also D. Oliver and J. Fedtke, 'Human Rights and the Private Sphere – The Scope of the Project', in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (London – New York: Routledge-Cavendish, 2007) at 7.

[198] V. Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "Secularism"', 6 *Utrecht Law Review* (2010) at 5 (on Bader's account, rights are first-order principles).

[199] Dworkin, *supra* note 51 at 199; D. Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest', 31 *Melbourne University Law Review* (2007) at 886; S. Gardbaum, 'A Democratic Defense of Constitutional Balancing', 4 *Law and Ethics of Human Rights* (2010) at 87; Jestaedt, *supra* note 115 at 172 (generally critical of balancing, but arguing that balancing can and should have a prominent place in fundamental rights doctrine insofar as it deals with competing fundamental rights). See *contra* Zucca, *supra* note 26 at 115; L. Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008) at 30-31; Scanlon, *supra* note 61 at 1478-1479. For an overview of alternatives to balancing as a method for the resolution of conflicts between human rights, such as hierarchical arguments and practical concordance, see De Schutter, *supra* note 194 at 446-458.

[200] This has been explicitly recognised by the Court. See ECtHR, *G. v. Germany*, app. no. 65210/09, 7 June 2012, para. 79; *Gäfgen*, *supra* note 2 at para. 176. See also Feinberg, *supra* note 65 at 97. See also M. K. Addo and N. Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?', 9 *European Journal of International Law* (1998) at 516; N. Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', 12 *Human Rights Law Review* (2012) at 734-735; X. Xu and G. Wilson, 'On Conflict of Human Rights', 5 *Pierce Law Review* (2006) at 42-43. See *contra* O. De Schutter and F. Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008) at 181.

invites further questions, already worth highlighting here. These questions lead us into an entirely different debate on the rationality of balancing and on *how* to conduct the balancing exercise. Can balancing ever be a rational process?[201] And how can the incommensurability challenge, which suggests that balancing is necessarily indeterminate, be tackled?[202] The answers to these questions will be provided in Part II of this dissertation. However, this chapter, in which I have argued that conflicts between relative Convention rights – *qua pro tanto* rights – need to be resolved through balancing,[203] has set the stage for the analysis presented in Part II. The arguments provided in this chapter have made consideration of the above questions unavoidable. Rather than in looking for alternatives to balancing, the challenge lies in making it work.[204]

[201] Habermas, *supra* note 29 at 259, 260-261.
[202] See, for instance, J. Alder, 'The Sublime and the Beautiful: Incommensurability and Human Rights', *Public Law* (2006), 697-721; F. Schauer, 'Commensurability and Its Constitutional Consequences', 45 *Hastings Law Journal* (1994), 785-812; J. Waldron, 'Fake Incommensurability: A Response to Professor Schauer', 45 *Hastings Law Journal* (1994), 813-824.
[203] See *supra* note 92 and accompanying text.
[204] Scholars who argue that human rights are rules (or function as rules) would of course negate this proposition. Such scholars generally deny that balancing is the best – or even an appropriate – procedure for the resolution of conflicts between human rights. See, for instance, Zucca, *supra* note 26 at 68 and 86.

CHAPTER III – CONFLICTS BETWEEN CONVENTION RIGHTS: IT SHOULD REALLY MAKE A DIFFERENCE[205]

Section I – The Arguments as to Why it Should Not Make a Difference

In the previous chapter I have argued that conflicts between human rights are an inherent feature of the ECHR system. The question that confronts us next is: are such conflicts problematic? Do they pose challenges to the Court, different from the ones it faces in 'traditional' human rights adjudication, where a Convention right is opposed by a public interest?

Certain scholars have answered these questions in the negative, either by arguing that there exists no fundamental difference between a Convention right and (public or private) interests or by maintaining that, while such a principled difference does exist, the method for resolving cases nevertheless remains the same: the proportionality test as developed by the Court is just as apt at dealing with cases of conflicts between Convention rights as it is at adjudicating cases in which restrictions on Convention rights are imposed in pursuit of a public interest.

The first argument, let us call it the 'argument from principle', is proffered, among others, by Janneke Gerards and Kai Möller.[206] Janneke Gerards has offered a moderate version of the thesis. She does not deny the normative force of fundamental rights.[207] However, she does argue that "the line between fundamental rights and other interests cannot always be drawn easily" and that, therefore, "good reason [exists] to reconsider the view that cases concerning (conflicts between) classic fundamental rights form a special category".[208] On Gerards' account, there is thus no need to *automatically* treat conflicts between Convention rights differently from cases in which a Convention right is opposed by an interest not protected by a Convention right:

> "[i]n cases concerning conflicts between rights and interests ... courts should not automatically attach special weight to individual interests qualifying as "fundamental rights", as compared to other individual interests."[209]

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[205] The title of this heading is inspired by J. Gerards, 'Fundamental Rights and Other Interests. Should it Really Make a Difference?', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp – Oxford – Portland: Intersentia, 2008), 655-690.

[206] Ibid.; K. Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

[207] Gerards, *supra* note 196 at 179 and 187.

[208] Gerards, *supra* note 205 at 656.

[209] Ibid. at 686. Note that in her later work, Gerards has clarified that she prefers a more fluid distinction between three different categories of (Convention) rights: (i) core Convention rights, (ii) non-core Convention rights and (iii) rights and interests that are currently protected under the Convention, but according to Gerards should not fall within the scope of Convention rights, because they are not sufficiently fundamental to warrant protection at the European level (this latter category includes, according to Gerards, commercial advertisement (freedom of expression), CCTV cameras in the streets and the right to give birth at home (right to private life), and the forced wearing of handcuffs and prison clothing for suspects and prisoners (prohibition of torture and inhuman or

Although Gerards limits her argument to individual interests,[210] it can easily be extended to include all interests, private or public.[211] This is precisely what Kai Möller has done in his more extreme approach to the issue. Möller argues that "the almost unanimously held view that there is a *threshold* which separates interests from rights should be given up."[212] Instead, Möller claims, "one must abandon the idea that rights hold a special normative force".[213] This line of thinking is typical of scholars, like Möller, who follow Alexy's views on principles as optimization requirements and on proportionality. On such an Alexian view, all principles – regardless of whether they express human rights, public interests or private interests – are considered to be optimization requirements: they are "characterized by the fact that they can be satisfied to varying degrees, and ... the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible".[214] Determining the "appropriate degree of satisfaction" of a principle is, according to Alexy, to be ascertained through application of the proportionality principle.[215] In the process, the conflicting principles – regardless of whether they express human rights, public interests or private interests – are principally treated on an equal footing, since they all function as optimization requirements.[216]

On an Alexian account, cases of conflicting Convention rights are thus not logically distinct from cases involving limitations on Convention rights imposed in pursuit of a public interest or a private interest not protected by the Convention. It is precisely because all principles are optimization requirements – or, in Möller's terms, because everything can and should be expressed in terms of autonomy interests[217] – that all cases should be treated identically: by application of the proportionality principle.[218]

The second argument, let us refer to it as the 'argument from procedure', accepts the idea that a fundamental difference exists between Convention rights and other interests, in the sense that Convention rights are granted principled, but inconclusive, priority over public or private interests. Nevertheless, the 'argument from procedure' insists, the judicial technique used to determine whether a Convention right has been violated *remains* one of proportionality

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degrading treatment). See Gerards, *supra* note 196 at 195-196. See also Gerards and Senden, *supra* note 84 at 629.

[210] Gerards uses the terms "other interests" and "individual interests" interchangeably, but from the chapter as a whole, as well as from certain key passages (some of which are quoted in the text above), it appears that her argument is limited to private or individual interests.

[211] Alexy, *supra* note 60 at 66.

[212] Möller, *supra* note 206 at 24 (emphasis in original).

[213] Ibid. at 73. Note, however, that Möller later on in his book does concede that "a list of rights has the advantage that it can single out particularly important aspects of personal autonomy, thus making it clear that interferences with these particularly important interests will require correspondingly solid justifications. A list thus avoids the misleading impression that all instances of a person's autonomy receive the same level of protection." It is not entirely clear how this statement relates to Möller's argument that rights do not hold a special normative force.

[214] Alexy, *supra* note 60 at 47-48.

[215] Alexy, *supra* note 92 at 28-32.

[216] Ibid.; Alexy, *supra* note 60 at 66-67.

[217] According to Möller, the autonomy interests that should be protected extend to "*every* autonomy interest, including trivial interests and even autonomy interests in engaging in immoral activities" (emphasis in original). See Möller, *supra* note 206 at 73.

[218] Ibid. at 24.

analysis in all situations. On the 'argument from procedure', there may thus be a *principled* distinction between cases involving conflicting Convention rights and those in which a Convention right is opposed by a public or private interest, but this does not have an impact at the level of the *procedure* to be followed: the proportionality test, as developed by the ECtHR, is perfectly able to deal with both types of cases. The 'argument from procedure' is advocated by, among others, Sébastien Van Drooghenbroeck. Van Drooghenbroeck agrees with Steven Greer that, under the ECHR system, a priority-to-rights principle applies.[219] This principle entails that Convention rights are awarded principled, but inconclusive, priority (Van Drooghenbroeck uses the term "préférence abstraite") over the public interests invoked to justify their restriction.[220] As a result, Van Drooghenbroeck accepts that conflicts between Convention rights can be principally distinguished from 'traditional' conflicts between a Convention right and a public interest: the priority-to-rights principle does not apply to the first type of cases, while it is part and parcel of the second type of cases.[221] However, according to Van Drooghenbroeck this principled distinction does not bear any consequences for the manner in which both types of cases are to be adjudicated. The proportionality test rules supreme:

> "en termes de *méthode de résolution*, le conflit de droits et libertés n'appelle pas d'autres instruments que ceux utilisés dans le cadre du conflit « classique » : de part et d'autre, la proportionnalité est conviée a effectuer l'arbitrage."[222] (emphasis in original)

Peggy Ducoulombier has convincingly demonstrated that this has also been the general approach of the ECtHR, which may have recognised the existence and specificity of conflicting Convention rights in certain cases,[223] but has by and large adjudicated these conflicts by utilising the same method it uses to resolve other disputes: proportionality analysis.[224]

In what follows, I will argue that both the 'argument from principle' and the 'argument from procedure' are mistaken. While the former rests on erroneous assumptions about the relationship between human rights and non-rights considerations, the latter fails to appreciate the complexities and intricacies of conflicting human rights cases. Rather than explaining how "it should not make a difference", arguments from principle as well as arguments from procedure instead demand that it really does make a difference.

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[219] S. Greer, *The European Convention on Human Rights – Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) at 196 and 208-210; Van Drooghenbroeck, *supra* note 26 at 313; Van Drooghenbroeck, *La proportionnalité dans le droit de la convention européenne des droits de l'homme: prendre l'idée simple au sérieux* (Brussels: Bruylant, 2001) at 242.
[220] Ibid.
[221] Van Drooghenbroeck, *supra* note 26 at 326-327.
[222] Ibid. at 312-313 and 326-327.
[223] Most notably among which *Chassagnou*, *supra* note 35.
[224] Ducoulombier, *supra* note 4 at 350 and 370; De Schutter and Tulkens, *supra* note 200 at 188-189.

Section II – The 'Argument from Principle': Misconceiving the Function of Human Rights

Let us start off by considering the 'argument from principle', in the extreme form offered by Kai Möller. His 'argument from principle' can be tailored to the ECHR context as follows: in cases concerning conflicts between Convention rights and interests, the ECtHR should not attach special weight to individual interests qualified as Convention rights, as compared to other (public or individual) interests, because all interests operate on the same level (*i.e.* as autonomy interests on Möller's account or as optimization requirements on Alexy's account).

I submit that this view is mistaken for two principal, but interconnected reasons. Firstly, because it undermines the normative importance of human rights and secondly because it misrepresents the manner in which human rights function in the ECHR context.

Accepting Möller's 'argument from principle' undermines the normative importance of human rights. It is at odds with the two primary functions that human rights fulfil: protecting individuals' fundamental interests and protecting them from abuse of power.

It is often argued that one of the primary functions of human rights is to protect certain fundamental interests of individuals, related as they are to such values as freedom, autonomy, equality and, many maintain, human dignity.[225] Other interests and preferences of individuals are, by contrast, deemed insufficiently fundamental to justify protection by way of human rights. A person's interest in driving a car or having a good dinner, for instance, would not be accepted as being protected by her human rights, at least not in the ECHR context.[226] However, if one argues that, for purposes of human rights adjudication, there exists no fundamental difference between human rights and "other interests", as the 'argument from principle' does, one is irrevocably condemned to conclude that there is nothing special about human rights, nothing that warrants setting them aside as norms that deserve increased protection.[227] This, however, is contrary to the very idea behind the human rights system. It is precisely because human rights protect certain fundamental interests of individuals that they are considered special, in the sense of being a higher category of norms, which deserve increased protection.[228]

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[225] This function of rights is vital on the model of rights proposed by interest-based theories of rights. See Letsas, *supra* note 7 at 101-102. For an account of human rights as protecting fundamental interests, see for instance Meyerson, *supra* note 199 at 885; Griffin, *supra* note 29; J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989); Nickel, *supra* note 74; R. H. Fallon, as described in Schauer, *supra* note 86 at 420-421 (Schauer appears to agree with Fallon on this point).

[226] Both interests qualify as autonomy interests under Möller's account and are thus protected by his general right to autonomy (although to Möller "protected" means no more than that a limitation of a person's autonomy triggers a duty of justification, which corresponds to the three-pronged proportionality test). See Möller, *supra* note 206 at 73, 87 and 179.

[227] See *supra* notes 212-213 and accompanying text.

[228] S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 7 *International Journal of Constitutional Law* (2009) at 479.

Möller's 'argument from principle' is also at odds with another function of human rights: the countermajoritarian function.[229] As George Letsas puts it: "[t]he purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will of their state, rather than to give effect to that will."[230] Human rights thus take on particular significance in contexts where there is a risk of abuse of power by the majority to force their views on minorities, whether this be minority groups or individuals who find themselves outside the mainstream.[231] Indeed, as the ECtHR itself has stated, "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."[232] Or, in its alternative formulation, "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."[233]

In democratic societies, human rights may in that respect not be as immediately important to individuals who are in line with the views of the ruling majority on social and other issues, since their interests will generally be protected through the political process, as they are vital to those who find themselves out of line with the views of the ruling majority. Indeed, human rights provide the essential function of allowing individuals to further their own conception of the good life by protecting them against the threat of subordination, through abuse of power, by the majority.[234] Treating all interests, public and private, on an equal footing with human rights (or refusing to grant special normative force to human rights) threatens to undermine the countermajoritarian function of human rights, because it invites utilitarian considerations to determine the fate of the few, who find themselves out of line with the views of the many. If human rights are not given at least some sort of principled special protection, over and above public interests, simple aggregation of the interests of the many will always threaten to outweigh any human right invoked by the few. As a result, it is essential to grant human rights principled priority over non-rights considerations, even if such priority is not conclusive. In that respect, insisting on principled priority of human rights over public interests is not

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[229] Note that Janneke Gerards, who has posited a more modest version of the 'argument from principle', accepts and defends - throughout her work - the countermajoritarian function of (fundamental) rights. See, most notably, Gerards, *supra* note 196.

[230] Letsas, *supra* note 7 at 74. See also Barak, *supra* note 194 at 494 ("[t]he accepted and proper view considers constitutional rights as a shield to protect individuals from tyranny of the majority").

[231] The President of the ECtHR, Judge Sir Nicolas Bratza, stated in his speech at the *High Level Conference on the Future of the European Court of Human Rights*, Brighton, 18-20 April 2012, that "[i]t is in the nature of the protection of fundamental rights and the rule of law that sometimes minority interests have to be secured against the view of the majority." The speech is available at http://hub.coe.int/20120419-nicolas-bratza (last accessed 7 October 2013).

[232] See, among many authorities, ECtHR, *Young, James and Webster v. the United Kingdom*, app. nos. 7601/76 and 7806/77, 13 August 1981, para. 63; *Chassagnou*, *supra* note 35 at para. 112; ECtHR, *Folgerø and Others v. Norway*, app. no. 15472/02, 29 June 2007, para. 84.

[233] See ECtHR, *Barankevich v. Russia*, app. no. 10519/03, 26 July 2007, para. 31; ECtHR, *Alekseyev* v. *Russia*, app. nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 81.

[234] This function of rights is vital on the reason-blocking model of rights. See Letsas, *supra* note 7 at 104-105. On reason-blocking theories of rights, see for instance Dworkin, *supra* note 51; R. H. Pildes, 'Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism', 27 *Journal of Legal Studies* (1998), 725-763; R. H. Pildes, 'Dworkin's Two Conceptions of Rights', 29 *Journal of Legal Studies* (2000), 309-315; Schauer, *supra* note 86.

inconsonant with accepting that they may nevertheless be outweighed by those interests under certain circumstances.[235]

The above described conception of human rights is not only important at the level of moral theory. The conclusion it leads to – human rights should be awarded principled, but inconclusive, priority over non-rights consideration – also corresponds to the manner in which human rights function under the Convention, which is "first and foremost a system for the protection of human rights".[236] Like any human rights system, the ECHR system is based on a priority-to-rights principle, under which the Convention's human rights are granted principled, if not necessarily conclusive, priority over other norms and non-rights considerations.[237] It follows that limitations of Convention rights are, as the ECtHR has recognised, to be interpreted restrictively:[238] protection of Convention rights is the rule, justified restrictions are the exception.[239] Procedurally, the priority-to-rights principle further entails that the burden of proof lies on the government to demonstrate that a restriction of a Convention right was necessary. Consequently, as argued by François Ost and Sébastien Van Drooghenbroeck, the axiom *in dubio pro libertate* applies: whenever there remains doubt as to whether the restriction is necessary in a democratic society, this plays to the benefit of the Convention right.[240]

Given the central role of the priority-to-rights principle for a proper understanding of the ECHR system,[241] it is not possible to maintain that Convention rights and non-rights considerations, such as public and private interests, function at the same level, as autonomy

[235] Rawls, *supra* note 48 at 24 and 476; Kumm, *supra* note 187 at 591; Schauer, *supra* note 86 at 429-431; Meyerson, *supra* note 199 at 883.
[236] ECtHR, *Chapman v. the United Kingdom*, app. no. 27238/95, 18 January 2001, para. 70; *Konstantin Markin*, *supra* note 144 at para. 126; ECtHR, *Herrmann v. Germany*, app. no. 9300/07, 26 June 2012, para. 78; ECtHR, *Kurić and Others v. Slovenia*, app. no. 26828/06, 26 June 2012, para. 387.
[237] ECtHR, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, app. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968, para 5 at 28 ("[t]he Convention therefore 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"); ECtHR, *Brand v. the Netherlands*, app. no. 49902/99, 11 May 2004, para. 65 ("a reasonable balance must be struck between the competing interests involved. On this point, reiterating the importance of Article 5 in the Convention system, the Court is of the opinion that in striking this balance particular weight should be given to the applicant's right to liberty"). See also Cariolou, *supra* note 61 at 254; Ducoulombier, *supra* note 4 at 461-463.
[238] See, among many other authorities, ECtHR, *Perez v. France*, app. no. 47287/99, 12 February 2004, para. 73; *Demir and Baykara*, *supra* note 36 at para. 146; ECtHR, *Stoll v. Switzerland*, app. no. 69698/01, 10 December 2007, para. 61; ECtHR, *Sunday Times v. the United Kingdom (No. 1)*, app. no. 6538/74, 26 April 1979, para. 65 ("[t]he Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted"); ECtHR, *Klass and Others v. Germany*, app. no. 5029/71, 6 September 1978, para. 42; ECtHR, *Gorzelik and Others v. Poland*, app. no. 44158/98, 17 February 2004, para. 95 ("exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom").
[239] Van Drooghenbroeck, *supra* note 219 at 50-51.
[240] Ost and Van Drooghenbroeck, *supra* note 127 at 33-34. See also Barak, *supra* note 194 at 11 (arguing that, when application of proportionality *sensu stricto* leads to "balanced scales", *i.e.* "whenever both sides of the balance are of equal marginal social importance", "the social value in preventing harm to the constitutional right should prevail [over the public interest]").
[241] Van Drooghenbroeck, *supra* note 26 at 313; Greer, *supra* note 219 at 196 and 208-210; Cariolou, *supra* note 61 at 251 and 254.

interests or as optimization requirements.[242] As a result, Kai Möller's argument to deny the fundamental difference between cases involving conflicts of human rights and cases in which a human right is opposed by a public or private interest must be rejected.[243]

Nevertheless, it remains true that, under the Convention system, most human rights *can* be – and frequently are considered by the Court to be – outweighed by public or private interests.[244] Convention rights therefore also do not meet the criteria necessary to function as 'trumps', in the strong sense meant by Ronald Dworkin.[245] Instead, their level of protection appears to lie somewhere between the protection offered by Joseph Raz's interest theory of rights, granting right holders' interests special weight over other interests,[246] and the presumptive, but inconclusive, protection offered by Frederick Schauer's conception of rights as shields against government actions.[247]

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[242] See also M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', in G. Pavlakos (ed.), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Oxford – Portland : Hart Publishing, 2007) at 165. See *contra* M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) at 23-26 (arguing that there is no need to favour the 'priority-to-rights principle' under the ECHR, because the proportionality test can incorporate a 'weak trump model' of rights).

[243] This is in line with the argument defended above that human rights function as principles and fulfil a bridging function between principles and policies. See *supra* notes 295-298 and accompanying text.

[244] This is the case for all so-called relative rights. Only the absolute Convention rights of articles 3, 4, 7 and 9 (1) of the Convention function as 'trumps' in the sense that they are awarded absolute priority over all possible countervailing non-rights considerations: they can never be outweighed by a public interest.

[245] Dworkin, *supra* note 51 at xi and xv. Note, however, that Dworkin's description of rights as trumps does not mean that he claims all rights should be absolute. Dworkin accepts that rights may be overridden by competing principles or even an urgent policy, but he appears to consider the situations in which such overriding is justified to be very limited, rendering his conception of rights to be at odds with the manner in which rights function in the case law of the ECtHR. See Dworkin, *supra* note 51 at 92; Dworkin, *supra* note 63 at 49-50. On the different possible conceptions of the trump model of rights, see Klatt and Meister, *supra* note 242 at 17-44 (distinguishing between a strong trump model, a medium trump model and a weak trump model and favouring the last conception).

[246] Ducoulombier, *supra* note 4 at 400 ("[l]a Cour … semble … se situer dans une définition des droits comme étant des prérogatives qui protègent des intérêts considérés comme suffisamment importants").

[247] Raz, *supra* note 136 at 186-187 and, particularly, 250 ("if 'rights' comes to acquire such a weak meaning then it loses its ability to mark matters which are of special concern to the right-holder, and which give the right holder's interest *special weight* when it conflicts with other interests of other members of the community." (own emphasis)); Schauer, *supra* note 86 at 429 (using the metaphor of 'rights as shields' or as suits of armour, Schauer writes: "[w]earing a suit of armor would protect me against arrows, knives, blackjacks, fists and small bullets, and thus it is plain that wearing a suit of armor provides me with a degree of protection I would otherwise not have had. But that suit of armor does not protect me against large bore ammunitions, bombs, or artillery fire and is as a result less than totally protective. Just like rights ... what rights *do* is to protect against certain low justification (small bore) efforts to restrict the activities that the rights are rights to, but do not protect against high justification (large bore) efforts to restrict those activities." (emphasis in original)). However, Schauer also argues "that courts are not necessarily engaged in the task of "balancing" ... in which governmental interests and their importance are persistently subjected to careful inspection." (at 431). Instead, he maintains that under his model of rights, "the decision maker ... keeps her eye on a smaller primary task, here the protection of rights, unless and until interests appear in such a forceful way that their power cannot be avoided." (at 431). Schauer concludes that, in the American context, "judicial protection seems both descriptively and normatively far more focused on the right and its contours, and far less on the interests that might conceivably outweigh it." (at 432). The ECtHR, however, appears to follow the first model of "balancing", taking all possibly relevant interests into account to determine whether or not they outweigh the Convention right invoked by the applicant. Its method of adjudication therefore does not correspond to the one suggested by Schauer, even if its conception of rights appears to be more or less in line with Schauer's. However, in line with Schauer's explanation of constitutional rights adjudication by the US Supreme Court, this may be due to the nature of the

Whatever the normative basis of the principle may be, it is vital to recognise that Convention rights are granted principled, but inconclusive, priority over public or private interests by the ECtHR, even if they may be outweighed by those interests in concrete circumstances.[248] The 'argument from principle' therefore fails to offer convincing reasons to refute the view defended in this chapter that conflicting Convention rights cases should be treated differently from cases in which a Convention right is opposed by non-rights considerations.

Section III – The 'Argument from Procedure': Underestimating the Complexities of Conflicting Convention Rights Cases

As argued above, a fundamental distinction should be made between cases involving conflicting Convention rights and cases in which a Convention right is opposed by non-rights considerations. This fundamental distinction can be translated into a procedural difference: the priority-to-rights principle and the axiom *in dubio pro libertate* are central to cases in which a Convention right is opposed by non-rights considerations, but they cannot logically be applied to cases of conflicting Convention rights.[249] The 'argument from procedure', as professed by Sébastien Van Drooghenbroeck, accepts this much.[250] Nevertheless, it insists that the version of the 'traditional' proportionality test developed by the ECtHR can and should rule all cases involving relative Convention rights, including those in which two or more Convention rights conflict with each other.

The 'traditional' proportionality test to which the 'argument of procedure' refers is comprised of three steps. The Court applies these steps once it has established that an interference with a Convention right pursues a legitimate aim. Abstracting from the influence of the Court's margin of appreciation doctrine on the *application* of the proportionality test,[251] its three steps

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specific types of cases that reach the Court, namely those in which "the potentially overriding interests are particularly strong, and thus virtually on or slightly over the threshold of overridability established by the force of the right." (at 433). In that respect, balancing may – to paraphrase Schauer – be connected to the function of the Court and the array of cases that reach it, even if it is not, according to Schauer, a necessary feature of rights themselves (at 433). George Letsas, for his part, has argued that the two dominant conceptions of rights – what Jeremy Waldron has termed the immunities theories and the reason-blocking theories of rights – can both accommodate limitation clauses to Convention rights. See Letsas, *supra* note 7 at 101-105. See further, Kumm, *supra* note 242 at 165 (arguing that rights are not optimisation requirements, but are also not trumps or shields; instead claiming that "[r]ights can serve as all those things but should not be identified as or reduced to either"); K. Möller, "Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights", 29 *Oxford Journal of Legal Studies* (2009), 757-786 (defending a modified conception of Raz's interest theory, which he terms the "protected interest conception").

[248] See *contra* Klatt and Meister, *supra* note 242 at 23-26 (arguing that a weak trump model, in which rights and public interests of constitutional status compete on the *same* level, applies to the ECHR); Möller, *supra* note 206 at 15 (arguing that (Convention) rights do not enjoy any special or elevated status over public interests, but rather operate on the same plane).

[249] Ducoulombier, *supra* note 4 at 461 and 464.

[250] Van Drooghenbroeck, *supra* note 26 at 315.

[251] The influence of the margin of appreciation has often led the Court to not investigate all three elements of the proportionality test. See Van Drooghenbroeck, *supra* note 219 at 173 and 191. See, however, E. Brems and L. Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (unpublished paper on file with the author; in which Brems and Lavrysen note that the Court has, even in cases in which it grants a wide margin of appreciation, at times investigated

can be summarised as follows: 1) do the measures pursue a pressing social need; 2) are the measures relevant and sufficient to achieve the legitimate aim pursued; and 3) are the measures proportionate (in the strict sense) to the legitimate aim pursued?[252] The Court's version of the proportionality test is somewhat analogous to – but certainly also functions differently from[253] – the German-style structured proportionality test, deduced by Robert Alexy from the case law of the German Constitutional Court and omnipresent in contemporary constitutional rights adjudication:[254] 1) are the measures able to realise the aim pursued? (suitability); 2) are the measure strictly necessary to realise the aim or are there equally efficient measures which would lead to a less invasive restriction of the affected right? (necessity); 3) do the measures have disproportionate effects on the exercise of the right, when balanced against the aim they are meant to achieve? (proportionality *strictu senso*).[255]

Before being able to determine whether the Court's version of the 'traditional' proportionality test does and/or should rule the ECtHR's approach to conflicting Convention rights, it is vital to shed further light onto how such conflicts may reach the Court. Determining how cases involving conflicting Convention rights can be conceptualised and broadly classified will inform our assessment of the validity of the 'argument from procedure'.

A case involving conflicting Convention rights may, generally speaking, reach the Court as the result of either action or inaction on the part of the State. As a result, conflicting Convention rights cases can be broadly classified as follows:

a) Cases in which the State took measures that interfered with the Convention rights of the applicant, in order to protect the Convention rights of others.

b) Cases in which the State failed to take measures to protect the Convention rights of the applicant, who claims to be a victim of a breach of his Convention rights, resulting from another private person exercising her Convention rights.

Since the first set of cases involves actions taken by the State, the Court generally treats them as turning on a question of negative interferences: were the measures necessary in a democratic society to protect the Convention rights of others? Typical examples of this first category are defamation cases in which the domestic courts have convicted a member of the

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whether there were less restrictive means available to achieve the aim pursued). For more elaborate discussion, see *infra* note 253 and 265.

[252] Van Drooghenbroeck, *supra* note 219 at 81.

[253] Van Drooghenbroeck, *supra* note 219 at 190-191; J. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', 11 *International Journal of Constitutional Law* (2013), 466-490 (arguing that the Court should (more) explicitly rely on the German-style structured balancing test); Brems and Lavrysen, *supra* note 251 at 1 (arguing that the Court does not apply the structured German-style proportionality test, but instead "has traditionally resorted to a loose balancing exercise", while noting a potential – and recent – least restrictive means 'revolution' in the Court's case law). Much of the reasons for the difference appears to lie in the role of the margin of appreciation. For more elaborate discussion, see *infra* note 265.

[254] A. Stone Sweet and J. Mathews, 'Proportionality, Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008), 73-165.

[255] Alexy, *supra* note 60 at 397-402. See also Van Drooghenbroeck, *supra* note 26 at 325; Barak, *supra* note 194 at 3.

press for having breached the reputation rights of, for example, a public figure.[256] Further examples are cases in which national authorities restrict one person's freedom to manifest her religion in order to protect the freedom from religion of others;[257] or cases in which domestic authorities threaten to torture a suspect in order to save the life of his kidnapped victim.[258]

Because the second set of cases involves the State's failure to act, they generally turn on a question of positive obligations: should the State have interfered with the Convention right of a private person in order to protect the applicant's Convention rights? A typical example of this category are defamation cases in which the domestic courts failed to convict a member of the press for having allegedly breached the reputation rights of, for example, a public figure.[259] Another example are cases in which the domestic authorities allegedly failed to protect the right to life or physical integrity of one person, motivated by concerns to not illegitimately interfere with the right to private life and/or the freedom from arbitrary deprivation of liberty of another person.[260] Further examples are cases in which the domestic authorities refused to grant an adult applicant, who had been given up for adoption as a child, access to personal information about her biological mother and cases in which the domestic courts failed to grant a female applicant the ability to make use of previously frozen embryos as her last chance of having a child, motivated by concerns to uphold her ex-partner's refusal to consent to the use of the embryo, which had been fertilized with use of his sperm.[261]

Although a caveat is in order, in the sense that – as duly recognised by the Court[262] – the line between the State's negative and positive obligations is not always easy to draw,[263] cases involving conflicting Convention rights at the ECtHR can thus be classified into two broad categories, depending on whether they are the result of action or inaction on the part of the State. With this classification in hand, we are now able to assess the validity of the 'argument from procedure' when applied to these two types of cases.

When a case reaches the Court as a result of inaction on the part of the State, which – the applicant claims – failed to take measures to protect her Convention rights, the Court does not generally apply its version of the 'traditional' proportionality test. In such cases of alleged failure on the part of the State to comply with its positive obligations under the Convention, the Court instead tends to apply a "fair balance" test, immediately balancing the competing interests involved, without going through the different steps of the proportionality test.[264] The

[256] *Axel Springer*, *supra* note 6.
[257] ECtHR, *Larissis and Others v. Greece*, app. nos. 23372/94, 26377/94 and 26378/94, 24 February 1998.
[258] *Gäfgen*, *supra* note 2.
[259] *Pfeifer*, *supra* note 39.
[260] See, for instance, *Osman*, *supra* note 44.
[261] *Odièvre*, *supra* note 1; *Evans*, *supra* note 44.
[262] See, among many authorities, *Evans*, *supra* note 44 at para. 75; *Odièvre*, *supra* note 1 at para. 40; ECtHR, *Hatton and Others v. the United Kingdom*, app. no. 36022/97, 8 July 2003, para. 119.
[263] This particularly goes for the last two examples of cases involving inaction offered above, since it was ultimately the existing legal framework in the State that allowed for a situation to arise in which the applicant was deprived of the ability to see her rights enforced.
[264] J. Gerards, 'Judicial Deliberations in the European Court of Human Rights', in N. Huls et. al. (eds.), *The Legitimacy of Highest Courts' Rulings – Judicial Deliberations and Beyond* (The Hague: T.M.C. Asser Press, 2009) at 421-421; Gerards, *supra* note 196 at 194; Möller, *supra* note 206 at 134 and 179. See, for example, *Von Hannover (No. 2)*, *supra* note 44; *Pfeifer*, *supra* note 39; *Evans*, *supra* note 44 (particularly at para. 76); ECtHR,

'argument from procedure' therefore does not apply to cases involving conflicting Convention rights that are the result of inaction on the part of the State: the test applied by the Court is already limited to one of balancing between competing interests.[265] However, as I will argue below,[266] a distinction should nevertheless be made, also in positive obligations cases,

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J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom, app. no. 44302/02, 30 August 2007. See, however, Spielmann, 'Chapter 14: The European Convention on Human Rights – The European Court of Human Rights', in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (London – New York: Routledge-Cavendish, 2007) at 443-444 (offering the example of ECtHR, *Craxi v. Italy (No. 2)*, app. no. 25337/94, 17 July 2003; the case involved a conflict between the right to private life and freedom of expression, brought under art. 8 ECHR; Spielmann cites it as an example of a case involving positive obligations, but in which the Court nevertheless applied the same test as it usually applies in examining negative interferences).

[265] It should be noted, however, that the Court has often conflated the concepts of proportionality and fair balance in its case law. See Ducoulombier, *supra* note 4 at 467. The Court has indeed repeatedly held that "[t]he boundaries between the State's positive and negative obligations ... do not lend themselves to precise definition" and that "in both instances regard must be had to the fair balance which has to be struck between the competing interests". See, among many authorities, *Odièvre*, *supra* note 1 at para. 40; *Hatton*, *supra* note 262 at paras. 98 and 119; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd*, *supra* note 264 at para. 75; *Aksu*, *supra* note 107 at para. 62; ECtHR, *Şerife Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010, para. 100. See further *A., B. and C.*, *supra* note 149 (in which the Court treated the first and second applicant's case as concerning negative obligations and the third applicant's case as concerning positive obligations, but nevertheless applies a fair balance test in both instances). I submit here that the Court's use of the "fair balance" principle – *i.e.* the principle that "[i]n both contexts [*i.e.* negative interferences and positive obligations] regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole" – obscures, rather than elucidates, the roles of the proportionality test and balancing in its case law. See also Klatt and Meister, *supra* note 242 at 88. See, for instance, *Kurić*, *supra* note 236 at para. 354 ("[t]he Court ... reiterates that a measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as being "necessary in a democratic society" if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other."); ECtHR, *Gladysheva v. Russia*, app. no. 7097/10, 6 December 2011, para. 66 ("[a]n interference with the peaceful enjoyment of possessions must ... strike a "fair balance" between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole ... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised"). One way to approach the "fair balance" principle is by acknowledging that it does not necessarily answer the question as to *how* – *i.e.* through which judicial technique – the "fair balance" falls to be determined. In that sense, the principle is not inconsistent with the argument raised in the text that, in cases involving opposition of Convention rights and public interests, all three steps of the proportionality test - in principle - apply to negative interferences, while only the last step - balancing - applies to positive obligations. See, in support, Möller, *supra* note 206 at 179. See also Gerards, *supra* note 253 at 469-470 (arguing that the Court's frequent references to the search for a fair balance as being inherent to the Convention could be explained by the fact that the Court tends to focus its analysis on the proportionality *sensu stricto* (or balancing) test, while it does not often deal with the suitability and necessity steps of the structured proportionality test). See, in that respect, for instance ECtHR, *Dickson v. the United Kingdom*, app. no. 44362/04, 4 December 2007, paras. 70-71 (first recalling that the "boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition" to then "not consider it necessary to decide whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since ... the core issue in the present case ... is precisely whether a fair balance was struck between the competing public and private interests involved."). Note that other scholars have, however, noted that the Court has, in recent years, engaged more explicitly with less restrictive alternative reasoning (necessity). See Brems and Lavrysen, *supra* note 251. The Court has also at times, although much less frequently so, ruled that national measures were not suitable to achieve the aim (suitability). For a recent example, see ECtHR, *Khlyustov v. Russia*, app. no. 28975/05, 11 July 2013, para. 97.

[266] See *infra* 'Section V – The Search for Genuine Conflicts between Convention Rights'.

between instances in which – relative[267] – Convention rights conflict with each other and those in which a Convention right is opposed by a public or private interest. The former types of cases should be resolved through the framework for the resolution of conflicts between Convention rights I propose in Part II, which aims to ensure that both Convention rights are treated with equal respect. The latter types of cases, conversely, fall to be resolved through the "fair balance" test, in which the priority-to-rights principle should apply and in which the Convention right should thus be granted presumptive, even if not conclusive, priority over the competing public or private interest.[268]

Different considerations apply to conflicting Convention rights cases that revolve around negative interferences, *i.e.* cases in which the State interferes with the applicant's Convention rights in order to protect the Convention rights of others. In resolving such cases of negative obligations, the Court – in line with the 'argument from procedure' – currently tends to apply its version of the 'traditional' proportionality test.[269] Yet, I submit, such an approach is ill-suited to deal with the complexities of conflicting Convention rights cases. A failure to modify the reasoning of the Court to cater for the fundamental difference between cases of conflicting Convention rights and cases in which a Convention right is opposed to a public interest threatens to undermine the fundamental distinction between Convention rights and non-rights considerations. The priority-to-rights principle is arguably so closely tied to the proportionality test, as employed by the ECtHR,[270] that it is impossible to eradicate all its traces from the Court's legal reasoning.[271] To address this problem, conflicts between – relative[272] – Convention rights should be resolved through the framework for the resolution of

[267] For reasons of simplicity and clarity, I leave absolute rights out of consideration for now. I thoroughly deal with conflicts involving absolute rights in chapters VI and VII of Part II.
[268] See also Cariolou, *supra* note 61 at 261.
[269] Ducoulombier, *supra* note 4 at 350 and 370; De Schutter and Tulkens, *supra* note 200 at 189. The Court has been particularly prone to do so when it is confronted with a conflict that involves freedom of expression, presumably because its proportionality test under article 10 ECHR is more developed than it is under other articles. See, for instance, *Dąbrowski*, *supra* note 40; *Ashby Donald*, *supra* note 44; ECtHR, *Mariapori v. Finland*, app. no. 37751/07, 6 July 2010; ECtHR, *Pinto Coelho v. Portugal*, app. no. 28439/08, 28 June 2011. Note that there are, of course, important exceptions. See *infra*, 'Part II – The Resolution of Conflicts between Convention Rights by the ECtHR'.
[270] Kumm, *supra* note 242 at 148-149 explains that, although the proportionality test does not prioritise individual rights over collective goods at the structural level, it is possible to give adequate expression to such priority within the test by assigning weights and priorities as required by the correct substantive theory of justice. See also R. Alexy, 'Thirteen Replies', in G. Pavlakos (ed.), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Oxford – Portland : Hart Publishing, 2007) at 341 (agreeing with Kumm's position). Arguably, the ECtHR has given expression to some sense of priority of rights over non-rights considerations by employing a priority-to-rights principle in applying its version of the proportionality test.
[271] De Schutter and Tulkens, *supra* note 200 at 170 and 188-190 (arguing that the Court's necessity test – which refers to the Convention's requirement that restrictions of Convention rights are "necessary in a democratic society" and thus corresponds to what I term the 'traditional' proportionality test – should not be applied to conflicts between Convention rights, because the test "recognizes at least an implicit priority of the right which is invoked by the applicant over the interest put forward by the defending state in order to justify the restriction", *in casu* the Convention rights of others, and thus "results in one right being recognized a priority over another, simply because it has been invoked by the applicant"). Inspired by the terminology used by De Schutter and Tulkens to refer to this phenomenon – *i.e.* "the framing of the conflict" and "framing effects" – I have termed it 'preferential framing'. See *infra* note 281 and accompanying text.
[272] For reasons of simplicity and clarity, I leave absolute rights out of consideration for now. I thoroughly deal with conflicts involving absolute rights in chapters VI and VII of Part II.

conflicts between Convention rights I propose in Part II, in which both rights are treated with equal respect, not through application of the Court's proportionality test.[273]

1. Illustration through a Case Study of the Court's Defamation Case Law

The validity of the arguments presented in this section can be further illustrated by way of a case study of the defamation case law of the ECtHR.[274] Originally, the Court did not offer protection to reputation as a Convention right.[275] Instead, reputation merely featured as an interest (or domestic or international human right) subsumed under the proportionality analysis in freedom of expression cases under art. 10 § 2 ECHR.[276] This approach of the Court famously led Judge Loucaides to complain about historic under-protection of the right to reputation under the Convention in *Lindon v. France*:

> "[f]or many years the jurisprudence of the Court has developed on the premise that, while freedom of speech is a right expressly guaranteed by the Convention, the protection of reputation is simply a ground of permissible restriction on the right in question which may be regarded as justified interference with expression only if it is "necessary in a democratic society", in other words if it corresponds to "a pressing social need" and is "proportionate to the aim pursued" and if "the reasons given were relevant and sufficient". Moreover, as a restriction on a right under the Convention it has to be (like any other restriction on such rights) strictly and narrowly interpreted. The State bears the burden of adducing reasons for interfering with expression and has to demonstrate the existence of "relevant and sufficient" grounds for doing so. As a consequence of this approach, the case-law on the subject of freedom of speech has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. ... This approach cannot be in line with the correct interpretation of the Convention. The right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life."[277]

The Court first mentioned that the right to protection of reputation is part and parcel of art. 8 ECHR in the art. 10 cases of *Radio France v. France* and *Chauvy and Others v. France* and formally included it under the scope of art. 8 in the art. 8 case of *Pfeifer v. Austria*.[278] From those judgments onwards, freedom of expression and the right to protection of reputation thus received principled equal protection as a Convention right.

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[273] See, in support, Cariolou, *supra* note 61 at 261 and 266; De Schutter and Tulkens, *supra* note 200 at 190 (note, however, that De Schutter and Tulkens go on to also question the usefulness of balancing; at 191 and following); Barak, *supra* note 194 at 154-155; Ducoulombier, *supra* note 4 at 466.
[274] For more extensive analysis, see Smet, *supra* note 38.
[275] ECtHR, *Lingens v. Austria*, app. no. 9815/82, 8 July 1986.
[276] See for instance ECtHR, *Bladet Tromsø and Stensaas v. Norway*, app. no. 21980/93, 20 May 1999.
[277] Dissenting opinion of Judge Loucaides in *Lindon, Otchakovsky-Laurens and July*, *supra* note 40.
[278] ECtHR, *Radio France and Others v. France*, app. no. 53984/00, 30 March 2004, para. 31; *Chauvy*, *supra* note 39 at para. 70; *Pfeifer*, *supra* note 39 at para. 35.

However, if the Court would have continued to apply the proportionality test as described by Judge Loucaides to all defamation cases, whether they were brought under art. 10 or under art. 8, this would have allowed arbitrary elements to 'contaminate' the Court's reasoning in the sense that the outcome of the case would be influenced by the result of the domestic proceedings. The losing party at the domestic level would be able to invoke her Convention right directly, thus gaining an edge if limitations on that right are to be interpreted restrictively and need to meet such standards as corresponding to "a pressing social need", being "proportionate to the aim pursued" and being taken in pursuits of reasons that are "relevant and sufficient". All these trace elements of the priority-to-rights principle are contrary to the objective of treating conflicting Convention rights on an equal footing and are, as the case law of the Court demonstrates, difficult, if not impossible, to eradicate entirely from a 'traditional' proportionality analysis.[279] Until recently, the Court indeed continued to apply the 'traditional' proportionality test in many defamation cases involving negative interference with freedom of expression. In doing so, it ended up treating the reputation rights of the other person involved in the domestic dispute more as an interest for the purposes of application of the proportionality test of art. 10 § 2 than as a Convention right against which freedom of expression should be balanced.[280]

This approach by the Court is partially responsible for what I term 'preferential framing': the process by which the Court frames the case around the directly invoked Convention right in its legal reasoning, while disregarding (to a greater or lesser extent) the importance of the other Convention right at stake, which disappears to the background as a result of the necessarily vertical nature of the Court's proceedings.[281] As a result, there are strong indications that the outcome in defamation cases is partly dependent on the Convention right invoked by the applicant, in the sense that the Court tends to find in favour of the Convention right directly invoked in front of her.[282] Yet, the outcome of the Court's reasoning should not depend on the – ultimately arbitrary – factor of which Convention rights was directly invoked in Strasbourg. Or, as Judge Schäffer put it in his dissenting opinion in *Pfeifer v. Austria*, "where both values [freedom of expression and the right to private life] are at stake, the result of the Court's balancing exercise ought not to depend on which particular Article of the Convention has been relied on in the case before it."[283]

The threat of preferential framing was also at the heart of the Court's attempt to deny the possibility of rights conflicts in *Karakó*:

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[279] See, in support, De Schutter and Tulkens, *supra* note 200 at 188-190; Ducoulombier, *supra* note 4 at 461-463.
[280] See for instance ECtHR, *Frankowicz v. Poland*, app. no. 53025/99, 16 December 2008; ECtHR, *Csánics v. Hungary*, app. no. 12188/06, 20 January 2009; ECtHR, *Standard Verlags GMBH v. Austria*, app. no. 13071/03, 2 November 2006; ECtHR, *Kuliś v. Poland*, app. no. 15601/02, 18 March 2008; ECtHR, *Dyundin v. Russia*, app. no. 37406/03, 14 October 2008.
[281] See also De Schutter and Tulkens, *supra* note 200 at 169-216; Ducoulombier, *supra* note 4 at 467 and 496.
[282] For more elaborate discussion see *infra* in Part II, the discission on '2. The Problem of 'Preferential Framing', starting at note 720 and accompanying text. See further Smet, *supra* note 38 at 235. See *contra* Spielmann and Cariolou, *supra* note 43 at 584 (arguing, in the context of the Court's defamation case law, that this "assumption is debatable", since there is "no reason in principle why the outcome of the Court's analysis would depend on how an application is framed, particularly given the nature of the Court's examination that involves precisely the application of the same principles concerning freedom of speech.").
[283] Dissenting opinion of Judge Schäffer to *Pfeifer*, *supra* note 39 at para. 5.

> "the purported conflict between Articles 8 and 10 of the Convention ... is one of appearance only. To hold otherwise would result in a situation where – if both reputation and freedom of expression are at stake – the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant."[284]

While the Court identified the problem correctly in *Karakó*, it failed to attach the correct consequences to that realisation. Rather than treating the right to protection of reputation and freedom of expression at a principled equal level, the Court first implied that art. 8 was not applicable to the facts of the case,[285] then examined the case with application of the principles of proportionality of art. 10 § 2,[286] to ultimately – and considering its first finding, quite bizarrely – conclude that art. 8 had not been violated.[287] I submit that the Court's approach in *Karakó*, attempting to avoid the problem of preferential framing by denying the existence of a conflict between Convention rights, is not the correct one. Addressing the problem of preferential framing instead requires a correct identification of a genuine conflict between Convention rights by the Court, followed by a legal reasoning in which both Convention rights are given equal respect. Granting both Convention rights equal respect calls for legal reasoning in which the Court assesses, *inter alia*, the importance of, and impact on, *both* Convention rights involved, in the concrete circumstances of the case at hand.

Interestingly, the most recent defamation case law of the ECtHR demonstrates that the Court is aware of the persistent threat of preferential framing in conflicting Convention rights cases and of the need to tackle the problem by awarding both Convention rights equal respect and by balancing them against each other, using criteria that gauge the importance of, and impact on, both Convention rights. The Grand Chamber of the Court has indeed acknowledged that

> "[i]n cases such as the present one ... the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect ..."[288]

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[284] *Karakó*, *supra* note 41 at para. 17.
[285] Ibid. at para. 23.
[286] Ibid. at paras. 24-28.
[287] Ibid. at para. 29.
[288] *Axel Springer*, *supra* note 6 at para. 87, continuing to balance freedom of expression against the right to protection of reputation by use of the following criteria: contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; prior conduct of the person concerned; method of obtaining the information and its veracity; content, form and consequences of the publication; severity of the sanction imposed. See also, on the issue of photographs of public figures published in the media (conflict between freedom of expression and the right to respect for private life) *Von Hannover (No. 2)*, *supra* note 44 at para. 106, continuing to apply similar criteria to those listed in *Axel Springer* to balance both Convention rights against each other. See further, in the context of a conflict between religious autonomy under art. 9 and trade union freedom under art. 11, ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania*, app. no. 2330/09, 9 July 2013, para. 160 ("the outcome of the application should not, in principle, vary according to whether it was lodged with the Court under Article 11 of the Convention, by the person whose freedom of association was restricted, or under Articles 9 and 11, by the religious community claiming that its right to autonomy was infringed.")

Based on the above findings and in line with Michel Hottelier's findings, I submit that dealing satisfactorily with conflicting Convention rights cases calls for concerted attention to the correct identification of conflicts and for a rational method for their resolution.[289] While Part II of this dissertation will address the latter aspect, our current concerns lie with the former. Correct identification of conflicts between Convention rights not only provides a first line of defence against preferential framing,[290] it also allows the Court to weed out those cases that do not involve *genuine* conflicts. As will be demonstrated further on, not every case that appears to involve conflicting rights turns out to entail a *genuine* conflict of Convention rights. It is the object of the next section to indicate how the Court can determine whether it is confronted with such a genuine conflict.

It should also be noted that the problem of preferential framing, being partially the result of procedural limitations that find their origin in the vertical nature of the Court's proceedings between an applicant and a Member State, can in certain types of cases effectively be counterbalanced by procedural means. Whenever possible, *i.e.* whenever a case involves a conflict between Convention rights of identified individuals or entities (for example a defamation case), the party who won the case at the domestic level and is currently absent from the Court's proceedings, should be invited, or at least allowed, to present her arguments by way of a third party intervention.[291] Hearing also that party's arguments would not only encourage a balanced framing of the case on the part of the Court, it would also correspond to one of the requirements of 'procedural justice' as applied by Eva Brems and Laurens Lavrysen to the case law of the ECtHR. According to Brems and Lavrysen, a "concern for *participation* requires the Court to adequately represent in the judgment the different viewpoints of the parties and to carefully assess the merits of each argument" as well as to "have an eye for stakeholders who may not be among the formal parties in the case".[292] Inviting or allowing the other party to the domestic proceedings to present her views to the Court by way of a third party intervention may on that account be the most sensible approach to take, given that her Convention rights are also at issue in the case. Doing so would moreover protect that other party against a government that is not entirely willing to defend her case with full force in Strasbourg. Indeed, the government's agent will arguably be primarily concerned with defending the process and outcome of the domestic legislative deliberations and/or judicial proceedings, instead of directly protecting the Convention rights of the other private party to the domestic proceedings.[293]

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[289] M. Hottelier, 'Les conflits de droits de l'homme et la sécurité juridique', in X. (ed.), *Annuaire international des droits de l'homme* (Brussels, Bruylant, 2009) at 119.

[290] Ducoulombier, *supra* note 4 at 468.

[291] Ibid. at 506. There exist a number of precedents in which the Court has allowed the other party in the domestic proceedings to present her views directly to the Court. See, most notably, *Gäfgen*, *supra* note 2; ECtHR, *Ahrens v. Germany*, app. no. 45071/09, 22 March 2012; ECtHR, *Lombardi Vallauri v. Italy*, app. no. 39128/05, 20 October 2009; *Schüth*, *supra* note 44; ECtHR, *Obst v. Germany*, app. no. 425/03, 23 September 2010; ECtHR, *Siebenhaar v. Germany*, app. no. 18136/02, 3 February 2011.

[292] E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* (2013) at 186.

[293] Without wishing to engage in unwarranted speculation, some doubts may for instance be raised as to whether the German government did its utmost to 'defend' the magazines which had published photographs depicting Princess Caroline of Monaco in the first *Von Hannover* case (*Von Hannover*, *supra* note 44), especially in light

Section IV – Conclusion

The distinctions on which the arguments raised in this chapter rely – between Convention rights and public interests, on the one hand, and between balancing and proportionality, on the other – have recently been clarified by the dissenting Judges in the Grand Chamber judgment of *Van der Heijden v. the Netherlands*.[294] *Van der Heijden* concerned the detention of a woman who had refused to testify in court against her partner with whom she had lived together for eighteen years, but without having married or entered into a registered partnership. As a result, she was not entitled to the testimonial privilege that, under Dutch law, only applied to suspects' spouses and registered partners. When she nevertheless refused to testify, the domestic courts ordered her detention for failure to comply with a judicial order to testify against her partner. The majority of the Court construed the case as one involving two competing *public* interests which had to be balanced against each other:

> "[t]he Court recognises that there are, in fact, two competing public interests at issue in this case. The first is the public interest in the prosecution of serious crime. The second is the public interest in the protection of family life from State interference. ... In balancing those competing interests ..."[295]

The dissenting Judges vehemently disagreed with this characterisation of the case, correctly pointing out that the majority had disregarded the structure of the Convention right to respect for family life:

> "[the majority's] presentation [of the case as involving two competing interests] is quite simply contrary to the spirit and letter of Article 8 of the Convention. Respect for family life is not only an interest but a right guaranteed by Article 8 § 1. The prevention of crime is, for its part, an interest included among the exceptions to the enjoyment of the right in Article 8 § 2. Whilst the right must be interpreted broadly, the exceptions must be construed narrowly. It is therefore incorrect, in the present case, to state that these are two competing interests that must be weighed in the

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of the fact that the German government decided to not request referral of the case to the Grand Chamber after the Chamber had found in favour of the applicant. See *Deutscher Bundestag*, document 15/4210, available at http://dipbt.bundestag.de/doc/btd/15/042/1504210.pdf (last accessed 7 October 2013), in which the German government explained, in reply to parliamentary questions, that it had chosen not to pursue a request for referral to the Grand Chamber in *Von Hannover*, primarily because the Chamber judgment did not have consequences for political reporting and investigative journalism and because politicians were explicitly excluded from the judgment, which concerned public figures only. In arguing along those lines, the German government at least gave the impression that it did not consider the freedom of expression of tabloids wishing to publish photographs of celebrities worth fighting for in front of the Grand Chamber of the Court.

[294] ECtHR, *Van der Heijden v. the Netherlands*, app. no. 42857/05, 3 April 2012.

[295] Ibid. at para. 62. Equally problematic is the opposite scenario, in which the Court has characterised both interests – that of the applicant and that of the State – as rights. See, for instance, ECtHR, *H. v. Finland*, app. no. 37359/09, 13 November 2012, para. 48 ("[t]he Court considers that in the present case there are two competing rights which need to be balanced against each other, namely the applicant's right to respect for her private life by obtaining a new female identity number and the State's interest to maintain the traditional institution of marriage intact.").

balance. Looked at rigorously, an assessment of the necessity of the interference must be followed by an examination of its proportionality."[296]

By insisting that proportionality should rule cases in which a Convention right is opposed by a public interest, the dissenting Judges moreover arguably defended the view put forward in this chapter that balancing should, by contrast, be reserved for cases involving conflicting – relative – Convention rights.

However, before turning towards the resolution of conflicts between Convention rights, we first need a firmer grasp on what exactly constitutes a genuine conflict. To that end, I will scrutinise the form of conflicting human rights in the context of the ECHR in the next chapter. I will particularly develop a double test to identify genuine conflicts between Convention rights, as well as propose a definition of such conflicts. I will also provide a rudimentary typology of the various types of conflicts.

Before doing so, however, I will offer one final explanation as to why it is vital to focus our – and the Court's – attention on the correct identification of genuine conflicts between Convention rights. Analysis of one of the Court's most notorious admissibility decisions, *Dahlab v. Switzerland*,[297] illustrates how such correct identification is not only relevant to addressing the problem of 'preferential framing', but also to avoiding 'bad outcomes' that are at least partially the result of the Court wrongfully characterising cases as involving conflicting Convention rights.

Dahlab revolved around the dismissal of a teacher in a public primary school for wearing the Islamic headscarf in class. In its decision, the Court implied that the case – partially – involved a conflict between the teacher's right to manifest her religion and the freedom *from* religion of her pupils. In finding against the applicant, the Court *inter alia* held that "it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect" on children aged between four and eight, "an age at which children ... are ... more easily influenced than older pupils".[298] However, and as I will argue more elaborately in Chapter VI of Part II, in the absence of indoctrination by Ms. Dahlab or any evidence of even the remotest influence of her wearing the headscarf on the freedom of religion of her pupils, *Dahlab* did not entail a genuine conflict between Convention rights,[299] as defined in the next chapter.[300] More careful scrutiny at the level of the identification of conflicts between Convention rights would thus have led to the *exclusion* of the argument based on the freedom from religion of Ms. Dahlab's pupils, which would have prevented it from 'infecting' the Court's reasoning.

[296] Dissenting opinion of Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque in *Van der Heijden*, *supra* note 294 at para. 6.
[297] ECtHR, *Dahlab v. Switzerland* (adm.), app. no. 42393/98, 15 February 2001.
[298] Ibid. at 13.
[299] For more elaborate analysis of *Dahlab*, see *infra* Part II, 'Chapter VI - Conflicts between an Absolute and a Relative Convention Right'.
[300] For my definition of a genuine conflict between Convention rights, see *infra* note 499 and accompanying text.

CHAPTER IV – THE FORM OF CONFLICTS BETWEEN CONVENTION RIGHTS

Section I – The Relevance of the Question

The classification of a case as involving a genuine conflict between Convention rights is important for the reasons set out above: (i) to prevent preferential framing, (ii) to eliminate erroneous arguments based on a perceived conflict of rights, and (iii) because such classification invites the application of a distinct framework for the resolution of the conflict. Apart from that, it is also a relevant question in light of the development of the Court's doctrine on positive obligations, which has given the Convention an indirect horizontal effect and has thus created a fertile ground for more and more cases involving conflicts between rights to reach the Court.[301] Governments have gladly made use of these developments to try and justify human rights interferences by referring to their obligation to protect the human rights of others.[302] They have especially employed such "human rights rhetoric"[303] to escape the finding of a violation when the rights of an individual or a minority were opposed by the alleged rights of the majority in the Contracting State in question or even of its entire population. However, closer examination of the particular circumstances in those cases reveals that many of them do not involve a *genuine* conflict between Convention rights. Instead, they concern a 'classical' opposition of a Convention right and a public or general interest.

In a number of cases, the Court has rightly ignored the government's reliance on its obligation to respect or protect the Convention rights of others, thereby dismissing the government's argument that the case involved conflicting Convention rights.[304] For instance, in *Saadi v. Italy*, a case concerning deportation of a foreign resident based on his alleged connections to a terrorist organisation, the United Kingdom, intervening as a third party, portrayed the case as entailing a conflict between the applicant's art. 3 rights and the right to life of Italy's entire

[301] See Van Drooghenbroeck, *supra* note 26 at 305-307; Ost and Van Drooghenbroeck, *supra* note 127 at 34-35; Sudre, *supra* note 57 at 364-367.
[302] Van Drooghenbroeck, *supra* note 26 at 307-308.
[303] The term is based on Van Drooghenbroeck, *supra* note 26 at 307 (referring to governments as employing "un registre "rhétorique""). See also E. Bribosia and I. Rorive, 'In Search of a Balance between the Right to Equality and other Fundamental Rights', European Commission, 2010, at 14, available at http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=548&type=2&furtherPubs=no (last accessed 7 October 2013) (referring to Van Drooghenbroeck and confirming his conclusion that there has been a "change of 'rhetoric' register in public policy").
[304] See also, for instance, *Yordanova*, *supra* note 192. In this case, regarding the removal of a Roma community from an illegally constructed settlement on government property, the Bulgarian government argued, *inter alia*, that "had the Bulgarian authorities remained inactive in the face of the safety and sanitary risks that the applicants' settlement represented, they would have risked liability under the Convention for failure to discharge their positive obligation to protect life and health" (para. 94). The Court, however, was not convinced that this argument was genuine, given that concerns for the lives and safety of the Roma applicants had not been among the motivating factors for their removal at the time of the events (paras. 114 and 124). Instead, the removal order was motivated by a desire to sell the land to a private investor for economic development and by a concern for the complaints of the inhabitants of adjacent neighbourhoods about hygiene risks and disturbances of public order associated with the illegal settlement.

population. Since "[t]errorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights",[305] the UK government argued that

> "the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to ... weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2."[306]

The Court, however, rejected the argument based on the right to life and upheld the absolute character of art. 3:

> "the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. 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."[307] [308]

There have, however, also been instances in which the Court has misconstrued cases as involving conflicting Convention rights by unreflectively relying on the government's argument that it could not respect or protect the Convention rights of the applicants, because it was under an obligation to respect or protect the Convention rights of others, or even the

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[305] ECtHR, *Saadi v. Italy*, app. no. 37201/06, 28 February 2008, para. 119.

[306] Ibid. at para. 122.

[307] Ibid. at para. 139. See also ECtHR, *Labsi v. Slovakia*, app. no. 33809/08, 15 May 2012, para. 128 ("[t]he Government's argument that the applicant's expulsion was nevertheless justified on the ground that he represented a security risk cannot be accepted. The guarantee under Article 3 of the Convention is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion").

[308] Another example in which the Court saw through the "human rights rhetoric" of the government can be found in *Folgerø*, *supra* note 232, in which the government argued that the refusal of the domestic authorities to grant the non-Christian applicants' children exemption from the compulsory subject in Christianity, Religion and Philosophy in public schools was motivated by, among others, a concern to uphold Norway's obligations under several human rights treaties to ensure the children's right to education (paras. 72, 73 and 78). The Court, however, ignored this argument from the government, emphasising instead that the compulsory nature of the subject was motivated by a public interest: to "ensure an open and inclusive school environment" (para. 88). Awarding preponderant visibility fell in that context in principle within the margin of appreciation of the Norwegian State, for further reasons of general interest, *i.e.* "in view of the place occupied by Christianity in the national history and tradition of [Norway]." (para. 89). The Court ultimately found a violation of art. 2 Protocol 1 in *Folgerø*, because "the respondent State took [in]sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner." (para. 102). A further example can be found in ECtHR, *Ciorap v. Moldova*, app. no. 12066/02, 19 June 2007, in which the government argued that "the applicant's force-feeding was based on a clearly established medical need", seeing as his "refusal to eat for 24 days had exposed his life to a real risk and it was the duty of the doctors to protect him." (para. 73). The Court implicitly rejected the argument of the government that the case amounted to a conflict between the applicant's art. 3 and art. 2 rights, agreeing with the applicant that "his force-feeding was not aimed at protecting his life but rather at discouraging him from continuing his protest" and concluding that "[i]n view of the lack of medical evidence that the applicant's life or health were in serious danger, it cannot be said that the authorities acted in the applicant's best interests in subjecting him to force-feeding" (para. 83).

rights of the very same applicants. In *Opuz v. Turkey*, for instance, the government argued that it had failed to institute criminal proceedings against a suspect of grave domestic violence because the applicant and her mother had withdrawn their criminal complaint.[309] The government insisted that this withdrawal meant that "any further interference by the authorities would have amounted to a breach of the victims' Article 8 rights", despite the fact that the applicant had "explained that she and her mother had had to withdraw their complaints because of death threats and pressure exerted by [the suspect]".[310] Rather than rejecting the insincere argument of the government, the Court accepted it, holding that it "will now examine whether the local authorities struck a proper balance between the victim's Article 2 and Article 8 rights."[311] This, however, catastrophically misconstrues the case as one involving conflicting rights. The applicant and her mother had withdrawn their criminal complaint because they feared retaliation, *not* because they wished to have their private and family life respected. Therefore, *Opuz* did not involve a conflict between their art. 2 and art. 8 rights.

The Court eventually found a violation of art. 2 in *Opuz*, thus reaching the correct outcome, but in order to do so it had to overcome the balancing problem it had created itself by overzealously concluding that the case involved a conflict between the victims' Convention rights. In the process, the Court was forced to recognise that "in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts" and to hold that "[t]he seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case."[312] Yet, it should not have been the seriousness of the risk to the applicant's mother that outweighed the government's obligation to not interfere with her private and family life. It is rather that there was no obligation to not interfere with her private and family life to be overridden in the first place. In misconstruing *Opuz* as a case of conflicting Convention rights, the Court invited the unacceptable possibility that, had the risk to the applicant's mother's life been less serious, the Turkish government may have gotten away with a failure to prosecute cases of domestic violence by unjustly relying on its obligation to protect the private and family life of the victims, who had not pursued their criminal complaint under pressure of the suspect and out of fear for further violence by his hand.[313]

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[309] ECtHR, *Opuz v. Turkey*, app. no. 33401/02, 9 June 2009.
[310] Ibid. at para. 137.
[311] Ibid. at para. 140.
[312] Ibid. at para. 144.
[313] Another example of a case in which the Court failed to truly appreciate what was at stake, instead relying on the government's characterisation of the case as one involving conflicting Convention rights is ECtHR, *TV Vest As & Rogaland Pensjonistparti v. Norway*, app. no. 21132/05, 11 December 2008. This case involved a general ban on political advertising on TV and its application to the "Pensioners Party", a small political party that otherwise did not receive much airtime. The government argued that "[t]he prohibition was aimed at supporting the integrity of the democratic process, to obtain a fair framework for political and public debate, and to avoid a situation where those who could afford it obtained an undesirable advantage by using the most potent and pervasive medium. The right to freedom of expression had therefore to be considered in the light of the right to free elections provided by Article 3 of Protocol No. 1 to the Convention." (para. 44). The Court accepted this argument, holding, with reference to art. 3 Prot. 1 and its earlier case of *Bowman v. the United Kingdom*, that "in certain circumstances the two rights [freedom of expression and the right to free elections] may come into

The above cases illustrate why it is imperative that the Court prevent "human right rhetoric" employed by the government from 'infecting' its legal reasoning. Indeed, once the Convention rights of the many find their way into the reasoning of the Court, it may be difficult for the Court to allow them to be outweighed by the Convention rights of the few. It is precisely to safeguard its legal reasoning from being hi-jacked by such utilitarian considerations that the Court would do well to (continue to) pay close attention to what is truly at stake in the case in front of it. The Court should, in particular, carefully scrutinise whether the case in front of it involves a genuine conflict of Convention rights. For that reason, this section aims to examine the question of when an ECtHR case involves a *genuine* conflict between Convention rights.

Section II – Public Interests and the Problems of Speculation and Aggregation

Common sense seems to demand that all cases in which a Convention right is opposed by a public interest are precluded from being classified as cases involving a conflict between Convention rights. This simple conclusion appears to flow logically from the formulation of the opposition as one between a right and a public interest, not as one between two rights. Automatic exclusion is clearly warranted for a number of public interests, such as "the economic well-being of the cosuntry",[314] "territorial integrity"[315] and "maintaining the authority and impartiality of the judiciary".[316] However, the argument has been contested in relation to other public interests. Peggy Ducoulombier, one of the few legal scholars who have attempted to classify and categorise conflicting fundamental rights,[317] has argued that cases in which Convention rights are restricted to protect "public order"[318] or "health"[319] should not *a priori* be excluded from the category of conflicting fundamental rights, since, she insists, those public interests reflect the fundamental rights of individuals.[320] A similar

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conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature'." (para. 61; see also para. 65). However, *TV Vest* is better characterised as a classical case of opposition of a Convention right (freedom of expression) and a general or public interest (supporting the integrity of the democratic process through fair elections). Despite having misconstrued the case as involving conflicting Convention rights, thus inviting the risk of a utilitarian calculus determining the outcome, the Court would eventually reach the correct conclusion that the applicants' freedom of expression had been violated, but it only found that violation because of the blanket nature of the ban. A further example of a case in which the Court too readily accepted the government's argument that the case involved a conflict of rights, is *Refah Partisi*, *supra* note 72, which will be discussed further on in this chapter. See *infra* notes 376-380 and accompanying text as well as note 382 and accompanying text.

[314] Art. 8 (2) ECHR.

[315] Art. 10 (2) ECHR.

[316] Art. 10 (2) ECHR.

[317] See also Zucca, *supra* note 26; Zucca, *supra* note 199.

[318] Art. 8 (2) ECHR, art. 9 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR. Note that in several of these articles "public order" does not feature explicitly. Instead it is referred to as "the prevention of disorder". However, the French version of the articles consistently speaks of "ordre public".

[319] Art. 8 (2) ECHR, art. 9 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR.

[320] Ducoulombier, *supra* note 26 at 223; Ducoulombier, *supra* note 4 at 36, 48, 54, 68, 105-106, 142-145, 148 and 159-160. Note that, although Ducoulombier includes these cases in the category of conflicts between fundamental rights, she argues that, in terms of their resolution, they should be treated differently from conflicting fundamental rights cases that involve identified right holders on both sides of the equation. In

argument could be applied to the public interests of "national security",[321] "the prevention of crime",[322] and "public safety",[323] which may also be regarded as reflecting the fundamental rights of individuals. It may indeed be the case that governments, in restricting the Convention rights of certain individuals to protect national security, prevent crime or preserve public order, are motivated by a concern to protect the lives or bodily integrity of the other members of society. However, does this necessarily mean that such cases entail a conflict between Convention rights? The aim of this section is to demonstrate why that question should be answered in the negative.

It may certainly be appealing to interpret certain public interests, such as public order, as encapsulating the Convention rights of all members of society or a particular subsection thereof. Indeed, as argued by Emmanuelle Bribosia and Isabelle Rorive, governments are increasingly becoming aware of the fact that,

> "[o]nce there is no longer wide acceptance of traditional values (such as general interest, public order and public security), which had been used as the basis for restricting rights and freedoms, it may be worth, in order to persuade judges or public opinion, classifying these values within the discursive register of fundamental rights."[324]

Jacco Bomhoff has similarly indicated that, "if the elaboration of the 'public'-side to conflicts between *individual* and *public* interests runs into difficulty, the conceptual move of understanding this 'public'-side as an aggregation of individual rights becomes highly attractive."[325] I have already argued above that the Court should not permit its judgments to be 'infected' by such "human rights rhetoric", seeing as it is designed to misconstrue the issues that are really at stake in the case *and* because it threatens to allow a utilitarian calculus to determine the outcome of the case. In this section I will develop and refine that argument. I will explain why cases involving public interests should in principle be excluded from the category of conflicting Convention rights, while admitting that there are borderline cases in which it is difficult to distinguish between the public interest and the individual rights implicit therein. Those latter cases will nevertheless also be excluded from the category of conflicts between Convention rights.

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particular, Ducoulombier argues that, since any 'rights' related to "public order" and "health" are generally held by an abstract category of persons, they should be granted less weight than rights held by identified individuals. As a result, Ducoulombier argues, the cited cases are similar to those involving restriction of Convention rights for the protection of the general interest. See Ducoulombier, *supra* note 4 at 510 and 515. In terms of the resolution technique to be applied, Ducoulombier's position and mine – see *infra* '2. Borderline Cases?' – are thus not all that different. However, I consider my approach – excluding these cases from the category of genuine conflicts between Convention rights – to allow for a more consistent and accurate description of such *genuine* conflicts. Moreover, my approach provides a clear analytical distinction, muddled in Ducoulombier's account, between such genuine conflicts, to be resolved through a balancing test in which both rights are treated *a priori* on an equal footing, and cases involving opposition of a Convention right and a public interest, to be resolved through a proportionality test in which the prioirity-to-rights principle applies.

[321] Art. 8 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR.

[322] Art. 8 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR.

[323] Art. 8 (2) ECHR, art. 9 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR.

[324] Bribosia and Rorive, *supra* note 303 at 14.

[325] Bomhoff, *supra* note 159 at 638.

1. The Rule: Exclusion of Cases Involving Public Interests from the Category of Conflicting Convention Rights

"Public order", "national security", "public safety" and "the prevention of crime" are vague and broad terms whose common meaning is much less tied to the idea of individual rights than it is to the idea of general interest.[326] There should consequently be a presumption against classifying cases in which these public interests feature as cases involving conflicting Convention rights. Matters are different, however, with regard to "the protection of health". As demonstrated by Peter Kempees and Gerhard van der Schyff, the Court has not limited its acceptance of the legitimate aim of "protection of health" to instances involving "public" health.[327] Instead, the Court has also included the health of individuals and groups of people under its banner.[328] While it thus appears as though cases involving "protection of health" may, under certain circumstances, indeed entail a conflict of (fundamental) rights, they nevertheless fall to be excluded from the category of conflicting *Convention* rights, because the ECHR does not ensure a right to health. However, the right to health will resurface further on, in the section dealing with conflicts between Convention rights and international human rights.[329]

Cases in which the other public interests – "public order", "national security", "public safety" and "the prevention of crime" – feature as the legitimate aim invoked to justify restriction of Convention rights may admittedly involve a concern for the protection of the human rights of others, such as their right to life and bodily integrity, which are guaranteed by the Convention. They should nevertheless be principally excluded from the category of conflicting Convention rights to prevent the Court from being lured in by *speculation* and getting trapped by *aggregation*.[330]

When governments invoke public interests such as "public order" and "the prevention of crime" to justify restriction of the Convention rights of an applicant, the question as to whether the Convention rights of others are at stake is necessarily speculative.[331] This is so

[326] Rawls, *supra* note 48 at 83; Hottelier, *supra* note 289 at 133. See also Dworkin, *supra* note 51 at 194. See *contra* Xu and Wilson, *supra* note 200 at 37 (dismissing the possibility of non-rights outweighing human rights, but insisting that "the reason why utilitarian values such as national security, public safety, public order, public health, and public morality may outweigh human rights is that they contain human rights elements"); Griffin, *supra* note 29 at 63 (arguing that a government's action of depriving a person of his liberty may be primarily motivated by a need to ensure citizen's right to self-defence, derived from their right to life, on their behalf; and as such constitutes an example of conflict of rights).

[327] Van der Schyff, *supra* note 89 at 191; P. Kempees, '"Legitimate Aims" in the Case-Law of the European Court of Human Rights', in P. Mahoney et. al. (eds.), *Protecting Human Rights: The European Perspective – Studies in the Memory of Rolv Ryssdal* (Köln – Berlin – Bonn – München: Carl Heymanns Verlag KG, 2000) at 667.

[328] Van der Schyff, *supra* note 89 at 191; Kempees, *supra* note 327 at 667-668. For examples of cases in which the health of individuals or all members of the population feature, see ECtHR, *Eriksson v. Sweden*, app. no. 11373/85, 22 June 1989*;* ECtHR, *Enhorn v. Sweden*, app. no. 56529/00, 25 January 2005; ECtHR, *Wretlund v. Sweden* (adm.), app. no. 46210/99, 9 March 2004; ECtHR, *Eweida and Others v. the United Kingdom*, app. nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 98. For further reading on *Enhorn*, see A. Mowbray, 'Compulsory Detention to Prevent the Spreading of Infectious Diseases', 5 *Human Rights Law Review* (2005), 387-391.

[329] See *infra* Section V, '2. Convention Rights versus International Human Rights'.

[330] Dworkin, *supra* note 51 at 202-204.

[331] Ibid.

because domestic authorities cannot *know* whether the concrete measures they take in the name of "public order" or "the prevention of crime", thereby restricting the Convention rights of identified individuals, will contribute to the actual protection of the Convention rights of other individuals.[332] Instead, they necessarily rely on an assessment of the *probability* of a (real and immediate) risk to those rights. Moreover, the measures at issue are generally not aimed at protecting an identified or identifiable individual. Instead, when restricting the Convention rights of an individual for "the prevention of crime", for example, authorities intend to protect the entire population against the possibility of further criminal acts perpetrated by said individual.

Cases in which public interests feature as constitutive of the government's defence are thus analogous to cases such as *Dahlab*, analysed above,[333] for the purpose of determining whether they involve a *genuine* conflict between Convention rights. In the absence of any evidence that the Convention rights of identified or identifiable individuals are at stake, the presumption should be against including those cases under the category of conflicting Convention rights.[334] The reason for their principled exclusion lies in the threat that, if the speculative argument would be accepted, simple aggregation may determine the outcome of a case that should not be ruled by utilitarian considerations. The Court should, in that respect, be particularly wary of any argument put forward by the government that would allow it to, through aggregation of interests of citizens, put a conflicting 'right of society' or 'right of the State' against the Convention right of an individual applicant.[335] The Court has nevertheless accepted such characterisation in certain cases. In *Zana v. Turkey*, for instance, the Court insisted that the relevant question to be answered was whether "a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations."[336] In *H. v. Finland*, the Court – equally problematically – considered that it was confronted with

[332] Note that what I have in mind here are the actions of domestic authorities in concrete cases, not the thought process the legislator goes through when promulgating laws that allow for the restriction of Convention rights in situations where the Convention rights of others may be at stake. In that respect, a distinction should be made between how conflicts of Convention rights play at the level of formulation of legislation, where the conflict is necessarily abstract, and how they play out at the level of the application of norms, where one should first determine whether there was – in the concrete circumstances of the case – a genuine conflict between Convention rights.

[333] See *supra* notes 297-300 and accompanying text.

[334] Dworkin, *supra* note 51 at 203-204.

[335] Ibid. at 194.

[336] ECtHR, *Zana v. Turkey*, app. no. 18954/91, 25 November 1997, para. 55. The Court would eventually hold, by twelve votes to eight, that the freedom of expression of the applicant had not been violated. See, similarly, ECtHR, *Kuharec alias Kuhareca v. Latvia* (adm.), app. no. 71557/01, 7 December 2004 (accepting that the measures at issue, restricting the Convention rights of non-citizens, were aimed at protecting the national language and thus pursued the legitimate aim of protecting "the rights of others", since "l'existence d'une langue officielle implique l'existence de certains droits subjectifs dans le chef de ses locuteurs."). In a later judgment in a similar case, concerning rejection by the Turkish authorities of requests by Kurdish to have their names in the official registries changed to the spelling in their minority language, Judge Sajó spoke of "le droit de la majorité à utiliser sa langue" in his concurring opinion. He then went on, however, to characterise the case in line with the main argument raised in this chapter: "[d]ans un cas comme celui présenté devant nous, un droit fondamental conventionnel relevant du droit à la vie privée doit être mis en balance avec une mesure dérivée protégeant des droits non conventionnels. Il faut alors accorder le poids qui convient au droit tiré de la Convention." Concurring opinion of Judge Sajó in ECtHR, *Kemal Taşkın and Others v. Turkey*, app. nos. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05, 2 February 2010.

"two competing rights which need to be balanced against each other, namely the applicant's right to respect for her private life by obtaining a new female identity number [pursuant to her gender re-assignment] and the State's interest to maintain the traditional institution of marriage intact".[337] Such incorrect conflation of citizens' interests with the 'right of society' and – equally incorrect – characterisation of State interests as rights is precisely what this section aims to warn against.

Reflections on speculation and aggregation, much like the ones described immediately above, also lay at the heart of disagreement within the Grand Chamber of the Court in *Austin and Others v. the United Kingdom*.[338] The case concerned the containment of a large number of people in a full police cordon in the context of a demonstration in central London on 1 May 2001. The applicants argued that their containment in the police cordon for seven hours had breached their right to not be deprived of their liberty under art. 5 ECHR. The government, conversely, argued that the full cordon had been absolutely necessary "to prevent serious public disorder involving a substantial risk of death or serious injury", thus connecting a public order defence to a need to protect the Convention rights of others.[339] In its reasoning, the majority of the Grand Chamber accepted the government's characterisation of the case, referring to the fact that "in certain well-defined circumstances, Articles 2 and 3 may imply positive obligations on the authorities to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals."[340] The majority then referred to the "trial judge['s conclusion] that, given the situation in Oxford Circus, the police had no alternative but to impose an absolute cordon if they were to avert a real risk of serious injury or damage."[341] Because art. 5 of the Convention does not provide for a "public order" exception to the rule that no one shall be deprived of her liberty, the majority subsequently found itself in a predicament. It found a way out by engaging in an *implicit* balancing exercise – disguised as contextualisation – between the applicant's interests and the "public order interest in averting a real risk of serious injury or damage" to ultimately conclude that the applicants had not been deprived of their liberty within the meaning of art. 5 at all.[342] The dissenters took issue with the implicit balancing exercise carried out by the majority and, particularly interesting for our current concerns, pointed out that "it has not been established in the present case that there was a clear and present danger to life or limb."[343]

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[337] *H. v. Finland*, *supra* note 295 at para. 48. The applicant had lawfully married her wife when she was of the male sex (*i.e.* prior to her gender re-assignment surgery) and the couple wished to remain married after the surgery. The national authorities, however, considered that under those circumstances the applicant could not be allowed to obtain a female identity number, because this would – according to the national authorities – be tantamount to recognising a same-sex marriage, an institution that is not permitted under Finnish law.

[338] ECtHR, *Austin and Others v. the United Kingdom,* app. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.

[339] Ibid. at para. 42.

[340] Ibid. at para. 55.

[341] Ibid. at para. 66.

[342] Ibid. at paras. 59-67. The majority resorted to implicit balancing, despite its earlier assertion that "it is clear from the Court's case-law that an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty" (para. 58).

[343] Dissenting opinion of Judges Tulkens, Spielmann and Garlicki in ibid. at para. 8.

Austin demonstrates how the characterisation of a case as involving conflicting Convention rights may steer its outcome. The majority in *Austin* arguably viewed the case as one involving a number of people being restricted in their freedom of movement to protect both themselves and those outside of the cordon from breaches of their art. 2 and art. 3 Convention rights. Aggregating those interests in an implicit balancing exercise, the majority then concluded, not unsurprisingly, that the applicants had to endure the temporary restriction of their freedom of movement. The dissenters, on the other hand, questioned whether the case was sufficiently closely connected to the positive obligations of the State under art. 2 and art. 3 to allow such aggregation to determine the outcome of the case, arguing that there was no clear and present danger to life or limb.

Austin also illustrates that cases in which the government invokes a public interest defence that may hold ties to the Convention rights of individuals are different from cases like *Dahlab*. As explained above, *Dahlab* did not entail a *genuine* conflict between Convention rights, because there was no evidence of any influence of the Islamic headscarf worn by Ms. Dahlab on the freedom from religion of the pupils in her class. In cases in which public interests like "public order" or "the prevention of crime" are invoked, however, the problem lies elsewhere: these cases necessarily involve a matter of speculation as to how closely such public interests are connected to the Convention rights of individuals. The relevant question to be answered is therefore: when are the Convention rights of individuals sufficiently at stake in such cases to warrant their inclusion in the category of conflicting Convention rights?

In order to answer that question, tools are needed to determine to what extent public interests such as "public order" or "the prevention of crime" actually contribute to the protection of the Convention rights of individuals in a particular case. One such tool may be borrowed from moral philosophy, in the form of an adapted version of Judith Jarvis Thomson's 'High-Threshold Thesis'. Thomson argues that, when assessing the legitimacy of the infringement of a person's claim, for instance the claim that she not be kicked, the distribution of the increment of good achieved by infringing the claim is a relevant consideration.[344] Thomson insists that, when such distribution takes the form of tiny increments to a large amount of people, the claim cannot justifiably be overridden: "surely it is on *no* view permissible to kill a person to save billions from a minor headache".[345] In a similar vein, George Letsas has argued that certain civil rights, such as freedom of speech, freedom of thought and freedom of association, are so central to the values of democracy and social justice that it is "important to ensure that these liberties are not limited for *speculative* or *marginal* benefits to the interests of others when they ... play these normative roles".[346] Thomson's 'High-Threshold Thesis', combined with Letsas' argument on the speculative nature of a benefit, has an intuitive appeal to it. I will, however, not use it in the sense that Thomson and Letsas intended it: as a

[344] Thomson, *supra* note 87 at 166. Here, I do not deal with Thomson's extension of that basic argument, which I consider convincing, to the more contestable claim that the 'High-Threshold Thesis' leads to the conclusion that one may not kill one person to save hundreds, thousands or even millions, because "the numbers do not count". On the latter issue, see Part II, Chapter VII - 'Conflicts between Absolute Rights'.
[345] Ibid. at 169 (emphasis in original).
[346] Letsas, *supra* note 7 at 118 (emphasis in original). Letsas gives the example of a demonstration, explaining that "[i]t causes great inconvenience to allow demonstrations on a regular basis in a city centre. But unless they pose a clear and present danger to the lives of others then they should not be banned…".

normative argument to protect (certain) rights claims from infringement for certain types of reasons. Rather, Thomson's 'High-Threshold Thesis' can be successfully modified into an analytical tool to determine when a case featuring a public interest defence should be excluded from the category of conflicting Convention rights. Such exclusion will, in short, be called for when a case involves a considerable degree of speculation *and* the distribution of good is far removed from the protection of Convention rights of identified or identifiable individuals.[347]

Thus, for instance, when a suspect in a violent robbery case is deprived of her liberty by an order of pre-trial detention, motivated by the legitimate aim of "the prevention of crime", the good that is being distributed is one of tiny increments to a large amount of people (potentially the entire population of a country).[348] The direct benefit they each receive is moreover not an increased protection of their Convention rights, but an increased feeling of security, in the knowledge that a person suspected of a violent crime will not be released before her trial. Any impact of the person's release on the Convention rights of identified or identifiable individuals is in such circumstances necessarily speculative. The fact that the suspect's deprivation of liberty only leads to tiny increments for a large amount of people, while the impact on individualised Convention rights necessarily remains speculative, is precisely why such a measure is more aptly referred to as pursuing a general interest. That general interest may be *related* to individuals' Convention rights, but to label the described case as involving conflicting Convention rights would stretch the category beyond the point where it can function as a useful category for legal reasoning.[349]

The above conclusion is also in line with the case law of the ECtHR on the matter, when looked at from the other angle. In a number of cases, the Court was confronted with a claim that the government had failed to protect the right to life of persons who had been killed by recently released convicted criminals.[350] In those cases, the Court has consistently held that, while "Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual", "[t]hat does not mean ... that a positive

[347] Nevertheless, in some cases the connection may be sufficiently close to justify inclusion in the category of conflicts between Convention rights. On these exceptions, see *infra* '4. A Provisional Conclusion on Genuine Conflicts between Convention Rights' and Section V - 'The Search for Genuine Conflicts between Convention Rights'.

[348] Similar considerations to the ones developed here in connection with "the prevention of crime" also hold for the protection of "public order", "national security" and "public safety".

[349] See also Bomhoff, *supra* note 159 at 647-648 (insisting, in his assessment of the legitimate aim category of "the rights of others", on a need to "single out those cases where the interests of those seen as 'others' are not distinguishable to a sufficient degree from the general interests shared by all members of society."). See, for an example from the Court's case law, ECtHR, *Ahmed and Others v. the United Kingdom*, app. no. 22954/93, 2 September 1998 (in which the majority determined that the restrictions imposed on the freedom of expression of civil servants pursued the legitimate aim of protecting "the rights of others, council members and the electorate alike, to effective political democracy at the local level", against which the dissenters reacted by "highlight[ing] the risk of that notion [of the rights of others] being stretched so far as to lose almost all distinct meaning if it is held to cover "rights" such as that to effective political democracy at the local level." (para. 54 + dissent para. 1)).

[350] See most notably ECtHR, *Mastromatteo v. Italy*, app. no. 37703/97, 24 October 2002; ECtHR, *Maiorano and Others v. Italy*, app. no. 28634/06, 15 December 2009; ECtHR, *Choreftakis and Choreftaki v. Greece*, app. no. 46846/08, 17 January 2012.

obligation to prevent every possibility of violence can be derived from this provision."[351] Indeed,

> "[s]uch an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources."[352]

As a result,

> "not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise, the Court has held, where it has been established that the authorities knew or ought to have known at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[353]

The Court has indicated that "the relevant risk [is] a risk to life for members of the public at large rather than for one or more identified individuals."[354] In that respect, the Contracting States are under an obligation to protect the lives of all individuals living in those States through an appropriate legal framework: "what is at issue is the obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection."[355] That is the paradigm case of a general interest.

The distinction drawn by the Court between cases in which a recently released criminal commits an act of violence against a random person who could not have been identified beforehand,[356] and those in which there are concrete indications that an identified person is at risk of suffering violence at the hand of another person,[357] is entirely justified. As explained by Dworkin, and reflected in the Court's case law,[358] national authorities are under an increased obligation to protect the lives of those in actual danger than to implement measures to *prevent* endangerment of statistical and anonymous persons.[359] While the former types of cases can be labelled as involving conflicting Convention rights, *i.e.* if the suspect is detained

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[351] *Mastromatteo*, *supra* note 350 at paras. 67-68.
[352] Ibid. at para. 68.
[353] Ibid. (emphasis added).
[354] Ibid. at para. 74.
[355] Ibid. at para. 69. See also, *Choreftakis and Choreftaki*, *supra* note 350 at para. 48.
[356] See for instance *Mastromatteo*, *supra* note 350; *Choreftakis and Choreftaki*, *supra* note 350; *Maiorano*, *supra* note 350.
[357] See, for instance, *Osman*, *supra* note 44.
[358] *Choreftakis and Choreftaki*, *supra* note 350 at paras. 48, 50 and, particularly, 59: "l'absence de lien de causalité direct et solide entre les modalités d'application du système grec et la mort du fils des requérants, exigerait une défaillance évidente de la loi appliquée en l'espèce pour engager la responsabilité de l'Etat défendeur sur le champ de l'article 2 de la Convention."
[359] R. Dworkin, *Justice for Hedgehogs* (Cambridge – London: Harvard University Press, 2011) at 279 (Dworkin gives an example related to public safety and terms the explanatory principle the 'dimension of confrontation').

or monitored during his private life, the latter types of situations represent a paradigm case of opposition between a Convention right and a general or public interest. They should therefore, in principle, be excluded from the category of conflicting Convention rights cases.[360]

Examination of the Court's case law nevertheless reveals that the Court has, on numerous occasions, held that a conflict of rights was at issue, although examination of those cases through the lens of the modified 'High-Threshold Thesis' reveals that they fall to be more aptly characterised as a 'classical' opposition of a Convention right and a public interest.[361] One such case is *Colon v. the Netherlands*, involving the order of Amsterdam's mayor designating the old centre of the city as a security risk zone, thereby giving public prosecutors the power to grant "preventive search" orders, under which – for a randomly selected period of twelve hours – any person in the old centre could be subjected to a search for the presence of weapons. The Court considered that it was:

> "faced, not for the first time, with the need to balance two interests protected by Article 8 against each other. The first is the protection of the individual against arbitrary interference by public authority, which the Court has consistently held to be the essential object of Article 8. The second is constituted by the protection of "private life" in the sense of the physical and moral integrity of those within the jurisdiction of the Contracting States, which imposes on the Contracting States not merely the right but the duty to take positive action."[362]

Yet, *Colon* is a prime example of a case in which the distribution of good intended by the measure is far removed from the protection of the Convention rights of identified individuals, instead benefitting the abstract category of "those within the jurisdiction of the Contracting [State]". Under the modified version of the 'High-Threshold Thesis', the case thus falls to be

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[360] This does not automatically mean that the Court can never find a violation of art. 2 in such cases. As evidenced by the case of *Maiorano, supra* note 350, specific circumstances may lead the Court to conclude that the domestic authorities had failed to fulfil their positive obligation to protect the right to life of the applicants' family members, despite the fact that *their* murder could not have been foreseen at the time of the perpetrator's release, but because there were sufficient reasons to indicate that he would commit new violent crimes. However, the Court's assessment took place *after* the perpetrator's release and in the knowledge that he had killed two family members of the applicants. If we were to take a hypothetical step back, to the moment of his release, any argument to the effect that his detention should be prolonged would not have featured the right to life of his later victims, who had no connection to him and could thus not be expected to become his victim at that time. Instead, it would have been phrased in terms of the general interest: to protect the entire population against the possible future acts of violence of the detainee. Whether *Maiorano* should nevertheless be included under the category of conflicting Convention rights will be assessed *infra* notes 374-375 and accompanying text.

[361] Apart from the examples given in the text, see also ECtHR, *Colombani and Others v. France*, app. no. 51279/99, 25 June 2002, paras. 47, 62 and 68; ECtHR, *Peck v. the United Kingdom*, app. no. 44647/98, 28 January 2003, paras. 67 and 79; *Şerife Yiğit, supra* note 265 at paras. 81-82 (with dissenting opinion of Judge Kovler). See also Bomhoff, *supra* note 159 at 640 (characterising "the conflict at the heart of *Colombani*" as "one between fundamental rights (to expression) and governmental powers (in foreign relation matters), not between the fundamental rights of different individuals."). For an example of a case in which the Court made the opposite move, rightly rejecting the government's characterisation of the case as also involving the "rights of others", see ECtHR, *F. v. Switzerland*, app. no. 11329/85, 18 December 1987, paras. 35-36 ("[t]he Court recognises that the stability of marriage is a legitimate aim which is in the public interest ... In any event, the Court cannot accept the argument that the temporary prohibition of remarriage is designed to preserve the rights of others, namely those of the future spouse of the divorced person.").

[362] ECtHR, *Colon v. the Netherlands* (adm.), app. no. 49458/06, 15 May 2012, para. 85.

characterised as involving opposition of a Convention right and the public interest.[363] The Court, further on in its reasoning, actually acknowledged as much by ultimately concluding that "[t]he domestic authorities were entitled to consider that the *public interest* outweighed the subjective disadvantage which the interference with his private life caused to the applicant."[364]

Another example of how the Court sometimes wrongfully treats a case as involving conflicting Convention rights can be found in *Buck v. Germany*. The case concerned a search and seizure order directed at the applicant in order to force him to disclose the identity of another person, liable for a speeding offence (the speeding offence had been committed with a company car; the applicant was the owner of the company in question). In its judgment, the Court insisted that the search and seizure order not only pursued the public interest of "prevention of disorder or crime", but also "the protection of the rights of others, notably the rights of other road users to protection of life and limb".[365] Preventing damage to life and limb of other road users may well be the underlying reason why speeding is a punishable offence, but the search and seizure order at issue in *Buck* was far removed from having any direct beneficial impact on the Convention rights of those road users. In application of the modified 'High-Threshold Thesis', construing the case as solely involving a public or general interest would have been more appropriate. *Buck* moreover demonstrates how unwarranted arguments from the rights of others threaten to steer the Court in the direction of a certain outcome, misguided by utilitarian considerations in which aggregation of the rights of the many (all road users) outweigh the rights of the few (a person through whom a suspect of speeding may be identified). Indeed, it was only due to the highly specific circumstances of the case – the fact that the search and seizure in question was ordered in connection with a minor contravention of a regulation, purportedly committed by a third person, and the fact that it comprised the private residential premises of the applicant – *and* by the narrowest possible majority that the Court found a violation of art. 8 in *Buck*. Under different circumstances, aggregation of "the rights of other road users to protection of life and limb" may easily have swayed the outcome the other way.

Yet, it also falls to be noted that part of the problem lies in the structure of the Convention itself, which does not always leave much room for the Court to determine exactly which legitimate aim underpinned the measures taken by the domestic authorities. Particularly articles 8 to 11 ECHR, with their limited array of legitimate aims that may be invoked to justify restriction of the respective Convention rights, invite over-use of the legitimate aim of "the rights of others".[366] The Court often finds itself resorting to this 'leftover' category whenever a measure does not fit neatly into one of the other categories.[367] In *Chapman v. the*

[363] See also Ducoulombier, *supra* note 4 at 515 (arguing that, when a Convention right is restricted to protect a right held by a category of abstract individuals, the right's protection comes close to the protection of a general interest; but nevertheless insisting that such cases fall to be included in the category of conflicts between rights).
[364] *Colon*, *supra* note 362 at para. 95 (emphasis added).
[365] ECtHR, *Buck v. Germany*, app. no. 41604/98, 28 April 2005, para. 41.
[366] See also Bomhoff, *supra* note 159 at 639 and 643.
[367] See, apart from the example given in the text, for instance *Kuharec alias Kuhareca*, *supra* note 336. The case involved the authorities' decision to transliterate the applicant's family name on official documents as Kuhareca, which under Latvian grammar reflects the applicant's female sex, instead of the literal Latin translation of her

United Kingdom, for instance, the Court was satisfied to conclude that the measures taken against the Roma applicant who wished to live in a caravan on her land "pursued the legitimate aim of protecting the "rights of others" through preservation of the environment."[368] This led the Court to characterise the case as involving "a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection", which in turn led it to award a wide margin of appreciation for the national authorities in the evaluation of the suitability of alternative accommodation for the applicant.[369] The Court would eventually not find a violation of art. 8.

The objective here is not to imply that *Chapman* was wrongly decided due to a mischaracterisation as a conflicting rights case. Such a claim would be unsubstantiated, given that the wide margin of appreciation may very well have been linked to the fact that the domestic authorities were better placed to assess the measures needed to preserve the environment, rather than to the characterisation of the case as involving conflicting rights.[370] Instead, the aim is to illustrate how arts. 8 to 11 of the Convention put a constraint on how the Court may characterise a case. The concern for the protection of the environment that lay at the basis of the restrictions of Ms. Chapman's Convention rights was arguably a concern of public interest that was to the *advantage* of each member of the community. It was thus not necessary to express that interest in terms of the *rights* of (each individual member of) that community. However, the structure of art. 8 constrains the Court's ability to characterise the case in the manner that most closely fits its circumstances. In that sense, contrasting *Chapman* to a similar case brought under art. 1 Prot. 1, which does not contain a limitative list of legitimate aims, is a useful exercise. In *Housing Association of War Disabled and Victims of War of Attica and Others v. Greece*, the Court held that in complex situations

> "in which any decision could weigh heavily on the property rights of a large number of people, the legitimate concern to protect the forests, understandable as it is in the modern day, should not absolve the State of its responsibility to provide adequate protection to people such as the applicants who *bona fide* possess or own property."[371]

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original family name, Kuharec (the applicant was born in Russia). The Constitutional Court of Latvia had considered that the rights restrictive measure was justified, because it was necessary to protect the grammatical integrity of the Latvian language. In its judgment, the Court noted that "la protection de la ou des langues nationales n'étant pas expressément mentionnée dans le texte de l'article 8 § 2 de la Convention, la Cour doit rechercher si les motifs invoqués par le Gouvernement correspondent à un ou plusieurs objectifs énumérés par cette disposition." The Court found the answer in "la protection des droits et libertés d'autrui".

[368] *Chapman*, *supra* note 236 at para. 82.

[369] Ibid. at paras. 102 and 104.

[370] The Court literally held that "[t]he evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment." See *Chapman*, *supra* note 236 at para. 104. It is impossible to determine which of the two elements – the need for environmental protection or the element of conflicting rights – attracted the wide margin of appreciation. Both are possible under the principles of the Court's case law.

[371] ECtHR, *Housing Association of War Disabled and Victims of War of Attica and Others v. Greece*, app. no. 35859/02, 13 July 2006, para. 38.

The Court thus treated the case as involving a Convention right that was restricted, unjustly so according to the Court, for the protection of a public interest.[372] Characterisation of both cited cases as involving Convention rights that were opposed by a general or public interest, expressed in terms of a need to conserve the environment, is indeed more appropriate than treating them as conflicting rights cases.

2. Borderline Cases?

Although the modified 'High-Threshold Thesis' calls for a principled exclusion of cases involving a public interest from the category of conflicting Convention rights, certain cases demonstrate that the degree of speculation as well as the distribution of increments of good may vary from case to case. We should therefore not *a priori* exclude the possibility that measures taken in the public interest may *in certain specific circumstances* provide an increased protection to the Convention rights of others that is not overly speculative. We thus need to determine whether the features of such borderline cases warrant inclusion into the category of conflicting Convention rights by way of an exception to the general rule put forward above.

Austin and Others appears to be such a case that may, on closer examination, involve a conflict of Convention rights. In *Austin* the domestic authorities acted, according to the government, "to prevent serious public disorder involving a substantial risk of death or serious injury" and were thus at least partly motivated by a need to comply with their positive obligation under articles 2 and 3 of the Convention "to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals".[373] *Maiorano and Others v. Italy* provides a further example of a case that may call for an exception to the rule set out above.[374] *Maiorano* concerned the murder of two of the applicants' family members by a convicted criminal who had recently been released from prison under an early release order. In its judgment, the Court ruled that the manner in which the domestic authorities had applied the legal framework for early release of convicted criminals had been so deficient as to lead to a failure on the part of those authorities to comply with their obligation to protect life under art. 2 of the Convention.[375]

A further example of a case that may be construed as involving conflicting Convention rights is *Refah Partisi v. Turkey*.[376] The case concerned the dissolution of an Islamist political party that had obtained 35% of the votes in the last general elections and was projected to obtain an absolute majority in the near future. The party's dissolution pursued, according to the Court, "the legitimate aims [of] protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others."[377] The Court went on

[372] Ibid. at para. 40 (the Court unfortunately used the language of balancing instead of proportionality).
[373] *Austin*, *supra* note 338 at paras. 42 and 55.
[374] *Maiorano*, *supra* note 350.
[375] Ibid. at paras. 116-121.
[376] *Refah Partisi*, *supra* note 72.
[377] Ibid. at para. 67.

to frame the case as one involving conflicting Convention rights.[378] Particularly relevant for our current concerns is the passage in the judgment in which the Court held that

> "[w]hile it can be considered, in the present case, that Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate."[379]

The cited examples indeed appear to involve a certain element of conflict between Convention rights. I nevertheless submit that they should *not* be included in the category of cases involving *genuinely* conflicting Convention rights. Instead, they should be characterised as cases involving opposition of a Convention rights and a (or several) public interest(s), *but* in which the Convention rights of others take on particular significance during the proportionality analysis.[380]

On that account, the domestic authorities in the case of *Austin* acted to prevent serious public disorder, *because* there was, in their opinion, a substantial risk of death or serious injury. That risk not only remained speculative, it was also not directed at identified individuals.[381] Instead, the persons at risk were a largely abstract group of people, *i.e.* everyone who may be in the vicinity of the demonstration throughout its duration, including the people in the police cordon. Allowing such a case to be presented as a *genuine* conflict between Convention rights invites the dangerous assumption that the Convention rights of a large number of people were directly and necessarily at stake. If a balancing test, in which the conflicting rights are *a priori* treated on an equal footing, is then employed unreflectively to determine whether temporarily restricting the rights of a sub-group of those people was justified, simple aggregation will threaten to provide a straightforward, but not necessarily correct, answer: the right to personal liberty of a small sub-section of the group can be temporarily sacrificed to protect the rights to life and bodily integrity of all the people involved (including the people of the sub-section). However, because those latter rights, held by a largely abstract group of people, were not necessarily at stake, *Austin* falls better to be conceptualised as a case involving opposition of a Convention right and a public interest, but in which the Convention rights of others are a relevant consideration. The relevant test to be applied is then one of proportionality, with the benefits of the priority-to-rights principle being extended to the Convention right invoked by

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[378] Ibid. at paras. 99, 103, 110, 119 and 123. See *contra* L. Zucca, 'Law v. Religion', in L. Zucca and C. Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge – New York: Cambridge University Press, 2012) at 146 (characterising the case as involving a conflict between the principle of secularism and the principle of free association, not between two Convention rights).

[379] *Refah Partisi*, *supra* note 72 at para. 110.

[380] For other cases, to which this conclusion also applies, see for example *TV Vest*, *supra* note 313 at paras. 41, 44, 61, 72 and 73; ECtHR, *Jendrowiak v. Germany*, app. no. 30060/04, 14 April 2011, paras. 35-38. *Compare* S. Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate', 63 *Cambridge Law Journal* (2004) at 418 (arguing that, while certain the public interests mentioned in art. 8 (2) ECHR "may be deemed a public interest or a source of rights, depending upon the context, even the implicit individual rights which may derive from this policy objective can only function as a limitation on other express Convention rights, and cannot become a cause of action themselves.")

[381] See Dworkin, *supra* note 51 at 202 and 204 (explaining why, in his view, speculative benefits to an unknown number of people cannot be used by governments to justify limitations on freedom of expression or freedom of assembly in the context of a demonstration).

the applicants. Under the proportionality test, the extent to which there indeed was a real and immediate risk of death or serious injury will have an impact on the Court's assessment whether or not the measures taken to prevent serious public disorder met the requirements of the proportionality test.

Refah Partisi differs from *Austin* in the sense that the group that was at risk of having their Convention rights breached was much larger, arguably comprising the entire population of Turkey, while the persons whose Convention rights were restricted were excluded from the protected group.[382] However, at the level of principle, *Refah Partisi* is analogous to *Austin*: it also entails the combination of a certain extent of speculation and exposure of an abstract group of people to a risk of having their Convention rights breached. *Refah Partisi* should thus also be characterised as a case involving opposition of a Convention right (the art. 11 rights of *Refah Partisi*) and a public interest (prevention of disorder in the form of protection of democracy), but in which risk to the Convention rights of others are an important element to be taken into account during the proportionality analysis.

The case of *Maiorano* appears to be different from the previous two cases in that it creates the impression that the art. 5 rights of an identified individual (the released criminal) and the art. 2 rights of other identified individuals (the applicants' family members who were murdered by the released criminal) were simultaneously at stake. However, that is merely an illusion. At the moment when the applicants' family members were murdered, the perpetrator had already been released. His art. 5 rights were therefore not at stake at that point in time. At the moment when he was released, conversely, the art. 2 rights of the applicants' family members were not in play, since they were unconnected to the released criminal and could therefore not be foreseen to become his concrete victim, even if there were indications that he would kill again once released. At the moment of the criminal's release, the case of *Maiorano* therefore necessarily involved a certain extent of speculation as to the existence of a threat that was, at that moment and crucially, directed towards an abstract group of people: the entire population of the country. As a result, the situation as it existed before the criminal's release fell to be characterised as a case in which a Convention right (the criminal's art. 5 right) was opposed by a public interest (the prevention of crime) and not as one involving conflicting Convention rights.[383]

[382] A debatable aspect of *Refah Partisi* is whether or not the people who voted for Refah Partisi should be included among the group of people whose Convention rights were, in the eyes of the government and the Court, at stake. This invites interesting questions on paternalism on the part of the Court as well as broader questions as to how far democracy can protect itself against its destruction, even if that is what the majority of the population wishes. These questions, however, lie beyond the scope of the current research and will therefore not be dealt with here.

[383] See also *Jendrowiak*, *supra* note 380 at paras. 35-38. See further ECtHR, *M. v. Germany*, app. no. 19359/04, 17 December 2009, para. 102 (in which the Court held that the risk of recidivism was insufficiently concrete to justify the applicant's continued detention).

3. The Protection of Morals as an Exceptional Category?

Several scholars have suggested that the legitimate aim of 'protection of morals'[384] may reflect individual rights.[385] The Court has also insisted that "there is a natural link between protection of morals and protection of the rights of others".[386] Does this mean that the Court is inevitably confronted with a conflict of (Convention) rights when the government invokes (public) morals to justify infringement of an applicant's Convention rights? The answer is "no" or "perhaps", depending on the type of morals involved.

In line with Christopher Nowlin, I submit that any case in which the government relies on the protection of *public* morals, reflecting the majority view on an issue in society that is not directly connected to the rights of others, should never be characterised as a case involving conflicting rights.[387] To allow such an argument to take hold would amount to accepting that society may put a *right* to protect its moral preferences in the balance against the Convention rights of an applicant, while what is really at stake for the (majority in the) State are those moral preferences pure and simple.[388]

Matters are slightly different, however, when the government relies on the protection of morals that *are* directly connected to the rights of others.[389] Abortion cases are the prime examples of such cases that may entail a conflict of rights. They can, however, not be expressly defined in terms of a conflict of *Convention* rights, given that the ECtHR has

[384] Art. 8 (2) ECHR, art. 9 (2) ECHR, art. 10 (2) ECHR, and art. 11 (2) ECHR mention the 'protection of … morals' as one of the legitimate aims that may justify restriction of the Convention rights guaranteed in the first paragraph of those articles.

[385] Greer, *supra* note 219 at 258; C. Nowlin, 'The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms', 24 *Human Rights Quarterly* (2002) at 279.

[386] ECtHR, *Wingrove v. the United Kingdom*, app. no. 17419/90, 25 November 1996, para. 30.

[387] Nowlin, *supra* note 385 at 279-282. For examples of cases, see ECtHR, *Akdas v. Turkey*, app. no. 41056/04, 16 February 2010; ECtHR, *Müller and others v. Switzerland*, app. no. 10737/84, 24 May 1988; ECtHR, *Handyside v. the United Kingdom*, app. no. 5493/72, 7 December 1976; ECtHR, *S.H. and Others v. Austria*, app. no. 57813/00, 3 November 2011.

[388] See Dworkin, *supra* note 51 at 194. Whether those moral preferences of the majority, expressed as public morals, may ever *justify* restriction of Convention rights of an applicant is a question I will not deal with here. The aim is only to demonstrate that such cases do not involve conflicting (Convention) rights. Others have, however, argued at length about whether (and if so, when) considerations of public morals may justify restriction of individual rights. See, among others, Nowlin, *supra* note 385; Dworkin, *supra* note 51; Letsas, *supra* note 7. The Court has allowed considerations of public morality to justify restrictions on freedom of expression in several cases. See for instance *Müller*, *supra* note 387 (in which the Court ruled that an order, motivated by concerns of public morality, to remove a sexually "offensive" painting from an art exhibition had not violated the artists' freedom of expression). For an example of a case in which the Court held that considerations of public morality could not justify restrictions on the freedom of assembly, see ECtHR, *Alekseyev v. Russia*, app. nos. 4916/07; 25924/08; 14599/09, 21 October 2010 (in which the Court held that a ban to organise a LGB "Pride March" in Moscow, which was primarily motivated by concerns of public morals, violated art. 11). For another example of the Court rejecting any connection between public morals and actual rights of others, see ECtHR, *B. and L. v. the United Kingdom*, app. no. 36536/02, 13 September 2005, §§ 32 and 37-40 (on the prohibition of marriage between parents-in-law and children-in-law).

[389] See also Nowlin, *supra* note 385 at 279-282. For an example of a case in which the government maintained that such a connection was present, see ECtHR, *Salgueiro da Silva Mouta v. Portugal*, app. no. 33290/96, 21 December 1999 (in which the Court unfortunately first accepted that the domestic court's decision to refuse the applicant, a homosexual, parental responsibility of his daughter during divorce proceedings pursued the legitimate aim of "protection of the health and rights of the child", but subsequently took a strong stance against the majoritarian conceptions of public morality – "The child should live in ... a traditional Portuguese family" – that wrongfully underpinned the domestic court's judgment to ultimately find a violation of art. 8 *juncto* art. 14).

consistently refused to determine whether or not the right to life of art. 2 extends to foetuses.[390] Abortion cases, at least those concerning Ireland, instead involve a conflict between a Convention right (the right to respect for private life of the mother, and possibly her right to life) and a constitutional right (the right to life of the unborn, guaranteed in the Irish Constitution). However, due to the sensitivities and disagreement involved in the question as to whether the unborn foetus has a right to life, the Court has (in)famously sidestepped the conflicting rights question entirely by determining that restrictions on abortion in Ireland "pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect."[391] The Court consequently had to

> "examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn."[392]

As long as the Court continues to refrain from answering the question whether the unborn have a right to life, abortion cases cannot be characterised as involving a conflict between Convention rights. Although they represent an exceptional class of cases, raising complex ethical issues that continue to pose a dilemma for the Court,[393] they will not be dealt with in detail in the current research. Since they do not entail a conflict between Convention rights, they fall outside the scope of this research.

4. A Provisional Conclusion on Genuine Conflicts between Convention Rights

Throughout this section, I have rejected the argument that certain cases in which Convention rights are restricted for the protection of a public interest may nevertheless involve genuinely conflicting Convention rights. This may tempt us to conclude that such *genuine* conflicts necessarily involve identified individuals and are equally necessarily characterised by an absence of speculation as to the risk posed to their Convention rights. However, two immediate thoughts are in order. One on the necessity of having *identified* individuals as right holders to be able to speak of a genuine conflict of Convention rights, the other on the necessity of the *total* absence of speculation as to the risk posed to those Convention rights.

Regarding the necessity of having identified individuals as rights holders, the provisional conclusion may well be too swift. It is very well possible that cases which feature *undetermined*, but nevertheless identifiable, persons on one end of the equation may also entail genuine conflicts of Convention rights. The distinction between identified and

[390] See *A., B. and C.*, *supra* note 149; ECtHR, *Vo v. France*, app. no. 53924/00, 8 July 2004; ECtHR, *Open Door and Dublin Well Woman v. Ireland*, app. nos. 14234/88 and 14235/88, 29 October 1992; ECtHR, *Tysiąc v. Poland*, app. no. 5410/03, 20 March 2007.
[391] *A., B. and C.*, *supra* note 149 at para. 227.
[392] Ibid. at para. 230.
[393] Ibid. at para. 233.

undetermined individuals will be discussed at length below, when I analyse the different types of conflicts between Convention rights.

Regarding the necessity of the total absence of speculation as to the risk posed to the Convention rights of identified individuals, the provisional conclusion was indeed reached too swiftly. It should be loosened, because, as is, it is under-inclusive. Its under-inclusiveness may be illustrated by way of an example drawn from the case of *Osman v. the United Kingdom*. *Osman* concerned the murder of a father and attempted murder of his son by a former teacher of the son, who had grown obsessed by him. In its judgment, the Court indicated that these types of cases, in which there were indications that an individual may pose a risk to the life of other identified individuals, may involve a conflict between Convention rights:

> "[f]or the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation [the positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention."[394]

The Court would ultimately conclude that, in the instant case, the police authorities could not be criticized for having held the reasonable view that the risk to the life of the applicant son and his father was insufficiently substantiated to warrant interference with the teacher's art. 5 and 8 rights.[395] One can nevertheless imagine slight changes to the circumstances of the *Osman* case to construct a hypothetical case in which the risk to the life of the son and father was substantiated by clearer indications, rendering it sufficiently concrete to warrant interference with the teacher's art. 5 and 8 rights, but still not entirely devoid of speculation. *Osman* thus demonstrates that a case *can* involve conflicting Convention rights, despite the fact that it is not entirely devoid of speculation as to the risk posed to the Convention rights of some of the persons involved. The element of speculation thus also requires further attention, which it will receive in the section that deals with the categories of identified and undetermined individual right holders.

[394] *Osman*, *supra* note 44 at para. 116.
[395] Ibid. at para. 121.

Section III – The Search for Genuine Conflicts between Convention Rights

1. The Starting Point: The "Rights of Others"

In what precedes, I have argued why cases involving opposition between a Convention right and a public interest should not be recognised as cases involving *genuine* conflicts between Convention rights.[396] The obvious next step is to focus our attention on "the rights of others". The Convention explicitly lists "protection of the ... rights of others" among the legitimate aims that may justify restriction of certain Convention rights.[397] Cases in which these "rights of others" feature can thus be expected to point us in the direction of the category I intend to define more concretely: genuinely conflicting Convention rights.

However, four precautionary remarks lead to the conclusion that screening cases for the presence of the "rights of others" can only offer an *indication* as to which types of cases *may* involve genuinely conflicting Convention rights. Indeed, the latter category is both narrower and broader than the category of cases in which the "rights of others" feature.

It is in some respects broader, for the simple reason that the "rights of others" are only explicitly named as a legitimate ground for restriction of a limited number of relative Convention rights. Other Convention rights may, however, also be at the heart of a conflict.[398] We should therefore broaden our search for conflicting Convention rights and also look beyond those cases that cite the "rights of others". Moreover, we will also need to investigate the possibility of a person's Convention rights conflicting, not with the "rights of others", but with her own rights (so-called 'intrapersonal' conflicts).[399]

The category of cases involving genuinely conflicting Convention rights is in other respects necessarily narrower than the category of cases featuring the "rights of others", for three reasons. Firstly because the "rights of others" are not limited to Convention rights, but also include non-Convention rights, namely other international human rights, constitutional rights, national legal rights and even (individual) interests that are not protected by a right at all. Secondly because, as explained above, the "protection of the ... rights of others" is often used extensively and flexibly by the Court, as a sort of 'leftover' category. In application of those Convention articles that contain an exhaustive list of legitimate aims, the Court tends to refer to the "rights of others" whenever the facts of the case and the argument of the government cannot properly be subsumed under one of the other, public interest oriented, legitimate aims.[400] Closer examination of those cases often reveals that the category is being used to

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[396] Even if an opening was left for abortion cases.

[397] See, most notably, art. 8 (2) ECHR, art. 9 (2) ECHR, art. 10 (2) ECHR and art. 11 (2) ECHR.

[398] Conflicts may, as illustrated throughout this dissertation, indeed involve art. 2 ECHR, art. 3 ECHR, art. 5 ECHR, art. 6 ECHR, art. 1 Prot. 1 ECHR, art. 2 Prot. 1 ECHR, etc.; none of these articles explicitly cater for the "rights of others" as a legitimate ground for the restriction of the Convention rights protected therein.

[399] See *infra* '7. Particular Categories of Conflicts between Convention Rights' - '*iii. Intrapersonal Conflicts?*'.

[400] See *supra* footnote 367 and accompanying text. For purposes of comparison, it is interesting to look at the wide array of legitimate aims that the Court has incorporated under art. 1 Prot. 1, which does not feature a limited list of legitimate aims. The Court has for instance recognised the following legitimate aims for purposes of application of art. 1 Prot. 1: "to reintroduce local self-government, to restructure the agricultural system and to generate financial means for the modernisation of military institutions" (ECtHR, *Broniowski v. Poland*, app. no.

accommodate a general interest that would otherwise not fit the structure of the Convention right in question.[401] And thirdly because the Court all too readily accepts the legitimate aims invoked by the government. The Court's extremely deferential approach to the question of whether a restriction pursued a legitimate aim has led it to generally accept the government's claim that the restriction protected "the rights of others",[402] often without explaining which "rights" of which "others" were at stake, nor how they were relevant to the case at hand.[403]

While I have already dealt with the issues raised by the other precautionary remarks, I have not yet had the opportunity to deal with the questions raised by the first finding: are conflicts between a Convention right and a non-Convention right problematic? And how may the Court deal with such cases? The Court has offered a possible solution to those questions in *Chassagnou v. France*, the first case in which it made an attempt at theorising conflicts between human rights. In *Chassagnou*, the Court suggested that a distinction should be made between cases involving conflicting Convention rights and those involving a conflict between a Convention right and a non-Convention right:

> "[i]n the present case the only aim invoked by the Government to justify the interference complained of was "protection of the rights and freedoms of others". Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society". The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect ... It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein.

31443/96, 22 June 2004, para. 158); and the "specific general interest in the extinguishment of title and the attribution of new title at the end of the limitation period" (*J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd*, *supra* note 264 at para. 71).

[401] Ibid.

[402] For an exception, dating back more than two decades, see *F. v. Switzerland*, *supra* note 361).

[403] See for instance ECtHR, *Dadouch v. Malta*, app. no. 38816/07, 20 July 2010, para. 54 (on the refusal to register the applicant's marriage because he could not provide a letter of nationality. The applicant was originally from Syria, but had obtained Maltese nationality following an earlier marriage to a Maltese national, which had subsequently been annulled because it was regarded to be a marriage of convenience; the applicant was allowed to retain Maltese nationality, however. The Court held that "it is difficult to perceive how the refusal to register the applicant's marriage could prevent bigamy or ensure certainty in respect of personal status as submitted by the Government", but nevertheless accepted that the measure pursued the legitimate aims of the prevention of disorder and the protection of the rights of others, without it being clear exactly whose rights and which rights were at stake). See also ECtHR, *Khelili v. Switzerland*, app. no. 16188/07, 18 October 2011, paras. 49, 60 and 68 (in which the applicant's police record continued to refer to her profession as "prostitute", despite the fact that she was never convicted and that her 'classification' as a prostitute was based on highly dubious grounds (the police had once found visiting cards on her person that read "Gentille, jolie femme fin trentaine attend ami pour prendre un verre de temps en temps ou sortir. Tel. (...))."). The Court nevertheless accepted that the restriction of Ms. Khelili's Convention rights pursued several legitimate aims, including the protection of the "rights of others", without explaining whose rights and which rights those were). For criticism of this approach, see Bomhoff, *supra* note 159.

> In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right."[404]

In *Chassagnou*, the Court thus argued that conflicting Convention rights cases should be resolved by balancing the individual interests involved, while resolution of cases involving opposition of a Convention right and a non-Convention right should remain a matter of proportionality, in which Convention rights are granted principled, but inconclusive, priority.

In what follows, I will examine the solution suggested by the Court on its merits by assessing the desirability and feasibility of its application to the different types of conflicts between Convention rights and non-Convention rights, starting with conflicts between a Convention right and other international human rights and moving 'down the hierarchy' to conflicts between a Convention right and an individual interest not protected by a right. Afterwards we will be all set to move on to our target: the categorisation of *genuine* conflicts between Convention rights.

2. Convention Rights *versus* International Human Rights

Given that "[a]ll human rights are universal, indivisible and interdependent and interrelated",[405] the suggestion in *Chassagnou* that a distinction should be made between cases involving conflicting Convention rights and those involving a conflict between a Convention right and a non-Convention right is difficult to maintain when those non-Convention rights are human rights recognised in other international instruments. The indivisibility and interrelatedness of all human rights oppose the idea that restrictions imposed on Convention rights for the protection of international human rights not recognised therein can only be justified by "indisputable imperatives". Despite the fact that the Court *could* opt to include the protection of other international human rights in the proportionality analysis under a § 2 type of reasoning, thereby extending the principle that Convention rights enjoy presumptive priority over other considerations to also cover international human rights,[406] it should not do so.[407] Instead, a harmonious interpretation of Convention rights and other international human rights, *i.e.* the approach the Court appears to have taken in its case law, is

[404] *Chassagnou*, *supra* note 35 at para. 113.
[405] Article 5 of the Vienna Declaration and Programme of Action, 25 June 1993, GA A/CONF.157/23.
[406] Ducoulombier, *supra* note 26 at 236 (arguing that the Court has applied the *Chassgnou* principle to these types of cases, which "implies a hierarchical conception" under which "Convention rights are superior, in theory, to human rights set forth in other texts").
[407] See *contra* Greer, *supra* note 219 at 266 (holding that "[t]he only rights which can legitimately limit express or implicit Convention rights are other express or implicit Convention rights. If it were otherwise, the privileged position of Convention rights would be undermined by rights which those who drafted the Convention chose not to include."). See also L. Wildhaber, 'The European Convention on Human Rights and International Law', 56 *International and Comparative Law Quarterly* (2007) at 223 (arguing that the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective could be interpreted as allowing deviations from general international law). However, Wildhaber proceeds to examine the case law of the Court on the extra-territorial application of the Convention and other issues related to general international law, but not the relationship between the Convention and other international human rights treaties. It is thus unclear whether or not he intended his argument to extend to that relationship.

more desirable.[408] In that respect, the Court's reminder that "[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part",[409] is to be kept firmly in mind. Yet, such harmonious reading may not always be possible. Whenever it is not, the indivisibility and interrelatedness of all human rights demand that cases in which Convention rights conflict with other international human rights should be resolved through application of the framework developed in Part II, which treats both human rights with equal respect, not through application of the proportionality test with its priority-to(-Convention)-rights principle.[410]

However, because the ECHR and the major international human rights instruments share a common origin in the Universal Declaration of Human Rights, their content largely overlaps. The instances in which a Convention right conflicts with another international human right will thus be rare, at least insofar as civil and political rights are concerned. Indeed, the case law of the ECtHR reveals only a few cases in which the Court explicitly recognised that it was confronted with a conflict between a Convention right and another international civil or political right. In the defamation case *Bladet Tromsø and Stensaas v. Norway*, the Court for instance pointed out that the "the right to protection of ... honour and reputation [of the subjects of the publication] is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights."[411] Yet, the Court did not clarify how this finding impacted on its reasoning.[412] The issue has since become moot, given that the Court has later recognised that the right to protection of reputation is protected by art. 8 ECHR.[413] Defamation cases therefore now involve a conflict between Convention rights.

International human rights also featured in the case of *Jersild v. Denmark*, involving alleged racist speech. In that case the Court accepted that "Article 10 (art. 10) should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention [on the Elimination of Racial Discrimination; CERD]."[414] In *Jersild*, the Court did clarify that the prohibition of racial discrimination under CERD had an impact on its reasoning, albeit in the context of the application of the proportionality test: "the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction was "necessary" within the meaning of Article 10 (2)."[415] The Court then opted for a harmonious reading of art. 10 and art. 4 CERD, which imposes an obligation on the States Parties to the Convention to, *inter alia*,

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[408] See the examples below. See also I. Ziemele, 'Case-Law of the European Court of Human Rights and Integrity of International Law', in R. Huesa Vinaixa and K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (Brussels: Bruylant, 2006) at 205.
[409] ECtHR, *Al-Adsani v. the United Kingdom*, app. no. 35763/97, 21 November 2001, para. 55.
[410] Analysis of the case law has, however, not revealed any case in which the conflict between a Convention right and another international human right could not be resolved through harmonisation. However, that conclusion is limited to civil and political rights. It does not extend to economic, social and cultural rights. On the latter, see *infra*, footnotes 417-420 and accompanying text.
[411] *Bladet Tromsø and Stensaas*, *supra* note 276 at para. 65.
[412] See *contra* De Schutter and Tulkens, *supra* note 200 at 175 (arguing that the Court "seeks to avoid [questions of conflicting international obligations] by defining such international obligations as an interest of the state which it may seek to pursue", offering *Bladet Tromsø and Stensaas*, *supra* note 276, as an example).
[413] *Pfeifer*, *supra* note 39 at para. 35; *Axel Springer*, *supra* note 6 at para. 83.
[414] ECtHR, *Jersild v. Denmark*, app. no. 15890/89, 23 September 1994, para. 27.
[415] Ibid. at para. 30.

declare racist speech a punishable offence under national law. In *Jersild*, the Court specifically held that "its interpretation of Article 10 (art. 10) of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention."[416] Part of the reason why the involvement of Denmark's international obligations under CERD did not lead to insurmountable problems for the Court in *Jersild* arguably lay in the fact that the Convention itself also contains a prohibition of racial discrimination, in art. 14. The Court thus had an 'in-house' provision to draw on in order to argue that its interpretation of art. 10 was in line with Denmark's duty under CERD to combat racial discrimination.

The indivisibility and interrelatedness of all human rights also extends – obviously – to economic, social and cultural rights (ESC rights). Because the ECHR – the prototype of a civil and political rights instrument – contains not more than a few ESC rights,[417] ample room exists for the possibility of Convention rights to come into conflict with ESC rights not recognised in the Convention, for instance in housing cases,[418] and health related cases.[419] Given the relatively large room for conflict, it is remarkable that the Court has thus far refrained from addressing the relationship between the ECHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in, for instance, housing cases and health related cases. These cases nevertheless raise interesting questions as to the relationship between the civil and political rights of the ECHR on the one hand and the economic, social and cultural rights of the ICESCR on the other, which definitely merit concerted scholarly research. However, because the issues that underlie them are too complex to be dealt with briefly and since the current research concentrates on conflicts between Convention rights, the relationship between the human rights guaranteed in the ICESCR and those contained in the

[416] Ibid.

[417] Most notably the right to education in art. 2 Prot. 1 and the right to property in art. 1 Prot. 1. Note, however, that the Convention has witnessed (limited) expandsions into the field of economic and social rights through the case law of its Court. See, for instance, ECtHR, *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 21 January 2011 (on economic and social rights of asylum seekers); ECtHR, *D. v. the United Kingdom*, app. no. 26565/05, 27 May 2008, para. 52 (ruling that deportation of an individual suffering from AIDS would amount to a violation of art. 3 given that "[a]ny medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts" and because he did not have any family members there who could or would support him); *Stec*, *supra* note 36 (bringing pension benefits within the ambit of art. 1 Prot. 1 for purposes of application of art. 14); and ECtHR, *Di Sarno and Others v. Italy*, app. no. 30765/08, 10 January 2012 (on the government's failure to collect garbage and the impact on the right to respect for the home and private life of the applicant).

[418] See, for instance, cases involving a conflict between the right to property of an owner and the housing rights of a tenant: ECtHR, *Hutten-Czapska v. Poland*, app. no. 35014/97, 19 June 2006; ECtHR, *James and Others v. the United Kingdom*, app. no. 8793/79, 21 February 1986; ECtHR, *Radovici and Stănescu v. Romania*, app. nos. 68479/01, 71351/01 and 71352/01, 2 November 2006. For an analysis of the approach of the ECtHR to housing cases, see W. Vandenhole, 'Conflicting Economic and Social Rights: The Proportionality Plus Test', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008) at 573-574 (arguing that the ECtHR does not treat these cases as involving conflicts of rights, but as involving a tension between the right to property and considerations of social housing policy). For an analysis of the approach of the South African courts to conflicts between the right to property and the right to housing, see A. J. Van der Walt, 'The State's Duty to Protect Property Owners v The State's Duty to Provide Housing: Thoughts on the *Modderklip* Case', 21 *South African Journal on Human Rights* (2005), 144-161 (explaining how the Supreme Court of Appeal, in particular, focused on the State's duty to protect rights in order to defuse the conflict as fake; on the notion of 'fake conflicts' see *infra* '8. Fake Conflicts' and Part II, Chapter III, Section II – 'Defusing Conflicts as Fake').

[419] For instance in the cases that have been set apart above, because the Convention does not contain a right to health. See *supra* footnotes 327-329 and accompanying text.

ECHR will not be addressed in detail. Instead, I tentatively suggest that the indivisibility of human rights demands that the Court treat Convention rights and other international human rights on an equal footing in its case law, since – from the perspective of the relevant right holders – it should not matter in which international document their human rights are recognised.[420] The Court should thus not apply the *Chassagnou* principle to cases involving a conflict between a Convention right and another international human right. Instead, those cases should be resolved by use of the same framework that, as argued in this dissertation, should be applied to conflicts between Convention rights.

3. Convention Rights *versus* Constitutional Rights

Given that most of the 47 Member States of the Council of Europe have enacted Constitutions (or another type of 'Bill of Rights')[421] that grant citizens and/or residents a wide variety of fundamental rights, one might expect there to be ample room for conflicts between Convention rights and constitutional rights not guaranteed in the Convention. Yet, the Court has only been confronted with such conflicts on the rarest of occasions.[422] A number of straightforward reasons explain the lack of such conflicts in the Court's case law. A first explanation lies in the fact that there is a large overlap between the human rights protected under the Convention and the constitutional rights guaranteed in the Constitutions of its Contracting States.[423] This is particularly, but certainly not only,[424] the case for those Constitutions that have been enacted after 1948 and 1950, the years that marked the birth of the UDHR and the ECHR respectively. A large number of States, for instance Romania[425], Cyprus,[426] Spain[427], Portugal[428], Bosnia and Herzegovina,[429] Malta[430] and Armenia,[431] have clearly sought inspiration in the UDHR and/or ECHR when enacting their Constitutions.[432] The fundamental rights guaranteed therein are, as a result, largely similar to those protected under the ECHR.[433] A second explanation for the lack of conflicts between Convention rights and constitutional rights in the case law of the Court is arguably tied to the role of the Court as

[420] See *contra* F. Sudre, 'Droits Intangibles et/ou Droits Fondamentaux: Y a-t-il des Droits Prééminents dans la Convention Européenne des Droits de l'Homme', in G. Cohen-Jonathan (ed.), *Liber Amicorum Marc-André Eissen* (Brussels: Bruylant, 1995) at 381-382 (arguing that it is possible to accept the philosophical proposition that all human rights are indivisible and interrelated, while noting that – legally speaking – not all human rights receive the same level of protection).
[421] For instance the Human Rights Act (1998) in the United Kingdom.
[422] See *infra* notes 435-439 and accompanying text.
[423] See A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', 1 *Global Constitutionalism* (2012) at 67-68.
[424] There is also a large overlap between the ECHR and the fundamental rights guaranteed in, for instance, the Constitutions of Belgium (1832), Italy (1947) and Ireland (1937).
[425] Constitution of Romania (1991), particularly art. 20 (1).
[426] Constitution of Cyprus (1960).
[427] See Constitution of Spain (1978).
[428] Constitution of Portugal (1976), particularly art. 16 (2).
[429] Constitution of Bosnia and Herzegovina (1995), particularly in the Preamble.
[430] Constitution of Malta (1964).
[431] Constitution of Armenia (1995).
[432] See also the Human Rights Act (1998) in the United Kingdom.
[433] It should be noted, however, that many of those Constitutions have incorporated more economic, social and cultural rights than the limited number of such rights that feature in the ECHR.

the ultimate interpreter of the Convention and in the binding nature of its judgments. Combined with the principle of subsidiarity, which lies at the heart of the Convention system, these two factors require national authorities to respect and protect the Convention rights, as interpreted by the Court. They therefore tend to interpret and apply their own constitutional system for the protection of rights in line with the requirements of the ECHR system, thereby avoiding antagonism between both.[434]

The Court has nevertheless been confronted with a small number of cases in which the government relied on a constitutional right to justify restriction of the applicant's Convention rights.[435] [436] Perhaps the most well known examples are the Irish abortion cases, already mentioned above, which involve a conflict between Convention rights (the right to life and the right to respect for private life of the pregnant women) and a Constitutional right (the right to life of the unborn as protected by the Irish Constitution),[437] although they have been characterised by the Court as cases revolving around the protection of morals.[438]

Another example can be found in the case of *Wasmüth v. Germany*.[439] The case concerned the obligation for employees to indicate to which religious denomination the Church tax, to be levied on their salary, should go. This indication was to be made by the employees on a document related to taxes imposed on their salary, which was then transmitted to their employer, who was responsible for withholding the taxes from her employees' wages. For the applicant in *Wasmüth*, this system meant that his employer would learn about his lack of religious affiliation, given that he had chosen to leave the relevant box on the form open. Having accepted that the applicant had suffered an interference in his freedom of religion, since he had been obliged to reveal his lack of religious affiliation,[440] the Court held that:

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[434] Stone Sweet, *supra* note 423 at 67-68. This is for instance the approach of the Belgian Constitutional Court, which relies heavily on the case law of the ECtHR in its own adjudication on fundamental rights. See L. Lavrysen and J. Theunis, 'The Belgian Constitutional Court: A Satellite of the ECtHR?', paper presented at Conference *Shaping Rights: the Role of the European Court of Human Rights in Determining the Scope of Human Rights*, 12-13 March 2012, Ghent, Belgium. See also Constitutional Court of Germany, BvR 1481/04, 14 October 2004 (*Görgülü*), para. 67. That national courts tend to apply the principles established in the case law of the ECtHR can also be deduced from those cases in which the ECtHR has confirmed that the national courts adjudicated the case in line with those principles. See, for instance, ECtHR, *Pedersen and Baadsgaard*, app. no. 49017/99, 17 December 2004, paras. 91-92; ECtHR, *Jasper v. the United Kingdom*, app. no. 27052/95, 16 February 2000, para. 56; ECtHR, *Aleksey Petrov v. Bulgaria* (adm.), app. no. 27103/04, 2 November 2010.

[435] See, apart from the examples given in the text, also - for instance - ECtHR, *PETA Deutschland v. Germany*, app. no. 43481/09, 8 November 2012 (involving a conflict between the applicant association's freedom of expression and the human dignity and personality rights of Holocaust survivors and relatives of the victims of the Holocaust).

[436] Given that several Member States have awarded constitutional protection to the right to health, the right to strike and the right to environment, the scope for conflict is nevertheless much larger than what the case law of the Court indicates. See for instance the art. 23 (3) 4° of the Constitution of Belgium (right to protection of a healthy environment); arts. 28 and 38 of the Constitution of Spain (right to strike and freedom of enterprise, respectively); art. 66 of the Constitution of Portugal (right to environment and quality of life); art. 68 of the Constitution of Poland (right to health); and art. 34 of the Constitution of Romania (right to health, specifying that "[t]he State shall be bound to take measures to ensure public hygiene and health.").

[437] Art. 40 (3) (3) of the Constitution of Ireland.

[438] See *supra* footnotes 389-392 and accompanying text.

[439] ECtHR, *Wasmüth v. Germany*, app. no. 12884/03, 17 February 2011.

[440] Ibid. at para. 51.

> "l'ingérence sert un but légitime, au sens de l'article 9 § 2 de la Convention, c'est-à-dire garantir les droits des Eglises et sociétés religieuses détentrices du droit de lever l'impôt cultuel consacré par le droit constitutionnel. La Cour doit dès lors se pencher sur la question de savoir si l'ingérence litigieuse est proportionnée au but légitime poursuivi."[441]

The Court thus insisted that the case involved a Convention right opposed by a constitutional right not guaranteed in the Convention,[442] but immediately indicated that the case was to be resolved through application of the proportionality test. The Court hence sidestepped the question of conflict, instead opting to mould the case into a 'traditional' case of negative interference with a Convention right. Olivier De Schutter and Françoise Tulkens have in that respect argued that it does not matter, in principle, to the Court

> "[w]hether the interest [invoked to justify restriction of a Convention right] in question is considered to constitute a 'fundamental right' in the domestic legal order ... the situation will be treated as one in which a state interest is put forward as a means of justifying the restriction to a Convention right, rather than as one in which two fundamental rights clearly are in conflict with another."[443]

Wasmüth demonstrates that cases involving conflicts between Convention rights and constitutional rights *can* thus be dealt with on the basis of the principles of the *Chassagnou* judgment, which insists that a distinction should be made between cases involving conflicting Convention rights and those involving a conflict between a Convention right and a non-Convention right. Indeed, the Court in *Wasmüth* followed the suggestion in *Chassagnou* that the latter cases, whenever they concern negative interferences, should be resolved through application of the 'traditional' proportionality test, in which the Convention right is awarded principled, but inconclusive, priority. The Court could arguably justify that approach by insisting that – as has been claimed by some – the European Convention aims at establishing a common European public order, which holds priority over the particular legal orders of the Contracting States.[444]

However, *Wasmüth* also points out how such an approach may be difficult to maintain, given that the case involved conflicting fundamental rights for all actors in the domestic legal order. Indeed, the Court accepted that, at the national level, the German courts had been called upon to balance the applicant's freedom of religion and the – constitutionally guaranteed – right of

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[441] Ibid. at para. 55.

[442] Article 140 of the German Basic Law *juncto* art. 137 (6) of the 1919 Weimar Constitution (art. 140 of the Basic Law states that the so-called 'Church provisions' (*Kirchenartikel*) of the Weimar Constitution constitute an integral part of the Basic Law).

[443] De Schutter and Tulkens, *supra* note 200 at 177.

[444] Wildhaber, *supra* note 407 at 229. See also Ducoulombier, *supra* note 4 at 268 (arguing that the Court can legitimately award rights that are not recognised in the Convention a different status to those which it considers the most fundamental (*i.e.* Convention rights)). See further ECtHR, *United Communist Party of Turkey and Others v. Turkey*, app. no. 19392/92, 30 January 1998, para. 30: "[t]he political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional … or merely legislative … From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention."

religious communities to raise taxes.[445] In that respect, the indivisibility of all human rights opposes (even indirect) imposition by the Court of any type of hierarchical relationship between Convention rights and constitutional rights not protected under the Convention, since – from the perspective of the relevant right holders – it should not matter whether their human or fundamental rights have been recognised in the ECHR or in their national constitution. Moreover, because national authorities are (at least *de facto*) obliged to apply the Court's case law in the domestic legal orders, awarding Convention rights presumptive priority over constitutional rights may involve forcing national authorities to recognise an implicit hierarchy within their Constitutions between constitutional rights that correspond to Convention rights and those that do not.[446] This suggestion is not only problematic from the viewpoint of the indivisibility and interrelatedness of all human rights, it also sits ill at ease with the fact that different constitutional orders have chosen to define the relationship between their country's Constitution and the ECHR differently.[447]

For all the above reasons, the principled conclusion drawn in the context of conflicts between Convention rights and international human rights should also apply here: Convention rights and constitutional rights should *a priori* be treated on an equal footing. Conflicts between both should consequently be resolved by use of the same framework that, as argued in this dissertation, should be applied to conflicts between Convention rights.

4. Convention Rights *versus* National Legal Rights

Cases involving conflicts between Convention rights and national legal rights (*i.e.* rights that do not have the status of a constitutional or fundamental right) are the types of cases for which the *Chassagnou* principles were designed. Indeed, the case of *Chassagnou* itself concerned restriction of a Convention right to protect a legal right, recognised under French law.[448]

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[445] *Wasmüth*, *supra* note 439 at para. 58. See also Hottelier, *supra* note 289 at 123-124 (arguing that the characterisation of a case involving a conflict between a Convention right and a constitutional right not guaranteed in the Convention will depend on the legal order (the national constitutional order or the supranational ECtHR) that deals with the case).

[446] See, in that context, also the criticism of the German Constitutional Court in *Görgülü*, *supra* note 434 at para. 62 ("[a]s long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR … clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. "Take into account" means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.").

[447] See Stone Sweet, *supra* note 423 at 11-12; Wildhaber, *supra* note 407 at 218-219; J. L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 55 *Stanford Law Review* (2003) at 1890-1895. These authors all give different accounts of which view is predominant among the CoE Member States. However, they all explain how relationships range from awarding the Convention supra-constitutional rank, over equal rank to that of the constitution, to inferior rank to the Constitution. In Germany, for instance, the Convention ranks below the Basic Law in the hierarchy of norms. See J. Fedtke, 'Chapter 4: Germany – *Drittwurking* in Germany', in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (London – New York: Routledge-Cavendish, 2007) at137.

[448] For other examples of cases involving a conflict between a Convention right and a national legal right, see ECtHR, *Luordo v. Italy*, app. no. 32190/96, 17 July 2003; ECtHR, *Société Cofinfo v. France* (adm), app. no. 23516/08, 12 October 2010; *Radovici and Stănescu*, *supra* note 418 (although the last case could also be

French legislation had set up a system of approved municipal hunters' associations to guarantee the "right to hunt", while ensuring the proper management of game stocks. Under the applicable legislation, certain types of landowners were obliged to join such a municipal hunters' association and transfer the hunting rights over their land to that association. The applicants in *Chassagnou* were among those forced to join a hunters' association, despite their refusal for moral reasons (they were morally opposed to hunting for sport). The government argued that the interference with the applicants' negative freedom of association pursued the legitimate aim of the protection of the rights of others (*i.e.* the right to hunt), which was accepted by the Court. It is in this context that the Court held, however, that a distinction was in order between conflicts between Convention rights and conflicts between a Convention right and a non-Convention right, insisting that:

> "where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right."[449]

The Court went on to note that, "[e]ven supposing that French law enshrines a "right" or "freedom" to hunt ... such a right or freedom is not one of those set forth in the Convention, which does, however, expressly guarantee the freedom of association."[450] The Court subsequently applied its newly designed principle to the effect that conflicts between Convention rights and non-Convention rights should be resolved by application of the 'traditional' proportionality test with its priority-to-rights principle. It particularly held that "the arguments put forward by the Government are not *sufficient* to establish that it was *necessary* to compel the applicants to become members of the ACCAs in their municipalities despite their personal convictions" (emphasis added) and ruled that "an obligation to join an ACCA which is imposed on landowners in only one municipality in four in France cannot be regarded as *proportionate* to the legitimate aim pursued" (emphasis added).[451]

There is nothing objectionable to be found in the Court's approach in the *Chassagnou* case. On the contrary. Given the supremacy of the European Convention over national legislation, Convention rights *should* be awarded presumptive priority over national legal rights. There is thus no need to insist that both be treated equally in a balancing exercise when they conflict. Instead, cases involving a negative interference with a Convention right for the protection of a national legal right fall to be dealt with by the 'traditional' proportionality test of the Court, in which the Convention right at stake is granted principled, but inconclusive, priority over the national legal right. Positive obligations cases that revolve around a conflict between a Convention right and a national legal right are similarly to be resolved through a balancing test in which the Convention right is to be granted presumptive priority. To treat either of both types of cases (negative interferences and positive obligations) otherwise would amount to

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interpreted as involving opposition of a Convention right and a general interest, as indicated by the Court (paras. 75 and 88); *compare Hutten-Czapska*, *supra* note 418; *James*, *supra* note 418).

[449] *Chassagnou*, *supra* note 35 at para. 113.

[450] Ibid.

[451] Ibid. at para. 117.

robbing Convention rights of their "peremptory normative force": their principled status as being more fundamental than considerations that do not reach the status of human rights.[452]

5. Convention Rights *versus* Interests Not Protected by Rights

The Court has dealt with a number of cases involving (in whole or in part) a conflict between a Convention right and a private or economic interest not protected by rights. Examples of such cases are those involving noise disturbance caused by road users,[453] secret surveillance by an insurance company that doubted the extent of a client's injuries,[454] sleep deprivation caused by night flights,[455] and a ban on religious symbols imposed by a private company in order to project a certain corporate image.[456] The conclusion reached immediately above regarding national legal rights applies *a fortiori* to these cases: Convention rights are to be granted principled, even if inconclusive, priority over private and commercial interests not protected by rights in the application of the 'traditional' proportionality test (in the case of negative interferences) or a balancing test (in the case of positive obligations).[457]

6. Genuine Conflicts between Convention Rights

i. Provisional Definition and Tests

In what preceded, I have argued why certain types of cases do *not* entail genuine conflicts between Convention rights. One conclusion that has revealed itself along the way is that the category of genuinely conflicting Convention rights includes, at the very least, those cases in which *individualised* Convention rights are in *direct* competition with each other (*i.e.* without there being any question of speculation as to whether the rights were at stake). Such cases entail conflicting Convention rights, because they involve incompatible duties on the part of the State, *i.e.* duties that cannot be simultaneously fulfilled: the State is, at the same time,

[452] The term "peremptory force" is borrowed from Joseph Raz. See Raz, *supra* note 136 at 192.
[453] ECtHR, *Dees v. Hungary*, app. no. 2345/06, 9 November 2010, para. 23.
[454] ECtHR, *Verliere v. Switzerland* (adm.), app. no. 41953/98, 28 June 2001.
[455] *Hatton*, *supra* note 262 at paras. 121 and 129 (the Court accepted that the case partly concerned the economic interests of the operators of airlines and other enterprises as well as their clients. However, the primary legitimate aim for the Court appears to have been the general economic interest of the country. In large parts of its reasoning, the Court only paid attention to the economic interest of the country as a whole and did not deal with the economic interests of the aforementioned entities and persons (see, for instance, para. 126)).
[456] *Eweida*, *supra* note 328 at para. 94. The Court specifically held that "while this aim [of projecting a certain corporate image] was undoubtedly legitimate, the domestic courts accorded it too much weight" (para. 94) and noted that the ban on the wearing of a necklace with a cross imposed on one of the other applicants pursued a legitimate aim, namely the protection of health and safety on a hospital ward, that "was inherently of a greater magnitude" (para. 99).
[457] See also the discussion on the "argument from principle", *supra* Chapter III, Section II – 'The 'Argument from Principle': Misconceiving the Function of Human Rights'. See further, A. Gervais, 'Quelques réflexions à propos de la distinction des "droits" et des "intérêts"', in X. (ed.), *Mélanges en l'honneur de Paul Roubier – Tome I – Théorie générale du droit et droit transitoire* (Paris: Dalloz & Sirey, 1961) at 248-250; F. Ost, 'Entre droit et non-droit : l'intérêt', in P. Gérard et. al. (eds.), *Droit et intérêt* (Brussels: Facultés universitaires Saint-Louis, 1990) at 186.

under an obligation to respect or protect the Convention rights of individual A *and* to respect or protect the Convention rights of individual, but it is not able to comply with both obligations at the same time.[458]

The abstract description can be illustrated by way of a concrete example, taken from the Court's case law.[459] In *Evans v. the United Kingdom*, the Court was called upon to rule on a case involving the right to respect for private life of two different individuals. Ms. Evans, the applicant, had at a given moment in time, while she was still in a relationship with her partner J., been diagnosed with serious pre-cancerous tumours in both ovaries. To combat the disease, her ovaries had to be removed. However, because the tumours were growing slowly there was still time to extract some eggs for *in vitro* fertilisation (IVF). Ms. Evans and J. decided to undergo treatment to ensure that they would still be able to have biological children in the future, even after the removal of Ms. Evans' ovaries. A number of Ms. Evans' eggs were extracted, six of which were successfully fertilized with J.'s sperm, and frozen. Both Ms. Evans and J. had to sign a consent form and were informed that either party could withdraw her consent at any given time, as long as the embryos were not implanted into Ms. Evans' uterus. Several months later, Ms. Evans and J. ended their relationship. J. then wrote to the clinic to notify it of the separation and to state that the embryos should be destroyed. Ms. Evans was informed by the clinic of J.'s lack of consent to further use of the embryos and its consequent legal obligation to destroy them. She instituted legal proceedings, seeking an injunction order requiring J. to restore his consent to the use and storage of the embryos. The domestic courts held against Ms. Evans and her case eventually reached Strasbourg. The Court accepted that the right to respect for private life "incorporates the right to respect for both the decisions to become and not to become a parent."[460] and that "the applicant's right to respect for the decision to become a parent in the genetic sense ... also falls within the scope of Article 8."[461]

The reason why *Evans* entailed a conflict between Convention rights is that the United Kingdom was *at the same time* under the obligation to respect J.'s decision not to become a parent, expressed through the withdrawal of his consent for the further storage and use of the embryos, *and* under the obligation to respect or protect Ms. Evans' right to respect for the decision to become a parent in the genetic sense.[462] Identifying the conflicting duties of the

[458] See also Waldron, *supra* note 32 at 506 ("[w]hen we say rights conflict, what we really mean is that the duties they imply are not compossible.").

[459] Other examples are, for instance, defamation cases (in which the State is simultaneously under a duty to respect one person's freedom of expression and to protect another person's right to reputation, but is usually unable to comply with both duties) and cases involving the publication of photographs of a celebrity in the tabloid press (in which the State is simultaneously under a duty to respect the celebrity's right to private life and the tabloid's freedom of expression, but is usually unable to comply with both duties). Further examples include paternity cases involving a request for a DNA sample, child custody cases and cases involving the dismissal of employees by a religious organisation for reasons to do with actions taken in their private lives. See, among many other examples, *Axel Springer*, *supra* note 6; *MGN Limited*, *supra* note 3; ECtHR, *Mikulić v. Croatia*, app. no. 53176/99, 7 February 2002; ECtHR, *Hokkanen v. Finland*, app. no. 19823/92, 23 September 1994; *Obst*, *supra* note 291.

[460] *Evans*, *supra* note 44 at para. 71.

[461] Ibid. at para. 72.

[462] The text mentions "the obligation to respect or protect Ms. Evans' right", because the State was under one of those duties (to respect *or* to protect) her rights, depending on the characterisation of the case. The domestic

State thus indicates that *Evans* entailed a conflict between Convention rights. I will label the test used to this effect the 'conflicting duties' test.

That *Evans* involved a conflict between Convention rights can be further demonstrated by imagining the converse situation from the one that reached the Court. Indeed, if we were to imagine a hypothetical situation in which Ms. Evans had been successful during the domestic proceedings, J. would have had a case in Strasbourg. Having lost the domestic proceedings, he could have argued that the obligation imposed on him to restore his consent violated *his* right to respect for private life. This converse situation would undoubtedly have been accepted as entailing an interference with J.'s art. 8 rights by the Court, just as the Court had established that there had been an interference in Ms. Evans' case. Therefore, no matter the outcome of the domestic proceedings, one of the parties to the *Evans* case would have been able to claim a violation of her art. 8 rights in front of the ECtHR *and* both their cases would have made it past the interference stage. This finding not only further demonstrates that the parties' art. 8 rights were indisputably in conflict with each other. It also serves as a useful basis for the development of an abstract test to identify genuine conflicts between Convention rights, *in addition to* the 'conflicting duties test'. I will label that second test the 'converse situation' test.

Application of the 'converse situation' test entails imagining the converse situation from the one that presents itself to the Court: if this converse situation would also make it past the interference stage, then the Court is confronted with a genuine conflict between Convention rights.

A concrete example from the Court's case law may serve to further illustrate how the 'converse situation' test contributes to the correct identification of conflicts between Convention rights. The example consists of an analysis – through the lens of the 'converse situation' test – of the Court's judgment in *MGN Limited v. the United Kingdom*.[463] The case revolved around the publication of a series of articles on Naomi Campbell's attendance of Narcotics Anonymous (NA) meetings in the newspaper *Mirror* (now *The Daily Mirror*). The articles contained details of Ms. Campbell's treatment and featured a number of photographs, including one in which she could be seen outside the building in which the NA meetings took place. Following the articles' publication, Ms. Campbell initiated proceedings against the newspaper, claiming damages for breach of confidence. Her case eventually reached the House of Lords, which ruled that there was a genuine public interest in informing the public about Ms. Campbell's attendance of NA meetings. The core facts of Ms. Campbell's drug addiction and the fact that she was in treatment were therefore capable of being published, particularly since she had publicly denied previous allegations of drug abuse. The articles thus revealed that she had been lying. However, the House of Lords also ruled that the publication of the additional information – *i.e.* the details of Ms. Campbell's treatment and some of the photographs, including one which Ms. Campbell could be seen outside the building in which the NA meetings took place – constituted an unjustified breach of her right to privacy.

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courts treated the case as involving a negative interference in Ms. Evans' rights, but the Court ruled that "it is more appropriate to analyse the case as one concerning positive obligations". See ibid. at para. 76.

[463] *MGN Limited*, *supra* note 3.

Importantly, Ms. Campbell's solicitors and counsel had acted under an ordinary retainer during the proceedings at the High Court and the Court of Appeal. However, the appeal to the House of Lords was conducted pursuant to a Conditional Fee Agreement (CFA), which provided that, if the appeal succeeded, Ms. Campbell's solicitors and counsel would be entitled to base costs as well as success fees amounting to 95% and 100% of their base costs. Pursuant to their partial victory at the House of Lords, Ms. Campbell's solicitors consequently billed the newspaper with success fees of GBP 279,981.35 in respect of the proceedings at the House of Lords. The newspaper subsequently sought a ruling that it should not be liable to pay the success fees. It particularly considered that, under the circumstances, such a liability was so disproportionate as to infringe its right to freedom of expression under art. 10 ECHR. However, the House of Lords disagreed. It ruled that the CFA regime was compatible with the Convention.

The newspaper then brought its case to the ECtHR, claiming a violation of its freedom of expression, both in respect of the breach of confidence ruling and of the recoverable success fees ruling. For our current purposes, it is important to note that the Court characterised the case as entailing a *double* conflict between Convention rights. In relation to the breach of confidence ruling, the Court considered the case to entail a conflict between the applicant newspaper's freedom of expression and Ms. Campbell's right to private life.[464] In relation to the recoverable success fees ruling, the Court considered the case to also entail a conflict between the applicant newspaper's freedom of expression and Ms. Campbell's right to a fair trial. Indeed, the Court explicitly held that "[t]his complaint also concerns the question of whether the authorities struck a fair balance between two values guaranteed by the Convention which may come into conflict with each other, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, an individual's right of access to court protected by Article 6 of the Convention."[465]

However, application of the 'converse situation' test to the case at hand reveals that the Court's characterisation of *MGN Limited* as entailing a double conflict was incorrect. Instead, the case only entailed a genuine conflict between the applicant newspaper's freedom of expression and Ms. Campbell's right to private life. Indeed, if we imagine the opposite scenario from the one that obtained during the domestic proceedings, *i.e.* if we imagine that Ms. Campbell lost her case entirely at the domestic level, it is clear that she could have claimed a violation of her right to private life at the ECtHR. Moreover, that claim – based on the allegedly unjustified publication of the details concerning her NA meetings and some of the photographs that accompanied the articles – would have certainly made it past the interference stage. Therefore, the 'converse situation' test demonstrates that *MGN Limited* indeed entailed a conflict between the applicant newspaper's art. 10 rights and the art. 8 rights of Ms. Campbell, insofar as the breach of confidence ruling was concerned. However, the same cannot be said of the alleged conflict between the newspaper's art. 10 rights and Ms. Campbell's art. 6 rights in respect of the recoverable success fees ruling. In that respect, it is crucial to note that Ms. Campbell was wealthy. Therefore, the CFA and its recoverable success fees were not

[464] Ibid. at paras. 138 and 142.
[465] Ibid. at para. 199.

necessary to ensure her access to court. Indeed, the Court itself recognised that "the claimant was wealthy and not in the category of persons considered excluded from access to justice for financial reasons".[466] It may be true that, as Lord Hoffman of the House of Lords found, the general policy objectives underlying the CFA scheme meant that it could not be disallowed solely on the ground that liability of an individual applicant would be inconsistent with its rights under art. 10 ECHR.[467] However, it thereby also becomes clear that the applicant's art. 10 rights were in fact opposed by the general interest in the preservation of the CFA system, *not* by the right to a fair trial of Ms. Campbell. Indeed, Ms. Campbell's right to a fair trial was never effectively at risk. This becomes clear when we imagine the converse situation to the one that obtained during the domestic proceedings. If the domestic courts would have ruled differently, *i.e.* if they would have considered the CFA scheme to impose a disproportionate burden on the newspaper's freedom of expression under the concrete circumstances of the case, Ms. Campbell should *not* have been able to claim a violation of her right to access to court under art. 6. Indeed, given her wealthy status, her right to access to court would not have been affected at all. The 'converse situation' test thus demonstrates that the second aspect of the *MGN Limited* case, *i.e.* the one related to the recoverable success fees, falls to be more accurately characterised as entailing an opposition of the applicant newspaper's freedom of expression and the general interest, *not* as a conflict between individual Convention rights.[468]

Immediately above, I have explained how the 'converse situation test' and the 'conflicting duties test' are able to correctly identify the genuine conflicts at stake in *Evans* and *MGN Limited*. Here, I will further demonstrate that both tests are able to identify a wide variety of conflicts between Convention rights. They are for instance able to identify the conflict that lay at the basis of *Odièvre v. France*, between the applicant's right to know her origins under art. 8 and the right to protection of her biological mother's private life, who had anonymously given her daughter up for adoption at birth. In *Odièvre*, the State was under incompatible duties: the duty to respect the biological mother's private life and the duty to protect the applicant's right to know her origins ('conflicting duties test'). Moreover, had the domestic authorities dealt with the case differently, granting - instead of denying - the applicant's request to know her origins, her biological mother could have claimed a violation of her right to respect for private life at the Court ('converse situation test'). Similar considerations apply to other cases in which the State interfered with the applicant's Convention rights to protect the Convention rights of identified others, such as *Axel Springer AG v. Germany*, *Von Hannover v. Germany (No. 2)*, *Aksu v. Turkey*, *Gäfgen v. Germany* and *Larissis and Others v. Greece*. In *Larissis*, for instance, the domestic authorities convicted military officers for having proselytised their subordinates. The State was under conflicting duties to respect the applicants' freedom to manifest their religion and to protect the subordinates' freedom to have a religion (freedom *from* religion). Application of the 'converse situation test' moreover

[466] Ibid. at para. 218.
[467] Ibid. at para. 202.
[468] Note that an alternative conception of the case is possible. One could insist that Ms. Campbell's art. 6 rights *had* been interfered with, but only very marginally so. On this alternative conception of the case, a conflict between individual Convention rights *does* arise. The marginal nature of the interference with Ms. Campbell's art. 6 rights would then sort its effect at the level of the balancing test employed to resolve the conflict. I am grateful to Eva Brems for suggesting this alternative conception of the case without, however, sharing her views.

reveals that, had the domestic authorities not acted to protect the subordinates' freedom from religion, they could have claimed a violation of their art. 9 rights at the Court. In *Von Hannover (Nr. 2*), application of both tests is even more straightforward.[469] The State was at the same time under a duty to protect the applicant's right to respect for her private life and under a duty to respect the freedom of expression of the newspapers. Had the domestic courts decided the case otherwise – in favour of, rather than against Princess Caroline and Prince Ernst August – the newspapers could have claimed a violation of their freedom of expression at the Court. Similar considerations apply to *Aksu*. Had the domestic authorities given preference to their duty to protect Mr. Aksu's art. 8 rights, they would have necessarily failed in their duty to respect the freedom of expression of the professor who wrote the book at issue in the case. He could, in that converse situation, have claimed a violation of his art. 10 rights at the Court.

Successful application of the 'conflicting duties test' and the 'converse situation test' to a range of cases sufficiently demonstrates their principled usefulness as tools to identify conflicting Convention rights cases. However, the *Aksu* case forces us to consider an additional challenge to both tests. A challenge that arises particularly in hate speech cases.[470] When considered in the abstract, hate speech cases appear to be different from the other conflicting Convention rights cases discussed in this section. They appear to be different because they involve opposition between one identified individual and a specific group of persons. Cases in which a person's freedom of expression is restricted because he has engaged in hate speech thus appear to fall foul of the provisional definition given at the outset of this section: they do not, at first sight, involve *individualised* Convention rights that are in *direct* competition with each other. However, more careful scrutiny reveals that they do meet the criteria previously set out to distinguish genuine conflicts between Convention rights from other types of cases. Firstly, given that hate speech targets a specific group of people, the right holders are identifiable. Their Convention right of freedom from discrimination can thus be individualised (even if they are not individualised from the outset). Secondly, and unlike in cases like *Austin*, the threat to their Convention rights is not merely speculative. On the contrary, given that the harm of hate speech is produced as soon as it is uttered, the Convention rights of the targeted persons are immediately and directly at stake from that moment of utterance. Although hate speech cases can thus be accommodated under the provisional definition, the need for elaborate explanation as to how they fit indicates that the definition may need refinement.

ii. Refining the Provisional Definition

The challenge posed by hate speech cases is not the only reason why the provisional definition offered at the outset of the previous section may need refinement. As already indicated above, certain types of cases fall foul of the provisional definition – because they do not fit the description of a case in which *individualised* Convention rights are in *direct* competition with each other – but *may* nevertheless turn out to involve genuinely conflicting

[469] See also, *mutatis mutandis*, *Axel Springer*, *supra* note 6.
[470] See for instance ECtHR, *Vejdeland and Others v. Sweden*, app. no. 1813/07, 9 February 2012.

Convention rights.[471] We thus need to determine whether a case can entail such a genuine conflict, despite the fact that it involves *undetermined* persons and/or a level of *speculation* as to whether other Convention rights were really at stake. Depending on our findings, we may then need to adjust the provisional definition of conflicting Convention rights offered in the previous section.

The already discussed case of *Osman* illustrates that cases that involve a certain extent of speculation *can* nevertheless entail a genuine conflict between Convention rights. This is borne out by the fact that the State was under conflicting duties in *Osman*. It is only because the domestic authorities were wary to not unjustly interfere with the teacher's art. 5 and art. 8 rights that they decided not to take concrete action to protect the lives of Osman and his father. On the balance of reasons, they gave preference to the teacher's rights, because there were insufficient indications that he posed a real and immediate threat to the lives of Osman and his father (*i.e.* there was an element of speculation). Applying the 'converse situation' test leads to the conclusion that the teacher could have claimed arbitrary interference with his Convention rights, if the authorities had put him under secret surveillance, searched his home and/or preventively deprived him of his liberty. Because *Osman* thus meets both proposed tests for the identification of conflicts between Convention rights, it should be included in the category of genuinely conflicting Convention rights.[472] Similar conclusions apply to, for instance, cases involving protective measures to protect a witness during trial, which may entail a restriction on the suspect's right to (through his lawyer) examine the witness directly in court (cross examination being replaced by, *e.g.*, teleconference means, with distortion of the witness' face and voice, or by a separate examination of the reliability of the witness by a magistrate).[473] Also those cases entail a genuine conflict between Convention rights (the art. 2 and/or 8 rights of the witness and the art. 6 rights of the suspect), provided that there are sufficiently concrete indications that the Convention rights of the witness are at stake.[474]

Detailed examination of other cases illustrates, however, that cases involving a speculative threat to the Convention rights of others require close scrutiny on the part of the Court, lest they be incorrectly characterised as involving conflicting Convention rights. The cases of

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[471] See *supra*, Section II, '4. A Provisional Conclusion on Genuine Conflicts between Convention Rights'.

[472] This conclusion would certainly hold true for the modified case in which there were more concrete indications, but still necessarily some extent of speculation as to the existence of a real risk that the teacher was going to (attempt to) murder Mr. Osman and his father.

[473] See for instance ECtHR, *Doorson v. the Netherlands*, app. no. 20524/92, 26 March 1996; ECtHR, *Van Mechelen and Others v. the Netherlands*, app. nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997. See further, generally, *Al-Khawaja and Tahery*, *supra* note 145 at paras. 120-125.

[474] On the level of speculation inherent in such cases, see *Al-Khawaja and Tahery*, *supra* note 145 at paras. 122-124. In *Al-Khawaja and Tahery*, the Court first established the principle that "[a]bsence [of a witness during trial] owing to fear calls for closer examination. A distinction must be drawn between two types of fear: fear which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial." (para. 122). In the first type of cases, the Court accepted that the absence of the witness from the trial would be justified when those threats were real, even if the evidence given by him was the sole or decisive evidence against the defendant (para. 123). In the latter type of cases, however, the Court insisted that not every subjective fear of the witness would suffice. Instead, "[t]he trial court must conduct appropriate enquiries to determine first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence." (para. 124).

Dahlab and *Leyla Şahin v. Turkey* illustrate this point well, particularly when contrasted to the case of *Larissis*.[475]

The applicants in *Larissis* were military officers who adhered to the Pentecostal Church. In the exercise of their freedom to manifest their religion, they had engaged in proselytism towards, *inter alia*, lower ranked military officers. The latter's freedom to have and hold a religion was thereby arguably breached, given that the proselytising applicants had (involuntarily) used their position of power in a way that constrained and pressurised their subordinates, leading to a violation of their autonomy. The Greek State was therefore at the same time under a duty to respect the applicants' freedom to manifest their religion and under a duty to protect the subordinates' freedom *from* religion, which was truly at stake.[476] If the Greek State would have failed to protect the subordinates' freedom *from* religion, they could have claimed a violation of their art. 9 rights in front of the Court. Such a case would certainly have made it past the interference stage in Strasbourg. The part of *Larissis* dealing with proselytism of subordinates thus entailed a genuine conflict between Convention rights.

Let us now contrast *Larissis* to *Dahlab*, in which the Court relied on a similar proselytism argument to suggest that the case involved, in part, a conflict between Ms. Dahlab's freedom to manifest her religion and the freedom *from* religion of the pupils in her class:

> "[t]he Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect..."[477]

Despite the fact that Ms. Dahlab found herself in a position of power towards her pupils, she was, contrary to the applicants in *Larissis*, not accused of having engaged in any type of 'indoctrinating' behaviour. Instead, what was being held against her was the proselytising effect that her headscarf *may have had* on the young children in her class. Constructing the case in such terms makes it appear as though it indeed involved a conflict between Convention rights. The relevant authorities regarded themselves to be under a duty to protect the freedom from religion of the pupils, which led them to the conclusion that, on the balance of reasons, their duty to respect Ms. Dahlab's freedom from religion was outweighed. *Dahlab*

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[475] For a more elaborate discussion of these cases, see S. Smet, 'Freedom of Religion V. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map', in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden - Boston: Martinus Nijhoff Publishers, 2012), 113-142.

[476] *Compare* the proselytism of private individuals by those same applicants in *Larissis*, *supra* note 257. The autonomy of those private individuals was arguably not breached. Therefore, their freedom *from* religion was not violated. This was also recognised by the Court: "[t]he Court finds it of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen." (para. 59).

[477] *Dahlab*, *supra* note 297 at 13.

therefore *prima facie* meets the test that looks at whether the State was under conflicting duties.

The apparent conflict presented itself to the Court as one between an individualised Convention right (of Ms. Dahlab) and the Convention rights of a number of persons who could easily be identified (the pupils) and whose rights could consequently be *individualised*. However, as I will demonstrate, the case for a conflict rested *entirely* on speculation. At this stage the strength of the 'converse situation' test reveals itself, seeing as it requires the Court to look behind the appearance of a threat to the Convention rights of others, evaluating the level of speculation involved. In that respect it falls to be noted that there was no concrete evidence in the case of *Dahlab* that the children's freedom from religion was actually at stake. There was no proof that their being confronted with Ms. Dahlab's headscarf had any influence on the formation of their religious beliefs. To fully appreciate the impact of the 'converse situation' test, we may compare *Dahlab* to *Lautsi*, a case in which pupils' parents complained about the presence of the crucifix on the wall of their children's public school classroom. The parents demanded the removal of the crucifix, claiming that its mere presence violated their right, under art. 2 Prot. 1, to ensure their children's education and teaching in conformity with their own (the parents') religious and philosophical convictions, *in casu* atheism. In *Lautsi*, the Court – diverging from its reliance on speculation in *Dahlab* – held that

> "[t]here is no evidence before [it] that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed".[478]

If the 'converse situation' test is applied to *Dahlab*, it becomes clear that there is no evidence that the wearing of a religious symbol may have an influence on young persons whose convictions are still in the process of being formed. The 'converse situation' to *Dahlab*, in which Ms. Dahlab would have been allowed to continue to wear the headscarf, should thus arguably not make it past the interference stage in Strasbourg. As a result, *Dahlab* did not entail a genuine conflict between Convention rights: its characterisation as such rested entirely on speculation. Similar conclusions apply, *a fortiori*, to the case of *Leyla Şahin*. In that case, involving a ban on the wearing of the headscarf at Istanbul University, the Grand Chamber confirmed the Chamber's argument that

> "when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."[479]

However, given that *Leyla Şahin* was a student and since "those who [chose] not to wear [the headscarf]" were her fellow students, the case was even further removed from the situation of *Larissis* than *Dahlab* was. *Leyla Şahin* was not even in a position of power over her fellow

[478] *Lautsi*, *supra* note 59 at para. 66.
[479] ECtHR, *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, para. 115.

students, which negates the very premise of *Larissis*: that those in a position of power may, through a manifestation of their religion, (involuntarily) breach the autonomy of those under their power.

The cases of *Larissis*, *Dahlab* and *Leyla Şahin* all concerned a situation in which the Convention rights of an identified individual were restricted to protect the alleged rights of undetermined persons who could nevertheless be identified and individualised (*i.e.* lower ranked military officers, the pupils in a classroom or fellow students at a university). As such, the three cases invite us to consider yet another type of cases alluded to earlier: that in which the undetermined persons cannot be individualised, but necessarily remain an *abstract* category, because the speculative nature of the threat to their rights makes it impossible to individualise those rights.[480]

Such a case presented itself to the Court in, for instance, *Austin*.[481] As indicated above, the case involved a speculative threat to the art. 2 and art. 3 Convention rights of a large number of undetermined persons. However, precisely because the threat was speculative (was there really a real and immediate risk?), it was impossible to identify the individuals whose rights might potentially be breached if the risk would be allowed to materialise. In that sense, the protected others were destined to remain an abstract group of people. Due to the combination of the speculative nature of the threat *and* the fact that the group of persons whose rights were allegedly at risk could only be described in abstract terms, *Austin* should not be characterised as a case involving a genuine conflict between Convention rights. Its inclusion would moreover create insurmountable problems for the application of a balancing test. It is impossible to directly balance the Convention rights of the people contained in the police cordon (rights that were clearly at stake) with those of an undefined number of persons, whose rights were only speculatively at stake. Inspiration can in that respect also be drawn from a different ECtHR case, involving repossession of the applicant's home by the State to cater for the needs of those on the waiting list for social housing. In that case, which is analogous to *Austin* insofar as it also involves abstract right holders, the Court recognised that it should attach

> "weight to the fact that the applicant's home has been repossessed by the State, and not by another private party whose interests in that particular flat would have been at stake ... The allegedly intended beneficiaries on the waiting list were *not sufficiently individualised* to allow their personal circumstances to be balanced against those of the applicant."[482]

[480] See *supra* Section II, '2. Borderline Cases?'.
[481] The discussion of *Austin* comes with the *caveat* that the case is peculiar in the sense that art. 5 does not allow for balancing of the right not to be deprived of one's liberty against public order concerns, even if those entail considerations of the Convention rights of others. *Austin* nevertheless represents the archetypical case of restriction of a Convention right for the speculative protection of the Convention rights of an abstract group of people. In ruling that the applicants had never been deprived of their liberty, the Court implicitly balanced their rights against those of the persons that would allegedly have been at risk if the police cordon had not been set up.
[482] *Gladysheva*, *supra* note 265 at para. 95 (emphasis added).

The Court therefore treated the case as involving a 'classic' opposition of a Convention right and a public interest, to which it applied the 'traditional' proportionality test.[483] In agreement with the cited argument by the Court, I submit that an *Austin* type of situation should be resolved through application of the 'traditional' proportionality test, despite the presence of an element of conflicting rights.[484]

The example of insult to religious feelings in the Court's case law illustrates the point further. The Court has explicitly characterised certain cases involving freedom of expression and insult to religious feelings as entailing conflicting Convention rights. In the art. 10 case of *Otto-Preminger v. Austria*, the Court thus held that the aim of the restriction of the applicant's freedom of expression "was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons."[485] The Court then determined that:

> "[t]he issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views ... on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand."[486]

Certain scholars have criticised the Court's characterisation of insult to religious feelings as a Convention right, thus denying that cases such as *Otto-Preminger* involve conflicting Convention rights.[487] Those scholars have claimed that art. 9 does not – or should not – protect religious believers against insult to their religious feelings, for reasons to do with speculation (uncertainty as to whether and how many religious believers were actually insulted in their religious beliefs),[488] subjectivity (how does one prove insult to religious feelings and who determines what constitutes such insult?),[489] pro-majoritarian bias (is it not rather so that the government attempts to protect the majority religion from being desecrated in (many of) these cases?)[490] and intolerance (people feeling insulted in their religious beliefs by the mere knowledge that a certain publication, book or film exists, without ever having

[483] Ibid. at paras. 93-97.
[484] See also Ducoulombier, *supra* note 26 at 224-225.
[485] *Otto-Preminger-Institut*, *supra* note 36 at para. 48.
[486] Ibid. at para. 55. For an analysis of the case in terms of proportionality, see Klatt and Meister, *supra* note 242 at 153-164 (arguing that the case should have been decided in favour of the applicant's freedom of expression).
[487] See, in particular, G. Letsas, 'Is There a Right not to be Offended in One's Religious Beliefs?', in L. Zucca and C. Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge – New York: Cambridge University Press, 2012), 239-260.
[488] This argument led the European Commission of Human Rights to rule (by 14 votes to two) that art. 10 had been violated in the case of *Wingrove v. the United Kingdom*, because the measures did not correspond to a pressing social need. See ECommHR, *Wingrove v. the United Kingdom*, app. no. 17419/90, 10 January 1995. The Commission's decision was, however, overturned by the Court in a 7-2 judgment. See *Wingrove*, *supra* note 386.
[489] See the dissenting opinion of Judge Lohmus in *Wingrove*, *supra* note 386 ("[i]n cases of prior restraint (censorship) there is interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of believers remains unknown.").
[490] This was particularly true of the common law offence of blasphemy at issue in *Wingrove*, which at the time only applied to Christianity and did not extend to other religions. See *Wingrove*, *supra* note 386 at paras. 28-29.

been confronted with it).[491] On their normative account, cases such as *Otto-Preminger*, *Wingrove v. the United Kingdom* and *Murphy v. Ireland* do not entail a conflict between Convention rights, but rather revolve around the question whether freedom of expression may be legitimately restricted to preserve religious tolerance in the general interest of society (which may be considered part of "public order").[492] The relevant questions then are, in terms of proportionality, is the measure taken suitable to the aim of preserving religious tolerance; is it necessary to achieve that aim; and, if the previous two questions are answered in the affirmative, does the measure not disproportionately affect freedom of expression? Asking these questions in relation to the preservation of religious tolerance allows for a more objective assessment of the issues at stake (for instance by gauging the risk that the speech at issue will cause religious violence), compared to the impossibility of balancing freedom of expression against a speculative number of persons' subjective 'right' to not be insulted in their religious feelings.[493]

However, in keeping with the analytical focus of the current research, the normative assessment of the cited scholars cannot be determinative of the question as to whether cases involving insult to religious feelings entail genuine conflicts between Convention rights. Given that the ECtHR is the ultimate interpreter of the Convention and can therefore autonomously 'create' new Convention right, the right to protection against insult to religious feelings must be treated as a Convention right for the purposes of analysis of the Court's case law. However, that is not the end of the story. Some of the normative arguments mentioned above reflect the ideas presented in this section on the identifiability of rights holders and the question of speculation as to whether their rights were actually at stake. In that respect, the Court's assertion in *Otto-Preminger-Institut* that the "right of other persons to proper respect for their freedom of thought, conscience and religion" was at stake rests on unsubstantiated speculation that the Convention rights of undetermined individuals were actually affected.[494]

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[491] I. Leigh, 'Damned if They Do, Damned if They Don't: the European Court of Human Rights and the Protection of Religion from Attack', 17 *Res Publica* (2011), at 67-68; F. Rigaux, 'Logique et droits de l'homme', in P. Mahoney et. al. (eds.), *Protecting Human Rights: The European Perspective – Studies in the Memory of Rolv Ryssdal* (Köln – Berlin – Bonn – München: Carl Heymanns Verlag KG, 2000) at 1211; Hottelier, *supra* note 289 at 135; Letsas, *supra* note 7 at 121-123; Letsas, *supra* note 487; Tsakyrakis, *supra* note 228 at 480-481; Bomhoff, *supra* note 159 at 468-469 (describing the Court's treatment of *Otto-Preminger-Institut* and *Wingrove* as "suspicious"). See also the dissenting opinion of Judges Palm, Pekkanen and Makarczyk in *Otto-Preminger-Institut*, *supra* note 36 (arguing that "[t]he Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.").

[492] See Hottelier, *supra* note 289 at 135; Bomhoff, *supra* note 159 at 648-649. See *contra* Rigaux, *supra* note 491 at 1211 (doubting whether blasphemy laws can serve any legitimate interest, including the "protection of order").

[493] See Tsakyrakis, *supra* note 228 at 481 (arguing that the Court, as interpreter of the Convention, should not overly rely on "the principle of definitional generosity", given that "if there is no such thing as a right to have one's religious feelings protected, then it makes no sense to speak of balancing in the first place, since we would be lacking that against which we are supposed to balance freedom of speech."). For an example from the Court's case law along these lines, see ECtHR, *Klein v. Slovakia*, app. no. 72208/01, 31 October 2006, paras. 50-52 (in which the Court held that the applicant's sharp criticism of an Archbishop, while possibly offending some members of the Catholic Church, did not amount to discrediting and disparaging a sector of the population on account of their Catholic faith.). For another example, see ECtHR, *Gündüz v. Turkey*, app. no. 35071/97, 4 December 2003 (in which the factor of the right to not be insulted in one's religious feelings did not feature, given that the insult was directed at secularists).

[494] See also the dissenting opinion of Judge Lohmus in *Wingrove*, *supra* note 386 at para. 3 ("[i]n cases of prior restraint (censorship) there is interference by the authorities with freedom of expression even though the

Those individuals thus necessarily remain abstract. The combination of speculation and absence of identified rights holders leads to the conclusion that cases such as *Otto-Preminger-Institut* fall (*pace* the Court) to be characterised as involving opposition of a Convention right and a public interest, but in which the Convention rights of others may take on particular significance during the proportionality analysis.

In conclusion, cases analogous to *Austin* and *Otto-Preminger-Institut* should not be treated as entailing genuine conflicts between Convention rights. However, the State's duty to protect the Convention rights of others should in such cases nevertheless be taken on board in the proportionality analysis, as a strengthening factor to the government's position that, under the circumstances of the case, restriction of the applicant's Convention rights was necessary. The extent to which the threat to the Convention rights of others was speculative (was there a real and immediate risk?) should then be factored into account: the more speculative the threat, the less cause there is to restrict the applicant's Convention rights (suitability and necessity).[495] Other cases to which this conclusion applies are, for instance, those involving speech that allegedly amounts to incitement to violence,[496] those relating to bans of political parties that allegedly pose a threat to the Convention rights of others,[497] and those concerning the risk that released criminals will reoffend.[498]

iii. A Definition of Conflicts between Convention Rights

As a result of the above findings, the provisional definition of conflicts between Convention rights I offered earlier needs to be refined. The definition should firstly be made more flexible, so as to be able to cater for cases that entail some level of speculation concerning the risk posed to some of the Convention rights involved. It should secondly be broadened to take into account those cases in which the Convention rights of an individual conflict with those of undetermined, yet identifiable others. However, the category of genuinely conflicting Convention rights should also be kept sufficiently narrow. It should allow for the exclusion of those cases in which the Convention rights of an individual are restricted to protect an abstract group of others against a purely speculative threat to their Convention rights.

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members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of believers remains unknown. I think that this is why we cannot conclude that the interference corresponded to a "pressing social need".").

[495] On the question of a real and immediate risk to the Convention rights of others, see the dissenting opinion of Judges Tulkens, Spielmann and Garlicki in *Austin*, *supra* note 338. See also, in the context of speech allegedly amounting to incitement to violence, ECtHR, *Sürek and Özdemir v. Turkey*, app. nos. 23927/94 and 24277/94, 8 July 1999, particularly the concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, and the partly dissenting opinion of Judges Wildhaber, Kūris, Strážnická, Baka and Traja. For an example of a case in which the level of speculation was so high that the Court outright rejected the argument of the government that the measure pursued the legitimate aim of the protection of the rights of others, see *F. v. Switerland*, *supra* note 361, particularly at paras. 35-36.

[496] See, for instance, *Sürek and Özdemir*, *supra* note 495.

[497] See most notably *Refah Partisi*, *supra* note 72.

[498] See, for instance, *Maiorano*, *supra* note 350.

Taking all these elements into account, I propose the following definition of genuine conflicts between Convention rights:

> *A genuine conflict between Convention rights arises whenever the State is under incompatible duties to protect/respect the Convention rights of two or more identified or identifiable individuals and/or entities, provided that their Convention rights are actually and sufficiently at stake.*[499]

The definition incorporates the 'conflicting duties' test through inclusion of the requirement that "the State is under incompatible duties to protect/respect the Convention rights". The possible constellations of the conflict are – in simplified form[500] – twofold: (i) conflicts in which the State is under incompatible duties to, on the one hand, protect a person's Convention rights and, on the other, respect the Convention rights of another,[501] and (ii) conflicts in which the State is under incompatible duties to protect both persons' Convention rights.[502]

The definition also incorporates the 'converse situation' test, through inclusion of the requirement that the conflicting "Convention rights are actually and sufficiently at stake". This renders the definition flexible, but also subject to unpredictability. It is therefore necessary to clarify the content of this phrase. Inclusion of the terms "actually" and "sufficiently" is meant to convey the idea that either (i) there should be no doubt that the Convention rights of the relevant parties were at stake; or (ii) the involvement of (one of) their Convention rights, while uncertain, is not merely speculative.[503] The 'converse situation' test is particularly apt at determining whether one of those two requirements is met.

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[499] This definition is broader than the definition of genuine conflicts between fundamental legal rights offered by Lorenzo Zucca. See Zucca, *supra* note 26 at 4, 25, 51, 86 and 115. My definition aims only at excluding apparent conflicts from the category of genuine conflicts. Zucca, however, excludes what he terms spurious conflicts, *i.e.* not only conflicts that can be dispelled by reconciling the claims of both parties, but also those that can be resolved through hierarchical ranking, *i.e.* by allowing one claim to prevail over the other due to its higher weight. See, in that respect, Zucca's claim that "[i]n the framework of rights conflict, the idea of balance seems more apt to avoid conflicts rather than adjudicate them." (at 86). Zucca thus prefers a narrower conception of genuine conflicts between fundamental rights. He only considers conflicts to be genuine if they imply constitutional dilemmas or constitutional tragedies: "the existence of genuine conflicts of [fundamental legal rights] points to the fact that in certain cases neither a right nor a rational answer are readily available" (at 25). However, I consider Zucca's definition to be under-inclusive, primarily because it combines the question of the identification/definition of conflicts with that of their resolution. I prefer a broader definition that allows for a clean separation of the questions of identification and resolution, but that is nevertheless sufficiently narrow to exclude 'conflicts' that are merely apparent.

[500] *I.e.* not taking into account conflicts involving more than two persons, nor conflicts involving entities.

[501] Examples are: cases involving conflict between a duty to respect a journalist's freedom of expression and a duty to protect the right to private life of the person whose medical information was revealed in the article written by the journalist (*cf.* ECtHR, *Biriuk v. Lithuania*, app. no. 23373/03, 25 November 2008); defamation cases; cases involving the publication of photographs of public figures; and cases in which a Church has dismissed one of its employees for actions she has taken in the context of her private life.

[502] Examples are: cases involving conflict between a duty to grant a child, given up for adoption immediately after her birth, access to information on her mother - thereby protecting her right to know her origins - and a duty to protect the mother's decisional privacy to remain anonymous (*cf. Odièvre*, *supra* note 1); paternity cases involving a request for a DNA sample; and child custody cases, for instance following divorce.

[503] The latter point, in particular, has been explicitly recognised by the Grand Chamber of the Court, in a case involving a conflict between religious autonomy under art. 9 ECHR and trade union freedom under art. 11 ECHR. See *Sindicatul "Păstorul cel Bun"*, *supra* note 288 at para. 159 ("a mere allegation by a religious

The definition further speaks of the "Convention rights of two or more identified or identifiable individuals". This is meant to capture three elements. Firstly, the idea that the right holders must be identified, or at least identifiable, before a genuine conflict between Convention rights can arise. Secondly, the fact that such a conflict can be either bilateral, *i.e.* between two parties, or multilateral, *i.e.* between three or more parties (*e.g.* in adoption cases or cases involving child care measures).[504] Thirdly, the fact that a conflict can involve a large group of persons (*e.g.* when the Convention rights of one – or more – individual(s) conflict with those of a group of – identified or identifiable – individuals).

Finally, the definition not only mentions the Convention rights of "individuals", but also those of "entities". As explained immediately below, since Convention rights can also be held and exercised by entities, conflicts can indeed arise between the Convention rights of different entities or between the Convention rights of (an) individual(s) and those of an entity.[505]

7. Particular Categories of Conflicts between Convention Rights

i. The Convention Rights of Entities

It is undisputed that a wide variety of actors that are not individual persons can nevertheless be right holders under the Convention.[506] The term "entities" is used here as a shorthand for that category of actors, comprising newspapers, unions, publishers, companies, religious organisations, political parties, etc. The Convention rights of these entities may, under certain circumstances, conflict with the Convention rights of other entities or those of (an) individual(s).[507] The most straightforward examples of such conflicts are those arising in certain defamation cases, where the freedom of expression of a newspaper or publisher conflicts with the right to protection of reputation of one or more individuals. The case of *Axel Springer* is but one of many examples of a case in which the Convention rights of a newspaper or publisher are directly at stake, rather than the rights of the journalist(s) who wrote the story.

However, a different defamation case, *Uj v. Hungary*, illustrates that there are limits to the possibility of conflict between the Convention rights of an individual and those of entities,

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community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial").

[504] On this, see *infra* Part II – 'The Resolution of Conflicts between Convention Rights by the ECtHR'.

[505] On this, immediately below, '*i. The Convention Rights of Entities*'.

[506] See O. De Schutter, 'L'accès des personnes morales à la cour européenne des droits de l'homme', in X. (ed.), *Mélanges offerts à Silvio Marcus Helmons: avancées et confins actuels des droits de l'homme aux niveaux international, européen et national* (Brussels: Bruylant, 2003), 83-108.

[507] See, apart from the examples given in the text, *Obst*, *supra* note 291; *Schüth*, *supra* note 44; *Siebenhaar*, *supra* note 291; ECtHR, *Fernández Martínez v. Spain*, app. no. 56030/07, 15 May 2012; *Sindicatul "Păstorul cel Bun"*, *supra* note 288 (all cases involved a conflict between a religious body's freedom of religion (in terms of religious autonomy) and the individual Convention rights of its employees/priests). For more on these cases, see *infra* Part II, Chapter III, Section II, '1. *Ad Hoc versus* Categorical Balancing'.

given that the latter can be the holders of many, but not all Convention rights. In *Uj*, the Court insisted that

> "there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension."[508]

Indeed, the Court has introduced a threshold for the applicability of the right to protection of reputation in its case law: "[i]n order for Article 8 to come into play ... an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."[509] The Court has indicated that the latter requirement is met when damage is done to a person's personal integrity, which presupposes that that person is an individual and not an entity, such as a company.[510] As a result, cases involving defamation of a company (or other entity) can arguably never entail a conflict between Convention rights, given that it are the reputational *interests* of the company that are at stake in such cases and not their Convention rights.[511]

It also falls to be emphasised that Convention rights should, under no circumstances, be extended to public bodies.[512] Any *interests* of a public body are to be phrased in such terms, rather than in terms of Convention *rights*. To hold otherwise would amount to accepting that the State is allowed to put forward a Convention right of its own to justify its failure to comply with its duty to respect or protect the Convention rights of individuals.[513] There can consequently be no question of conflict between the Convention rights of individuals and alleged Convention rights of public bodies.

ii. The Convention Rights of Groups?[514]

A second particular category of conflicting Convention rights appears to involve a group of people who share a certain characteristic on one side of the equation. The most obvious examples are cases involving racist speech, provided that the Court does not apply art. 17 to exclude the speech in question from the protection of art. 10.[515] In those cases, freedom of expression enters into conflict with the prohibition of discrimination. However, the holders of the latter Convention right are arguably the individual members of the group that is being targeted, not the group as a separate entity. Cases involving a group of persons that share a

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[508] ECtHR, *Uj v. Hungary*, app. no. 23954/10, 19 July 2011, para. 22.
[509] *Axel Springer*, *supra* note 6 at para. 83.
[510] See *Karakó*, *supra* note 41 at para. 23; ECtHR, *Polanco Torres and Movilla Polanco v. Spain*, app. no. 34147/06, 21 September 2010.
[511] This conclusion holds *a fortiori* when the entity that claims to have been defamed is a governmental body or the government as such. See, for instance, ECtHR, *Castells v. Spain*, app. no. 23954/10, 23 April 1992.
[512] See also Bomhoff, *supra* note 159 at 626-627 and 650.
[513] Ibid. at 650.
[514] On group rights generally, see Griffin, *supra* note 29 at 258-271, with further references.
[515] See, for instance, ECtHR, *Feret v. Belgium*, app. no. 15615/07, 16 July 2009. On the latter types of cases, in which the Court has applied art. 17, see *infra* '8. Fake Conflicts'.

certain characteristic thus only *appear* to require discussion as a particular category of conflicting Convention rights cases. Despite the group element, they can be formulated in line with the definition of conflicting Convention rights by focusing on the individual members of the group. *Aksu v. Turkey* illustrates this well.[516] *Aksu* partly concerned a conflict between the freedom of expression of a professor who had written a book on Roma in Turkey and the Convention rights of Mr. Aksu, one individual member of the concerned group (the Roma) who experienced certain of the statements in the book as insulting.[517] The case thus presented itself to the Court as one involving a conflict between the Convention rights of one individual and the Convention rights of another individual, in line with the definition.

iii. Intrapersonal Conflicts?

The definition of genuine conflicts between Convention rights offered above specifically states that genuine conflicts can arise between the Convention rights of "two or more ... individuals". Yet, a number of ECtHR cases appear to entail a conflict between different Convention rights of *one and the same* individual. These cases therefore warrant specific attention in order to determine whether or not the definition requires further refinement.

A case that is often referred to as involving an 'intrapersonal' conflict is *Pretty v. the United Kingdom*.[518] *Pretty* involved an applicant who suffered from a progressive neuro-degenerative disease. Ms. Pretty was essentially paralysed from the neck down, had virtually no decipherable speech and was fed through a tube. Her life expectancy was very poor, measurable only in weeks or months. However, her intellect and capacity to make decisions were unimpaired. To save herself from further suffering, she wished to commit suicide, which is not a crime under English law. But because she was paralysed, she was not able to kill herself. Instead, she had to ask her husband to assist her. However, assisted suicide is a crime under English law. Ms. Pretty therefore requested the prosecutorial authorities to give an undertaking not to prosecute her husband, should he assist her to commit suicide in accordance with her wishes. The authorities refused and the applicant eventually claimed a violation of, *inter alia*, her art. 8 rights in front of the Court.

Ms. Pretty's case has been characterised, in the literature, as entailing a conflict between her decisional privacy under art. 8 and her right to life under art. 2.[519] Such characterisation seems

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[516] *Aksu*, *supra* note 107. For another example, see *Gorzelik*, *supra* note 238 (on the refusal to register the applicants' association as an organisation of a national minority in order to protect the rights of officially recognised national minorities, including their right not to be discriminated against in the sphere of electoral law).

[517] The Court, bizarrely, did not examine the discrimination claim of the applicant, despite having accepted that the book allegedly contained racial insults. Instead, the Court examined the case under art. 8 alone, holding that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group." See *Aksu*, *supra* note 107 at para. 58.

[518] *Pretty*, *supra* note 36.

[519] Zucca, *supra* note 26 at 144 and 147-148. See also D. Rietiker, 'From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent *Haas v. Switzerland* Judgment' 25 *Harvard Human*

counter-intuitive, given that Ms. Pretty *wanted* to die. The argument that her case nevertheless involved an intrapersonal conflict can be expressed in more sensible terms by looking at the duties of the State: the State was under the – incompatible – *prima facie* duties to respect Ms. Pretty's decisional privacy *and* to protect her life.[520] Presented thusly, *Pretty* does *appear* to involve an intrapersonal conflict between Convention rights. However, closer examination of the facts of the case reveals that *Pretty* did not involve a genuine conflict between Convention rights. The English law in question intended to "safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life.", thereby dealing with the conflict in the abstract.[521] Yet, Ms. Pretty did not find herself in the category of vulnerable persons, whom the law intended to protect.[522] As a result, the aim pursued by the authorities in their refusal to exempt Ms. Pretty's husband from prosecution was *not* the protection of the right to life of Ms. Pretty herself. Instead, the authorities acted to protect the legal framework that had been set in place to protect vulnerable persons, by upholding the blanket ban on assisted suicide through criminalisation. *Pretty* therefore did not entail a conflict between different Convention rights of the same individual. Instead, it involved an opposition between a Convention right (the decisional privacy of Ms. Pretty) and a public interest (protection of the value of life through a legal framework that protects vulnerable persons against assisted suicide without informed consent).[523]

Cases that appear to entail an intrapersonal conflict often involve application of legislation that limits individuals' freedom for paternalistic reasons, for instance to 'protect' them from euthanasia, untested medicinal drugs or sadomasochism.[524] For the same reasons as those explained in relation to *Pretty*, the Court should examine carefully whether *application* of such legislation to the specific case at hand leads to a situation of genuine conflict between the Convention rights of one and the same person. *Pretty* illustrates how that is not necessarily the case, even if the legislation at issue can be characterised as dealing with an intrapersonal conflict in the abstract.

Rights Journal (2012) at 86 and 97 (commenting on a different, but analogous, ECtHR judgment on assisted suicide and – in the process – dealing with *Pretty*).

[520] Zucca, *supra* note 26 at xv. On the different conceptions of the right to life (and a potential converse right to die), see Feinberg, *supra* note 65.

[521] *Pretty*, *supra* note 36 at para. 74.

[522] Ibid. at para. 73.

[523] See, generally, M. P. Allen, 'The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die', 53 *American University Law Review* (2004), 971-1020.

[524] On untested medicinal drugs, see ECtHR, *Hristozov and Others v. Bulgaria*, app. nos. 47039/11 and 358/12, 13 November 2012. The case concerned terminally ill patients for whom all available treatment had proven ineffective and who requested access to an experimental drug in the hope that it would cure them. The authorities refused, because the drug was not authorised for use in Bulgaria (or any other country for that matter). The Court held that "[t]he countervailing public interest in regulating the access of terminally ill patients such as the applicants to experimental products appears based on three premises. First, to protect them, in view of their vulnerable state and the lack of clear data on the potential risks and benefits of experimental treatments, against a course of action which may prove harmful to their own health and life, their terminal condition notwithstanding ... All of those interests relate – the first in a more specific ... way – to rights guaranteed under Articles 2, 3 and 8 the Convention. Moreover, their balancing against the applicants' interest..." (para. 112). On sadomasochism, see ECtHR, *K.A. and A.D. v. Belgium*, app. nos. 42758/98 and 45558/99, 17 February 2005.

A further, different, example of a case that allegedly involved a conflict between different Convention rights of the same individual, this time according to the defending government, can be found in *Opuz v. Turkey*. Above, I have already explained why it is misleading and incorrect to characterise *Opuz* as involving a conflict between the art. 2 and art. 8 rights of a victim of domestic violence.[525]

The above examples were the most likely 'suspects', the cases in which we were most likely to encounter a conflict between different Convention rights of one individual. However, their examination indicates that cases in which such 'intrapersonal' conflicts arise are, at best, rare. This is to be expected, given that the premise of an 'intrapersonal' conflict entails that one of the Convention rights at stake works *against* the individual whom it is intended to protect.

Perhaps the Court's case law nevertheless reveals one case that might accurately be characterised as entailing a genuine 'intrapersonal' conflict. In *Göç v. Turkey*, the Turkish courts decided to not hold a hearing in the applicant's case, instead dealing with it through a fast-track procedure.[526] The dissenters pointed out that "[r]equiring domestic courts to hold a hearing every time a claim raising no particular problems is submitted to them might practically frustrate the objective of complying with the "reasonable time" requirement in Article 6 § 1 of the Convention."[527] The dissenters thus pointed out that a conflict between two separate art. 6 rights of the same individual may arise. The majority, however, characterised *Göç* differently. In ruling that a public hearing should have taken place, they did not explicitly dismiss the possibility of characterising the case as one involving an 'intrapersonal conflict'. However, unlike the dissenters, they did not refer to "the "reasonable time" requirement in Article 6 § 1". Instead, the majority stressed "the considerations of speed and efficiency" on which the legislation in question was based.[528] The majority judgment thus indicates that *Göç* could just as easily be characterised as a case involving opposition of a Convention right and a public interest (the speedy administration of justice).

8. Fake Conflicts[529]

Certain cases appear to involve conflicting Convention rights, but on closer examination turn out to not involve a real competition between both Convention rights, given that the exercise of the one right does not have an impact on the exercise of the other. Such cases can be labelled as fake conflicts.

They include, as a first category, all cases in which the exercise of one of the allegedly conflicting rights has no real impact on the exercise of the other right. An example can be

[525] See *supra* notes 309-313 and accompanying text.
[526] ECtHR, *Göç v. Turkey*, app. no. 36590/97, 11 July 2002.
[527] Joint partly dissenting opinion of Judges Wildhaber, Costa, Ress, Türmen, Bîrsan, Jungwiert, Maruste and Ugrekhelidze to ibid.
[528] Instead, the majority held that several factors justified an oral hearing in the applicant's case, thus "[outweighing] the considerations of speed and efficiency on which, according to the Government, Law no. 466 is based." (ibid. at para. 51).
[529] I have borrowed the term 'fake conflicts' from Eva Brems. See Brems, *supra* note 8 at 4.

found in *Association Rhino v. Switzerland*. The case partly concerned the dissolution of the applicants' squatters association. In its judgment, the Court held that the dissolution protected the property rights of the owners of the occupied buildings.[530] The case thus appeared to entail a conflict between the applicants' art. 11 rights and the art. 1 Prot. 1 rights of the owners of the buildings. However, the mere existence of the applicants' association had no impact on those property rights. The order that the owners of the building attempted to obtain – one for the dissolution of the association – could therefore not contribute to the effective protection of their property.[531] This part of *Association Rhino* thus falls to be classified as a fake conflict, given that both rights were not in real competition with each other.[532]

Eva Brems has suggested a second category of cases that – upon closer examination – entail a fake conflict, namely those in which the competition between 'conflicting' Convention rights can, through the intervention of the State, be resolved in a manner that keeps both rights intact.[533] Brems gives the example of a case in which procedural limits are imposed on the accused during a criminal trial, but not on the Prosecutor, in order to guarantee the delivery of a judgment within a reasonable time.[534] In this situation, an apparent conflict arises between the right to equality of arms and the right to a trial within a reasonable time, both elements of the right to a fair trial (art. 6). However, as Brems points out, in *Wynen v. Belgium* the Court held that the reasonable time objective should be realized without impinging on the equality of arms.[535] Hence, the State should organise its system in such a way as to guarantee that both human rights are kept entirely intact. As a result, the situation can be defused as a fake conflict.

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[530] ECtHR, *Association Rhino and Others v. Switzerland*, app. no. 48848/07, 11 October 2011, para. 60.

[531] Although the Court accepted this argument, it nevertheless insisted that the measure pursued the legitimate aim of protection of the rights of others. Ibid. at para. 63.

[532] Another example is arguably *Jersild*, *supra* note 414. The case involved the criminal conviction of a journalist for having assisted in the dissemination of racist speech by an extreme right wing group (the Greenjackets) on which he was making a documentary. Because Jersild himself did not proclaim racist views, but merely – and objectively – reported on the views held by the Greenjacket, for instance by interviewing members of the group, he arguably did not contravene any prohibition of discrimination. While criminal prosecution of the members of the extreme right wing group was justified, prosecution of Jersild was therefore arguably not. This was also recognised by the Court: "[t]here can be no doubt that the remarks in respect of which the Greenjackets were convicted … were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (art. 10) … However, even having regard to the manner in which the applicant prepared the Greenjackets item … it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code." (para. 35).

[533] Another case that could be viewed as entailing a fake conflict, in spite of the Court's 4-3 ruling that the applicant's Convention rights had not even been interfered with, is ECtHR, *Fransesco Sessa v. Italy*, app. no. 28790/08, 3 April 2012. *Sessa* concerned the authorities' refusal - for reasons to do with their duty to deal with cases within a reasonable time - of a lawyer's request to reschedule a court hearing so that he would be able to adhere to Jewish religious holidays. As indicated by the dissenters, the applicant's freedom of religion could have easily been reconciled with the art. 6 right of others to a hearing within a reasonable time. Thus, both Convention rights could have been kept entirely intact, thereby defusing any potential conflict between them. For an example from outside the ECtHR's case law, see Van der Walt, *supra* note 418 at 155 (explaining how the Supreme Court of Appeal, in its judgment in the *Modderklip* case, focused on the State's duty to protect rights in order to defuse an apparent conflict between the right to property and the right to housing as fake).

[534] Brems, *supra* note 8 at 4.

[535] ECtHR, *Wynen and Centre hospitalier interrégional Edith-Cavell v. Belgium*, app. no. 32576/96, 5 November 2002, para. 32.

Another example in which a conflict can be defused as fake through intervention of the State can be found in certain abortion cases, such as *R.R. v. Poland* and *P. and S. v. Poland*. These cases, in part, involve an apparent conflict between the art. 8 right to decisional privacy of a woman who wishes to have an abortion and the art. 9 right to conscientious objection of doctors who, for religious reasons, object to performing the abortion. In both cases, the Court held that "States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation."[536] This indicates that, through the intervention of the State, the conflict could be defused as fake: both Convention rights could be kept entirely intact.[537] [538]

The two categories of cases mentioned above – *i.e.* cases in which the exercise of one right has no impact on the exercise of the other rights, and cases in which the conflict can be defused through intervention of the State – can be qualified as *positive* instances of fake conflict, since both Convention rights at stake are (or can be) kept entirely intact. Such positive instances of fake conflict can be contrasted to *negative* instances of fake conflict, *i.e.* cases in which two Convention rights appear to conflict, but in which the Court removes one of the rights from the equation, thereby escaping the conflict.[539]

Certain cases in which the Court applies the abuse of rights clause of art. 17 ECHR offer the paradigm examples of negative instances of fake conflict.[540] According to art. 17, "[n]othing in this Convention may be interpreted as implying ... any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein."[541] The Court has relied on this provision to, *inter alia*, deny certain forms of speech

[536] ECtHR, *P. and S. v. Poland*, app. no. 57375/08, 30 October 2012, para. 106. See also ECtHR, *R.R. v. Poland*, app. no. 27617/04, 26 May 2011, para. 206.

[537] This, of course, is subject to the guarantee that the woman's right to decisional privacy is not rendered illusory or does not face serious obstacles. If her right is *not* kept entirely intact, the conflict cannot be dissolved as fake. See, for instance, *P. and S.*, *supra* note 536, in which the procedural guarantees put in place under national law were not complied with, causing the applicant to have to travel 500 km to obtain an abortion, although she had obtained, as required under national law, the necessary permission to have an abortion (paras. 105 and 107).

[538] See also *Eweida*, *supra* note 328 (in the applications of Ms. Ladele, concerning an apparent conflict between the applicant's freedom of religion (in the form of conscientious objection to same-sex partnerships) and the right to be free from discrimination of same-sex couples wishing to register their same-sex partnership with the borough of Islington, where Ms. Ladele worked as a civil servant). In this case, it also appears possible to defuse the conflict as fake by allowing Ms. Ladele an exemption from having to register same-sex partnerships and have one of the other civil servants take care of the registration instead. Any remaining conflict would, on that account, be one between Ms. Ladele's freedom of religion and the borough of Islington's interest in protecting its non-discrimination policy. See, further, Leigh, *supra* note 67 at 262 (explaining that, in judicial practice, the apparent conflict has also been tackled by defining away one of the rights involved, through the belief-action distinction; giving the example of the Supreme Court of Canada, which has relied on this distinction to argue that believers are free to *believe* that same-sex conduct is immoral, but not to *act* upon that belief to the detriment of another person's right to non-discrimination).

[539] Apart from the examples given in the text, this category also includes those cases that appear to involve a conflict between Convention rights, but in which the Court has ruled that the invoked right has not been interfered with.

[540] Van Drooghenbroeck, *supra* note 219 at 111; Ducoulombier, *supra* note 4 at 407-414.

[541] Art. 17 ECHR.

the protection normally granted by art. 10.[542] It has done so especially in Holocaust denial cases,[543] but also in a number of hate speech cases.[544] The latter cases may be regarded as entailing an apparent conflict between freedom of expression and the prohibition of discrimination. However, by applying art. 17, the Court denies the hate speech in question the protection offered by art. 10. The Court thus renders the apparent conflict fake by removing one of the rights from the equation.[545]

Another example of a negative instance of fake conflict can be found in *Ciorap v. Moldova*. In that case the Court held that force-feeding a person on hunger strike cannot be considered inhuman or degrading treatment when it is necessary to save the person's life, as long as the manner in which the force-feeding is administered is not excessive.[546] In the particular circumstances of the *Ciorap* case, in which the life of the person on hunger strike was not in danger, the Court ruled that

> "the applicant's repeated force-feeding, not prompted by valid medical reasons but rather with the aim of forcing the applicant to stop his protest, and performed in a manner which unnecessarily exposed him to great physical pain and humiliation, can only be considered as torture".[547]

However, under hypothetically altered circumstances, in which the hunger-strike would reach the moment at which the applicant's life was in danger, the Court would presumably have accepted that a less brutal form of force-feeding was justified. Such a ruling would involve escaping an apparent conflict between the applicant's art. 2 and art. 3 rights by removing art. 3 from the equation.

[542] For an example in which the Court has applied art. 17 to a case involving a different right – namely the right normally protected by art. 11 – see ECtHR, *Hizb Ut-Tahrir v. Germany* (adm.), app. no. 31098/08, 12 June 2012, particularly at para. 74.
[543] See, among many examples, *Garaudy*, *supra* note 68.
[544] See for instance ECtHR, *Norwood v. the United Kingdom* (adm.), app. no. 23131/03, 16 November 2004*;* ECtHR, *Pavel Ivanov v. Russia* (adm.), app. no. 35222/04, 20 February 2007.
[545] For a critique of the Court's approach, see Cannie and Voorhoof, *supra* note 68. For an example of a case in which the Court did not apply art. 17 to the hate speech in question – thus letting the conflict play out – see *Vejdeland*, *supra* note 470.
[546] *Ciorap*, *supra* note 308 at para. 77.
[547] Ibid. at para. 89. See also ECtHR, *Jalloh v. Germany*, app. no. 54810/00, 11 July 2006, para. 82.

CHAPTER V – CONCLUSION OF PART I

Throughout Part I, I have answered the research questions, raised in the General Introduction, related to the existence, conceptualisation and problematisation of conflicts between human rights in the ECHR context.

I answered the first question – "can human rights really conflict with one another?" – in the affirmative, by arguing that conflicts between human rights are an inherent feature of the ECHR system. In tackling the question, I started off by considering a hypothesis that was designed to demonstrate the primary objection to the existence of such conflicts, namely the alleged logical inconsistency they bring into the rights system. In analysing the four steps of the hypothesis, I argued that the specificationist strategy of defusing conflicts through the extensive iteration of rule-based (human) rights fails. I argued that, instead, the vast majority of the human rights enumerated in the Convention – *i.e.* all relative Convention rights – fall to be understood as *pro tanto* rights, which function as principles. I therefore concluded that there is no cause to question the ability of Convention rights, thus understood, to enter into conflict with one another. I insisted that we should instead focus on understanding the intricacies of conflicts between human rights in the ECHR context.

To that end, I turned my attention to the second research question: "how can conflicts between human rights be conceptualised in the ECHR context?". In answering that question, I focused on conflicts between Convention rights, leaving other types of conflicts largely aside. My analysis led me to posit the following definition of a genuine conflict between Convention rights:

> *A genuine conflict between Convention rights arises whenever the State is under incompatible duties to protect/respect the Convention rights of two or more identified or identifiable individuals and/or entities, provided that their Convention rights are actually and sufficiently at stake.*

I moreover suggested two tests to assist in the correct identification of genuine conflicts: a 'conflicting duties' test, application of which is intended to reveal whether or not the State was under incompatible duties in the case at hand, and a 'converse situation' test, application of which is intended to determine whether or not both apparently conflicting Convention rights were actually and sufficiently at stake under the concrete circumstances of the case.

In Part I, I finally also answered the research question related to the problematisation of conflicts between Convention rights, *i.e.* "to what extent do such conflicts raise different issues from the ones raised by 'traditional' human rights adjudication?" In answering that question, I argued that there exist principled and practical differences between the two situations. I specifically argued that 'traditional' human rights adjudication is subject to the priority-to-rights principle, while that principle is inapplicable in case of a conflict between Convention rights. Consequently, I argued that the Court's proportionality test should not be applied to conflicts between Convention rights. Instead, I insisted, such conflicts should be resolved through different resolution methods.

In Part II of this dissertation, I will turn my attention towards those resolution methods. Nevertheless, I have already offered some hints as to their form and application throughout Part I. Indeed, in arguing that absolute Convention rights function as rules, while relative Convention rights function as principles, I have laid the basis for a distinction between three different types of conflicts: (i) conflicts between relative Convention rights, (ii) conflicts between a relative and an absolute Convention rights, and (iii) conflicts between absolute rights. Crucially, these conflicts each come with their own key question in terms of their resolution. Conflicts between relative Convention rights, firstly, should be resolved through a balancing test. However, the key question then arises: how can such balancing (adequately) function in practice? The resolution of conflicts between an absolute and a relative Convention right, secondly, appears straightforward: the absolute right – by its very nature – should prevail. However, the key question then becomes: when is an absolute right effectively interfered with? In terms of conflicts between absolute Convention rights, finally, the primary question arises as to whether such conflicts are at all possible. If they are a conceptual possibility, the key question that poses itself is: how can they be resolved?

These questions, and others, will be answered in Part II of this dissertation, in which I will propose a three-step framework for the resolution of conflicts between Convention rights by the Court. Crucially, however, the first two steps of the framework – which apply regardless of the type of conflict – are respectively concerned with (i) avoiding the conflict and (ii) reaching a compromise between the conflicting Convention rights. I will argue that it is only when those two prior steps fail to provide satisfactory answers that the Court should turn to the third step, *i.e.* to the resolution methods listed above: balancing in the case of conflicts between relative Convention rights, subsumption in the case of conflicts between an absolute and a relative Convention rights, and deontological reasoning in the case of conflicts between absolute Convention rights.

PART II – THE RESOLUTION OF CONFLICTS BETWEEN CONVENTION RIGHTS BY THE ECTHR

CHAPTER I – INTRODUCTION

In Part I, I have examined the existence, nature and form of conflicts between human rights in the ECHR context. In this, Part II, I will focus on the *resolution* of conflicts between Convention rights.

I will start off, in Chapter II, by proposing a framework for the resolution of such conflicts. The framework will strongly emphasise the need to treat the Convention rights that (appear to be in) conflict with equal respect. The framework will consist of three consecutive steps, which should be applied in their given order. Application of the next step of the framework will thus only be possible – and required – when the prior step has failed.

Crucially, the first two steps of the framework – which apply regardless of the type of conflict – aim at achieving the most optimal solution to (apparent) conflicts between Convention rights. The first step aims to avoid such conflicts altogether by defusing them as positive instances of fake conflict. Seeing as the first step of the framework aims at keeping both rights entirely intact, it provides the most optimal way to tackle a 'conflict'. Therefore, it should be applied before any attempts at resolution of the conflict are made.

The second step of the framework is concerned with the resolution of a genuine conflict, *i.e.* a conflict that cannot be defused. Nevertheless, it still aims at providing an optimal solution to the conflict. In that respect, an examination should be made as to whether it is possible to resolve the conflict by having both rights make mutual, but minimal, sacrifices. As such, the second step of the framework is concerned with achieving a *praktische Konkordanz* between conflicting Convention rights.

The third and final step of the framework is geared towards determining which of the conflicting Convention rights should prevail over the other, under the circumstances of the case at hand. Since its application inevitably entails that one of the conflicting rights is, in the concrete case, sacrificed to the benefit of the other right, it should be a measure of last resort. Therefore, it is the final step of the framework, which should only be applied if the two prior steps have failed to offer a satisfactory resolution to a conflict.

Crucially, as I have explained in the Conclusion of Part I, there exist three different types of conflicts between Convention rights, each with their own intricacies. As a result, I will argue that the third and final step of the framework should consist of different resolution methods for each type of conflict.

In Chapters III, IV and V, I will focus on the resolution of conflicts between *relative* Convention rights. I have already argued, in Part I, that such conflicts should be resolved through balancing (provided that the first two steps of the framework have failed). To that end, I will develop a structured balancing test. Since I will rely on balancing as a resolution method, I will first engage with one of the primary challenges to balancing: incommensurability (Chapter III). Incommensurability, the absence of a common metric to adequately express the relationship between rights, appears to preclude any rational balancing exercise. However, I will argue that this is only the case if the balancing metaphor is taken literally, as requiring a mechanical exercise of measuring and comparing the respective weights of the items in the balance. To overcome the incommensurability challenge, I will rely on the distinction between weak and strong incommensurability. I will argue that weak incommensurability does not preclude a rational balancing exercise, as long as balancing is not understood literally, in the sense of an arithmetic exercise, but as 'balancing as reasoning'.

Having countered the theoretical objection to balancing as a method for the resolution of conflicts between Convention rights, I will go on to examine the current approach of the ECtHR to conflicting rights cases (Chapter III). I will demonstrate that the prevailing legal reasoning of the Court in such cases – an open ended *ad hoc* balancing approach – requires a great deal of improvement before it can offer sufficient guarantees of rationality, objectivity, transparency and coherence.

To ameliorate the Court's legal reasoning, I will propose a structured balancing test for the resolution of conflicts between relative Convention rights (Chapter IV). The test will be composed of seven criteria and will aim at the development of nets of arguments in support of each of the conflicting Convention rights. Crucially, the construction of such nets will allow for the making of a comparative judgment on the strength of the reasons in favour of – and against – each of the conflicting Convention rights. I will argue that, as a result of this 'balancing as reasoning', it will usually be possible to rationally determine which of the conflicting rights should prevail under the circumstances. I will conclude the chapter by offering my views on the role of the margin of appreciation in conflicting Convention rights cases and its impact on the application of the structured balancing test.

In Chapter V, I will explore the limits of the structured balancing test by analysing the existence and resolution of dilemmas in the Court's case law. I will specifically argue that genuine dilemmas cannot be resolved through application of the structured balancing test. Instead, I will insist, the existence of strong incommensurability in those cases precludes the making of a rational choice between the Convention rights in conflict. As a result, I will argue that the Court should defer the resolution of the conflict, which may take the form of a bright line rule, to the national legislator.

In Chapters VI and VII, I will move away from the structured balancing test. In those chapters I will examine conflicts involving at least one absolute right. The resolution of such conflicts, I will claim, requires different resolution techniques than the consequentialist reasoning of the structured balancing test of Chapter IV, which should only be applied to conflicts between relative rights.

In Chapter VI, I will examine a specific conflict between a relative and an absolute Convention right, namely between freedom *of* religion and freedom *from* religion. I will argue that the resolution of the conflict is relatively straightforward, taking the form of subsumption: the absolute Convention right should – by its very nature – prevail over the relative right. However, as I will demonstrate, everything consequently turns on the correct identification of the conflict. In analysing the Court's legal reasoning in the relevant cases, I will specifically argue that, while some of the examined cases do entail a genuine conflict (*e.g. Larissis and Others v. Greece*), others do not (*e.g. Dahlab v. Switzerland*).

In Chapter VII, finally, I will engage with the existence and resolution of conflicts between two absolute rights. I will first examine the theoretical possibility of such conflicts actually existing. After establishing that it appears possible for two absolute Convention rights to conflict, I will argue that such (apparent) conflicts cannot be resolved through the existing strands of legal reasoning of the Court's case law. Instead, I will rely on deontological reasoning to develop two principles that are able to assist us in resolving (apparent) conflicts between absolute rights. I will finally translate those moral arguments into legal reasoning, which can subsequently be employed by the Court.

But, as already mentioned, I will start off by presenting a general framework for the resolution of conflicts between Convention rights.

CHAPTER II – A FRAMEWORK FOR THE RESOLUTION OF CONFLICTS BETWEEN CONVENTION RIGHTS

Section I – Introduction

Throughout Part II, I will develop a framework for the resolution of conflicts between Convention rights.[548] The framework strongly emphasises the need to show equal respect to both rights that are in (apparent) conflict. The framework is composed of three steps, only the latter of which is directly concerned with determining which right should prevail over the other, in the concrete circumstances of the case at hand. The two prior steps are respectively concerned with (i) defusing conflicts as fake, whenever possible, and (ii) resolving conflicts through *praktische Konkordanz*, *i.e.* by reaching a compromise between the conflicting rights, again whenever possible. Both prior steps are, in their given order, preferable to a resolution that lets one right prevail over the other.

[548] As explained in the methodology, the framework is inspired by - and builds on - the work of Professor Eva Brems. See *supra* notes 8-25 and accompanying text. I first worked with Professor Brems on formulating an adapted version of the framework in a joint publication on conflicting rights in the case law of the Belgian highest courts. See Brems, Ouald Chaib and Smet, *supra* note 8. I have since adapted and further developed the framework in my own work, while applying it to the case law of the ECtHR. See, in particular, Smet, *supra* note 38 at 87-92. In this dissertation, I present the framework in its final and most detailed iteration.

Defusing a conflict as fake is the optimal approach, because it removes the conflict itself, while keeping both rights entirely intact. However, many conflicts before the ECtHR cannot be defused as fake. Instead, most conflicts will be genuine, as defined in Part I.[549] In that case, their resolution through *praktische Konkordanz* is preferable, since this resolution method focuses on minimising the damaging effects of genuine conflicts by having both rights make mutual, but minimal sacrifices, instead of having one right prevail over the other. However, most conflicts that appear in front of the Court will also resist resolution through *praktische Konkordanz*. In most cases, the Court will only be able to resolve the conflict by letting one right prevail over the other.

In respect of the third step of the framework, *i.e.* the step under which the Court has no choice but to determine which of the conflicting rights prevails over the other, a distinction falls to be made between three different types of conflicts, each of which comes with its own resolution technique. When a conflict involves *relative* Convention rights, application of a structured balancing test should determine which of the conflicting rights should prevail (Chapter IV). If a conflict involves a relative and an absolute Convention rights, the solution to the conflict is predetermined: the absolute right should prevail. Under those circumstances, everything thus turns on the correct identification of the conflict (Chapter VI). If a conflict involves two absolute rights, finally, its resolution requires deontological reasoning, rather than the consequentialist reasoning of balancing (Chapter VII).

In this chapter, I will explain the functioning of the two prior steps of the framework, which are applicable regardless of the type of conflict: (i) defusing conflicts as fake; and (ii) achieving a *praktische Konkordanz* between conflicting Convention rights. In the chapters that follow (Chapters III - VII) I will focus on the other resolution techniques, *i.e.* those that allow us to determine which of the conflicting rights should prevail when the two prior steps of the framework fail.

Section II – Defusing Conflicts as Fake

The optimal way to deal with conflicts between Convention rights is, of course, to make the conflict itself disappear, while keeping both rights entirely intact.[550] This approach to conflicts is optimal, because – unlike the resolution methods discussed below – it does not entail any sacrifice on the part of either of the rights involved. Neither right prevails over the other, nor do they have to suffer a partial, but mutual, sacrifice. For that reason, the first step of any framework for the resolution of conflicts between Convention rights should aim to defuse such conflicts, whenever possible.

Defusing a conflict, as I use the term here, entails finding a way to keep both Convention rights entirely intact. I have already started to explain this approach in Part I, in which I

[549] See *supra* note 499 and accompanying text.
[550] Brems, *supra* note 9 at 302-303.

provided an analytical distinction between positive and negative instances of fake conflict.[551] Here I submit that, normatively speaking, only positive instances of fake conflict provide an optimal solution to conflicting Convention rights cases. The positive approach to defusing conflicts is optimal, because it keeps both Convention rights entirely intact. The negative approach, conversely, relies on denying – from the outset – Convention protection to one of the rights that appear to be in conflict. This approach is suboptimal, because it may do away with the apparent conflict, but only at the cost of completely removing one of the rights from the equation. In Part I, I have offered the example of certain types of hate speech cases, in which the Court employs art. 17 ECHR to deny the speech at issue protection under art. 10 ECHR.[552] Another clear example of a negative approach to defusing conflicts can be found in *Gillberg v. Sweden*, in which the Court held that the applicant did not have a "negative right within the meaning of Article 10 of the Convention not to make ... research material available",[553] because "finding that the applicant had such a right under Article 10 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under Article 10 ... to receive information in the form of access to the public documents concerned, and on their rights under Article 6 to have the final judgments [granting them access to the documents] implemented."[554] I have already argued, in Part I, that *Gillberg* illustrates the Court's inability to come to grips with the intricacies of conflicting Convention rights cases.[555] I have also insisted that genuine conflicts between Convention rights cannot and should not be explained away, as the Court does in *Gillberg*, but should rather be tackled head on.[556]

For that reason, the first step of my framework – *i.e.* defusing conflicts as fake – is only concerned with the optimal approach provided by positive instances of fake conflict, not with the suboptimal approach of negative instances of fake conflict.

1. Examples of Positive Fake Conflicts

In Part I, I have already offered two examples of positive instances of fake conflict.[557] I have firstly pointed out that certain cases may appear to involve conflicting Convention rights, but on closer examination turn out to not involve a real competition between Convention rights, given that the exercise of the one right does not have an impact on the exercise of the other. I have offered *Association Rhino v. Switzerland* as an example. I have explained that the case partly concerned the dissolution of the applicants' squatters association and that, in its judgment, the Court held that the dissolution protected the property rights of the owners of the occupied buildings.[558] I have gone on to explain that the case thus appeared to entail a conflict between the applicants' art. 11 rights and the art. 1 Prot. 1 rights of the owners of the

[551] See *supra* Part I, Chapter IV, Section V, '8. Fake Conflicts'.
[552] See *supra* notes 540-545 and accompanying text.
[553] *Gillberg*, *supra* note 45 at paras. 92 and 94.
[554] Ibid. at para. 93.
[555] See *supra* notes 45-47 and accompanying text.
[556] See *supra* Part I, Chapter II, Section III – 'Conclusion'.
[557] See *supra* Part I, Chapter IV, Section V, '8. Fake Conflicts'.
[558] *Association Rhino*, *supra* note 530 at para. 60.

buildings. However, I have insisted that the mere existence of the applicants' association had no impact on those property rights. The order that the owners of the building attempted to obtain – one for the dissolution of the association – could therefore not contribute to the effective protection of their property.[559] I have, as a result, concluded that the apparent conflict inherent in *Association Rhino* falls to be classified as a fake conflict, given that both rights were not in real competition with each other.

In Part I, I have also referred to a second set of cases that involve positive fake conflicts, namely those in which the apparent competition between the Convention rights at issue can be 'resolved' in a manner that keeps both rights entirely intact. I have given the example of *Wynen v. Belgium* by way of illustration. Here, I submit that defusing this second type of apparent conflicts is made possible due to the triadic relationship, in the ECHR context, between two (groups of) right holders and the State. Indeed, before a conflict between right holders reaches the ECtHR, the State will inevitably have intervened. This intervention on the part of the State renders it possible to defuse conflicts that appear very real when only considered between right holders.

The case of a doctor who works at a private hospital and conscientiously objects to an abortion may serve to illustrate the point.[560] In such circumstances, the art. 9 rights of the doctor appear to be in real conflict with the art. 8 rights of any woman wishing to have an abortion. The doctor cannot perform the abortion without violating his own deeply held convictions, but if he refuses the woman suffers a grave breach of her right to private life. However, this characterisation only describes the conflict as it exists between the respective right holders. In the ECHR context, we also – and crucially – need to consider the role of the State. When called upon to intervene, the State *may* respond by letting one right prevail over the other. In the abortion scenario, the State may force the doctor to perform the abortion, thereby interfering with his rights, or deny the woman access to abortion, thereby failing to protect her rights. However, the State may also choose an alternative approach. It may attempt to keep both rights entirely intact by organising the health system in such a way as to *simultaneously* guarantee doctors a right to conscientious objection and ensure that women have effective access to abortion. This entails, *inter alia*, providing a steady roster of doctors who *are* willing to perform abortions and ensuring that women do not have to travel excessively long distances to get an abortion. When the right conditions are put in place by the State, the apparent conflict between Convention rights can thus be defused as a positive instance of fake conflict. Interestingly, this is precisely how the ECtHR approached the issue in *R.R. v. Poland* and *P. and S. v. Poland*, in which it held that "States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from

[559] Although the Court accepted this argument, it nevertheless insisted that the measure pursued the legitimate aim of protection of the rights of others. *Association Rhino*, *supra* note 530 at para. 63.

[560] In the example, the doctor works at a private hospital for two reasons. Firstly, to make sure the conflict is considered to be one between two private parties and, secondly, to get rid of a number of other variables, such as any potential duty of neutrality on the part of the doctor. This does not mean that these other variables would necessarily be relevant if the doctor were working at a public hospital. Presenting the conflict without them simply makes it easier to focus on the conflicting rights case itself. On the (ir)relevance of duties of neutrality in the context of (apparent) conflicts between Convention rights, see Smet, *supra* note 475.

obtaining access to services to which they are entitled under the applicable legislation."[561] In both cited cases, the Court concluded that the State had failed to live up to this obligation and that it thereby violated the art. 8 rights of the applicant who wished to have an abortion. Or, in the terms used here: the State had failed to provide the optimal solution to the conflict, *i.e.* it had failed to defuse the conflict as a positive fake conflict, and thereby violated the applicant's rights.

2. Tools for the Identification of Positive Fake Conflicts

The examples of positive instances of fake conflict offered immediately above share one characteristic, which directly explains their label as *fake*: they do not meet the definition of *genuine* conflicts between Convention rights proposed in Part I. According to that definition, "a genuine conflict between Convention rights arises whenever the State is under incompatible duties to protect/respect the Convention rights of two or more identified or identifiable individuals and/or entities, provided that their Convention rights are actually and sufficiently at stake." In the examples offered immediately above, however, either the Convention rights of both parties were *not* actually and sufficiently at stake or the State was *not* under incompatible duties. The first situation obtained in *Association Rhino v. Switzerland*, while the latter situation obtained in *Wynen v. Belgium* and *R.R. v. Poland*.

Crucially, as I have explained in Part I, the presence or absence of both elements of the definition – the State being under "incompatible duties" and both parties' Convention rights being "actually and sufficiently at stake" – can be determined through the use of a double test, *i.e.* a 'conflicting duties' test and a 'converse situation' test. Whenever one of both tests is not met, the case under examination does not entail a genuine conflict between Convention rights. In that respect, both tests not only assist the Court in determining whether a case involves a genuine conflict between Convention rights, they can also be used to indentify positive instances of fake conflict.

In *Association Rhino v. Switzerland* the 'converse situation' test was not met, because – in the opposite scenario from the one that presented itself to the Court – the owners of the occupied buildings would not have been able to claim an interference with their property rights. Indeed, any refusal by the domestic authorities to dissolve the squatters' association would not have amounted to an interference with the owners' property rights. Therefore, their Convention rights were not "actually and sufficiently at stake". As a result, the case did not meet the definition of a genuine conflict between Convention rights. Instead, it entailed a positive instance of fake conflict. In *R.R. v. Poland*, conversely, the 'conflicting duties' test was not met, because it was possible for the State to take alternative measures that would allow it to fulfil its obligation to respect/protect both parties' Convention rights. Since the State was not under "incompatible duties", the case did not entail a genuine conflict. Instead, it could be defused as a positive instance of fake conflict.

[561] *R.R.*, *supra* note 536 at para. 206; *P. and S.*, *supra* note 536 at para. 106.

The above application illustrates that the 'conflicting duties' test and the 'converse situation' test are useful tools for the identification of positive instances of fake conflict. They thus enable the Court to determine the optimal 'solution' to (apparent) conflicts between Convention rights. The examples also indicate that application of the 'converse situation' test is a rather technical exercise: the opposite scenario either entails an interference with the other party's Convention right or it does not. However, the same does not necessarily hold true in respect of the 'conflicting duties' test. As illustrated by the analysis of *R.R. v. Poland*, its application requires an exercise of creativity on the part of the Court in determining whether – and if so, how – the State was in a position to ensure the compatibility of its duties towards both parties involved in the conflict. The need for creative legal reasoning also lies at the heart of the next step of my framework: the achievement of a *praktische Konkordanz* in cases of genuine conflicts between Convention rights, *i.e.* cases that cannot be defused as positive instances of fake conflict.

Section III – Achieving a *praktische Konkordanz* between Conflicting Convention Rights

Whenever the Court is confronted with a genuine conflict between Convention rights – *i.e.* a conflict that cannot be defused as a positive fake conflict – it will need to find some way to resolve it. The most preferable resolution technique for genuine conflicts – and the second step of my framework – entails achieving a *praktische Konkordanz* between the conflicting Convention rights.

Praktische Konkordanz is the cornerstone of Konrad Hesse's comprehensive approach to conflicting constitutional rights in German constitutional law.[562] Hesse specifically intends *praktische Konkordanz* to assist in achieving an optimisation of conflicting rights: "[r]ights … guaranteed by the Constitution must be related to one another in such a way that each of them can be put into effect. In the case of conflicting rights, none of them must be implemented at the expense of the other, neither by hastily balancing the underlying values nor on the basis of abstract considerations."[563] Hesse thus contrasts *praktische Konkordanz* – commonly translated as 'practical concordance' in English – to balancing and intends it to be applied in the concrete circumstances of each case, rather than "on the basis of abstract considerations".

Several human rights law scholars have discussed *praktische Konkordanz* as a resolution technique for conflicts between human rights.[564] Yet, different conceptions of the technique can be found in the literature.[565] A number of scholars describe *praktische Konkordanz* as an element of the proportionality test, rather than as a wholly distinct test.[566] They for instance argue that *praktische Konkordanz* is "a methodological tool to apply proportionality *stricto*

[562] T. Marauhn and N. Ruppel, 'Balancing Conflicting Human Rights: Konrad Hesse's Notion of "*Praktische Konkordanz*" and the German Federal Constitutional Court', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008) at 276.
[563] Konrad Hesse, as translated in ibid. at 280.
[564] See the references *infra*, in notes 571, 572 and 581.
[565] Marauhn and Ruppel, *supra* note 562 at 282.
[566] Ibid. at 281; Ducoulombier, *supra* note 4 at 492-496; Barak, *supra* note 194 at 369.

sensu" or a test applied following a "specific rule of balancing".[567] Although they recognise that *praktische Konkordanz* "considers all constitutional rights … involved as being of equal validity and rank", they deem it to be a resolution technique that enables "the courts to give preference to one of [the rights] according to the specifics of the case under consideration."[568] Thus understood, *praktische Konkordanz* is not all that different from balancing: both techniques are applied as the final step of the proportionality test (proportionality *stricto sensu*) and both aim to determine which right should be given preference in the concrete circumstances of the case at hand.[569]

Other scholars, however, offer a different understanding of the concept. They follow Hesse more closely and argue that *praktische Konkordanz* constitutes a distinct resolution technique, which functions differently and separately from balancing.[570] They further argue that *praktische Konkordanz* should precede or replace any attempt at balancing, because it offers a more optimal solution to conflicts between human rights.[571] Unlike balancing, which utilises a weighing procedure to determine which of the rights in conflict should prevail, *praktische Konkordanz* aims to reach a compromise between both rights.[572] On this understanding of the concept, which is the one I will follow, achieving a *praktische Konkordanz* between conflicting rights requires that mutual, but minimal sacrifices are made by both rights, so as to keep both rights as intact as possible in the circumstances of the case at hand.[573] Unlike balancing, *praktische Konkordanz* thus avoids sacrificing one of the conflicting rights to the benefit of the other.[574] Instead, it aims to optimise the conflicting rights by minimising the damage each suffers, in order to have *both* rights survive the conflict as intact as possible.

Because *praktische Konkordanz* relies on mutual, but minimal sacrifices, it offers a more optimal solution to conflicts between Convention rights than the one-sided, but entire sacrifice entailed by, for instance, balancing.[575] It is therefore preferable to attempt to achieve a *praktische Konkordanz* between conflicting Convention rights before considering the application of a balancing test.[576]

Yet, for *praktische Konkordanz* to offer an optimal solution to a conflict between Convention rights it is vital that both rights make sacrifices *and* that those sacrifices are *minimal*. If the sacrifices made by (one of) the conflicting rights would be so extensive as to effectively hollow out (its or) their protection, there can be no question of *praktische Konkordanz*, since

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[567] Marauhn and Ruppel, *supra* note 562 at 281; Barak, *supra* note 194 at 369.
[568] Marauhn and Ruppel, *supra* note 562 at 296. See also Barak, *supra* note 194 at 369.
[569] Barak, *supra* note 194 at 369; Ducoulombier, *supra* note 4 at 494.
[570] D. Kosař, 'Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008) at 360; De Schutter and Tulkens, *supra* note 200 at 203.
[571] Kosař, *supra* note 570 at 372; De Schutter and Tulkens, *supra* note 200 at 203; Van Drooghenbroeck, *supra* note 126 at 383.
[572] Kosař, *supra* note 570 at 372; Brems, *supra* note 8 at 5; De Schutter and Tulkens, *supra* note 200 at 203.
[573] Van Drooghenbroeck, *supra* note 126 at 383. See also J. L. Mackie, as found in Xu and Wilson, *supra* note 200 at 44 (describing the same ideas of compromise and equality of sacrifice in the context of conflicting rights, but without reference to *praktische Konkordanz*, which is a distinctly German concept).
[574] Brems, *supra* note 8 at 5; De Schutter and Tulkens, *supra* note 200 at 203.
[575] Brems, *supra* note 9 at 303.
[576] Ibid.; Kosař, *supra* note 570 at 372; Van Drooghenbroeck, *supra* note 126 at 383.

the conflict's resolution would clearly be suboptimal. For instance, in some defamation cases a *praktische Konkordanz* may be reached between a newspaper's freedom of expression and an individual's right to reputation, for instance by demanding that a newspaper add a disclaimer to an article in its archives, referring to – pending or concluded – defamation proceedings in front of the domestic courts.[577] This solution may, under certain circumstances,[578] provide a *praktische Konkordanz* between both conflicting Convention rights, because both make mutual, but *minimal* sacrifices. By adding the disclaimer, the newspaper sacrifices a small part of its freedom of expression in keeping an archive. The individual, conversely, sacrifices a small part of his right to reputation by allowing the article's continued existence in the newspaper's archive, but with a disclaimer that clearly indicates its defamatory nature.

However, this does not mean that – in all situations – newspapers can simply add a disclaimer whenever they write an article they know to be defamatory, nor that individuals who are the subject of a newspaper article can always demand the publication of such a disclaimer. Indeed, under different circumstances the sacrifices made by (one of) the conflicting rights may not be so minimal, for instance if the article is written in good faith on an issue of great public interest or if it is written with the intention to insult the individual and in the absence of any public interest. In those circumstances, the publication of a disclaimer cannot be said to achieve a *praktische Konkordanz* between the conflicting rights, since one of the rights involved is forced to make great – and therefore unacceptable – sacrifices. In those circumstances, in which it is not possible to achieve a *praktische Konkordanz*, a balancing test needs to be employed to determine which of the conflicting Convention rights should prevail.

A few examples from the Court's case law may serve to further illustrate how *praktische Konkordanz* can usefully function in the ECHR context, *i.e.* by providing a solution to a conflict between Convention rights in which both rights make mutual, but minimal sacrifices, and how its application requires an exercise of creativity on the part of the Court. The examples that follow are all based on existing case law of the Court. As such, they demonstrate how *praktische Konkordanz* can be a helpful tool for the resolution of conflicts between Convention rights. The examples also explain the role of the State in achieving a *praktische Konkordanz* between conflicting Convention rights. Indeed, in exercising its Convention obligations, the State may sometimes be in the position to ensure a compromise between respecting/protecting the Convention rights of one person (or one group of persons) and respecting/protection the Convention rights of another person (or another group of persons).[579] In adjudicating individual cases, the Court can – and should – thus ascertain whether the State had options at its disposal that would enable it to achieve a *praktische Konkordanz* between conflicting Convention rights, rather than sacrificing one right to the benefit of the other.

[577] See ECtHR, *Węgrzynowski and Smolczewski v. Poland*, app. no. 33846/07, 16 July 2013, para. 66; ECtHR, *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, app. nos. 3002/03 and 23676/03, 10 March 2009, para. 46.
[578] Ibid.
[579] See also De Schutter and Tulkens, *supra* note 200 at 206.

A first set of cases that is ideally suited to be resolved through *praktische Konkordanz* are cases involving counter-demonstrations.[580] Several scholars have already pointed towards one such case, *Öllinger v. Austria*, as a prime example of *praktische Konkordanz*.[581] The applicant in *Öllinger* was a member of an assembly that wished to organise a counter-demonstration to protest against the gathering of Comradeship IV, an association consisting mainly of former members of the SS that had been granted permission to organise a commemoration service at a cemetery to remember SS members who had died during WWII. The applicant emphasised that the main purpose of his assembly was to remind the public of the crimes committed by the SS and to commemorate the Jews murdered by them. The applicant further indicated that the concurrence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wanted to convey. Yet, the domestic authorities barred the applicant's assembly from organising a counter-demonstration. The prohibition not only aimed at protecting the rights of Comradeship IV to a peaceful assembly, but also the cemetery-goers' right to manifest their religion. The domestic authorities particularly feared that allowing the applicant's assembly's counter-demonstration would lead to disturbances on the cemetery grounds. It is important to point out that the Austrian Constitutional Court had already ruled that the aim of protecting the gathering of Comradeship IV could not justify the prohibition of the counter-demonstration. Therefore, the ECtHR focused its attention on determining whether the need to protect the cemetery-goers' freedom of religion could offer sufficient justification for the ban.

In its judgment, the Court held that it did not. The Court first pointed out that the applicant expected only a small number of participants (six) and that the assembly members envisaged peaceful and silent means of expressing their opinion (they intended to carry commemorative messages and had explicitly ruled out the use of chanting or banners).[582] The Court consequently ruled that

> "[i]n these circumstances, the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors."[583]

The Court concluded that, by imposing "an unconditional prohibition on the applicant's assembly", the domestic authorities "gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances."[584]

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[580] See, apart from the cases discussed here, *Plattform "Ärzte für das Leben"*, *supra* note 183.
[581] See, for instance, De Schutter and Tulkens, *supra* note 200 at 204-205; Ducoulombier, *supra* note 26 at 244.
[582] ECtHR, *Öllinger v. Austria*, app. no. 76900/01, 29 June 2006, para. 47.
[583] Ibid. at para. 48.
[584] Ibid. at para. 49.

In *Öllinger*, the Court thus ruled that the domestic authorities should have allowed the counter-demonstration to take place, instead of completely impeding the applicant's assembly from exercising its art. 11 rights. The Court also indicated that the domestic authorities were in a position to take measures to ensure that the effects of the counter-demonstration on the cemetery-goers' freedom of religion would have been minimal. The Court thereby clearly expressed, without using the term, its preference for a *praktische Konkordanz, i.e.* a resolution to the conflict between the applicant's assembly's right to a peaceful assembly and the cemetery-goers' freedom of religion that achieves a compromise between both rights, involving mutual, but minimal sacrifices. Indeed, the applicant's assembly had already indicated that it was willing to minimally sacrifice its art. 11 rights, for instance by not chanting or holding banners, while the authorities were in a position to take further protective measures to ensure that also the cemetery-goers' art. 9 rights would only suffer minimal damage.

Another counter-demonstration case in which a *praktische Konkordanz* could have been achieved between the conflicting Convention rights, this time directly between the right to a peaceful assembly of both groups of demonstrators, was *Fáber v. Hungary*. *Fáber* revolved around the applicant's arrest for holding a flag with Árpád stripes (a symbol with fascist connotations), while taking part in a counterdemonstration against an antiracism demonstration. The case entailed a conflict between the applicant's art. 11 rights and the art. 11 rights of the persons participating in the antiracism demonstration. The domestic authorities resolved the conflict to the benefit of the latter persons' rights by arresting the applicant, thereby precluding him from further exercising his art. 11 rights. In its judgment, the Court indicated that the national authorities should have dealt with the conflict differently. The Court first held that "the State has to fulfil its positive obligations to protect the right of assembly of both demonstrating groups, and should find the least restrictive means that would, in principle, enable both demonstrations to take place."[585] The Court specifically indicated that the State was able to take "preventive measures, such as police presence keeping the two assemblies apart and offering a sufficient degree of protection."[586] The Court concluded that

> "[i]n the absence of additional elements, the Court, even accepting the provocative nature of the display of the flag ... cannot see the reasons for the intervention against the applicant. ... Given the applicant's passive conduct, the distance from the [antiracism] demonstration and the absence of any demonstrated risk of insecurity or disturbance, it cannot be held that the reasons given by the national authorities to justify the interference complained of are relevant and sufficient."[587]

The Court thus explained its reasoning in terms of "least restrictive means" and a lack of relevant and sufficient reasons (*i.e.* an element of the Court's proportionality test). However,

[585] *Fáber*, *supra* note 44 at para. 43.
[586] Ibid. at para. 44.
[587] Ibid. at para. 47.

Fáber can also – and better – be explained in terms of *praktische Konkordanz*.[588] *Fáber* is a prime example of a case in which a *praktische Konkordanz* could and should have been achieved between the art. 11 rights of the respective demonstrators. The domestic authorities were indeed in a position to take measures to ensure optimal protection of the right of assembly of both demonstrating groups. Due to the police presence and certain limiting factors, such as the distance both demonstrating groups were forced to keep between each other, the demonstrating groups suffered mutual, but minimal sacrifices in the exercise of their art. 11 rights. As a result, a compromise had been reached that allowed both groups to exercise their rights to the fullest extent possible, under the circumstances. When confronted with the incident involving the applicant's flag, the domestic authorities could and should have continued to allow both rights to be exercised to the fullest extent possible, instead of taking measures that completely impeded the applicant from further exercising his art. 11 rights.

A second set of conflicting Convention rights cases that are particularly apt at being resolved through *praktische Konkordanz* are those involving conflicts between the right to a fair trial of defendants and the rights to life, physical integrity and private life of witnesses.[589] In this context, several authors have cited *Van Mechelen v. the Netherlands* as a prime example of *praktische Konkordanz*.[590] In *Van Mechelen* and other relevant cases, such as *Al-Khawaja and Tahery v. the United Kingdom*, the Court has indicated its approach to conflicts between the Convention rights of defendants and those of witnesses who are at risk of suffering violence at the hands of the defendant or his accomplices.[591] The Court has ruled that "Contracting States should organise their criminal proceedings in such a way that [the] interests [of witnesses] are not unjustifiably imperilled."[592] Therefore, the Court has held,

> "[w]hen a witness's fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant ... The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval."[593]

The Court has stated that similar principles apply when the fear is not directly attributable to threats made by the defendant or his agents. As long as there are objective grounds for that

[588] Reasoning on the basis of *Praktische Konkordanz* is essentially different from reasoning on the basis of "least restrictive means". *Praktische Konkordanz* requires that *both* rights make minimal sacrifices, while the "necessity" test – at least as used by the Geman Constitutional Court and explained by Robert Alexy – can only be applied when it is possible to impose a smaller (or no) burden on a right *without* lessening the effectiveness of the aim pursued (the aim pursued therefore does *not* make any sacrifices). See Alexy, *supra* note 110 at 135-136; Alexy, *supra* note 60 at 67-68 and 398-399.
[589] *Doorson*, *supra* note 473 at para. 70; ECtHR, *S.N. v. Sweden*, app. no. 34209/96, 2 July 2002, para. 47.
[590] See, for instance, Van Drooghenbroeck, *supra* note 126 at 385; Ducoulombier, *supra* note 26 at 244.
[591] For further relevant cases, see *Doorson*, *supra* note 473; ECtHR, *Ellis and Simms and Martin v. the United Kingdom* (adm.), app. nos. 46099/06 and 46699/06, 10 April 2012; ECtHR, *Pesukic v. Switzerland*, app. no. 25088/07, 6 December 2012.
[592] *Doorson*, *supra* note 473 at para. 70.
[593] *Al-Khawaja and Tahery*, *supra* note 145 at para. 123.

fear, supported by evidence, there is "no requirement that a witness's fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial."[594]

However, the Court has also looked at the other side of the conflict. The Court has indeed held that the right to a fair trial of the defendant needs to be respected to the fullest extent possible. It has clarified that "given the extent to which the absence of a witness adversely affects the rights of the defence ... allowing the admission of a witness statement in lieu of live evidence at trial" will only be allowed if "all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable."[595] The Court has moreover held that "where a hearsay statement is the sole or decisive evidence against a defendant ... sufficient counterbalancing factors, including the existence of strong procedural safeguards ... that permit a fair and proper assessment of the reliability of that evidence to take place" need to be put in place.[596]

The Court has developed similar principles in cases involving allegations of sexual abuse of minors.[597] Also in those cases, the Court has held that "certain measures may be taken for the purpose of protecting the [right to private life of the] victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence."[598] The Court has likewise indicated that also in those cases "the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours."[599]

The mentioned counterbalancing factors are not set in stone in the Court's case law. Instead, the Court examines them on a case by case basis. Counterbalancing factors that have been deemed relevant are, for instance, (i) the ability of the judge, jury, prosecutor and counsel for the defence to see and hear the witness give evidence;[600] (ii) the ability of counsel for the defence to put questions to the witness;[601] (iii) careful and cautious evaluation by the judge or jury of the witness' evidence;[602] (iv) disclosure of material, based on the witness' statements, which allows for cross-examination by defendant's counsel;[603] (v) the ability of the defence to challenge the reliability of the evidence given by the witness;[604] and – specifically in the context of sexual abuse of minors – the showing of video interviews of the minor during the trial.[605]

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[594] Ibid. at para. 124.
[595] Ibid. at para. 125.
[596] Ibid. at para. 147. See also *Doorson*, *supra* note 473 at para. 72.
[597] ECtHR, *A.S. v. Finland*, app. no. 40156/07, 28 September 2010; *S.N.*, *supra* note 589; ECtHR, *D.T. v. the Netherlands* (adm.), app. no. 25307/10, 2 April 2013.
[598] *S.N.*, *supra* note 589 at para. 47; *A.S.*, *supra* note 597 at para. 55.
[599] Ibid.
[600] *Ellis and Simms and Martin*, *supra* note 591 at para. 82; *Doorson*, *supra* note 473 at para. 73; *Pesukic*, *supra* note 591 at para. 50.
[601] *Doorson*, *supra* note 473 at para. 73; *S.N.*, *supra* note 589 at para. 50; *A.S.*, *supra* note 597 at para. 56.
[602] *Ellis and Simms and Martin*, *supra* note 591 at paras. 83-84.
[603] Ibid. at para. 86.
[604] Ibid. at para. 87; *S.N.*, *supra* note 589 at para. 52; *Pesukic*, *supra* note 591 at para. 50; *D.T.*, *supra* note 597 at para. 51.
[605] *S.N.*, *supra* note 589 at para. 52; *D.T.*, *supra* note 597 at para. 50; *A.S.*, *supra* note 597 at para. 56.

The aim of the counterbalancing factors is, in both sets of cases, to minimise any damage suffered by the defendant's art. 6 rights by the measures taken to protect the witness' or minor's art. 2 and/or art. 8 rights. Nevertheless, also the witness or minor suffers minimal damage to his Convention rights. He has to testify in some form or other and consequently exposes himself to some extent. Even if measures are put in place to protect his identity or private life, in offering testimony he puts his Convention rights more – even if marginally – at risk than by outright declining to testify. This is precisely the idea behind *praktische Konkordanz*. It entails *mutual* sacrifices on the part of both rights in conflict and requires that the national authorities take steps to *minimise*, to the fullest extent possible, the damage suffered by each right. Ideally, this process leaves both rights virtually (but never entirely) intact, so that the difference with the complete absence of a conflict is barely noticeable in practice.

The above examples, along with a few others that I will not discuss at length here, demonstrate how *praktische Konkordanz* can function in the Court's case law on conflicts between Convention rights.[606] The preceding discussion has moreover revealed that such conflicts can only be resolved through *praktische Konkordanz* when two conditions are met: (i) both rights in conflict have to make sacrifices; and (ii) those sacrifices have to be minimal. When these conditions are not met, which may be the object of reasonable debate, particularly concerning the second condition, it is not possible to achieve a satisfactory solution of a conflict through *praktische Konkordanz*. A few examples may serve to illustrate what I consider to be the limits of the potential of *praktische Konkordanz* in providing optimal solutions to conflicts between Convention rights.

These limitations relate, firstly, to the fact that – even if it is *possible* to achieve a compromise between conflicting Convention rights – it is not necessarily *desirable* to insist on a compromise, regardless of the costs thereof. For instance, in cases involving a conflict between freedom of expression and the right to private life or the right to reputation, one *may* insist that both rights make mutual sacrifices, *e.g.* by limiting the circulation of a critical publication, through partial censorship of photographs or by having journalists express criticism in modest terms. However, I submit that these measures fail to meet the second condition for the application of *praktische Konkordanz*, since the sacrifices made are not minimal. Instead, they decrease the usefulness of the exercise of the respective Convention rights beyond what can be expected under *praktische Konkordanz*. Forcing a journalist to refrain from employing his freedom to engage in exaggeration and provocation may be considered a grave breach of his Convention rights. Partial censorship of a photograph may leave both the art. 8 rights of the photographed person and the art. 10 rights of the newspaper less than satisfactorily protected. And limiting the circulation of a publication may similarly leave both the person who is the subject of the publication and the author and publisher

[606] For further examples of cases that may be resolved through *praktische Konkordanz* or in which elements of *praktische Konkordanz* may be a relevant consideration, see ECtHR, *Dupuis and Others v. France*, app. no. 1914/02, 7 June 2007 (in which the Court indicated a compromise between freedom of expression and the presumption of innocence in the context of media reports about ongoing criminal trials) and ECtHR, *Sporer v. Austria*, app. no. 35637/03, 3 February 2011 (in which the Court found a violation due to the inability under Austrian law to grant a father joint custody over a child born out of wedlock, which categorically precludes any sort of compromise solution from being reached).

thereof, less than satisfied: the first will still suffer the full extent of the damage to his right to reputation in the eyes of the limited number of people who will read the publication, while the latter will be completely prohibited from exercising their freedom of expression towards the entire public.

The limits of what *praktische Konkordanz* can achieve are, of course, not only related to the *desirability* of a compromise, but also to the very *possibility* thereof. Indeed, in many situations it will not be possible to reach any sort of compromise between conflicting Convention rights, because the conflict can only be resolved by allowing one of the conflicting rights to prevail *entirely* over the other.[607] For instance, in cases involving a conflict between a religious employer's freedom of religion and the right to private life of an employee she wishes to dismiss for failing to adhere to religious principles, it appears impossible to strike an effective compromise between both rights.[608] Instead, the conflict can only be resolved by letting one right prevail over the other. The same goes for conflicts involving the establishment of paternity or international child abduction.[609] Similar considerations apply to cases involving child care measures, even if it will in those cases often be possible to let one right prevail, while limiting – to some extent – the damage suffered by the other right.[610] Cases involving moral or legal dilemmas will also resist resolution through *praktische Konkordanz*.[611] Furthermore, as indicated above, also conflicts between freedom of expression and the right to private life or the right to reputation will often need to be resolved by declaring one of the rights the clear 'winner'.[612]

Whenever it is not possible to achieve a *praktische Konkordanz* to resolve a conflict between relative Convention rights, application of a balancing test will need to determine which right should prevail under the particular circumstances of the case at hand.[613] It is to this balancing test that I will now turn.

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[607] Brems, *supra* note 9 at 303.

[608] See, for instance, *Obst*, *supra* note 291; *Schüth*, *supra* note 44. Note that it may be possible to avoid the conflict by means of something along the lines of a "don't ask, don't tell" policy. However, once a religious body becomes aware that an employee has taken actions in the course of her private life that are out of line with the religious body's rules and principles, it appears impossible to reach a compromise through *praktische Konkordanz*.

[609] See, for instance, *Mikulić*, *supra* note 459; ECtHR, *Röman v. Finland*, app. no. 13072/05, 29 January 2013; ECtHR, *Neulinger and Shuruk v. Switzerland*, app. no. 41615/07, 6 July 2010.

[610] See, for instance, ECtHR, *K. and T. v. Finland*, app. no. 25702/94, 12 July 2001; ECtHR, *Vojnity v. Hungary*, app. no. 29617/07, 12 February 2013.

[611] See, for instance, *Odièvre*, *supra* note 1; *A., B. and C.*, *supra* note 149; *Evans*, *supra* note 44.

[612] See, for instance, *Lindon, Otchakovsky-Laurens and July*, *supra* note 40; *Axel Springer*, *supra* note 6; *Biriuk*, *supra* note 501; *Von Hannover (No. 2)*, *supra* note 44.

[613] Apart from the cases mentioned *supra*, in notes 608-612, see also, for instance, *Osman*, *supra* note 44; *Appleby*, *supra* note 44.

CHAPTER III – BALANCING CONFLICTING RELATIVE CONVENTION RIGHTS: THEORETICAL CHALLENGES AND PRACTICAL SHORTCOMINGS

Thus far, I have set out the first two steps of my framework. These steps are respectively aimed at (i) defusing apparent conflicts between Convention rights as positive fake conflicts and (ii) resolving genuine conflicts by reaching a compromise between the conflicting Convention rights (*praktische Konkordanz*). When those two steps fail, however, resolution of a conflict between Convention rights will require a ruling that one right should prevail over the other.

In Part I, I have argued that, if the conflict involves two *relative* Convention rights, a structured balancing test should be applied to determine which right should prevail in the concrete circumstances of the case at hand. I will develop that structured balancing test in this chapter. However, before doing so, I will first set out the theoretical challenges to balancing (Section I) as well as the practical shortcomings of the Court's current balancing test (Section II). In the next chapter (Chapter IV), I will then present the structured balancing test, which aims at overcoming the identified theoretical challenges and practical shortcomings. In the same chapter I will also examine the role of the margin of appreciation in the application of the test.

Section I – Balancing and the Theoretical Challenge of Incommensurability

1. Criticisms of Balancing

In this chapter and the next, I aim to develop a structured balancing test for the resolution of conflicts between relative Convention rights by the ECtHR. Yet, a plethora of objections have been raised against balancing as a judicial tool for the resolution of human rights cases. These objections, formulated by judges and academics alike, would – if successful – be quite devastating for my project. They therefore require detailed attention and countering.

Many of the objections against balancing can be tied to the imperfections of the balancing metaphor. When taken literally, something one should of course resist doing with metaphors, the balancing metaphor conjures up the physical image of a scale on which two diametrically opposed items (rights, values, private interests, public interests, etc.) are weighed. Each item is placed on one side of the scale and the balancing authority – in our case, the ECtHR – either notes the side to which the scale tips or notices that it stays in equilibrium.[614] But, crucially, the balancing authority needs to be able to determine the weight of the items on the scales for the balancing metaphor – taken literally – to work. In that respect, as emphasised by

[614] Stavros Tsakyrakis, a notable critic of balancing, describes the balancing metaphor in similar terms. See Tsakyrakis, *supra* note 228 at 469. Kai Möller refers to this kind of balancing as 'interest balancing' and opposes it to 'balancing as reasoning'. See K. Möller, 'Proportionality: Challenging the Critics', 10 International Journal of Constitutional Law (2012) at 715. I will return to this distinction below.

American Circuit Judge Frank Coffin, "perhaps the biggest problem with the balancing metaphor is that it suggests a mechanistic, quantitative, and utilitarian comparison of the weight or value of two claims according to one scale which is equally appropriate to both."[615]

It is this literal image of balancing that lies at the heart of most of the criticism levelled against the use of balancing as a judicial test. Justice Antonin Scalia has famously objected to the judicial use of balancing tests, because "the scale analogy [implied by balancing] is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[616] Jürgen Habermas has equally famously criticised balancing, claiming that "[b]ecause there are no rational standards [for bringing values into a transitive order with other values], weighing takes place either arbitrarily or unreflectively."[617] Stavros Tsakyrakis, writing in the ECHR context, has insisted that balancing "leads to a complete erosion of human rights. It overlooks the idea that human rights are not merely quantities of freedom but protect some basic status of people as human agents."[618] Alexander Green, also commenting on the ECHR system, has criticised balancing's reliance on "the obtuse metaphor of "weight"", arguing that "the balancing test tacitly assumes that there is some common metric by which values ... can be measured [while this] idea of "measuring" is ... of course nonsense."[619] Ralf Poscher has also questioned the usefulness of balancing, arguing that "it is not apparent what advantage the balancing of principles is supposed to have over other sources of practical knowledge ... since the balancing process itself depends on our intuition as to the relative weight of the conflicting principles."[620] Thomas Alexander Aleinikoff, finally, has lamented the obscure nature of balancing methodologies: "[s]ome rough, intuitive scale calibrated in degrees of "importance" appears to be at work. But to a large extent, the balancing takes place inside a black box."[621]

Balancing has thus been represented by its critics as – among others[622] – weakening rights,[623] irrational,[624] arbitrary,[625] subjective or intuitionist,[626] and unpredictable.[627]

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[615] F. M. Coffin, 'Judicial Balancing: The Protean Scales of Justice', 63 *New York University Law Review* (1988) at 19. See also Van Drooghenbroeck, *supra* note 219 at 281; Jestaedt, *supra* note 115 at 165.
[616] Concurring opinion of Justice Scalia in United States Supreme Court, *Bendix Autolite v. Midwesco Enterprises*, 17 June 1988.
[617] Habermas, *supra* note 29 at 259.
[618] Tsakyrakis, *supra* note 228 at 490.
[619] Green, *supra* note 64 at 75.
[620] Poscher, *supra* note 115 at 241.
[621] T. A. Aleinikoff, 'Constitutional Law in the Age of Balancing', 96 *Yale Law Journal*, (1987) at 976.
[622] Other objections relate, for instance, to the democratic legitimacy argument and the limited role of courts. See ibid. at 984-986; McFadden, *supra* note 93 at 641-642. These objections will not be dealt with here, but they will resurface during the discussion of the role of the margin of appreciation in Chapters IV and V.
[623] Tsakyrakis, *supra* note 64 at 471 and 490-491; Aleinikoff, *supra* note 621 at 991-992; B. Çali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', 29 *Human Rights Quarterly* (2007) at 257 and 269, Cariolou, *supra* note 61 at 266; McFadden, *supra* note 93 at 636 and 640 (citing the criticism and explaining why he does not consider it established).
[624] Habermas, *supra* note 29 at 259; Green, *supra* note 64 at 75; Greer, *supra* note 380 at 413 (explaining the "hostile" view to balancing); Alexy, *supra* note 60 at 96 (referring to the irrationality objection as put forwards by others).
[625] Habermas, *supra* note 29 at 259; Aleinikoff, *supra* note 621 at 975; Greer, *supra* note 380 at 413 (explaining the "hostile" view to balancing).

Some of the above challenges are of no relevance for our current project, since they do not apply to balancing in cases of conflicts between human rights, as opposed to balancing rights against the public interest. The argument that balancing weakens rights, in particular, has no real bite in the context of conflicts between Convention rights.[628] Given that the resolution of such conflicts does not entail weighing Convention rights against the public interest, there is no risk that they will lose their status as 'trumps' over non-rights considerations.[629] Indeed, admitting that, when in conflict, Convention rights should be balanced cannot undermine any status they would hold as higher ranked fundamental norms *vis-à-vis* non-rights considerations.[630]

The remaining objections, however, cannot be so easily dismissed. They require substantive engagement if they are to be overcome. These objections – of irrationality, subjectivity, unpredictability and arbitrariness – are all linked to the primary challenge to balancing: its alleged impossibility in the face of incommensurability.[631] The notion of incommensurability has its origins in Ancient Greek mathematics and literally means "no common measure".[632] If rights are incommensurable, *i.e.* if "no common measure" exists to express their relationship, it indeed appears impossible to *weigh* rights against one another in a rational, objective, non-arbitrary and predictable manner. Incommensurability is thus the primary challenge to be tackled and overcome, if balancing is to succeed. Overcoming the challenge will entail painting a more accurate and workable picture of balancing,[633] of 'balancing as reasoning' rather than a mechanical 'balancing of interests'.[634]

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[626] Habermas, *supra* note 29 at 259; Aleinikoff, *supra* note 621 at 972-973 and 976; McFadden, *supra* note 93 at 643; Poscher, *supra* note 115 at 241. See also, indicating the potential criticism, while not necessarily sharing it, Van Drooghenbroeck, *supra* note 219 at 282-283; De Schutter and Tulkens, *supra* note 200 at 196-197.

[627] Concurring opinion of Justice Scalia in United States Supreme Court, *Bendix Autolite v. Midwesco Enterprises*, 17 June 1988; Aleinikoff, *supra* note 621 at 975-976; McFadden, *supra* note 93 at 642 and 646. See also, indicating the potential criticism, without necessarily sharing it, De Schutter and Tulkens, *supra* note 200 at 196-197.

[628] Cariolou, *supra* note 61 at 266; Ducoulombier, *supra* note 4 at 329.

[629] For this reason, I will not engage further with the argument that balancing or proportionality weakens rights. Instead, I refer the reader to the illuminating works of Ronald Dworkin, Stavros Tsakyrakis, Richard Pildes, George Letsas and Mattias Kumm, among others.

[630] Ducoulombier, *supra* note 4 at 329.

[631] Aleinikoff, *supra* note 621 at 973 and 975; Habermas, *supra* note 29 at 259; Raz, *supra* note 136 at 333-334; Klatt and Meister, *supra* note 242 at 59; B. Scharffs, 'Adjudication and the Problems of Incommensurability', 42 *William and Mary Law Review* (2001) at 1385 and 1406. Note that the objection of balancing as weakening rights – already dismissed in the text as irrelevant in the context of conflicts between rights – can also be related to the incommensurability challenge. See Schauer, *supra* note 202 at 797-798.

[632] E. Oberheim, 'The Incommensurability of Scientific Theories', *Stanford Encyclopedia of Philosophy*, 2013, available at http://plato.stanford.edu/entries/incommensurability/ (last accessed 7 October 2013).

[633] Scharffs, *supra* note 631 at 1377 ("[t]hese metaphors [of weighing, balancing and measuring] are both powerful and problematic. Their power lies in the promise to provide objective and quantifiable answers to practical choices. The problem is that these very metaphors presuppose the commensurability of the values being weighed, balanced, and measured.").

[634] See *infra* Chapter IV, Section I – 'The Structured Balancing Test, in Theory and in Practice'. For the distinction between 'balancing of interests' and 'balancing as reasoning', see Möller, *supra* note 206 at 715 and 721.

2. Incommensurability as the Primary Challenge to Balancing

i. The Different Conceptions of Incommensurability

In the legal philosophical realm, incommensurability knows many forms and incarnations. Although scholars generally tie the concept to Isaiah Berlin's notion of value pluralism,[635] different scholars offer different definitions and descriptions of the term.[636] Joseph Raz, for instance, uses incommensurability as synonymous to incomparability.[637] He offers the following definition: "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value".[638] Raz claims that the test of incommensurability is failure of transitivity of options, so that "[t]wo valuable options are incommensurable (1) if neither is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the others."[639] Raz himself illustrates his claims through the example of a person faced with a choice between two careers: one in law and one as a clarinet player.[640] But Raz's test of a failure of transitivity is perhaps easier understood with reference to a simpler example: the choice between two cars.[641] Assume I have been looking to buy a car. After laborious research according to a number of parameters (fuel consumption, space, price, safety, etc.) I am left with two options between which I am truly unable to choose: a certain Audi and a certain Volvo. I cannot find any rational criterion that will allow me to choose the one over the other. I am left hopelessly indecisive. The failure of transitivity then entails that finding a better option for one of the cars will not make my choice between both cars any easier. For instance, if besides the original Audi I would find exactly the same Audi being sold for 100 euros less,[642] I would immediately choose that Audi over the original one. However, I may still be unable to decide between that second Audi and the Volvo. Although the second Audi is clearly a better choice than the first Audi, this knowledge will not help me dispel my inability to choose between the first Audi and the Volvo. This is due to the failure of transitivity that marks Raz's conception of incommensurability.

However, the car example signals that Raz's conception of incommensurability – as synonymous with incomparability – is too narrow. Instead, a distinction falls to be made between incommensurability and incomparability. Crucially, incomparability can only obtain *after* an attempt has been made to make a choice between incommensurable options. In the

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[635] I. Berlin, 'Two Concepts of Liberty', in N. Warburton (ed.), *Arguments for Freedom* (Milton Keynes: Open University, 1999) at footnote 10, p. 165; Scharffs, *supra* note 631 at 1372.
[636] For overviews, see H. S. Mather, 'Law-making and Incommensurability', 47 *McGill Law Journal* (2002), 345-388; P-E. N. Veel, 'Incommensurability, Proportionality and Rational Legal Decision-making', 4 *Law and Ethics of Human Rights* (2010), 176-228.
[637] Raz, *supra* note 136 at 322.
[638] Ibid. Henry Mather has labeled this "rational incommensurability". See Mather, *supra* note 636 at 355.
[639] Raz, *supra* note 136 at 325.
[640] Raz, *supra* note 136 at 332.
[641] The example is taken from L. Katz, 'Incommensurable Choices and the Problem of Moral Ignorance', 146 *University of Pennsylvania Law Review* (1998) at 1465.
[642] Let us assume the salesman will deliver the car at my doorstep free of charge in both situations, to cancel out any potential added collection costs.

car example, such an attempt has already been made. I have used a number of parameters that have allowed me to make a rational choice between multiple incommensurable options: a myriad of cars. This has led me to scratch a number of cars – a BMW and a Toyota, for instance – of my list, because I have been able to rationally compare them to the Audi and the Volvo and found them to be worse. The problem I faced afterwards – the impossibility to choose rationally between the Audi and the Volvo – was a *result* of my attempt to compare them: it failed. It is only in the face of a failure of comparability that rational choice becomes impossible. Incomparability and incommensurability thus need to be distinguished from one another.

Indeed, most scholars define incommensurability without reference to comparability or concepts such as "better" or "worse". Some scholars define incommensurability solely with reference to the absence of a common metric: values, options, goods or rights are incommensurable if they do not share a common metric.[643] According to Ruth Chang, for instance, two items are incommensurable if they "cannot be precisely measured by some common scale of units of value".[644] This definition immediately brings to mind Justice Scalia's objection that balancing "is more like judging whether a particular line is longer than a particular rock is heavy."[645]

However, as rightly pointed out by Brett Scharffs, the definition offered by Chang underestimates the incommensurability challenge. Indeed, the absence of a common metric is only part of the problem. The real problem – or the central idea of incommensurability, as Scharffs puts it – is irreducibility: the impossibility, not simply to express the relationship between two items in a common metric, but to *adequately* express what is important about (the relationship between) those items, even when a common metric is available.[646] To illustrate this point, Scharffs offers the illuminating example of a man and a book.[647] Although it is possible to express the relationship between the man and the book with reference to a common metric – weight – there is nothing of value in expressing the comparison between both in those terms. Cass Sunstein has defined incommensurability in similar terms: "[i]ncommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterised."[648] It is this notion of incommensurability, the one offered by Scharffs and Sunstein, that is central to the incommensurability challenge to balancing, as I understand it.

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[643] V. Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision', 31 *Oxford Journal of Legal Studies* (2011) at 278, with further references (in footnote 25). See also Tsakyrakis, *supra* note 228 at 471.

[644] Chang, as found in Veel, *supra* note 636 at 182.

[645] Concurring opinion of Justice Scalia in United States Supreme Court, *Bendix Autolite v. Midwesco Enterprises*, 17 June 1988.

[646] Scharffs, *supra* note 631 at 1389-1390. See also G. C. N. Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', 23 *Canadian Journal of Law and Jurisprudence* (2010) at 194: "two options are incommensurable when it is not appropriate to evaluate both options according to a common measure ... To say that it is "not appropriate" to evaluate both options according to a common measure is to say that applying a common measure to one or both options would distort, transform, or misrepresent the value, importance, or quality of that option."

[647] Scharffs, *supra* note 631 at 1391.

[648] C. R. Sunstein, 'Incommensurability and Valuation in Law', 92 *Michigan Law Review* (1994) at 796.

ii. The Incommensurability Challenge as it Applies to Balancing

James Griffin has tied the incommensurability challenge directly to balancing: "[m]any who say, "some values are incommensurable" mean something like this ... not all values can be fitted onto a single scale; nor can conflict between them be resolved by measuring them and then, in some arithmetic way, combining the measurements; no such scale exists; no such measurement is possible."[649] Indeed, Stavros Tsakyrakis has claimed that "[t]he most effective critique of balancing concerns the assumption of a common metric in the weighing process. The metaphor says nothing about how various interests are to be weighed and this silence tends to conceal the impossibility of measuring incommensurable values".[650] Frederick Schauer has similarly pointed towards the tension between incommensurability and balancing: "it is at least plausible to conclude that certain legal methodologies – so-called "balancing" being the most obvious – presuppose something resembling broad-based commensurability."[651] Or, as Scharffs puts it, "[t]he problem with balancing metaphors is that they slip commensurability in through the back door. If values are incommensurable, they cannot be successfully weighed against each other."[652]

By combining the above claims with the notion of incommensurability put forward by Scharffs and Sunstein, we are able to posit the incommensurability challenge to the balancing of conflicting rights in full effect. If two conflicting rights are incommensurable, *i.e.* if *no common metric* is available along which they can be measured in a manner that *adequately* captures their relationship, then how can we weigh them against each other in the rational manner suggested by the balancing metaphor?

An example can assist in further illuminating the double nature of the challenge, *i.e.* (i) the absence of a *common metric* (ii) able to *adequately* capture the relationship between rights.[653] The example draws on the fact that, in law, money is often used – by way of a legal fiction – as a metric to express a loss, such as that of a family member.[654] The loss of a brother may for instance be compensated by, say, 10,000 euros. Although it thus becomes possible to – at some level – bring the loss of a brother in relationship with other items, this possibility does not necessarily say anything meaningful about that relationship. For instance, imagine that my brother has died by a gunshot wound, inflicted upon him by his neighbour, from whom my brother had just stolen some valuable goods and from whom he was running away in the streets. Through the legal fiction of compensation in monetary terms, a common metric exists to express both my loss (my brother's life) and the potential loss of my brother's neighbour (the goods my brother had just stolen). Whatever one's thoughts may be on the justifiability of using lethal force to protect one's possessions, it is clearly not correct to claim that, if my brother had stolen goods worth more than 10,000 euro, his neighbour was justified in shooting

[649] Griffin, *supra* note 29 at 47-48.
[650] Tsakyrakis, *supra* note 228 at 471.
[651] Schauer, *supra* note 202 at 785 and 806-807.
[652] Scharffs, *supra* note 631 at 1416.
[653] In the literature on conflicting rights, this dual aspect of the incommensurability challenge is often overlooked. Instead, the challenge is often posited only in terms of the absence of a common metric. See for instance, Zucca, *supra* note 199 at 30; De Schutter and Tulkens, *supra* note 200 at 191.
[654] Schauer, *supra* note 202 at 788; Sunstein, *supra* note 648 at 796.

him in the back, while if the goods were worth less than 10,000 euro, he was not justified in doing so. Expressing both options – the loss of my brother's life and the theft of goods – in the same metric (money) does not render them commensurable.

The crux of the incommensurability challenge thus lies in the claim that there is no common metric available that could adequately express the relationship between two conflicting rights and that *therefore* it is not possible to make a rational choice between both rights through some sort of balancing exercise.[655] It is this challenge that must be overcome, if a judicial balancing test to resolve conflicting Convention rights is to be feasible.

3. Overcoming the Incommensurability Challenge

i. Incommensurability in the Court's Case Law?

Before offering ways to overcome the incommensurability challenge, which has thus far remained a theoretical challenge, I will first examine to what extent it has featured as a practical obstacle in the case law of the ECtHR. Knowing the potential concerns of the Court will tell us something about the practical impact of the incommensurability debate on the ability of the Court to actually resolve cases involving conflicting rights. As Brett Scharffs has pointed out, "Judges routinely seek to accomplish the impossible – to commensurate incommensurable values. That they attempt to do so with regularity says something important about the problems of incommensurability, namely that such problems do not foreclose reasoned deliberation and choice."[656] The ECtHR is no exception. In its case law, the Court continuously balances rights against each other and against the public interest, as if their commensurability obtains. Before we examine what this means for the incommensurability challenge, let us first take a look at the (very) few references to incommensurability that can be found in the Court's case law.

To my knowledge, the notion of incommensurability, as we have employed it thus far, only features twice in the Court's entire case law. The first reference can be found in the concurring opinion of Lord Reed in *V. v. the United Kingdom*, a case about two young children who had murdered a third young child (Jamie Bulger) and were subsequently tried as adults in criminal court. In his concurring opinion, Lord Reed emphasised that

> "it has to be borne in mind that whether a legal system requires a child to be tried in public or in private reflects the way in which a balance is drawn between countervailing, and *incommensurable*, values. On the one hand, the importance attached to safeguarding the well-being and future of young children who have offended, and promoting their rehabilitation and reintegration into society, point towards holding their trials in private. On the other hand, the public interest (and that

[655] Webber, *supra* note 66 at 97; Afonso da Silva, *supra* note 643 at 278 (setting out the challenge, before rebutting it).
[656] Scharffs, *supra* note 631 at 1374.

> of the defendant) in the open administration of justice, and the public interest in freedom of information, point towards holding trials in public."[657]

This was, of course, only the opinion of a single Judge. Since the majority of the Court did not reference the notion of incommensurability in its judgment, there is not much we can learn from this reference other than that the majority did not consider it necessary to include it in the majority judgment.

In fact, the only reference to incommensurability in a majority judgment features in *Evans v. the United Kingdom*, a case involving a conflict between Ms. Evans' right to decisional privacy over her ability to become a biological parent and the same right of her former partner, J. The case concerned the applicant's last and only chance to become a genetic parent by using frozen embryos, fertilized with J.'s sperm. However, after their breakup, J. withdrew his consent for use of the embryos. Because the applicable legislation laid down an absolute rule, stating that any of both partners could at all times revoke their consent to the use of their sperm or ovum, Ms. Evans was not able to have a biological child. In its judgment, the ECtHR held that

> "the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as "entirely incommensurable" interests."[658]

It falls to be noted that the Court did not employ the term "incommensurable" itself. Instead, it referred to the domestic court's use thereof. Moreover, the Court did not express any approval, nor disapproval of the characterisation of the case as involving "entirely incommensurable" interests, but simply noted that this was how the domestic court had described the case. Throughout its own legal reasoning, the Court used different terms to describe the conflicting interests, terms such as "entirely irreconcilable".[659]

It does not appear as though the Court was of the opinion that incommensurability obtained in the *Evans* case, in the sense of precluding rational weighing of the interests at stake.[660] Instead, it rather seems as if the Court, in using terms such as "entirely irreconcilable", wished to emphasise the tragic nature of the case. Indeed, the Court specifically held that "whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated."[661] Nevertheless, the Court, by way of conclusion, "[did] not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically related child with her."[662] True recognition of the

[657] Concurring opinion of Lord Reed to *T. v. the United Kingdom*, *supra* note 150 (emphasis added).
[658] *Evans*, *supra* note 44 at para. 89.
[659] Ibid. at para. 73.
[660] See *contra* J. Bomhoff and L. Zucca, 'Evans v. UK, European Court of Human Rights – The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans* v. *the United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 2 *European Constitutional Law Review* (2006), 424-442.
[661] *Evans*, *supra* note 44 at para. 73.
[662] Ibid. at para. 90.

incommensurability of both interests at stake would of course, in the eyes of balancing's critics, have precluded such a conclusion.

It should perhaps not come as such a big surprise that the supranational ECtHR acts pragmatically, as if incommensurability is not a challenge which it has to engage. As Jacco Bomhoff and Lorenzo Zucca have pointed out in their analysis of the *Evans* case, "[m]uch of fundamental rights law simply is based on the assumption that it must be possible for courts to make rational choices between incommensurable values or interests."[663] Moreover, on pain of denial of justice, the Court is obliged to resolve the issues that are put before it, lest it forsake its judicial duty.[664] Therefore, the ECtHR appears to rely on what Frederick Schauer has termed "instrumental commensurability",[665] *i.e.* a pragmatic attitude that *assumes* or *chooses* commensurability, rather than demonstrating it, and does so for instrumental reasons; simply because the advantages of assuming commensurability are far greater than the disadvantages.[666] Schauer's notion of "instrumental commensurability" is also designed to "show [that] the philosophical and legal controversies [may be] more distinct from each other than has commonly been supposed."[667] In other words, since the Court has no choice but to resolve cases, despite the philosophical charge of incommensurability, it has taken a stance – even if unsupported or incorrect[668] – that assumes commensurability at the level of law.

However, these pragmatic attitudes, choices and assumptions will do nothing to appease critics of balancing. Critics will instead point out that herein lies exactly the problem: when courts ignore the incommensurability challenge, they fail to realise that they cannot – despite their best intentions – ever succeed in balancing rights against each other (or against the public interest) in a rational, objective, non-arbitrary and predictable manner. Therefore, the critics insist, courts should abandon all attempts at balancing and should instead employ different resolution methods or increasingly defer to the (national) legislator.[669]

It thus becomes clear that the incommensurability challenge cannot simply be ignored. It needs to be met head on, particularly in this part of my dissertation, in which I aim to present a balancing test to assist the ECtHR in resolving conflicts between Convention rights in a rational, objective, non-arbitrary and predictable manner.

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[663] Bomhoff and Zucca, *supra* note 660 at 432.
[664] Van Drooghenbroeck, *supra* note 219 at 282; Scharffs, *supra* note 631 at 1410-1411; J. Gerards, '"Hard Cases" in Law', in A. in 't Groen et. al. (eds.), *Knowledge in Ferment – Dilemmas in Science, Scholarship and Society* (Leiden: Leiden University Press, 2007) at 128. See also Zucca, *supra* note 26 at 69.
[665] Schauer develops this notion in two articles. See F. Schauer, 'Instrumental Commensurability', 146 *University of Pennsylvania Law Review* (1998), 1215-1233; Schauer, *supra* note 202. See also Jeremy Waldron's reply to the second article: Waldron, *supra* note 202.
[666] Schauer, *supra* note 665 at 1216-1217 and 1225.
[667] Schauer, *supra* note 202 at 786.
[668] Ibid. at 803 and 806.
[669] The former position is for instance defended by Tsakyrakis, *supra* note 228, while the second is preferred by Webber, *supra* note 66.

ii. Overcoming the Incommensurability Challenge

Tackling the incommensurability challenge obviously requires an accurate understanding of what it exactly entails. As already indicated above, incommensurability has in the legal realm been defined as the absence of a common metric that would allow us to adequately express the relationship between two items, in our case conflicting Convention rights. The incommensurability challenge to the resolution of conflicts between Convention rights thus goes as follows: it is not possible to make a rational choice between conflicting rights by weighing them against each other, because no common metric exists to adequately express their relationship. Here, I aim to deepen our understanding of incommensurability in order to demonstrate that not all instances of incommensurability preclude rational choice between conflicting rights.

When we delve deeper into the meaning of incommensurability, we soon discover that a distinction falls to be made between two conceptions thereof: weak incommensurability and strong incommensurability.[670] Jeremy Waldron's work provides the basis for this crucial distinction. Waldron describes strong incommensurability as "genuine incomparability", as the "sort of incommensurability that can leave us paralysed, not knowing what to choose."[671] According to Waldron, strong incommensurability does not necessarily preclude choice, given that an agent will *have* to make a choice if the problem is acute enough.[672] However, the choice made cannot be a rational one. Instead, it will be one that reveals a particular, subjective preference.[673] Strong incommensurability therefore precludes *rational* choice. Weak incommensurability, on the other hand, does not preclude rational choice.[674] Under weak incommensurability it is possible to bring the incommensurable items into relation with one another.[675] According to Waldron, weak incommensurability "is usually expressed in terms of a simple and straightforward rule" that creates an ordering between the items.[676] He gives the examples of Ronald Dworkin's conception of 'rights as trumps', Robert Nozick's conception of 'rights as side constraints' and John Rawls' concept of a 'lexical ordering'.[677] Waldron concludes that

> "the difference between strong incommensurability and weak incommensurability is this. In a case of strong incommensurability, the competing values cannot even be brought into relation with one another: They are genuinely incomparable ... In a case of weak incommensurability ... the values *can* be brought into relation with one another ... Their lack of commensurability refers only to the absence of a common dimension of measurement that would allow trade-offs between them ..."[678]

[670] Waldron, *supra* note 202 at 815-817.
[671] Ibid. at 815-816.
[672] Ibid. at 816.
[673] Ibid.
[674] Ibid. at 816-817; Scharffs, *supra* note 631 at 1383.
[675] Waldron, *supra* note 202 at 817.
[676] Ibid. at 816.
[677] Ibid. at 816-817.
[678] Ibid. at 817 (emphasis in original).

It falls to be noted that Waldron's conception of weak incommensurability is contested by certain proportionality scholars, insofar as it creates an abstract ordering or hierarchy between rights and public or private interests.[679] Because our current project aims to offer resolution methods for conflicts between rights, rather than for tensions between rights and public or private interests, I will not engage with that side of the debate here. Instead, it falls to be noted that there is no reason to contest Waldron's notion of weak incommensurability as it applies to conflicts between rights. Indeed, Waldron himself has indicated that – under the trumping model, for instance – weighing and balancing may need to be done between the trumps (*i.e.* rights) themselves.[680]

An example may serve to further illustrate the difference between weak and strong incommensurability. The example draws on other examples that have been offered in the literature.[681] It involves two artists: a painter and a composer. Both are weakly incommensurable, because they cannot be adequately or usefully compared with reference to a common metric. However, that does not necessarily mean that we are not able to rationally say that one is better than the other. If we would take Wolfgang Amadeus Mozart as our composer and compare him to a run-of-the-mill painter (I prefer not to name one, but I am sure the reader can think of one herself), we would be able to say – with rational confidence – that Mozart is the better of the two. We are not able to draw that conclusion by expressing their relationship with reference to an objectively measurable common metric, but we are able to do so by relying on a number of factors that we deem central to what it means for an artist to be "great" or "a genius". These factors include her influence on the development of her field, her uniqueness, her ability to move people, the extent to which she is regarded (by critics and others alike) to be "great" or "a genius", etc. On the basis of these factors we are able to conclude quite easily that Mozart is better than your average, run-of-the-mill painter, because he 'scores better' on each and every one of the factors mentioned. However, if we take as our painter not some average artist, but instead, say, Vincent Van Gogh, we may find it much more difficult to say which one of the two is better, Van Gogh or Mozart. Not because rational choice between them is impossible from the outset – we were able to choose between Mozart and an average painter after all – but because our attempts at rational choice will fail. We might be able to say "I prefer Van Gogh over Mozart", but that will be merely an expression of personal preference, and thus a sign of their strong incommensurability.

In the realm of conflicts between Convention rights, weak incommensurability means that we are not able to measure the conflicting rights with reference to a single metric. Nevertheless, in most situations such weak incommensurability can be overcome, because we *are* able to make a rational choice between conflicting Convention rights, provided that we are able to compare them through rational legal reasoning. I submit that, for such rational comparison to work, we need a test for the resolution of conflicts between Convention rights. To that end, I

[679] See, for instance, Afonso da Silva, *supra* note 643 at 280-282.
[680] Waldron, *supra* note 202 at 816-817. See also Zucca, *supra* note 199 at 29.
[681] See, for instance, Afonso da Silva, *supra* note 643 at 283 (giving the example of comparing Bach and Madonna).

will develop a structured and multi-factorial balancing test,[682] which will enable rational choice between conflicting relative Convention rights by the ECtHR,[683] despite their weak incommensurability.[684] It is only when the test fails that we will be confronted with a case of strong incommensurability, in which reason is not able to dictate or justify a choice between the conflicting Convention rights. However, such strong incommensurability will only rarely obtain.[685] It is particularly likely to arise, not in 'normal' hard cases, but in the context of genuine dilemmas.[686] Indeed, as Waldron has emphasised, strong incommensurability "is the stuff of tragic choices."[687] Strong incommensurability will thus resurface in Chapter V, in which I explore the existence and resolution of (apparent) dilemmas in the Court's case law.

The above arguments reveal that my views on incommensurability build upon Waldron's distinction between weak and strong incommensurability, but also depart from it in important respects. In particular, I consider weak incommensurability to be a state that obtains *prior to* any attempt at rational choice between conflicting Convention rights, while I view strong incommensurability as the result that will in rare situations obtain *after* that attempt at rational choice has failed.[688] Strong incommensurability of two items – in our case rights – can thus not obtain from the outset, but can only be the *result* of a failure of reason to offer a rational choice *between* both items.[689] In that respect, the notion of strong incommensurability I employ is broader than the one relied on by Waldron. Indeed, Waldron equates strong incommensurability with "genuine incomparability", insisting that it "suggests that two considerations, *A* and *B*, figuring on opposite sides of a practical decision-problem might be genuinely incomparable. The true state of affairs might be as follows: It is not the case that *A*

[682] I reject other attempts at overcoming the incommensurability challenge, such as the insistence that a common metric exists (*e.g.* utilitarianism's "greatest happiness for the greatest number"), the creation of such a common metric within a balancing test (*e.g.* Aharon Barak's "marginal social importance" or Robert Alexy's triadic scale) and value monism (*e.g.* Ronald Dworkin's right to equal concern and respect). On these other methods, see for instance Dworkin, *supra* note 51; Alexy, *supra* note 60; Barak, *supra* note 194 at 349, 483-484; Griffin, *supra* note 29 at 48; Afonso da Silva, *supra* note 643 at 284 and 301; M. Klatt and M. Meister, 'Proportionality – A Benefit to Human Rights? Remarks on the I•CON Controversy', 10 International Journal of Constitutional Law (2012) at 698-699; Veel, *supra* note 636 at 188-189. See also Scharffs, *supra* note 631 at 1384 (warning of the temptation to assert value monism in order to overcome incommensurability). I will explain my reasons for rejecting Alexy's balancing test at length below. See *infra* Section III, 1. 'Evaluating Alexy's Balancing Test'.

[683] See, in support, Jestaedt, *supra* note 115 at 172 (generally critical of balancing, but accepting that, if the "claim of the doctrine of balancing is reduced to the status of a subject-specific analytical theory directed to the structure of competing fundamental rights ... then there is no reason why it should not have a prominent place in fundamental rights doctrine, and plenty of reasons why it should").

[684] See *contra* Klatt and Meister, *supra* note 242 at 62 (claiming that proportionality and balancing allow for a common metric and, therefore, denying weak incommensurability).

[685] Scharffs, *supra* note 631 at 1375; Sunstein, *supra* note 648 at 810.

[686] See *infra* Chapter V (on dilemmas in the Court's case law).

[687] Waldron, *supra* note 202 at 816.

[688] *Cf.* Raz, *supra* note 136 at 329.

[689] Since I am only concerned with the possibility of rational choice between Convention rights, I do not engage directly with the issue of incomparability. I consider the third option – "both rights in conflict are equally strong" – to be an indication of their strong incommensurability, since the statement indicates that no rational choice *beween* the conflicting rights is possible. Raz would insist that the possibility to rationally express the relationship between both rights means that they are not incommensurable, because he defines incommensurability as synonymous with incomparability. However, I have already explained that the conception of incommensurability employed in this dissertation differs from Raz's, since it is necessary to distinguish incommensurability from incomparability. See *supra* notes 637-643 and accompanying text.

carries more weight than *B*, and it is not the case that *B* carries more weight than *A*, and it is not the case that they are of equal weight."[690]

For purposes of the resolution of conflicts between Convention rights by the ECtHR, however, I suggest we employ a broader notion of strong incommensurability, one that emphasises the impossibility of *rational* choice *between* conflicting rights. This inability – which can only be established *after* we have attempted to resolve the conflict rationally – can be the result of two factors. It may flow from Waldron's "genuine incomparability", *i.e.* when it is not the case that, under the circumstances, one right is stronger than the other and it is also not the case that they are equally strong. However, it may also be the result of what Robert Alexy has termed a "stalemate",[691] *i.e.* a situation in which rational comparison of both conflicting rights leads to the conclusion that, under the concrete circumstances of the case, they are equally strong. Crucially, in both scenarios it will not be possible for the ECtHR to choose rationally between the conflicting Convention rights. For that reason, I consider both factors to entail, for the Court, a situation of strong incommensurability. In Chapter V, I will argue that, when confronted with such a situation of strong incommensurability, the Court should defer the resolution of a conflict between Convention rights to the national legislator.

In this chapter and the next, however, I will focus on overcoming the challenge from weak incommensurability. The structured balancing test I will present to that effect in Chapter IV is a multi-factorial one. It consists of a number of criteria that allow us to determine which of the conflicting relative Convention rights should, in the concrete circumstances the case, prevail.[692] I do not intend to offer some magical 'balancing of interests' test that is somehow able to convert the value of both rights into a common metric so they can be weighed, quite literally, against one another, simply by noting which right holds the higher value. Instead, I will offer a test that relies on 'balancing as reasoning', a form of practical reasoning, to determine which right should take precedence in the case at hand.[693] Balancing thus understood is a process of comparing reasons in favour of both conflicting rights in order to

[690] Waldron, *supra* note 202 at 815-816. *Cf.* also Raz's conception of incommensurability. See *supra* notes 637-640 and accompanying text.

[691] Alexy, 'On Balancing and Subsumption. A Structural Comparison', 16 *Ratio Juris* (2003) at 445; Alexy, *supra* note 60 at 411. See also Afonso da Silva, *supra* note 643 at 276 and 292; M. Klatt, 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion', 20 *Ratio Juris* (2007) at 519.

[692] I thus aim to meet Cass Sunstein's call: "[a]n especially large task for legal theory is to offer an adequate description of how, in legal contexts, choices should be made among incommensurable goods … There are limits to how much can be said in the abstract; a close inspection of particular contexts will be indispensable to this endeavor." See Sunstein, *supra* note 648 at 861.

[693] Möller, *supra* note 614 at 715 and 721-722; Möller, *supra* note 206 at 25 and 137-139; I. Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law', 27 *Cardozo Law Review* (2006) at 1398; Webber, *supra* note 66 at 98; Zucca, *supra* note 199 at 29. It falls to be noted that these authors strongly disagree on the use of the proportionality test to resolve human rights cases, yet all appear to agree that some type of 'balancing as reasoning' or "practical reasoning" may be used to overcome the incommensurability challenge. See further, McFadden, *supra* note 93 at 628-629 (arguing that, if understood in the non-literal sense, balancing is a very bad metaphor for judging, because the image of the scales is only useful in the presence of actual physical weights). I, however, still find the image of the balance – even when taken quite differently from its literal meaning – useful.

determine which right should prevail under the concrete circumstances of the case.[694] The criteria of the structured balancing test will be designed to assist the Court in making that determination. As a multi-factorial test, it will moreover rely on reasoning in terms of 'nets of arguments', rather than 'chains of arguments'. While the deductive style of reasoning implied by 'chains of arguments' – *e.g.* if P1 is valid, then P2 is valid and therefore P3 follows – entails that the entire argument is only as strong as its weakest link, the holistic reasoning based on 'nets of arguments' means that all arguments mutually reinforce each other so that they form a net that is able to support and justify the outcome of the case.[695] I submit that it is through the construction of such 'nets of arguments' that we will usually be able to rationally choose between the Convention rights in conflict.

Howver, before presenting the fully detailed version of my structured balancing test, aimed at overcoming the challenge from weak incommensurability, I will examine the current balancing practice of the ECtHR, laying bare the practical shortcomings thereof.

Section II – The Court's Current Approach to Balancing and Its Practical Shortcomings

1. *Ad Hoc versus* Categorical Balancing

Whenever the Court resolves a conflict between Convention rights through balancing,[696] it currently generally applies an open ended and *ad hoc* balancing test, *i.e.* a concrete weighing – in the specific circumstances of the case – of the interests at stake.[697] The Court in principle also demands, as a preliminary requirement, that the national authorities have themselves engaged in such an *ad hoc* balancing exercise.[698] The Court thus imposes a procedural

[694] See also Griffin, *supra* note 29 at 69 and 131 (arguing that "[f]or a pair of values to be commensurable … there must be a bridging notion in terms of which the comparison can be made" and offering, as an example of such a bridging notion, "the notion of a 'reason': 'this reason is stronger than that'").

[695] L. Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice', 16 *Ratio Juris* (2003) at 319 (introducing the idea of constructing 'nets of arguments', rather than chains); Scharffs, *supra* note 631 at 1423 (using the metaphor of reasons being woven into a cable of cumulative strength, rather than a net).

[696] On the different approaches of the Court to the resolution of conflicts between Convention rights, see *supra* Part I, Chapter III, Section III – 'The 'Argument from Procedure': Underestimating the Complexities of Conflicting Convention Rights Cases'. See also note 697, immediately below.

[697] See, for instance, *Axel Springer*, *supra* note 6; *Pfeifer*, *supra* note 39; *Obst*, *supra* note 291; *Siebenhaar*, *supra* note 291; *Neulinger and Shuruk*, *supra* note 609. See also Ducoulombier, *supra* note 4 at 457; Greer, *supra* note 380 at 412; Gerards, *supra* note 264 at 424. Note, however, that the Court has also often applied its 'traditional' proportionality test to resolve conflicts between Convention rights. The Court has been particularly prone to do so when confronted with a conflict that involves freedom of expression, presumably because its proportionality test under article 10 ECHR is more developed than it is under other articles. See, for instance, *Lindon, Otchakovsky-Laurens and July*, *supra* note 40; *Dąbrowski*, *supra* note 40; *Ashby Donald*, *supra* note 44; ECtHR, *Ciuvică v. Romania* (adm.), app. no. 29672/05, 15 January 2013. As I have argued in Part I, conflicts between Convention rights should, however, not be resolved with recourse to the 'traditional' proportionality test.

[698] See, for instance, *Von Hannover (No. 2)*, *supra* note 44 at para. 124; *Röman*, *supra* note 609 at paras. 58 and 60; ECtHR, *Niskasaari and Others v. Finland*, app. no. 37520/07, 6 July 2010, para. 74; *Schüth*, *supra* note 44 at paras. 67 and 74; ECtHR, *Anayo v. Germany*, app. no. 20578/07, 21 December 2010, para. 71; *Pinto Coelho*, *supra* note 269 at para. 40; ECtHR, *Lindheim and Others v. Norway*, app. nos. 13221/08 and 2139/10, 12 June 2012, para. 128.

obligation upon the domestic authorities: to provide for and conduct a balancing exercise that weighs the competing interests in the concrete circumstances of the case at hand.[699] [700] Whenever the domestic authorities fail to live up to this procedural obligation, the Court generally concludes that – in the absence of a fair balance between both Convention rights – there has been a violation of the invoked Convention right.[701]

However, the above picture knows some exceptions. In a few conflicting Convention rights cases, the Court does not automatically tie the absence of an *ad hoc* balancing exercise in the domestic proceedings to the finding of a violation in Strasbourg. Instead, the Court – exceptionally – finds it acceptable under the Convention for the national legislator to strike a *categorical* or *definitional* balance between Convention rights.[702] In those rare situations, the Court tends to adopt a position of deference, signalling its unwillingness to dismiss the bright line rule preferred by the national legislator.

The difference between the Court's insistence on *ad hoc* balancing and its acceptance, in rare situations, of categorical balancing is nowhere more obvious than in its case law on conflicts between religious autonomy and individual human rights. Indeed, in a number of ECtHR cases the Convention rights of individuals conflict with the freedom of religion, in terms of religious autonomy, of a Church.

In the first three relevant cases discussed here, all concerning Germany, the applicants were fired for having acted against religious precepts, adherence to which was a requirement under their employment contracts. In *Siebenhaar v. Germany*, a Catholic applicant who worked in

[699] See also C. Evans and A. Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights', 1 *Oxford Journal of Law and Religion* (2012) at 102-103; I. Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention', 1 *Oxford Journal of Law and Religion* (2012) at 13 (both in the specific context of conflicts between collective freedom of religion (religious autonomy) and the individual human rights of Church employees; see for instance *Obst*, *supra* note 291, *Schüth*, *supra* note 44 and *Siebenhaar*, *supra* note 291).

[700] Apart from this procedural obligation, which is explicitly linked to the substantive balancing exercise, the Court may in conflicting Convention rights cases of course also impose procedural obligations that are not directly related to the substantive balancing exercise. These other procedural obligations may for instance imply that the relevant parties should be sufficiently consulted in the domestic decision making process. For an example of a conflicting rights case in which the Court found a violation because this procedural obligation was not fulfilled, see ECtHR, *Venema v. the Netherlands*, app. no. 35731/97, 17 December 2002, paras. 89 and 98. See also *Lombardi Vallauri*, *supra* note 291 at paras. 52-55 (in which the Court found a procedural violation because the reasons for the applicant's dismissal were never disclosed to him).

[701] See, for an example, *Röman*, *supra* note 609 at paras. 58 and 60. See also the cases referenced *supra*, in note 698.

[702] See, for instance, *Odièvre*, *supra* note 1 at para. 89; *Fernández Martínez*, *supra* note 507 at paras. 84-85. The difference between *ad hoc* balancing and categorical or definitional balancing corresponds to what Patrick M. McFadden has described as follows: "the balancing test can be used ... first ... to decide the case at hand and *only* the case at hand; and second ... to generate a *rule*, applicable to all like cases in the future." (emphases in original). See McFadden, *supra* note 93 at 596, 598, 600 and 602 (McFadden refers to both types of balancing as "result-balancing" and "rule-balancing"; he refers to the results of the former as *ad hoc*). See further A. Barak, 'A Judge on Judging: the Role of a Supreme Court in a Democracy', 116 *Harvard Law Review* (2002) at 95-96 (distinguishing between *ad hoc* balancing and principled balancing and expressing his preference for the latter). On the benefits and drawbacks of *ad hoc* balancing and categorisation, see S. Sottiaux and G. Van der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights', 31 *Hastings International and Comparative Law Review* (2008), 115-156. For an argument in support of categorical, rather than case-by-case resolutions of conflicts between human rights (and in favour of a limited role for courts in this regard), see Zucca, *supra* note 26 at 24.

the crèche of a Protestant parish was dismissed by the Protestant Church (her employer) after it had come to the Church's attention that the applicant also taught introductory courses for another religious community.[703] In *Obst v. Germany*, the Director for Europe in the public relations department of the Mormon Church was fired after he had confessed to his superior that he had had an extramarital relationship.[704] In *Schüth v. Germany*, finally, an organist for the Catholic Church, who had separated from his wife, was fired for having engaged in an 'extramarital' relationship with a woman who was moreover expecting his child.[705]

In its judgments in the three cited cases, the Court acknowledged that they all involved a conflict between the Convention rights of the applicant – art. 10 in the case of *Siebenhaar* and art. 8 in the cases of *Obst* and *Schüth* – and the art. 9 and art. 11 rights of the Church. In *Schüth*, for example, the Court characterised the conflict as follows:

> "[t]he main question which arises in the present case is … whether the State was required, in the context of its positive obligations under Article 8, to uphold the applicant's right to respect for his private life against his dismissal by the Catholic Church. Accordingly, the Court, by examining how the German employment tribunals balanced the applicant's right with the Catholic Church's right under Articles 9 and 11, will have to ascertain whether or not a sufficient degree of protection was afforded to the applicant."[706]

The Court moreover held that

> "religious communities traditionally and universally exist in the form of organised structures and that, where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords."[707]

The Court thereby clarified that any constitutional protection in the form of separation of Church and State can be translated into the language of Convention rights. Such translation is arguably inevitable under the ECHR system, given that the Court functions as a supranational human rights court and not as a national constitutional court. Absolute deference to the autonomy of the Church as a requirement of the separation of Church and State therefore did not, until recently, appear to be an option for the Court. Instead, in *Obst*, *Schüth* and *Siebenhaar*, the Court insisted that an *ad hoc* balancing exercise should be conducted between

[703] *Siebenhaar*, *supra* note 291.
[704] *Obst*, *supra* note 291.
[705] *Schüth*, *supra* note 44.
[706] *Schüth*, *supra* note 44 at para. 57. See also *Obst*, *supra* note 291 at para. 43; *Siebenhaar*, *supra* note 291 at para. 40.
[707] *Schüth*, *supra* note 44 at para. 58. See also *Obst*, *supra* note 291 at para. 44; *Siebenhaar*, *supra* note 291 at para. 41.

the Convention rights of the applicant and those of the Church to determine whether or not the former's rights had been violated.[708]

However, the Court has recently taken a step in the other direction, in *Fernández Martínez v. Spain* and *Sindicatul "Păstorul cel Bun" v. Romania*.[709] In both cases, the Court ruled that the categorical balance struck by the Spanish and Romanian courts to the benefit of church autonomy was compatible with the Convention.

The applicant in *Fernández Martínez* was described, in the Court's judgment, as a "secularised priest". The applicant used to be a practicing priest, but had later become a teacher of Catholic religion and ethics in the public education system in Spain. Although he had – at the time of the facts – not yet been formally relieved of his status as priest, he had married his partner, with whom he had five children. At some point, a newspaper article reported on a meeting of the "Movement for Optional Celibacy" for priests, at which the applicant was present. The newspaper article featured a photograph of the applicant attending the meeting with his wife and children. The article also mentioned that the applicant was a member of the movement. The Diocese of Carthagena, upon becoming aware of these facts regarding the applicant's private and family life, refused to approve the renewal of his teaching contract with the State (under the applicable Spanish legislation, the granting and prolonging of contracts of teachers of religion was subject to the approval of the relevant religious body). The Diocese motivated its decision by referring to the publicity given by the applicant to his personal situation as a "married priest", which it characterised as a breach of the applicant's duty to teach "without any risk of scandal". This breach of duty, the Diocese explained, prevented the church authorities from proposing the applicant again for the following school year, in order to protect the sensitivity of the parents of children who attended the centre where the applicant was teaching.

At the domestic level, the Spanish courts resolved the ensuing conflict between the applicant's art. 8 rights and the Church's art. 9 and art. 11 rights to the benefit of the latter. The Spanish courts ruled – in essence – that the clauses on neutrality and freedom of religion of the Spanish Constitution required that the religious autonomy of the Church in its hiring and firing policies be respected. Crucially, the Spanish courts did not engage in an *ad hoc* balancing exercise between the conflicting rights, but deferred entirely to the religious autonomy of the Church. In its judgment, the ECtHR accepted that argumentation. It first distinguished *Fernández Martínez* from the earlier cases of *Obst*, *Schüth* and *Siebenhaar* on the basis that it concerned a "secularised priest", while the earlier cases had all concerned lay persons.[710] The Court specifically held that

> "the requirements of the principles of religious freedom and neutrality preclude it from carrying out any further examination of the necessity and proportionality of the non-

[708] *Schüth*, *supra* note 44 at paras. 67 and 74; *Obst*, *supra* note 291 at paras. 43, 45 and 52; *Siebenhaar*, *supra* note 291 at paras. 40, 42 and 47. The Court found a violation in *Schüth*, but not in *Obst* and *Siebenhaar*.
[709] *Fernández Martínez*, *supra* note 507; *Sindicatul "Păstorul cel Bun"*, *supra* note 288.
[710] *Fernández Martínez*, *supra* note 507 at para. 83.

renewal decision, its role being confined to verifying that neither the fundamental principles of domestic law nor the applicant's dignity have been compromised."[711]

The Court thus accepted the domestic courts' categorical balancing to the benefit of the Church's religious autonomy and refused to engage in an *ad hoc* balancing exercise of its own.

Recently, the Grand Chamber of the Court has confirmed this deferential reasoning in *Sindicatul "Păstorul cel Bun" v. Romania*. The case involved a conflict between the right of priests to form a trade union under art. 11 and the Orthodox Church's religious autonomy under art. 9. In the domestic proceedings, the Romanian authorities had refused to register the priests' trade union, because they had failed to obtain the – religiously required – permission of the Archbishop to set up the trade union. The domestic courts considered that, under the circumstances, requirements of religious autonomy precluded them from allowing the registration of the priests' trade union. In its judgment, the Court approved the domestic authorities' deference to religious autonomy, holding that it "does not consider that the judicial decision refusing to register the union with a view to respecting the autonomy of religious denominations was unreasonable, particularly in view of the State's role in preserving such autonomy."[712] The Court further held that the national authorities, in refusing to register the trade union, were "simply applying the principle of the autonomy of religious communities."[713] Crucially, as in *Fernández Martínez*, the Court did not engage in an *ad hoc* balancing exercise to resolve the conflict between Convention rights inherent in *Sindicatul "Păstorul cel Bun"*, nor did it fault the domestic authorities for having failed to engage in such an exercise.[714]

With *Fernández Martínez* and *Sindicatul "Păstorul cel Bun"*, the Court has thus moved away from the *ad hoc* balancing it required in *Obst*, *Schüth* and *Siebenhaar*. However, it has done so without contradicting or overruling that earlier case law, which still stands. Instead, it has distinguished the later cases from the earlier ones. The crucial difference between both sets of cases lies, according to the Court, in the functions exercised by the applicants and in their relationship with their respective Churches. The applicants in *Obst*, *Schüth* and *Siebenhaar* were all described as lay persons, while the applicants in *Fernández Martínez* and *Sindicatul "Păstorul cel Bun"* were described as priests.

With *Fernández Martínez* and *Sindicatul "Păstorul cel Bun"*, the Court thus appears to have introduced a type of 'ministerial exception' in its case law, by which categorical balancing to

[711] Ibid. at para. 84.
[712] *Sindicatul "Păstorul cel Bun"*, *supra* note 288 at para. 164.
[713] Ibid. at para. 168.
[714] See the dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom in ibid. at para. 5 (criticizing the fact that the domestic authorities "did not take into account the competing interests and did not perform a balancing exercise to assess the proportionality of the adopted measure in relation to the applicant union's rights").

the benefit of religious freedom, in the form of deference to Church autonomy, rules cases involving alleged violations of the Convention rights of 'ministers' (*e.g.* priests).[715]

Apart from the discussed cases on religious autonomy, the Court also tends to defer to the categorical balance struck by the national legislator in cases involving sensitive moral and ethical issues, particularly when it characterises those cases as involving a dilemma.[716] The Court's position of deference in those cases is heavily contested, not in the least within its own walls.[717] Moreover, the Court only defers to the national legislator when the latter has attempted to strike some sort of – categorical – balance between the Convention rights involved. If the national legislator has failed to do even that, the Court will – also in sensitive cases – not hesitate to find a violation.[718] In Chapter V, I will deal at length with the specific category of dilemmas in the Court's case law. There, I will explain my views on the acceptability of bright line rules established by the national legislator. I will connect that acceptability to the margin of appreciation and to strong incommensurability in cases of (apparent) dilemmas.

In the remainder of this chapter, I will examine the Court's *ad hoc* balancing exercise in 'standard' cases involving conflicts between Convention rights. Since I aim to develop a structured balancing test for the resolution of conflicts between relative Convention rights, I will initially restrict myself to critiquing the Court's *substantive* use of balancing. In the following subsections I will discuss what I consider to be the main shortcomings of the Court's substantive use of *ad hoc* balancing. These shortcomings are, in the order in which they will be discussed, related to (i) the problem of 'preferential framing'; (ii) the threats of arbitrariness and subjectivity; (iii) the role of coherence in legal reasoning; and (iv) the need to counteract intuitive reasoning. At the end of Chapter IV, I will complement the analysis with a discussion on the relationship between *ad hoc* balancing, the margin of appreciation and *procedural* checks.[719]

2. The Problem of 'Preferential Framing'

A first problem with the Court's current approach to resolving conflicts between Convention rights has already been mentioned in Part I. I have coined this problem one of 'preferential framing', *i.e.* a process by which the Court, in its legal reasoning, frames the case around the

[715] *Compare* United States Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et. al.*, No. 10-553, 11 January 2012 (in which the Supreme Court of the United States similarly engaged in categorical balancing, relying on the 'ministerial exception' to defer in near absolute terms to the autonomy of religious bodies in their hiring and firing policies).
[716] See, for instance, *Odièvre*, *supra* note 1; *Evans*, *supra* note 44.
[717] See the concurring and dissenting opinions in ibid. See also, in favour of the Court's approach in *Evans*, Bomhoff and Zucca, *supra* note 660 at 448-449.
[718] See, for instance, ECtHR, *Godelli v. Italy*, app. no. 33783/09, 25 September 2012, para. 70 ("à la différence du système français examiné dans l'arrêt *Odièvre*, la législation italienne ne tente de ménager aucun équilibre entre les droits et les intérêts concurrents en cause. En l'absence de tout mécanisme destiné à mettre en balance le droit de la requérante à connaître ses origines avec les droits et les intérêts de la mère à maintenir son anonymat, une préférence aveugle est inévitablement donnée à cette dernière.").
[719] On the Court's increasing reliance on procedural checks in conflicting rights cases, see Sudre, *supra* note 57 at 385-386.

directly invoked Convention right and disregards (to a greater or lesser extent) the other Convention right at stake.[720] This other Convention right thus disappears to the background.

In Part I, have explained how the threat of preferential framing is partly related to the procedural limitations of the Convention system.[721] Indeed, when a conflict between Convention rights reaches the Court, it is not presented as a conflict between right holders. Instead, the counter-party to a claim at the Court is always the government of the contracting State in question. This is also the case when the original conflict in the domestic proceedings was one between two or more individuals. At the international level, a formerly horizontal conflict is thus transformed, as it were, to a vertical one between the applicant and the State. The other individual(s) – whose Convention rights are also at stake in case of a genuine conflict – disappear(s) to the background.

The 'verticalisation' of the conflict causes a risk of preferential framing. This risk becomes even greater if the Judges deciding the case intuitively prefer a finding in favour of the applicant.[722] In its reasoning, the Court may – as a result of both factors – be tempted to focus on the right invoked by the applicant and disregard (to a lesser or greater extent) the other Convention right at stake. Such preferential framing is problematic, because it may lead to an unsatisfactory resolution of the conflict. Overemphasis on the directly invoked right may cause the Court to decide the conflict in favour of that right, without supporting its ruling with convincing reasons.[723] Preferential framing moreover introduces an element of arbitrariness into the Court's reasoning in conflicting Convention rights cases: the reasoning becomes – partly – dependent on the result of the domestic proceedings. This is, from the viewpoint of the Convention's requirements, a factor that should not matter.[724]

i. Testing the Theoretical Problem of Preferential Framing in Practice

Although preferential framing, as described above, is surely a theoretical threat to the resolution of conflicts between human rights by the ECtHR,[725] it is not easy to establish its practical impact in the Court's legal reasoning. One particularly promising way to search for

[720] See *supra* note 281 and accompanying text. My analysis builds on the one presented in De Schutter and Tulkens, *supra* note 200 at 201-203 and in Brems, *supra* note 9 at 305.
[721] See *supra*, around notes 291-293 and accompanying text.
[722] On the potentially disruptive role of intuitive reasoning in the Court's conflicting rights case law, see *infra* '5. Counteracting Intuitive Reasoning'.
[723] See also C. Fried, 'Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test', 76 *Harvard Law Review* (1963) at 763 ("under no circumstances should the Court formulate the conflict in a particular case, or identify the elements of the balance to be struck, in such a way that the statement itself prejudices the decision.").
[724] Barring, of course, the relevance of the margin of appreciation. However, here we are not discussing the impact of the margin of appreciation, which would have the Court confirming the domestic courts' reasoning, but rather the opposite effect: the Court 'overruling' the reasoning of the domestic courts due to its framing of the case to the advantage of the directly invoked right.
[725] See *contra* Spielmann and Cariolou, *supra* note 43 at 584 (arguing, in the context of the Court's defamation case law, that this "assumption is debatable" since there is in their view "no reason in principle why the outcome of the Court's analysis would depend on how an application is framed, particularly given the nature of the Court's examination that involves precisely the application of the same principles concerning freedom of speech.").

indications of preferential framing in the Court's case law is to examine a specific type of conflict under both relevant Convention rights. The defamation case law of the Court is particularly suited to this exercise.

In the seminal case of *Chauvy and Others v. France*, the Court explicitly recognised that art. 8 ECHR includes a right to protection of one's reputation.[726] As a result, all defamation cases decided since *Chauvy* involve a conflict between freedom of expression and the right to reputation. Depending on who won the domestic proceedings, these cases are brought to Strasbourg under art. 8 (if the domestic courts ruled in favour of freedom of expression) or under art. 10 (if the domestic courts ruled in favour of the right to reputation). In order to assess the existence of preferential framing in the Court's case law, it is thus particularly interesting to examine the outcome of defamation cases in Strasbourg. By dividing the relevant judgments according to the invoked article and comparing the reasoning and outcome under each article, we may get a better sense of the existence of preferential framing effects in the Court's defamation case law. To that end, I will present both a statistical and a substantive analysis of the Court's defamation case law. Both analyses will lead me to conclude that the threat of preferential framing is real.

ii. The Statistical Analysis

Methodological Considerations

The statistical analysis of the Court's defamation case law I present below takes two defining moments in that case law into account. The first defining moment is the judgment in *Chauvy*, in which the Court established the right to reputation under art. 8 ECHR *and* held that defamation cases entail a conflict between the art. 10 right of freedom of expression and the – newly established – art. 8 right to reputation. The Court thereby introduced the possibility of conflict between freedom of expression and the right to reputation under the Convention. This also brought the risk of preferential framing into play: without conflicts between Convention rights, there is no threat of preferential framing in their resolution. For that reason, I have taken the Court's judgment in *Chauvy* as the temporal starting point of my analysis.

The second defining moment in the Court's defamation case law is the Grand Chamber judgment in *Palomo Sánchez and Others v. Spain*, in which the Court ruled in favour of a deferential position in cases of conflict between art. 8 and art. 10. To fully understand how and why the Court's judgment in *Palomo Sánchez* is relevant to my analysis, some additional background information is needed.

The Grand Chamber ruling in *Palomo Sánchez* followed the distress signal sent by the Chamber in *Karakó v. Hungary*. In *Karakó,* the Court had expressed its concerns over

[726] *Chauvy*, *supra* note 39 at para. 70.

potential preferential framing effects in its defamation case law. These concerns had led the Court to deny the possibility of rights conflicts:

> "the purported conflict between Articles 8 and 10 of the Convention ... is one of appearance only. To hold otherwise would result in a situation where – if both reputation and freedom of expression are at stake – the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant."[727]

I have already argued in Part I that, although the Court's identification of the problem in *Karakó* may have been accurate, its solution is unacceptable.[728] Instead of leading to the denial of rights conflict, the threat of preferential framing should be avoided by (i) a correct identification of a genuine conflict between Convention rights, followed by (ii) a legal reasoning in which both Convention rights are given equal respect. In its later defamation case law the Court has, in fact, recognised the need to principally award conflicting Convention rights equal respect. In *Axel Springer AG v. Germany*, the Court held that:

> "[i]n cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect ..."[729]

However, in the meantime the Court had already taken another measure, with an indirect impact on the risk of preferential framing. In *Palomo Sánchez*, the Court had ruled as follows:

> "[i]n the present case, the Spanish courts were required to balance the applicants' right to freedom of expression ... against the right to honour and dignity [of others] ... If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts."[730]

This passage was confirmed in *Axel Springer*, in which the Court held that:

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[727] *Karakó*, *supra* note 41 at para. 17.
[728] See *supra* notes 284-288 and accompanying text.
[729] *Axel Springer*, *supra* note 6 at para. 87. In its judgment, the Court balanced freedom of expression against the right to protection of reputation by use of the following criteria: contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; prior conduct of the person concerned; method of obtaining the information and its veracity; content, form and consequences of the publication; severity of the sanction imposed. See also, on the publication of photographs of public figures (and thus on the conflict between freedom of expression and the right to respect for private life), *Von Hannover (No. 2)*, *supra* note 44 at para. 106, in which the Court applied similar criteria to those listed in *Axel Springer* to balance both Convention rights against each other.
[730] ECtHR, *Palomo Sánchez and Others v. Spain*, app. nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011, para. 57. This principle was first introduced in the Chamber judgment in *MGN Limited*, *supra* note 3 at para. 150.

> "[w]here the balancing exercise between ... two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts."[731]

Both quotes indicate an alternative approach to combatting the risk of preferential framing. Indeed, a principled position of deference to the reasoning of the domestic courts should lead to an increase in the number of cases in which the Court does not find a violation of the invoked right, but instead defers to the balance as struck by the domestic courts. Because this balance will by definition have been struck to the benefit of the other right, a deferential position indirectly counteracts the threat of preferential framing in the Court's case law.[732] For that reason, I have taken the Court's judgment in *Palomo Sánchez* as the cut off point of the first time period – and the starting point of the second time period – of my analysis of the Court's defamation case law. Dividing the statistical analysis into two time periods allows for useful comparison of the results under both.

Thus, the first time period of the statistical analysis presented below runs from *Chauvy* until *Palomo Sánchez*, while the second time period runs from *Palomo Sánchez* until the present.[733] In conducting the analysis, I have gathered all defamation judgments under art. 10 and under art. 8 in both time periods. I have then examined which judgments led to the finding of a violation and which did not, under each article and in each time period.

Results and Discussion

In the first time period (see Table 1 below), *i.e.* between *Chauvy* and *Palomo Sánchez*, I examined the Court's judgments in 102 relevant defamation cases: 94 art. 10 cases and eight art. 8 cases. The Court found a violation in 76 of the 94 cases under art. 10 and no violation in the remaining 18. The Court found a violation in five of the eight cases under art. 8 and no violation in the remaining three.

In the second time period (see Table 1 Below), *i.e.* from *Palomo Sánchez* onwards, I examined 16 relevant defamation judgments: 14 under art. 10 and two under art. 8. The Court found a violation in nine of the 14 judgments under art. 10 and no violation in the remaining five. The Court found no violation in both art. 8 cases.

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[731] *Axel Springer*, *supra* note 6 at para. 88. See further ECtHR, *Rothe v. Austria*, app. no. 6490/07, 4 December 2012, para. 50; ECtHR, *Küchl v. Austria*, app. no. 51151/06, 4 December 2012, para. 66; ECtHR, *Szima v. Hungary*, app. no. 29723/11, 9 October 2012, para. 29. The Court has established and applied a similar principle in its case law on the publication of photographs. See *Von Hannover (No. 2)*, *supra* note 44 at para. 107; ECtHR, *Verlagsgruppe News GmbH and Bobi v. Austria*, app. no. 59631/09, 4 December 2012, para. 94.

[732] De Schutter and Tulkens, *supra* note 200 at 202-203 (considering this a powerful argument in favour of an increased role of the margin of appreciation in conflicting Convention rights cases).

[733] I conducted the case law analysis on 25 May 2013. This is therefore also the ending date of the second period ('the present').

First time period: *Chauvy – Palomo Sánchez*		
	Violation	**No violation**
Article 10	76	18
Article 8	5	3
Second time period: *Palomo Sánchez – present*		
	Violation	**No violation**
Article 10	9	5
Article 8	0	2

Table 1: violations – no violations in defamation cases *post-Chauvy*.

It is impossible to draw definitive conclusions from the above figures, illustrated in Table 1, primarily due to the low number of judgments under art. 8. However, the results do offer valuable indications. They indicate, in particular, that the threat of preferential framing is real.[734]

During the first time period, the invoked right was at a clear advantage: the Court found a violation in the vast majority of art. 10 cases *and* in the majority of art. 8 cases, even if the margin was much smaller in respect of the art. 8 cases. Moreover, the ratio between the numbers teaches us something the numbers themselves cannot. Under art. 10, the ratio violation / no violation was roughly 4/1, while under art. 8 it was 5/3. If there was an alternative explanation for the results – *e.g.* an abstract preference on the part of the Court in favour of freedom of expression – we should have noted more findings of no violation under art. 8 than findings of a violation. Yet, we do not. A consistent preference for freedom of expression – replicating the 4/1 ratio – would have required roughly the following results under art. 8: 6 no violations, 1.5 violations. This is far removed from the actual figures. An abstract preference on the part of the Court in favour of freedom of expression can thus not explain the results. Instead, preferential framing effects offer the most likely explanation for the discrepancy.[735]

[734] See *contra* Spielmann and Cariolou, *supra* note 43 at 584 (arguing, in the context of the Court's defamation case law, that this "assumption is debatable" since there is in their view "no reason in principle why the outcome of the Court's analysis would depend on how an application is framed, particularly given the nature of the Court's examination that involves precisely the application of the same principles concerning freedom of speech.").

[735] An alternative explanation of the results could be a combination of preferential framing effects and an abstract preference for freedom of expression over the right to reputation on the part of the Court. This would also explain the difference between both ratios (4/1 *versus* 5/3): the preference for freedom of expression is partially, but not entirely, countered by preferential framing effects. However, it is impossible to maintain this alternative explanation on the sole basis of the presented figures. Moreover, any indications of a potential abstract preference for freedom of expression on the part of the Court could be caused by other factors, leading us to erroneously find a causal connection where there is none. For instance, many of the relevant judgments concern political speech or speech in the public interest directed at political figures. These factors strengthen the

This hypothesis is supported by the results of the second time period. These no longer show a clear indication of preferential framing effects. The ratio violation / no violation under art. 10 is markedly smaller, at less than 2/1 (there were no violations under art. 8).[736] The results from the second time period are moreover in line with my earlier hypothesis: the Court's change to a deferential approach in *Palomo Sánchez* indirectly counteracts the threat of preferential framing in its defamation case law. These results thus further corroborate the charge that preferential framing effects are a risk not only in theory, but also in the Court's practice.

iii. The Substantive Analysis[737]

The results of the statistical analysis are confirmed by a substantive analysis of the Court's defamation case law, which lends further support to the hypothesis that the Court's legal reasoning in conflicting Convention rights cases is liable to be skewed by preferential framing effects. Such skewing in favour of the directly invoked Convention right is particularly apparent in the Court's assessment of the damage suffered by the conflicting rights. In its reasoning under both art. 8 and art. 10, the Court tends to only gauge the damage done to the directly invoked right. The Court usually does not assess, nor mention the damage suffered by the other Convention right at stake. As a result, the Court's reasoning is skewed. Preferential framing effects take hold, rendering it more likely that the Court will rule in favour of the directly invoked right, particularly if and when it considers the damage suffered by that right to be serious. In the absence of countervailing arguments – due to the 'invisibility' of the damage done to the other right – alternative solutions to the case simply do not appear on the Court's radar.

This preferential framing process can clearly be seen at work in the Court's art. 10 defamation case law.

Throughout its rich history, the Court has infused that case law with a plethora of relevant factors for the resolution of the case at hand.[738] One such factor is the status of the person whose reputation has allegedly been damaged. Ever since *Lingens v. Austria*, the Court has distinguished between several categories of plaintiffs in defamation proceedings, establishing the limits of acceptable criticism against them.[739] Politicians are required to demonstrate a higher degree of tolerance to criticism than ordinary citizens, since a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed."[740] The level of

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claim of freedom of expression and weaken that of the right to reputation, in the concrete circumstances of the case. Yet, they do not indicate an abstract preference on the part of the Court for all forms of freedom of expression over the right to reputation of all individuals.

[736] Note that there were only two judgments, which is a very small sample from which not even preliminary conclusions can be drawn.

[737] The text below is partly taken from Smet, *supra* note 38, where the full substantive analysis of the Court's legal reasoning in defamation cases can be found.

[738] Smet, *supra* note 38.

[739] *Lingens*, *supra* note 275 at para. 42.

[740] Ibid.

acceptable criticism is also more expansive for public servants than private individuals.[741] However, because they do not knowingly and willingly lay themselves open to close scrutiny to the same extent as politicians do, and because they "must enjoy public confidence . . . free of undue perturbation if they are to be successful in performing their tasks," the range of acceptable criticism against public servants is less broad than for politicians.[742] With regard to public figures, the Court has consistently held that when private individuals enter the public arena they lay themselves open to public scrutiny and should therefore display a higher degree of tolerance to criticism.[743] Finally, the Court has held that private individuals should be awarded the largest protection from defamatory statements in Article 10 cases, because they do not specifically open themselves up to public scrutiny.[744]

By introducing a distinction between different categories of plaintiffs and requiring that certain persons exhibit a higher degree of tolerance to criticism than others, the Court has created an excellent opportunity for careful consideration of cases involving a conflict between freedom of expression and the right to reputation. Theoretically speaking, the Court's reasoning could be expected to take the following form. Categories of persons who willingly and knowingly lay themselves open to public scrutiny will expect the possibility of criticism. As a result, the impact of defamatory statements on their reputation is less profound and more easily mitigated. Therefore, the limits of acceptable criticism are wider with regard to these persons. Conversely, the impact of defamatory statements on the reputation of persons who do not lay themselves open to public scrutiny will be greater and less easily mitigated. Therefore, the level of acceptable criticism with regard to these persons is more limited.

Keeping the above in mind, it is striking that the recognition of the existence of a conflict between freedom of expression and the right to reputation in *Chauvy* has had virtually no impact on the way the Court addresses the status of the plaintiff in art. 10 cases. Particularly problematic is the Court's continued one-sided examination, in post-*Chauvy* cases, of the damage done to the conflicting Convention rights. In cases involving defamation of politicians, the foundation of the Court's art. 10 reasoning always lies in the finding that the limits of acceptable criticism are wider with regard to politicians. However, when a case involves defamation of a private individual, the Court rarely builds its analysis on the converse assumption that the level of acceptable criticism is more limited with regard to private individuals. The Court thus succumbs to preferential framing effects. Rather than looking at factors that have an impact on the strength of the applicant's argument for freedom of expression *and* on the plaintiff's right to reputation, the Court focuses its attention on freedom of expression alone.

Similar preferential framing effects can be seen at play in the Court's assessment, also under art. 10, of the tone and form of allegedly defamatory statements. For instance, in *Gavrilovici v. Moldova*, a case involving the conviction of a private individual who was sentenced to five days of detention for having supposedly called the president of the regional council a fascist,

[741] ECtHR, *Nikula v. Finland*, app. no. 31611/96, 21 March 2002, para. 48.
[742] Ibid.; ECtHR, *Lešník v. Slovakia*, app. no. 35640/97, 11 March 2003, para. 53.
[743] See, for instance, ECtHR, *Bodrožić v. Serbia*, app. no. 32550/05, 23 June 2009, para. 54.
[744] See, for instance, ECtHR, *Tammer v. Estonia*, app. no. 41205/98, 6 February 2001, para. 68.

the Court took into account the particular circumstances in which the insulting remark had been uttered.[745] The applicant was accused of making the statement during a heated exchange immediately after he was told that the regional council would stop providing financial aid for the medical transportation of his chronically ill wife and son. The Court ruled that, even if the disputed remark had indeed been uttered by the applicant, he was clearly in a state of despair and anger, circumstances under which the effect on the reputation of the plaintiff must have been minimal because all those present at the council meeting were aware of the tension and had heard the unspecified provoking statements made by the plaintiff.[746] The Court therefore concluded that the criminal conviction and detention of the applicant had violated art. 10.[747] Although, taken in isolation, this indicates careful reasoning on the part of the Court, it is worth noting that the Court only uses this argument in cases where the damage to the reputation is expected to be limited. It hardly ever uses it in the opposite sense, *i.e.* to find a greater potential damage to reputation when statements are made through mass or print media. This is another clear indication that preferential framing effects to the benefit of the directly invoked right are at work in the Court's defamation case law under art. 10.

The findings in relation to the Court's art. 10 case law also apply to its art. 8 case law. Under art. 8, the Court similarly assesses the damage done to the conflicting Convention rights in a one-sided manner. This process can be seen at work in *A v. Norway*, a case involving a newspaper article in which it was alleged that, due to his prior conviction, the applicant was the prime suspect in a murder investigation.[748] In this case, the Court found a violation of art. 8 after having established that the public interest nature of the publication did not justify the defamatory allegations, since the publication represented a "particularly grievous prejudice to the applicant's honour and reputation that was especially harmful to his moral and psychological integrity and to his private life."[749] However, the Court failed to examine the damage that would be done to the freedom of expression if the case had been decided differently at the domestic level. Hence, the Court reproduced one of the major shortcomings of its art. 10 case law: it only assessed the damage done to the directly invoked Convention right without examining the impact on the other right (in this case, freedom of expression). Such one-sided assessment of the impact on the conflicting Convention right is a substantial indication that the Court continues to practice preferential framing in its defamation case law, also under art. 8.

Another such indication can be found in *Pfeifer v. Austria*.[750] That case involved allegations that a journalist's harsh criticism of a professor had unleashed a witch hunt against him, which eventually caused his suicide. In *Pfeifer*, the Court held that the domestic court's failure to provide relief to the applicant violated his right to reputation under art. 8.[751] The Court held that the accusation that the journalist was morally responsible for the professor's death

[745] ECtHR, *Gavrilovici v. Moldova*, app. no. 25464/05, 15 December 2009, para. 54.
[746] Ibid. at paras. 58-59.
[747] Ibid. at paras. 60-61.
[748] *A. v. Norway*, *supra* note 88.
[749] Ibid. at paras. 71 and 73.
[750] *Pfeifer*, *supra* note 39.
[751] Ibid. at para. 49.

severely maligned his reputation and lacked a sufficient factual basis.[752] As a result, the Court concluded, the defendant's freedom of expression did not outweigh the applicant's right to reputation.[753] However, given the Court's tendency to, in an art. 10 analysis, independently determine the status of the statement at issue and to take a lenient attitude toward the requirement of a factual basis,[754] it can seriously be doubted whether the outcome of the case would have been the same if it had been decided differently at the domestic level and brought under art. 10 in front of the Court. This further indicates that a problem of preferential framing indeed exists in the Court's defamation case law.

iv. Overcoming the Problem of Preferential Framing

The statistical and substantive analyses presented above offer strong indications that the problem of preferential framing in the Court's approach to conflicts between Convention rights is not confined to the theoretical realm. They show that preferential framing effects are a real threat to the Court's practice. The question therefore poses itself as to how this problem can successfully be tackled.

As explained above, the Court's deferential approach in *Palomo Sánchez* indirectly counteracts the threat of preferential framing. However, as I will argue extensively below, the mere existence of a conflict between Convention rights cannot and should not lead to the granting of a wide margin of appreciation to the State.[755] In my argument, the Court should *not* automatically defer to the views of the domestic courts whenever it is confronted with a conflict between Convention rights. A possible threat of preferential framing therefore falls to be countered by different measures than the ones taken in *Palomo Sánchez*. I submit that those measures should be the following:

1) correct identification of genuine conflicts between Convention rights, as outlined in Part I; and

2) in case of a genuine conflict between relative Convention rights – which cannot be resolved through *Praktische Konkordanz* – resolution of the conflict through a structured balancing test in which both Convention rights are treated with equal respect.[756]

Step 1) is intended to provide a first guarantee against preferential framing: understanding the problem is half the solution.[757] Once a genuine conflict between relative Convention rights

[752] Ibid. at paras. 44-49.
[753] Ibid. at para. 49.
[754] Smet, *supra* note 38 at 214-217.
[755] See *infra* Chapter IV, Section II – 'The Role of the Margin of Appreciation in the Application of the Structured Balancing Test'
[756] See, in support, Afonso da Silva, *supra* note 643 at 286; Möller, *supra* note 206 at 25; S. Besson, 'Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights', 21 *International Journal of Law, Policy and the Family* (2007) at 140. See *contra* Fried, *supra* note 723 at 775; Zucca, *supra* note 26 at 169; De Schutter and Tulkens, *supra* note 200 at 191-192 and 196-197.
[757] In Part I, I indicated an additional – procedural – countermeasure. See *supra*, around notes 291-293 and accompanying text.

has been identified, application of step 2) will further ensure that the Court does not engage in preferential framing, but instead rationally assesses, *inter alia*, the damage done to *both* Convention rights. The question as to *how* the balancing exercise should be conducted will be answered in Chapter IV, in which I aim to develop balancing into a workable piece of methodology.

3. The Threats of Arbitrariness and Subjectivity

Critics of balancing often lament the arbitrariness and subjectivity of balancing tests used by courts. Lorenzo Zucca has for instance argued that "[b]alancing often seems arbitrary, and little more than window-dressing for unsophisticated ethical intuitions."[758] Stavros Tsakyrakis has similarly argued that

> "the balancing approach fails, spectacularly, to deliver what it promises. At the very least, we would expect that the balancing approach would throw some light on the "black box" of comparisons of incommensurable values. What we find, instead, is a characteristically impressionistic assessment of the relative weights of the competing considerations, which does not lend itself to a rational reconstruction of the argumentative path that has led to a particular decision. The reasoning is terse and fails to identify the contribution that different considerations make to the outcome."[759]

However, also scholars who generally support the use of balancing tests have criticised the specific balancing methodology employed by the ECtHR. Matthias Klatt and Moritz Meister have for instance criticised the Court's failure to develop and apply a "proper balancing approach" to conflicting rights cases.[760] Sébastien Van Drooghenbroeck has similarly pointed out that any attempt at structuring the Court's balancing test "est largement déçue par la pratique européenne, qui ... semble préférer le "flair" ... a la méthode."[761]

i. The Origin of the Threat

The origin of the threat of arbitrariness and subjectivity in the Court's balancing methodology arguably lies in the open ended and *ad hoc* nature thereof.

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[758] L. Zucca, '*Evans v United Kingdom*: Frozen Embryos and Conflicting Rights', 11 *Edinburgh Law Review* (2007) at 449.
[759] Tsakyrakis, *supra* note 228 at 482.
[760] Klatt and Meister, *supra* note 242 at 157 (criticising the Court's balancing exercise in *Otto-Preminger-Institut*, *supra* note 36: "[a] substantiated balancing test was applied by neither the majority nor the minority of the judges"). Note that I have excluded *Otto-Preminger-Institut* from the category of genuine conflicts between Convention rights in Part I. However, for our current purposes my characterisation of the case is irrelevant to the evaluation of the balancing test employed by the Court in *Otto-Preminger-Institut*. Instead, what is important is that the Court treated the case as involving conflicting Convention rights.
[761] Van Drooghenbroeck, *supra* note 219 at 306.

In evaluating balancing methodologies generally, Marko Novak has been particularly critical of "simple (or unrestrained) balancing".[762] Unrestrained balancing, in Novak's terms, "refers to a situation in which a court balances two conflicting ... rights only for the purposes of resolving a particular case."[763] According to Novak, "[t]he problem with balancing of this type is that the court performs balancing without carrying out a rationality test of balancing. It usually only states in its ruling that it has balanced one principle against another principle and that one or the other principle prevailed. It does not provide full reasons for such balancing."[764] This is precisely the *modus operandi* of the ECtHR in conflicting Convention rights cases. As argued by Pieter van Dijk en G.J.H. van Hoof, the Court's "[j]udgments typically contain a (sometimes extensive) listing of the factors to be taken into account, but then somewhat abruptly – without additional arguments as to the weight of the factors concerned – conclude, for instance, that ... "a proper balance was not achieved"".[765]

Although the Court has formulated a number of criteria that guide the resolution of certain types of conflicts between Convention rights (*e.g.* the principle that a political figure should show greater tolerance to criticism in the press than a private individual), it generally approaches the balancing exercise in a strictly casuistic manner that leaves many considerations implicit or unaddressed.[766] In conducting the balancing test, the Court is able to draw on a wide array of criteria, at some point or other established as potentially relevant throughout its own case law. On the one hand, this allows for great flexibility: it grants the Court the ability to truly take the concrete circumstances of each case into account.[767] On the other hand, however, it also invites a risk of subjectivity and arbitrariness. Because the balancing exercise is an open ended one, it is entirely up to the Court to decide which criteria it will resort to in a given case. The Court may leave certain criteria aside entirely, without having to explain why it has done so. Moreover, the Court generally fails to clarify how the criteria it does apply relate to each other, thereby precluding the possibility for a *comparative* judgment about the relative strength of the reasons in favour of each right.[768]

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[762] M. Novak, 'Three Models of Balancing (in Constitutional Review)', 23 *Ratio Juris* (2010) at 106.
[763] Ibid.
[764] Ibid.
[765] Van Dijk and van Hoof, as found in Van Drooghenbroeck, *supra* note 219 at 284. See also Gerards, *supra* note 264 at 422 ("[i]n applying the balancing test, the Court mostly mentions a variety of aspects which would seem to stress the importance and weight of the interests at stake, and then it considers that one or the other tips the scale"); J. Martínez-Torrón, The (Un)protection of Individual Religious Identity in the Strasbourg Case Law', 1 *Oxford Journal of Law and Religion* (2012) at 364 ("the Court often declares formally and solemnly its attachment to certain general principles, deemed immovable, but then it assesses the factual evidence with such concision and lack of detail that sometimes those same principles could have been used to decide the case the opposite way"). See further Coffin, *supra* note 615 at 22 ("[a]ll too commonly in judicial opinions, lip service is paid to balancing, a cursory mention of opposing interests is made, and, presto, the "balance" is arrived at through some unrevealed legerdemain.").
[766] Note that the granting of a (wide) margin of appreciation may lead the Court to restrict its supervision to a more procedural examination of the balancing exercise conducted by the domestic authorities. See Gerards, *supra* note 7 at 105-106; Sudre, *supra* note 57 at 385-386. However, in performing the procedural check, the Court still relies on its own established criteria, gauging to what extent the domestic balancing exercise corresponds to those criteria. They thus remain relevant. See, for example, *MGN Limited*, *supra* note 3. As already indicated, I will leave the procedural aspect aside for now and will return to it at the end of Chapter IV.
[767] Gerards, *supra* note 264 at 420.
[768] On the need for a comparative judgment, see Mather, *supra* note 636 at 366.

As a result, the Court's legal reasoning in conflicting Convention rights cases almost invariably entails a "jump", to borrow the terminology used by Aleksander Peczenik.[769] In relevant part, Peczenik explains that a "jump from a set of premises S to a conclusion q exists if ... q does not follow deductively from S".[770] In conflicting rights cases, it is indeed often not possible to directly deduce the Court's conclusion – violation or no violation – from the premises it offers, because the Court generally (i) does not explain why it has selected certain criteria and left others out and (ii) does not explicate the weight it attaches to each criterion, nor the relationship between the criteria.[771] This often creates an impression of subjectivity and arbitrariness. It can even make it seem as if Judges decide conflicting Convention rights cases on the basis of their own unarticulated preferences, to then – *ex post facto* – formulate an (unsatisfactory) balancing exercise to support their conclusion.[772] Novak links this latter impression to the particular type of balancing used by the Court. He claims that one of the primary shortcomings of unrestrained balancing is that, under it, "the court does not subject its intuition .... to the rationality (justification) test ... whose categories, if they existed, would offer some possibility of enabling an external review (by the public) of what was going on in the case."[773] Patrick McFadden has, in similar terms, argued that "balancing test results are peculiarly subject to the world view of the judge who employs it. When the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important."[774]

A few examples from the Court's case law on conflicting Convention rights may serve to illustrate the points made here, *i.e.* that the Court generally (i) does not explain why it has selected certain criteria for inclusion in its balancing exercise, while leaving others out; and (ii) does not explicate the weight it attaches to each criterion, nor the relationship between the criteria.

[769] A. Peczenik, *On Law and Reason* (Dordrecht – Boston – London: Kluwer Academic Publishers, 1989) at 130.
[770] Ibid. at 130-131. Note that this is only the first part of Peczenik's definition. Its full statement also includes a second requirement for the existence of a jump, namely the inability to "expand or change S in such a way that set of premises S1 occurs [from which] the conclusion q follows deductively". However, since I am at the moment only concerned with the legal reasoning actually employed by the Court in conflicting rights cases, the only relevant premise is the one displayed in the judgment (*i.e.* premise S). It may well be that one may counteract the jump in legal reasoning by expanding on that premise to formulate a premise S1 from which q deductively follows. However, this would be done through a hypothetical reformulation of the Court's reasoning by the observer (in this case me). According to Peczenik, the ability to do so would make the jump in the original reasoning "reasonable". Yet, I am at this stage not concerned here with the reasonableness or otherwise of the jump, but merely with its occurrence in the Court's legal reasoning in conflicting rights cases. For that reason, in the text I have only offered the first part of Peczenik's definition of a jump in legal reasoning.
[771] Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text', 4 *Law and Ethics of Human Rights* (2010) at 39.
[772] See *contra* Van Drooghenbroeck, *supra* note 219 at 284 (arguing that there is certainly an element of subjectivity in the Court's balancing judgments, but denying that this inevitably leads to arbitrariness).
[773] Novak, *supra* note 762 at 106.
[774] McFadden, *supra* note 93 at 643. I will further examine the role of intuitive reasoning in the Court's case law below. See *infra* '5. Counteracting Intuitive Reasoning'.

ii. Some Bad Examples

An example of how the Court leaves certain – *prima facie* relevant – criteria unaddressed and/or downplays their relevance without explaining why it does so, can be found in *Palomo Sánchez and Others v. Spain*.[775] The case involved a conflict between the freedom of expression of certain trade union members and the right to reputation of two of their fellow employees and the human resources manager of the company. The facts of the case took place in the context of labour disputes. The applicants were the founders of a trade union set up to defend their interests and those of the other employees of the company. They had already instituted several sets of proceedings against their employer in employment tribunals. In one of the newsletters of the trade union, the applicants reported on a court ruling that partly upheld their claims. The cover of the newsletter featured a caricature in the form of a cartoon drawing. The cartoon depicted the human resources manager sitting behind a desk, under which the legs of a person sitting on all fours could be seen. It was clear from the cartoon that the person beneath the desk was offering sexual services to the resource manager (the cartoon did not graphically depict the act, which took place beneath the desk). Two employees of the company – recognisable from their faces – were standing in front of the desk. The cartoon made it clear that they were standing in line, waiting for their turn to sexually please the resource manager. The newsletter further featured two articles, in which the applicants vehemently denounced the fact that the two employees standing in front of the desk in the cartoon had testified in favour of the company during the labour proceedings. The newsletter was distributed among the workers and displayed on the notice board of the applicants' trade union, located on the company's premises. The company dismissed the applicants on grounds of serious misconduct, namely for impugning the reputations of the persons depicted in the cartoon and attacked in the articles. The applicants eventually brought their case to Strasbourg, claiming a violation of their freedom of expression.

In its judgment, the Grand Chamber of the Court found no violation of art. 10 ECHR, in a 12-5 split ruling. The majority's reasoning demonstrates how the open ended nature of the Court's balancing test invites a subjective selection of the relevant criteria for the balancing exercise. In *Palomo Sánchez*, the majority particularly ignored and/or downplayed the relevance of certain criteria that would – *prima facie* – seem directly relevant to the balancing exercise. The majority firstly downplayed the importance of the trade union aspect of the case. Instead of strengthening the applicants' position, the fact that the speech was uttered in a labour context even appears to have weakened their claim. Indeed, the majority held that "certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations."[776] The majority secondly ignored the fact that the most contentious part of the expression at issue – the cartoon – took the form of a caricature. Despite the availability of case law that specifically deals with caricatures,[777] the majority refused to attach any weight to the fact that the accusations were partly depicted in the form of a cartoon, which by its very nature aims to exaggerate and ridicule.

[775] *Palomo Sánchez*, *supra* note 730.
[776] Ibid. at para. 76.
[777] ECtHR, *Vereinigung Bildender Künstler v. Austria*, app. no. 68354/01, 25 January 2007.

Both shortcomings of the majority's reasoning were criticised by the dissenters. Regarding the majority's downplaying of the trade union aspect of the case, the dissenters first criticised the fact that the majority "brushes aside, somewhat artificially, the *trade union dimension* of the case".[778] Instead, they continued, "in balancing the interests at stake, the majority give scant consideration to the fact that the applicants were members of a trade union, or that they were expressing professional and employment-related claims."[779] As a result, the dissenters pointed out, the majority also failed to recognise that the applicants' dismissal constitutes a ""chilling effect" on the conduct of trade unionists".[780] The dissenters finally also criticised the majority's claim that freedom of expression is more limited in labour contexts: "[w]e are puzzled by such an assertion … the argument of possible disruption in the workplace is one that has been traditionally used in order to justify *greater* protection of freedom of expression and not *less* protection".[781]

Regarding the cartoon, the dissenters pointed out that "it is a caricature, which, whilst being vulgar and tasteless in nature, should be taken for what it is – a satirical representation."[782] They lamented the fact that the majority has failed to attach any weight thereto: "[i]n other cases the Court has recognised the satirical nature of an expression, publication or caricature. In refusing to take that nature into account in the present case, the judgment gives the curious impression of placing trade union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively."[783]

What is important to note for our current purposes is how the majority in *Palomo Sánchez* downplayed the relevance of one factor (trade union dimension of the case) and outright failed to mention another relevant factor (criticism by way of caricature), *without explaining why* these criteria would be irrelevant to the balancing exercise.[784] This is a direct result of the

[778] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in *Palomo Sánchez*, *supra* note 730 at para. 3 (emphases in original).
[779] Ibid. at para. 4.
[780] Ibid. at para. 17.
[781] Ibid. at para. 18 (emphases in original).
[782] Ibid. at para. 11.
[783] Ibid.
[784] For another example from the Court's case law, in which the majority of the Grand Chamber similarly downplayed the relevance of a particular aspect of a defamation case (*in casu* the fact that the impugned statements represented a few lines in a novel) and thereby affected the outcome of the balancing exercise, see *Lindon, Otchakovsky-Laurens and July*, *supra* note 40. In that case, the four dissenting Judges lamented the majority's position on the nature of the work at issue: "we attach considerable weight to the nature of the work in question and … consider that the Court has not sufficiently taken this into account. It is undeniable – and not in fact disputed – that the book containing the two passages finally regarded as defamatory is not a news report but a *novel*, written by an author who is recognised as such. We are not saying that artistic and literary creation should be immune from all criticism and unbridled, but we nevertheless believe that this aspect should be given due consideration." (emphasis in original). The dissenters also criticised the majority's failure to attach sufficient weight to the fact that the statements concerned Jean-Marie Le Pen. Considering the circumstances (the novel dealt with a fictional case of incitement to racial violence, but did use Mr. Le Pen's real name), the dissenters claimed that Mr. Le Pen "should accept an even higher degree of tolerance precisely because he is a politician who is known for the virulence of his discourse and for his extremist views." The dissenters finally also criticised the majority's characterisation of some of the statements as statements of fact (such as the reference to Mr. Le Pen as "the chief of a gang of killers" or "a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood"). The dissenters argued that these statements fell to be characterised as "value judgments which have an established factual basis." All elements referred to by the dissenters would have played

open ended nature of the Court's balancing test, which arguably does not offer sufficient guarantees to prevent arbitrariness and subjective preferences from determining the outcome of the Court's balancing exercise.

A second example illustrates how, in applying its balancing test, the Court generally fails to explicate the weight it attaches to the employed criteria and the relationship between them. The example consists of a pair of cases: *Obst v. Germany* and *Schüth v. Germany*, already introduced above.[785] It suffices to remind the reader here that both cases involved a conflict between collective freedom of religion (in the form of religious autonomy) and the right to private life of individuals working for religious bodies.

The facts of *Obst* and *Schüth* are remarkably similar: both cases entailed a conflict between the applicant's right to private life and the religious autonomy of their religious employer. In both cases adultery was the cause for the dismissal of the applicant. And in both cases the domestic courts ruled in favour of the church's religious freedom. Yet, the ECtHR found a violation of art. 8 in *Schüth* and no violation of art. 8 in *Obst*.

A cursory glance at both judgments might suggest that the reason for this difference in outcome is strictly procedural. Indeed, in *Schüth* the Court concluded that

> "the employment tribunals did not sufficiently explain the reasons why … the interests of the Church far outweighed those of the applicant, and … they failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention.",[786]

In *Obst*, conversely, the Court concluded that

> "eu égard à la marge d'appréciation de l'Etat en l'espèce ... et notamment au fait que les juridictions du travail devaient ménager un équilibre entre plusieurs intérêts privés, ces éléments suffisent à la Cour pour estimer qu'en l'espèce l'article 8 de la Convention n'imposait pas à l'Etat allemand d'offrir au requérant une protection supérieure."[787]

However, a more careful analysis of *Schüth* demonstrates that the Court did not restrict its reasoning to strictly procedural considerations. Instead, the Court also indicated substantive reasons as to why the resolution of the conflict should have gone the other way, *i.e.* to the benefit of the right to private life of Mr. Schüth.[788] In *Obst*, the Court also explained its substantive reasons for agreeing with the balance struck by the domestic courts, *i.e.* in favour of the freedom of religion of the Mormon Church.[789] As I will now explain, the Court's murky reasoning makes it needlessly difficult to understand exactly why it considered both cases to differ to such an extent as to warrant a different outcome.

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to the benefit of freedom of expression, but were downplayed by the majority. It is the downplaying of these elements that allowed the majority to rule that Article 10 ECHR had not been violated.

[785] See *supra* notes 704-707 and accompanying text. For extensive analysis of these cases as conflicting rights cases, see Leigh, *supra* note 699; Evans and Hood, *supra* note 699.

[786] *Schüth*, *supra* note 44 at para. 74.

[787] *Obst*, *supra* note 291 at para. 52.

[788] See also Evans and Hood, *supra* note 699 at 102.

[789] Ibid.

It should first be noted that the reasoning of the domestic courts, at least as reflected in the summary provided in the Court's judgments, was largely identical in both cases. Particularly the judgments of the Federal Employment Tribunal cited exactly the same principles and considerations in both cases. The final judgments on the merits by the Employment Appeal Tribunal (to which the Federal Employment Tribunal remitted the cases for fresh consideration) were also largely identical in their considerations. In both cases, the Tribunal considered that the respective churches could not continue employing the applicant without losing all credibility (in relation to the mandatory nature of their religious and moral precepts). Although there were slight differences in the consideration of the countervailing interests of the applicant (in *Obst*, the Employment Appeal Tribunal for instance explicitly held that the applicant should have been aware of the gravity of his acts in the eyes of his religious employer, while the judgment of the Employment Appeal Tribunal in *Schüth* did not contain a similar finding), in both cases the domestic courts essentially examined the effects of the dismissal on the applicant's ability to find a new job. Both courts concluded that any difficulties experienced by the applicant in this respect could not outweigh the religious employer's right to autonomously decide to dismiss an employee for having committed a grave breach of his duties. Neither court *really* balanced the church's religious freedom against the applicant's right to private life.

When comparing the ECtHR's reasoning in both cases (the Court's judgments were delivered on the same day), several elements stand out. Firstly, the Court treated a number of criteria differently in both cases. In *Obst*, in which the Court found no violation of art. 8, it for instance stated that the lack of media coverage or public repercussions of the applicant's revelations was not decisive.[790] In *Schüth*, conversely, the Court reproached the domestic courts for having given "only marginal consideration to the fact that the applicant's case had not received media coverage".[791] The Court moreover emphasised that, due to the wage-tax card system in Germany, "an event liable to amount to a breach of the duty of loyalty is in all cases brought to the attention of the employing Church, even if the case has had no media coverage or public repercussions."[792] In *Obst* and *Schüth*, the Court thus sent conflicting messages, thereby obscuring whether – and if so, how – the presence or absence of media coverage or public repercussions had an impact on the balancing exercise.

Another factor that was not treated the same in both cases, rendering its impact on the balancing exercise opaque, was the applicant's awareness that he had breached his employer's religious principles. In *Obst*, the Court held that the applicant "était ou devait être conscient, lors de la signature du contrat de travail ... de l'importance que revêtait la fidélité maritale pour son employeur".[793] In *Schüth*, conversely, this factor played less of a role. The Court did note that "in signing his employment contract, the applicant accepted a duty of loyalty towards the Catholic Church", but it immediately held that his "signature on the contract cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the

[790] *Obst, supra* note 291 at para. 51.
[791] *Schüth, supra* note 44 at para. 67.
[792] Ibid.
[793] *Obst, supra* note 291 at para. 50.

event of separation or divorce."[794] It is thus unclear how this factor impacted on the balancing exercise.

Secondly, a number of criteria were made relevant – by the Court – to the balancing exercise in *Schüth*, while they did not feature at all in *Obst*. In *Schüth*, the Court for example found that "the employment tribunals ... gave only marginal consideration to the fact that, after fourteen years of service for the parish church, [the applicant] did not appear to have challenged the stances of the Catholic Church, but rather to have failed to observe them in practice."[795] The same could be said of the applicant in *Obst*, yet the Court's judgment in that case did not contain a similar finding. Similar considerations apply to the Court's repeated references to the "very heart of the applicant's private life" in *Schüth*. The Court for instance held that "the impugned conduct in the present case went to the very heart of the applicant's private life"[796] and that any interpretation of the applicant's contract that he should live a life of abstinence in the event of separation or divorce "would affect the very heart of the right to respect for the private life of the person concerned".[797] In *Obst*, however, the Court did not reference the "very heart of the applicant's private life", although that case concerned a similar issue.

The only way to make sense of the latter difference is, I submit, as an indication that the Court considered Mr. Schüth to be the victim of a more serious interference with his private life than Mr. Obst. This is problematic, because it appears to be the result of a subjective preference, *i.e.* one in favour of an applicant who has had the decency to separate from his wife before starting a new relationship, instead of an applicant who has cheated on his wife. Yet, it is difficult to appreciate how this makes any difference from the viewpoint of the religious employer (adultery remains adultery to the church, whether one is separated from one's spouse or not). Moreover, the Court's evaluation of the applicant's private conduct should not have impacted on the balancing exercise. If the private conduct at issue would have consisted in criminal behaviour (in the case of paedophilia, for instance), the Court would have had cause to accord it substantially less weight in the balancing exercise. However, since this was not the case in *Obst* and *Schüth*, any evaluative considerations on the part of the Court threatened to themselves undermine the applicant's private life. It is simply not up to the Court to accord less weight to a person's right to private life, simply because that person has engaged in conduct that the Judges may find reprehensible (for instance, cheating on one's spouse *versus* separating from one's spouse and engaging in a new relationship, even if before the divorce).

A comparative analysis of *Obst* and *Schüth* further reveals a third problematic element in the Court's reasoning, namely the confusion created by the Court concerning the relevance of one particular factor of the balancing exercise, primarily in *Schüth*. In its judgment in that case, the Court reproached the domestic courts for failing to balance the "interests of the employing Church ... against the applicant's right to respect for his private and family life", instead only

[794] *Schüth*, *supra* note 44 at para. 71.
[795] Ibid. at para. 67.
[796] Ibid. at para. 71.
[797] Ibid. at para. 72.

balancing them "against his interest in keeping his post." However, the Court itself – near the end of its judgment – devoted ample attention to explaining how "the fact that an employee who has been dismissed by a Church has limited opportunities of finding another job is of particular importance." The Court emphasised that "[t]his is especially true where the employer has a predominant position in a given sector of activity ... or where the dismissed employee has specific qualifications that make it difficult, or even impossible, to find a new job outside the Church, as is the case for the applicant." The Court in fact indicated that these considerations were central to determining the outcome of the balancing exercise. It is difficult to see how this is any different from what the domestic courts had done, other than that the Court concluded that the balance should *in casu* tip in favour of the applicant.

Notwithstanding the foregoing, there are of course real differences between the cases of Mr. Obst and Mr. Schüth, which are moreover reflected in the Court's judgments. But to find them, one has to wade through a swamp of other considerations, the relevance of which is far from clear. Apart from the already mentioned impact on the applicant's ability to find a new job, the relevant considerations to distinguish *Obst* and *Schüth* appear to be the following. The Court firstly found that Mr. Obst was bound, under his contract, by "heightened duties of loyalty", while this was not the case for Mr. Schüth. The Court secondly indicated that it had problems with the overly deferential position of the domestic courts in *Schüth*. It reproached the domestic courts for "not [examining] the question of the proximity between the applicant's activity and the Church's proclamatory mission, but [instead reproducing] the opinion of the employing Church on this point without further verification." The Court consequently held that "a decision to dismiss based on a breach of ... duty cannot be subjected, on the basis of the employer's right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question." In *Obst*, conversely, the Court praised the domestic courts: "la cour d'appel du travail a clairement indiqué que ses conclusions ne devaient pas être comprises comme impliquant que tout adultère constituait en soi un motif justifiant le licenciement ... d'un employé d'une Eglise, mais qu'elle y était parvenue en raison de la gravité de l'adultère aux yeux de l'Eglise mormone et de la position importante que le requérant y occupait et qui le soumettait à des obligations de loyauté accrues."

The problem with *Obst* and *Schüth* is thus not that it is impossible to justify the different outcome in both cases. The central problem is rather that it is needlessly complicated to discover that justification. Instead of offering clear legal reasoning, the Court presented balancing exercises that not only come across as haphazard and convoluted, but also as arbitrary and infused with subjective preferences.

iii. Some Good Examples

Although the Court's balancing methodology in conflicting Convention rights cases often leaves a lot to be desired, the Court's case law also offers examples of a more structured approach. One particularly interesting development is the Court's elaboration of a limited number of criteria that it considers relevant to the balancing exercise between freedom of

expression and the right to private life or the right to reputation. With respect to the first type of conflict, and insofar as they revolve around the publication of photographs, the Court has listed the following criteria as relevant to the balancing exercise, in *Von Hannover v. Germany (No. 2)*: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report; (iii) prior conduct of the person concerned; (iv) content, form and consequences of the publication; (v) circumstances in which the photos were taken.[798] In *Axel Springer AG v. Germany*, delivered on the same day, the Court has indicated the following criteria as relevant to the balancing exercise between freedom of expression and the right to reputation: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication; (vi) severity of the sanction imposed.[799]

The explicit listing of an exhaustive list of criteria has the clear advantage of adding some much needed structure to the Court's balancing test in conflicting Convention rights cases. In providing such an exhaustive list, the Court also offers guidance for the future resolution of such cases.[800] However, it is also immediately clear that there are differences between both lists, despite the fact that the types of conflicts they are designed to rule are similar. Moreover, nearly all of the listed criteria lose all relevance outside of the freedom of expression context. They can thus not be applied to resolve other types of conflicts. Although the exhaustive listing of relevant criteria is certainly an important step forward in the Court's conflicting rights case law, it thus remains an imperfect solution. In order to arrive at a truly comprehensive approach to conflicting Convention rights case, I will move a few steps further by offering a structured balancing test that can be applied to a wide range of conflicts. The criteria listed by the Court in *Von Hannover (No. 2)* and *Axel Springer* will nevertheless prove relevant, in the sense that they can be used to concretise the structured balancing test in applying it to specific types of conflicts.

iv. The Remedy

The shortcomings of arbitrariness and subjectivity identified in this subsection can be overcome in several ways. Firstly, one may – along with McFadden – insist on (a return to) rule-based syllogism.[801] Secondly, one may – along with Novak – seek refuge in the structured proportionality test, as used by the German Constitutional Court, to overcome the shortcomings of *ad hoc* and open ended balancing approaches.[802] I will follow neither, but will instead provide a third way. In Part I, I have already rejected the relevance of

[798] *Von Hannover (No. 2)*, *supra* note 44.
[799] *Axel Springer*, *supra* note 6.
[800] They have already been applied in, for instance, *Rothe*, *supra* note 731; *Verlagsgruppe News GmbH and Bobi*, *supra* note 731; *Küchl*, *supra* note 731; ECtHR, *Yordanova and Toshev v. Bulgaria*, app. no. 5126/05, 2 October 2012; ECtHR, *Tănăsoaica v. Romania*, app. no. 3490/03, 19 June 2012.
[801] McFadden, *supra* note 93.
[802] Novak, *supra* note 762 at 107-108.

specificationism (which relies on the formulation of exceptions to rights in the form of rules) to conflicts between human rights in the ECHR context.[803] Also in Part I, I have argued that conflicts between Convention rights should not be resolved through application of the 'traditional' proportionality test.[804] I will instead, in Chapter IV, present a structured balancing test for the resolution of conflicts between relative Convention rights that is aimed at overcoming all the challenges identified in these subsections, including the threats of subjectivity and arbitrariness. The structured test thus aims at making balancing work.

4. The Role of Coherence in the Court's Legal Reasoning

In the previous two subsections I have pointed towards several problems with and threats inherent in the Court's current approach to resolving conflicts between Convention rights. I have argued that the Court's approach is prone to entail preferential framing effects and that it is likely to exhibit elements of arbitrariness and subjectivity. These threats are in turn liable to undermine the coherence of the Court's case law on conflicting Convention rights.

Coherence in legal reasoning is notoriously difficult to define. It requires more than mere consistency, *i.e.* the absence of logical contradictions.[805] Logical consistency is thus a necessary, but not sufficient condition for obtaining coherence in legal reasoning.[806] Coherence instead also requires something that can only be expressed in rather abstract terms, *i.e.* that a legal system 'fits together'[807], 'hangs together'[808] or 'makes sense'.[809] To illustrate the difference between consistency and coherence in the legal domain, Neil MacCormick has offered the famous example of a statute that imposes different speed limits for different cars, depending on the colour in which they are painted.[810] As MacCormick explains, such a statute will not lead to inconsistency, but it is incoherent because it fails to make sense.[811] Indeed, we do not have access to the rational justification for the difference; there in fact appears to be none. Rational justification of legal norms and decisions, having them 'make sense', is thus a central element of coherence.

I submit that the role of coherence in the judicial resolution of conflicts between Convention rights is twofold. Firstly, to avoid logical contradictions between or within cases, *e.g.* by countering preferential framing effect. Secondly, to make the whole body of case law 'make

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[803] See *supra* Part I, Chapter II, Section II, '1. On Invalid Rules' - '*ii. The Failure of the Specificationist Argument and the Success of the Pro Tanto Model of Rights*'.
[804] See *supra* Part I, Chapter III, Section III – 'The 'Argument from Procedure': Underestimating the Complexities of Conflicting Convention Rights Cases'.
[805] N. MacCormick, 'Coherence in Legal Justification', in Peczenik, A., et. al. (eds.), *Theory of Legal Science – Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (Dordrecht – Boston – Lancaster: D. Reidel Publishing Company, 1983) at 235; A. Schiavello, 'On "Coherence" and "Law": An Analysis of Different Models', 14 *Ratio Juris* (2001) at 236.
[806] A. Peczenik, 'Law, Morality, Coherence and Truth', 7 *Ratio Juris* (1994) at 167.
[807] Moral Soriano, *supra* note 695 at 310.
[808] MacCormick, *supra* note 805 at 235.
[809] Ibid.; Schiavello, *supra* note 805 at 237.
[810] MacCormick, *supra* note 805 at 235.
[811] Ibid.

sense'. The first aim is one of consistency,[812] the second is one of coherence.[813] To achieve the latter aim, decisions in individual cases should fit together with those in other cases, be rationally justified and give proper guidance for future cases. Coherence thus calls for increased rationality, objectivity and predictability.[814]

With those thoughts in mind, let us examine what coherence theories bring to the table. Coherence theories in law aim to present an alternative to both the formal model of rationality relied on by legal positivists and the abandonment of rationality by skeptics. As Amalia Amaya explains: "[f]aced with the failure of attempts to model [legal] rationality after scientific rationality ... the only viable response is not skepticism ... [instead] [c]oherentism is ... proposed as an alternative to scientific models of knowledge."[815] Indeed, the fact that legal norms, decisions and propositions often involve practical and/or moral reasoning renders it impossible to call them 'true' or 'false' in the scientific meaning of the word. They are instead normative positions that claim to be right or correct, rather than true.[816] As a result, the deductive approach of legal positivism, which relies on the truth value of legal norms and decisions, knows considerable limitations, not in the least in the area of (conflicting) human rights. In law, and especially in hard cases, it is simply not possible to deduce one *true* outcome from a given set of premises, in the same manner as one may deduce, in science, that the temperature is below 0°C from the fact that water freezes. Instead, lawyers and judges *argue* that one particular outcome among several possible ones is the (most) *correct* or *right* one, *i.e.* in hard cases the one that best responds to the requirements of justice.[817] Formal rationality thus needs to be cast aside and replaced by something else.[818] That something else can be skepticism about the ability to rationally justify, among others, judicial decisions. But it can also be a more positive approach, *i.e.* an attempt to put forward a more fitting conception of rationality in the legal context. Coherentism aims to present precisely such a broader conception of rationality.[819] Here, I will examine its claims and adapt them to the specific context of the judicial resolution of conflicts between Convention rights.

Most coherence theories in law focus on the meta-level of the legal system.[820] As system theories, they aim to provide the necessary criteria for rendering an entire legal system

[812] The need for which the Court has for instance recognised in *Herrmann*, *supra* note 236 at para. 78.
[813] Moral Soriano, *supra* note 695 at 298.
[814] On the link between coherence and legal certainty, see, for instance, A. Amaya, 'Ten Theses on Coherence and Law' (2012) at 24, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064295 (last accessed 7 October 2013).
[815] Ibid. at 25.
[816] Peczenik, *supra* note 769 at 45-46, 186-187. See also Scharffs, *supra* note 631 at 1423 ("[w]e routinely speak of judicial conclusions being correct or incorrect. By this we mean that the reasons that were, or that could have been, marshaled on behalf of a particular outcome are or are not more compelling than the reasons that were, or that could have been, marshaled on behalf of the alternatives.").
[817] I have added this substantive requirement here, because – theoretically speaking – the existence of coherence in law does not say anything about the values we pursue in our legal system. As Neil MacCormick explains, the legal system of the NSDAP during the Nazi regime in Germany could be perfectly coherent, even if we would never label it as just. That is why we must add such substantive requirements. See MacCormick, *supra* note 805 at 243-244.
[818] Dworkin, *supra* note 51; Alexy, *supra* note 60.
[819] Amaya, *supra* note 814 at 26.
[820] See, for instance, Peczenik, *supra* note 769; MacCormick, *supra* note 805; A. Amaya, 'Legal Justification by Optimal Coherence', 24 *Ratio Juris* (2011), 304-329.

coherent. Here, however, we are concerned with the narrower issue of coherence in legal reasoning (*in casu* by the ECtHR). Certain coherence theories also prove particularly valuable in this more specific context. Especially the coherence theory of Aleksander Peczenik is of immediate use for our current purposes. Four elements are central to Peczenik's theory of coherence in law. Peczenik firstly argues that coherence is the central requirement for legal argumentation's claim to rightness or correctness. He secondly argues that legal justification, especially in hard cases, is the result of weighing and balancing and that such balancing needs to be underscored by coherent reasons.[821] He thirdly argues that the required coherence can be obtained by constructing chains of arguments (P1 supports P2, P2 in turn supports P3, etc.).[822] He fourthly argues that the final step in weighing and balancing is different: it cannot be underscored by further reasons, but is necessarily one of subjectivity or personal intuition.[823]

Peczenik's theory is, for our current concerns, at the same time useful and problematic. His theory is useful because it provides a clear link between legal justification, balancing in hard cases (which conflicts between Convention rights generally are), and the relevance of coherence to such balancing. As Amaya has argued, "coherence methods not only help us realize the different values that the law aims at promoting, but they also crucially help us deliberate about how to weigh and balance these values when they come into conflict."[824] It is precisely for this reason that Peczenik's coherence theory is particularly suited to assist in the resolution of conflicts between relative Convention rights, given that I have already argued that balancing is the proper methodology to resolve such conflicts.

Yet, Peczenik's theory is at the same time problematic, because it cannot do away with the threats of subjectivity and arbitrariness discussed above.[825] Peczenik admits that the ultimate step of balancing is necessarily a subjective or intuitive one. However, this admission is only rendered inevitable by his reliance on *chains* of arguments to achieve coherence. Advocating the construction of chains of arguments in legal reasoning has two downsides. First, it renders the entire legal reasoning as weak as the weakest link between two arguments in the chain. Second, chains of arguments will be infinite – and thus never fully supported – *unless* one argues, like Peczenik, that there is an ultimate argument, which is "taken for granted",[826] *i.e.* assumed to be correct on the basis of subjective or intuitive preferences.[827] But this means that Peczenik's chains of argument cannot effectively counter threats of subjectivity and arbitrariness. Peczenik can only aim to *minimise* those threats, by requiring the construction of as long a chain of coherent arguments as possible. Nevertheless, he must ultimately concede that subjectivity in balancing is inevitable. One way – I submit, the best way – to escape his

[821] Peczenik, 'A Coherence Theory of Juristic Knowledge' at 1, available at http://www.ivr2003.net/peczenik/documents/2_papers.pdf (last accessed 7 October 2013); Peczenik, *supra* note 806 at 147 and 158; Peczenik, *supra* note 769 at 203.
[822] Peczenik, *supra* note 821 at 2; Peczenik, *supra* note 806 at 147; Peczenik, *supra* note 769 at 137.
[823] Peczenik, *supra* note 806 at 172; Peczenik, *supra* note 769 at 308.
[824] Amaya, *supra* note 820 at 322.
[825] See *supra* '3. The Threats of Arbitrariness and Subjectivity'.
[826] Peczenik, *supra* note 769 at 308.
[827] Ibid.; Peczenik, *supra* note 806 at 172.

conclusion is to achieve coherence in legal reasoning by constructing *nets* of arguments, rather than chains.[828]

Nets of arguments function differently from chains. Netted arguments are *mutually* supportive, while chained arguments are *sequentially* supportive. As already explained, each argument in a chain of arguments builds on the previous one (P1 supports P2, P2 in turn supports P3, etc.). This means that one *must* accept that the ultimate argument, at the outer end of the chain – what Peczenik calls the "final act of weighing"[829] – cannot be supported by a further argument. Nets of arguments, however, function differently. Netted arguments mutually reinforce each other (P1 strengthens P2 and P3, P2 strengthens P1 and P3, and P3 strengthens P1 and P2). As a result, it is possible to present a *finite* number of coherent arguments to rationally justify a certain outcome. There is thus no need for an 'ultimate' argument that relies on subjective or intuitive preferences. This does not mean that nets of arguments are immune to subjectivity and intuitive preferences. However, reliance thereon is no longer inevitable and can therefore – at least theoretically – be avoided.

Because nets of arguments have at least one clear advantage over chains of argument,[830] I will present a structured balancing test that encourages the construction of nets of arguments to resolve conflicts between relative Convention rights. Constructing nets of arguments will not only allow us to ensure coherent legal reasoning in conflicting Convention rights cases. It will also allow us to overcome the incommensurability challenge, as set out above.[831] The balancing test I have in mind will allow for the rational comparability of conflicting Convention rights through the construction of coherent nets of arguments that balance the reasons in favour of each right. These nets of arguments will enable rational choice between weakly incommensurable rights.[832]

5. Counteracting Intuitive Reasoning

In each of the previous subsections I have indicated how intuitive preferences may influence the Court's approach to resolving conflicts between Convention rights. I have argued that Judges' intuitions (i) may strengthen preferential framing effects; (ii) are liable to increase the arbitrariness and subjectivity of the Court's reasoning; and (iii) are an inevitable element in Peczenik's coherence theory, which is directly relevant to the judicial resolution of conflicts between relative Convention rights. It is thus vital to examine the role of intuitions in the Court's practice.

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[828] Moral Soriano, *supra* note 695 at 319 (introducing the idea of constructing 'nets of arguments', rather than 'chains of arguments').
[829] Peczenik, *supra* note 806 at 172.
[830] A further advantage is that, contrary to chains of arguments, the supportive structure of nets of arguments is not as weak as the weakest link between two arguments. Its strength instead depends on the number of arguments and on how well they mutually support each other.
[831] See *supra* Section I, '2. Incommensurability as the Primary Challenge to Balancing'.
[832] See also Moral Soriano, *supra* note 695 at 297.

The role of intuitions in judging is notoriously contested and fiercely debated.[833] Legal formalists insist that judges restrict themselves to rationally applying the law to specific cases and do so in a logical and deliberative manner.[834] Legal realists, conversely, claim that judges decide cases on the basis of intuitions or hunches,[835] to then afterwards rationalise these decisions and present them in the form of deliberative reasoning.[836] I will rely on insights from cognitive psychology[837] to argue that the truth, like with so many things, probably lies somewhere in the middle.[838] I will argue that both intuitive and deliberative thought processes have their part to play in judicial reasoning.[839] I will nevertheless accord a pre-eminent role to deliberative reasoning, because it provides a much needed check on intuitive judgments. I will argue that such monitoring of intuitions is especially vital in hard cases, which conflicts between Convention rights generally are.

[833] It happens, especially in the ECtHR context, extremely rarely that Judges reveal *how* they decide cases: on the basis of intuition, reason or a combination of both. There are, however, some indications that ECtHR Judges may be prone to rely on both. A study by Kanstantin Dzehtsiarou has for instance revealed that certain Judges refuse to follow a European consensus (if one exists) on certain sensitive issues if they have strong personal convictions on that particular issue. Dzehtsiarou has found it "very hard to rationalise these firm convictions … because some of [the Judges] agreed that no reason would be able to convince them to change their opinion." Dzehtsiarou, 'Consensus from within the Palace Walls', *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 40/2010* (2010) at 15, available at http://ssrn.com/abstract=1678424 (last accessed 7 October 2013). Certain separate opinions also shed some light on the role of intuitions in the Court's – or individual Judges' – legal reasoning. These include references to what "experience and common sense teach[es] us [*i.e.* the Judges at the Court]" and to the "self-evident" nature of certain violations. See, respectively, partly dissenting opinion of Judge Palm joined by Judges Jungwiert, Levits, Panţîru, Kovler and Marcus-Helmons to ECtHR, *Cyprus v. Turkey*, app. no. 25781/94, 10 May 2001; partly dissenting opinion of Judge Costa to ECtHR, *Kyprianou v. Cyprus*, app. no. 73797/01, 15 December 2005, para. 6. They also include admissions from a Judge that he has changed his mind about a certain case: "I have realised that the third violation of Article 6 … did not even occur! … I considered this complaint to be genuine and distinct; *on reflection*, I consider it artificial and pointless" or "the material and arguments before the Grand Chamber did not differ in any significant respect from those before the Chamber. I have nevertheless concluded, *on further reflection*, that my previous view on the main issue was wrong." (emphases added). See, respectively, the partly dissenting opinion of Judge Costa to *Kyprianou*, current note at para. 7 and the concurring opinion of Judge Bratza to *Dickson*, *supra* note 265. None of the above references definitively prove or disprove the role of intuitions in the Court's reasoning, but they do offer noteworthy parallels to how the System 1 and System 2 thought processes described in the text, immediately below, function.

[834] See, for instance, D. L. Shapiro, 'In Defense of Judicial Candor', 100 *Harvard Law Review* (1987), 731-750.

[835] J. C. Hutcheson, 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision', 14 *Cornell Law Quarterly* (1928) at 278 ("when the case is difficult or involved … I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the connection between question and decision".).

[836] See, for instance, R. J. Wright, 'The Role of Intuition in Judicial Decisionmaking', 42 *Houston Law Review* (2006), 1381-1424; Hutcheson, *supra* note 835.

[837] On the need for legal theory to be responsive to developments in cognitive psychology, see Amaya, *supra* note 814 at 30.

[838] C. Guthrie et. al., 'Blinking on the Bench: How Judges Decide Cases', 93 *Cornell Law Review* (2007) at 3; W. J. Brennan, 'Reason, Passion, and 'The Progress of the Law', 10 *Cardozo Law Review* (1988) at 3 and 9-12;

[839] See also Sajó, particularly at p. 19, 78 and 80. See *contra* Cariolou, *supra* note 61 at 267: "[i]t is commonly accepted that judges cannot be sensibly allowed to reach their decisions on the basis of their intuitions."

i. Intuitive and Deliberative Reasoning in Cognitive Psychology and Law

In cognitive psychology, widespread agreement exists on the existence of two types of cognitive processes: intuitive reasoning and deliberative reasoning.[840] As Daniel Kahneman explains, "[t]here is considerable agreement on the characteristics that distinguish the two types of cognitive processes ... labelled System 1 and System 2 ... The operations of System 1 [*i.e.* of intuitive reasoning] are fast, automatic, effortless, associative, and difficult to control or modify. The operations of System 2 [*i.e.* of deliberative reasoning] are slower, serial, effortful, and deliberatively controlled."[841] Both systems thus function differently.[842] System 1 – intuitive reasoning – functions by way of impressions, which come to mind spontaneously (hence the term intuitive).[843] Intuitive judgments are snapshot considerations of perceptions or problems: they "directly reflect impressions."[844] One of the central functions of System 2 – deliberative reasoning – is its control function: it monitors the quality of thought processes.[845] Deliberative reasoning may lead to either the confirmation, modification or overriding of intuitive judgments.[846]

The above description of intuitive reasoning in cognitive psychology is remarkably similar to Judge Hutcheson's description of the judicial hunch as "that intuitive flash of understanding which makes the connection between question and decision."[847] It also reminisces Justice William Brennan Jr.'s description of the role of "passion" in the judicial process.[848] Justice Brennan defines passion as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogism of reason."[849] The reason referred to by Justice Brennan is, conversely, part of deliberative thought processes, of what cognitive psychologists call System 2.

ii. The Problem with Intuitive Reasoning

It is fairly uncontested that problems in human reasoning may arise due to a combination of the shortcomings of intuitive reasoning and the lax nature of the monitoring of deliberative

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[840] D. Kahneman, 'Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice', Nobel Prize Lecture (8 December 2002) at 49, available at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/kahnemann-lecture.pdf (last accessed 7 October 2013); S. Frederick, 'Cognitive Reflection and Decision Making', 19 *Journal of Economic Perspectives* (2005) at 26; Guthrie et. al., *supra* note 838 at 7; D. Kahneman and C. R. Sunstein, 'Indignation: Psychology, Politics, Law', *University of Chicago John M. Olin Law & Economics Working Paper No. 346 / Public Law and Legal Theory Working Paper No. 171* (July 2007) at 4, available at http://www.law.uchicago.edu/files/files/346.pdf (last accessed 7 October 2013).

[841] Kahneman, *supra* note 840 at 450. See also Frederick, *supra* note 840 at 26.

[842] Cass Sunstein has presented his views on the role of System 1 and System 2 thought processes in legal decision-making in several publications. See Kahneman and Sunstein, *supra* note 840; C. R. Sunstein, 'Moral Heuristics and Moral Framing', 88 *Minnesota Law Review* (2004), 1556-1597; C. R. Sunstein, 'Some Effects of Moral Indignation on Law', 33 *Vermont Law Review* (2009), 405-433.

[843] Kahneman, *supra* note 840 at 452.

[844] Ibid. at 451.

[845] Ibid.

[846] Ibid. at 481.

[847] Hutcheson, *supra* note 835 at 278.

[848] Brennan, *supra* note 838.

[849] Ibid. at 9.

reasoning. As explained by Kahneman, "the monitoring [of System 2] is normally quite lax ... [It] allows many intuitive judgments to be expressed [uncorrected], including some that are erroneous."[850] It is, however, crucial to clarify that intuitive reasoning is not *per definition* a system that cannot be trusted.[851] It need not lead to erroneous results and can, in fact, be quite efficient: the snapshot impressions generated by it will often be correct and confirmed upon reflection.[852] It is also important to note that intuitive thought processes can be developed, so that more and more useful responses are made easily and quickly accessible, without requiring the effort associated with deliberative thought processes.[853] The example of a chess master who views the board entirely differently from a novice and immediately 'sees' all available options, is often given to illustrate how intuitive thought processes can usefully be developed through practice and experience.[854] Nevertheless, the threat remains that uncontrolled intuitions may lead people, especially non-experts, astray.

To demonstrate how sole reliance on intuitive reasoning may lead to erroneous results, Shane Frederick has developed a Cognitive Reflection Test (CRT).[855] The CRT is composed of three puzzles:[856]

1) A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? ____ cents.

2) If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? ____ minutes.

3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? ____ days.

Each puzzle is designed to offer an intuitive (*i.e.* easily accessible) answer that appears to be correct, but turns out to be false.[857] Finding the correct answer requires deliberative reasoning.[858] Frederick administered the CRT to 3,428 respondents, mostly undergraduates at American universities.[859] His results show that the mean CRT score, among all respondents, was 1.24 (out of 3).[860] This means that, on average, less than half of the questions were answered correctly. Frederick also examined the wrong answers and found that, among all the possible wrong answers people could have given, the intuitively appealing answers

[850] Kahneman, *supra* note 840 at 451.
[851] Kahneman and Sunstein, *supra* note 840 at 4 (explain that "[a]lthough System 1 is more primitive than System 2, it is not necessarily less capable.").
[852] Guthrie et. al., *supra* note 838 at 29-30 (with further references).
[853] Kahneman, *supra* note 840 at 453; Sunstein, *supra* note 842 at 410.
[854] Kahneman, *supra* note 840 at 453; Guthrie et. al., *supra* note 838 at 30; Kahneman and Sunstein, *supra* note 840 at 4-5.
[855] Frederick, *supra* note 840.
[856] Ibid. at 27.
[857] Ibid. The intuitively appealing, but false answers are 10 cents; 100 minutes; 24 days.
[858] Ibid. The correct answers are 5 cents; 5 minutes; 47 days.
[859] Ibid. at 28.
[860] Ibid. at 29.

dominated.[861] He further found that the respondents who answered correctly often first considered the wrong – intuitive – answer (as indicated by introspection, verbal reports and scribbles in the margins).[862] Frederick's experiment thus shows how many people rely solely on intuitive reasoning, which leads them to answer the puzzles of the CRT incorrectly. It also demonstrates how deliberative reasoning acts as a monitoring system that is able to correct the intuitively appealing – but incorrect – answer.

For our current concerns, it is particularly interesting to note a further study, by Chris Guthrie et. al., in which Frederick's CRT puzzles were presented to 295 circuit court judges in the United States.[863] The 252 judges that completed all puzzles achieved an average score of 1.23 out of a possible 3.[864] The study also showed that judges who gave wrong answers tended to select the intuitive answer (88.4 % on the bat-and-ball puzzle; 57.4 % on the widget puzzle; and 68 % on the lily patch puzzle).[865] The study of Guthrie et. al. thus demonstrates that judges are not immune to being misled by intuitive reasoning.

iii. The Implications for the Legal Reasoning of the ECtHR

We should of course not jump to conclusion from these CRT experiments.[866] Indeed, the kinds of conflicting rights cases with which the Judges at the ECtHR are confronted are very different from the puzzles of the CRT.[867] Yet, Guthrie et. al. have also examined the role of intuitive reasoning in the legal context and have found that judges also commonly make

[861] Ibid. at 27.
[862] Ibid. 27.
[863] Guthrie et. al., *supra* note 838 at 13.
[864] Ibid. at 13-14.
[865] Ibid. at 16.
[866] As Guthrie et. al. explain, "judges undoubtedly exercise greater care when ruling in court than when responding to CRT questions". Ibid. at 18.
[867] Moreover, one important counteracting factor to excessive reliance on personal intuitions (or subjective preferences) by Judges at the ECtHR is the fact that the most important ECtHR judgments are delivered by a Chamber of seven or a Grand Chamber of seventeen Judges. Judicial deliberations among the Judges of the (Grand) Chamber can indeed be expected to bring about an increase in the use of reflective reasoning. See, for instance, Gerards, *supra* note 664 at 124 (arguing that the fact that controversial cases at the ECtHR are decided by a Chamber or even the Grand Chamber has "the obvious value … that the opinions and personal convictions of one single judge can never be decisive"). However, it should also be noted that the preparation of the actual judgment is in the hands of the Judge Rapporteur and a lawyer of the Registry. Any deliberations among the Judges usually only take place once a draft judgment has been prepared by the Registry lawyer and the Judge Rapporteur. This diminishes the capacity of cameral discussions in contravening excessive reliance on intuitionist reasoning by the Judge Rapporteur and/or the lawyer of the Registry. Moreover, it remains the case that every individual Judge may assume his or her position on the basis of intuitionist reasoning, particularly when cases have to be resolved under time pressure. Nevertheless, the fact that important ECtHR judgments are delivered by seven or seventeen Judges does create vital opportunities for reflective reasoning, particularly in the Grand Chamber where multiple rounds of discussion and votes are held and a Drafting Committee, composed of multiple Judges, is appointed to prepare the final draft of the judgment. This process of judicial deliberation should be further supported by substantive, rather than institutional measures, namely by the application of a structured balancing test, as advocated in the text, in order to overcome the problem of excessive reliance on intuitive reasoning. On the procedure for the drafting of ECtHR judgments, see L. Garlicki, 'Judicial Deliberations: The Strasbourg Perspective., in N. Huls et. al. (eds.), *The Legitimacy of Highest Courts' Rulings – Judicial Deliberations and Beyond* (The Hague: T.M.C. Asser Press, 2009) at 393-394.

intuitive judgments in exercising their judicial functions.[868] Guthrie et. al. have concluded that "[d]espite their best efforts ... judges, like everyone else, have two cognitive systems for making judgments ... and the intuitive system appears to have a powerful effect on judges' decision making."[869] But we should not necessarily condemn such a practice. As Guthrie et. al. argue, "[e]liminating all intuition from judicial decision making is both impossible and undesirable because it is an essential part of how the human brain functions. Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so."[870] Indeed, it is vital to recognise that the Judges at the ECtHR are human beings and, as human beings, they are prone to rely on their intuitions and, sometimes, make mistakes.[871]

Importantly, Judges' experience may make them more apt at correctly using intuitive reasoning than the average person, particularly when it comes to fulfilling their judicial role.[872] In that respect, the considerations mentioned above on the ability of chess masters to successfully rely on intuitive reasoning may also apply to judges.[873] Judge Hutcheson even considers that the rather practical role played by judges *requires* them to rely on intuition: "[t]he purely contemplative philosopher may project himself into an abstract field of contemplation where he reasons, but practical men, and in that judges must be included, must have impulses."[874]

However, as Richard Posner explains, this must not lead us to "go to the opposite extreme and suppose intuition a sure guide to sound decision making. An intuitive decision may ignore critical factors that lie outside the range of the person's experience that informs his intuition."[875] Moreover, as pointed out by Guthrie et. al., there are limitations to the ability of judges to hone their intuitive reasoning skills: "[u]nlike chess grandmasters, judges operate in an environment that does not allow them to perfect their intuitive decision-making processes."[876] Indeed, judges – those at the ECtHR in particular – "are unlikely to obtain accurate and reliable feedback on most of their judgments", for instance in the form of an

[868] Guthrie et. al., *supra* note 838 at 6 and 19-29 (Guthrie et. al. present several case studies in which they examined the role of intuitions in judicial decisions that involve, respectively, anchoring (*i.e.* the phenomenon that leads people to rely on the initial values available to them in making numerical estimations, *e.g.* in decisions on award of damages), statistical inferences (in which representativeness heuristics lead people to undervalue statistical information, *e.g.* in which a particular description of a person or event leads people to neglect or undervalue statistical information available) and hindsight bias (*i.e.* the tendency to overestimate the predictability of events that have occurred, which arises from the intuitive sense that the outcome must have been inevitable).
[869] Guthrie et. al., *supra* note 838 at 43.
[870] Ibid. at 5.
[871] United States Supreme Court Justice Cardozo has wonderfully described the human limitations of judges as follows: "they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by." B. N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 144. See also M. L. Minow and E. V. Spelman, 'Passion for Justice', 10 *Cardozo Law Review* (1988) at 74.
[872] See also Scharffs, *supra* note 631 at 1420.
[873] R. A. Posner, 'The Role of the Judge in the Twenty-First Century', 86 *Boston University Law Review* (2006) at 1064.
[874] Hutcheson, *supra* note 835 at 286.
[875] Posner, *supra* note 873 at 1064.
[876] Guthrie et. al., *supra* note 838 at 32.

appeal against their judgment.[877] Yet, obtaining accurate and reliable feedback appears to be a prerequisite for the successful development of one's intuitive reasoning skills.[878] Furthermore, pressures experienced by the Judges at the ECtHR, for instance as a result of their caseload, may further inhibit – rather than improve – their ability to hone their intuitive reasoning skills. There thus exists a certain danger in having even the most experienced Judges solely rely on intuitive judgments. As Kahneman argues, "experienced decision makers working under pressure, such as captains of firefighting (sic.) companies, rarely need to choose between options because in most cases only a single option comes to their mind. The options that were rejected are not represented. Doubt is a phenomenon of System 2".[879] Similar considerations apply to Judges at the ECtHR, who may experience pressure from the Court's case load and backlog.[880] They may, in that respect, be prone to rely more often on their intuitive judgment, because it is readily available and makes it easier to dispense of a case quickly. Indeed, Guthrie et. al. have for instance found that "[j]udges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier."[881]

The above picture is not *necessarily* objectionable. Reliance on intuitive thought processes, honed by years of experience, may allow Judges to deal with easy cases without wasting much time and effort. However, exclusive or primary reliance on intuitive reasoning (consciously or otherwise) arguably becomes problematic in hard cases, where reliance on intuitive thought processes may render alternative solutions to a case invisible. In conflicting Convention rights cases in particular, a combination of preferential framing effects and intuitive reasoning may lead the Court to only consider one solution to a case, without properly investigating alternative solutions. Indeed, as explained by Daniel Kahneman, "[a]bsent a system that reliably generates appropriate canonical representations, intuitive decisions will be shaped by the factors that determine the accessibility of different features of the situation. Highly accessible features will influence decisions, while features with low accessibility will be ignored."[882] In that sense, the open ended and *ad hoc* nature of the Court's current balancing test does not allow for an adequate control of intuitive judgments. It particularly offers insufficient guarantees against what is termed 'confirmation bias' in cognitive psychology. Confirmation bias is the phenomenon under which a hypothesis (in this case an intuitive judgment in a conflicting rights case) is tested by considering more evidence that confirms it than evidence that denies it.[883] As explained by Carey Morewedge and Daniel Kahneman, confirmation bias entails the "overweighting of some aspects of the information and underweighting or neglect of others" and "usually occurs automatically, without explicit

[877] Ibid.
[878] Ibid. at 31-32.
[879] Kahneman, *supra* note 840 at 455-456.
[880] Similar considerations apply to the lawyers working in the Registry, who actually prepare and write the judgments, in close cooperation with the Judge Rapporteur. Garlicki, *supra* note 867 at 393-394. For ease of writing and reading, I only refer to Judges in the text.
[881] Guthrie et. al., *supra* note 838 at 35.
[882] Kahneman, *supra* note 840 at 459.
[883] C. K. Morewedge and D. Kahneman, 'Associative Processes in Intuitive Judgment', 14 *Trends in Cognitive Science* (2010) at 435. Morewedge and Kahneman also explain that confirmation bias is connected to the associative memory of System 1.

intent to do so."[884] Applied to the ECHR context, confirmation bias may lead the Judges of the ECtHR to mould the balancing exercise in a conflicting rights case to support an outcome they have intuitively 'perceived'. The Court may, as described above, leave certain criteria unconsidered and/or fail to explicate the weight attached to the employed criteria, nor the relationship between them.[885] Open ended and *ad hoc* balancing tests offer insufficient guarantees against such a process. On the contrary, they support it.

The problematic relationship between the open ended nature of the Court's balancing test and judicial intuitions has been aptly described by Olivier de Schutter and Françoise Tulkens. De Schutter and Tulkens have argued that "the less rigorous the judicial methodology used – the more the judicial decision depends on elements of intuition or 'hunch – and the more ... 'framing effects' may have a real impact on judicial decision-making."[886] They have also, in their discussion of the incommensurability challenge, expressed concerns that "the 'balancing' metaphor to describe the act of judging may be profoundly misleading, hardly masking what is, in fact, a decisionist position, one leaving a considerable degree of freedom to the judge in the balancing process, and making the outcome .... dependent on his or her intuitions."[887] These latter concerns are directed at the kind of open ended and *ad hoc* balancing tests currently employed by the ECtHR.

Fortunately, however, they *can* be avoided – or at least seriously mitigated – by obliging Judges to engage in deliberative reasoning. This is precisely what *structured* balancing tests, such as the one presented in Chapter IV, aim to do.[888] They invite Judges to rely on deliberative thought processes in order to monitor and – if necessary – adapt or overrule any intuitive judgment they may have immediately 'perceived'. The structured balancing test I present below thus aims at assisting the Judges of the ECtHR in achieving the fertile synergy

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[884] Ibid.

[885] See *supra* notes 766-768 and accompanying text.

[886] De Schutter and Tulkens, *supra* note 200 at 202. See further, Wright, *supra* note 836 at 1398 ("[t]hat intuition plays an important role in judicial balancing tests should hardly be a surprise"); Zucca, *supra* note 758 at 449 ("[b]alancing often seems arbitrary, and little more than window-dressing for unsophisticated ethical intuitions"); Veel, *supra* note 636 at 192 ("intuitive weighing … seems less acceptable as a basis for judicial decisions on the appropriate balancing of parties' rights [than it may be as a means of deciding between various dinner options]"); Poscher, *supra* note 63 at 444 ("balancing … depends on our intuitions as to the relative weight of the colliding principles").

[887] De Schutter and Tulkens, *supra* note 200 at 191-192. See also Alder, *supra* note 202 at 697 ("accommodations between competing values and goods which arise in human rights disputes depend substantially upon emotional attitudes not susceptible to legal rationality"); Jestaedt, *supra* note 115 at 165.

[888] Novak, *supra* note 762 at 105 ("precisely because balancing [includes] some elements of intuitive activity, various balancing tests had to be invented in order to rationalize such intuitions."). Structured balancing tests aim to increase reliance on deliberative reasoning over and above institutional features that provide for an increased potential for deliberative processes, in particular the fact that Judges at the ECtHR do not sit alone (apart from in trivial cases), but in Chambers of seven or Grand Chambers of 17 Judges (or in Committees of three). Although the drafting of the judgment is in the hands of a Judge Rapporteur and a lawyer of the Registry, the institutional organisation of the Court in Chambers and a Grand Chamber offers (ample) opportunity for deliberation among the Judges of the (Grand) Chamber that delivers the judgment. The question is, however, how often and to what extent do the Judges make use of this opportunity? In the absence of detailed insight into the internal workings of the Court, we have little way of knowing. Nevertheless, on the potential importance of such deliberation in the drafting of a judgment, see – in the context of the United States Supreme Court – L. Levine and S. Wermiel, 'The Landmark Case that Wasn't: A First Amendment Play in Five Acts', 88 *Washington Law Review* (2013), 1-101 (analysing the deliberative process in the defamation case of *Dun & Bradstreet v. Greenmoss Builders* on the basis of previously undisclosed internal papers from the chambers of several Justices).

between intuition and reason described by Justice Brennan: "the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to deliberation and evaluation of the two, is the judge least likely ... to sacrifice principle to spasmodic sentiment."[889]

Section III – Bridging Theory and Practice: Towards a Structured Balancing Test for the Resolution of Conflicts between Relative Convention Rights

In the preceding sections I have set out the theoretical challenges to balancing as well as the practical shortcomings of the *ad hoc* and open ended balancing test currently employed by the Court. In the next chapter (Chapter IV) I will present my version of a structured balancing test, aimed at overcoming the practical shortcomings of the Court's current approach to conflicting Convention rights cases, as well as the theoretical challenge of incommensurability. However, before doing so, I should first explain why an already available alternative, Robert Alexy's balancing test, is inapt at satisfactorily dealing with conflicts between Convention rights and, consequently, falls to be rejected.

1. Evaluating Alexy's Balancing Test

i. Alexy's Balancing Test

Robert Alexy has proposed his famous balancing test, comprised of two Laws of Balancing and a Weight Formula, in order to allow for the rational weighing of competing principles (including constitutional rights). Before being able to formulate a critique of Alexy's balancing test, it is vital to have a clear picture of how it functions.

The basis of Alexy's balancing test is his first Law of Balancing, which goes as follows:

> "[t]he greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other."[890]

According to Alexy, the first Law of Balancing "shows that balancing can be broken down into three stages", all of which are crucial to ensuring the rationality of balancing.[891] As Alexy explains, "[t]he first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of the first."[892] Alexy equates the "degree of non-satisfaction of or detriment" to a principle,

[889] Brennan, *supra* note 838 at 11-12.
[890] Alexy, *supra* note 60 at 102.
[891] Ibid. at 401; Alexy, *supra* note 691 at 436-437.
[892] Alexy, *supra* note 60 at 401.

with the "intensity of interference" therewith.[893] In what follows, I will use the latter, shorter term for ease of reference. In order to determine the "intensity of interference" with a principle, as well as the "importance of satisfying the competing principle", Alexy proposes a triadic scale, which he deduces from the case law of the German Constitutional Court.[894] The triadic scale suggested by Alexy is composed of three stages: "light," "moderate" and "serious".[895]

In its most basic formulation, Alexy's balancing test thus proceeds as follows: the intensity of interference with the first principle is determined and compared to the importance of satisfying the competing principle. This comparison reveals which principle should prevail.

Alexy recognises, however, that the first Law of Balancing alone is insufficient to successfully balance principles against each other, since it does not take account of the fact that the actual effects on principles may often be uncertain, for instance when a case involves an element of speculation, potentiality or risk. In order to take such elements of uncertainty into account, Alexy has introduced a second Law of Balancing, which he terms the epistemic Law of Balancing.[896] The second Law of Balancing goes as follows:

> "[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premisses (sic)."[897]

With the Epistemic Law of Balancing comes a further triadic scale, aimed at expressing the reliability of the underlying premises. This second triadic scale is composed of the following classes: "certain or reliable", "maintainable or plausible", and "not evidently false".[898]

Alexy further recognises that "also the abstract weights [of principles] can play a role in balancing."[899] Whenever the abstract weight of the competing principles is different, this will thus also need to be taken into account in balancing them against each other.[900]

According to Alexy, all the above considerations - the first Law of Balancing, the second Law of Balancing and the abstract weight of principles - are relevant to the weighing of competing principles.[901] In order to determine, through balancing, which of two competing principles weighs heavier, Alexy has proposed a Weight Formula that incorporates all these elements.[902] In its full statement, the Weight Formula goes as follows:

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[893] Alexy, *supra* note 691 at 440.
[894] Ibid. at 437-440.
[895] Ibid. at 440.
[896] Alexy, *supra* note 60 at 418.
[897] Ibid.
[898] Alexy, *supra* note 691 at 447.
[899] Ibid. at 446.
[900] Ibid.
[901] Ibid. at 448.
[902] Balancing – and the application of the Weight Formula – will of course only become relevant if the prior steps of the proportionality test, *i.e.* "suitability" and "necessity", have not been able to resolve the case at hand. I do not mention these other steps in the text, because I am – at this stage – only concerned with Alexy's views on the balancing stage (proportionality *stricto sensu*).

$$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j}$$

In the first half of the formula, (*W*) stands for concrete weight, (*i*) stands for the first principle and (*j*) for the second principle.[903] ($W_{i,j}$) thus expresses how both principles relate to each other, in terms of their weight in the concrete circumstances of a case.[904] The second half of the formula represents all the criteria that are, according to Alexy, necessary and sufficient to determine the weight of each principle in any given case. This part of the formula is expressed as an equation. The top part of the equation expresses the concrete weight of the first principle (*i*) in the case at hand. The lower part of the equation expresses the concrete weight of the second principle (*j*) in the case at hand. The remaining letters stand for the intensity of interference (*I*), the abstract weight of the principle (*W*) and the reliability of the underlying premises (*R*), *i.e.* the certainty with which one can state that the effects on the principle will occur.[905]

Alexy uses an equation to express the relationship between both competing principles, because this allows for a direct comparison of the weight accorded to each principle under the circumstances at hand. The Weight Formula functions by multiplying the relevant considerations for each principle and then dividing the results for the first principle by the results for the second principle. The result then shows which principle should prevail under the concrete circumstances of the case at hand.

In order to make those calculations possible, we of course need numbers. That is why Alexy has proposed to represent the triadic scale for the first Law of Balancing (intensity of interference (*I*)) - "light," "moderate" and "serious" - by the following numbers in the Weight Formula: 2^0, 2^1 and 2^2 or 1, 2 and 4.[906] He has similarly proposed to substitute the triadic scale for the second Law of Balancing (epistemic reliability (*R*)) - "certain or reliable", "maintainable or plausible", and "not evidently false" - by the following numbers in the Weight Formula: 2^0, 2^{-1}, 2^{-2} or 1, $\frac{1}{2}$ and $\frac{1}{4}$.[907]

Alexy works with coefficients, because this allows him "to express the over-proportional growth of resistance of fundamental rights against infringements."[908] The geometric sequences – 1, 2, 4 or 1, $\frac{1}{2}$, $\frac{1}{4}$ – indeed 'translate' the idea that the concrete weight of a principle gets exponentially heavier (or lighter) the more serious the interference therewith is and the more reliable the underlying premises of the interference are (or, conversely, the

[903] Alexy, *supra* note 691 at 444.
[904] Ibid.
[905] Ibid. at 440 and 446.
[906] Ibid. at 444.
[907] Ibid. at 447.
[908] Alexy, 'Discourse Theory and Fundamental Rights', in A. J. Menéndez and E. O. Eriksen (eds.), *Arguing Fundamental Rights* (Dordrecht: Springer, 2006) at 28.

lighter the interference therewith is and the less reliable the underlying premises of the interference are).[909]

Because Alexy principally considers principles to be of equal abstract weight,[910] he generally disregards the abstract weights in balancing by omitting W_i and W_j from the equation, since they neutralise each other.[911] For our current purposes, we can also assume that the abstract weight – in Alexian terms – of conflicting *relative* Convention rights, *i.e.* the sort of rights we wish to balance against each other here, will generally be equal.[912] Therefore, the element of abstract weight can be omitted from the equation.

To balance two conflicting relative Convention rights against each other with the use of Alexy's Weight Formula, the following version thereof will thus suffice:

$$W_{i,j} = \frac{I_i * R_i}{I_j * R_j}$$

Alexy explains that calculating the results of this equation can lead to one of three possibilities. The result may firstly be higher than 1, in which case the concrete weight of the first principle (*i*) is higher than that of the second principle (*j*), for instance at 2/1.[913] In that case, the first principle prevails in the balancing test.[914] The result may secondly be lower than 1, in which case the concrete weight of the second principle is higher than that of the first principle, for instance at 1/2.[915] In that case, the second principle prevails in the balancing test.[916] The result may finally be equal to 1, in which case there is a stalemate between both principles, for instance at 2/2.[917] According to Alexy, the existence of a stalemate is a case of "structural discretion in balancing".[918] In the case of a stalemate, the ruling court (in Alexy's work the German Constitutional Court) is therefore justified in taking a deferential position by refusing to overturn any earlier decision taken, either by another court or by the legislator, since that earlier decision is – in case of stalemate – per definition "not disproportionate".[919]

To further illustrate how, according to Alexy, balancing with use of his Weight Formula functions in practice, I will summarise one of his examples. The example is a German case, in

[909] Alexy, *supra* note 691 at 446-447 (explaining the reason for choosing a "geometric sequence" to express the intensity of interference in relation to his double triadic scale (see *infra* note 946 and accompanying text); however, the same reasoning applies to the single triadic scale; ibid. at 445); Alexy, *supra* note 92 at footnote 37.
[910] Alexy, *supra* note 691 at 440. See, however, Alexy, 'Comments and Responses', in M. Klatt (ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2011) at 328-329 (in which Alexy exceptionally argues that certain principles, for example human dignity, have higher abstract weight than others, for example the principle of private property).
[911] Alexy, *supra* note 691 at 440 and 446-447. See also Klatt and Meister, *supra* note 242 at 11.
[912] Below I will explicate the role of the abstract weight of relative Convention rights in the structured balancing test more fully. It suffices to say, at this point, that only the right to life of art. 2 ECHR falls to be accorded a higher abstract weight than the other relative Convention rights. See also Klatt and Meister, *supra* note 242 at 11.
[913] Alexy, *supra* note 691 at 444.
[914] Ibid.
[915] Ibid.
[916] Ibid.
[917] Ibid. at 445.
[918] Ibid. at 443; Alexy, *supra* note 60 at 411.
[919] Alexy, *supra* note 60 at 411. For an example, see Alexy, *supra* note 92 at 31 (the example – of the *Titanic* case – is discussed in the text; see *infra* notes 929-930 and accompanying text).

which a "widely-published satirical magazine, *Titanic*, described a paraplegic reserve officer who had successfully carried out his responsibilities, having been called to active duty, first as a "born Murderer" and in a later edition as a "cripple.""[920] In ECHR terms the case thus involved a conflict between the magazine's freedom of expression and the officer's right to reputation. Alexy notes that, *in casu*, "[t]he Düsseldorf Higher Regional Court of Appeal ruled against *Titanic* in an action brought by the officer and ordered the magazine to pay damages in the amount of DM 12,000 (roughly EUR 6,000; author's note)."[921] Alexy goes on to explain how the German Constitutional Court, on a constitutional appeal, found in favour of the magazine with regard to the statement of "born Murderer", but against it with regard to the statement of "cripple".[922]

In reconstructing the reasoning of the German Constitutional Court, Alexy describes it in terms of his two Laws of Balancing and Weight Formula. He disregards the relevance of (R_i) and (R_j), presumably because the epistemic reliability was considered to be identical with respect to both principles.[923] He then explains that, with regard to the statement of "born murderer", the German Constitutional Court considered the interference with the magazine's freedom of expression to be "serious", while it considered the interference with the officer's personality rights[924] to be "moderate, perhaps even light", given the highly satirical context.[925] Alexy then substitutes "serious" and "moderate" for their corresponding numbers in the Weight Formula, *i.e.* respectively 4 and 2.[926] When we fill those into the equation, the result is 4/2 = 2.[927] As a result, the magazine's freedom of expression prevails.[928] Things are different, however, with regard to the Constitutional Court's evaluation of the statement that the officer was a "cripple". Alexy explains how the Constitutional Court considered that description to constitute a "serious" interference with the personality rights of the officer.[929] In this case, the result of the equation is therefore 4/4 = 1. This is a case of stalemate, the consequence of which is that, *in casu*, the magazine's constitutional complaint was unsuccessful with regard to the statement that the officer was a "cripple".[930]

ii. Rejecting Alexy's Balancing Test

The balancing test described by Alexy is attractive for a number of reasons. It firstly infuses balancing with a much needed dose of rationality. It is secondly successful at addressing the challenge of incommensurability. Indeed, as Alexy explains, his balancing test allows for the indirect comparability of two principles, namely by examining both principles from the

[920] Alexy, *supra* note 691 at 438.
[921] Ibid. at 437.
[922] Ibid. at 438.
[923] Ibid. at 437-438.
[924] In terms of the German Basic Law.
[925] Alexy, *supra* note 92 at 31.
[926] Ibid.
[927] Ibid.
[928] Ibid. at 32.
[929] Ibid. at 31.
[930] Ibid.

viewpoint of their importance for the constitution and by expressing the intensity of interference with each principle with reference to a common scale: "light", "moderate" and "serious".[931] This comparison enables a choice between competing principles and could also be useful to resolve conflicts between Convention rights.

However, Alexy's balancing test is also plagued by several serious shortcomings, which ultimately lead me to reject it in favour of a more fluid and more complex balancing test. I will, however, incorporate the useful features of Alexy's balancing test in my own version thereof.

A first problematic aspect of Alexy's balancing test is that it relies on the "rules of arithmetic" to overcome the incommensurability challenge.[932] Alexy searches for the solution to the incommensurability challenge in the creation of a common scale, which he translates into numbers in his Weight Formula. Of course, this translation into numbers is not *required* for the application of Alexy's balancing test.[933] The numbers merely represent or clarify the balancing exercise, "thus giving more rationality towards the entire process".[934] Especially when intensity of interference is the only relevant factor, it is possible to apply Alexy's balancing test without the use of numbers. However, it remains the case that numbers play a central role in Alexy's balancing test. In explaining how his Weight Formula works, Alexy for instance states that "one can only talk about quotients in the presence of numbers, which is not the case in any direct sense with balancing. So concrete weight can only really be defined as a quotient in a numerical model which illustrates the structure of balancing."[935] Indeed, the Weight Formula – which is at the heart of Alexy's balancing test – is pointless in the absence of numbers.

More importantly, it is only *really* possible to do away with the numbers if the entire balancing exercise boils down to a comparison of the intensity of interference with each of the competing principles, while the values for both other elements (abstract weight and reliability of the underlying premises) are equal for each principle and therefore irrelevant from the viewpoint of the Weight Formula. When intensity of interference is the only relevant criterion, one may indeed simply hold that, if there has been a "serious" interference with the first principle and only a "moderate" interference with the competing principle, the first principle should prevail, instead of holding that the result of the equation is 2 (4/2) and that therefore the first principle prevails. However, as soon as one of the other factors becomes relevant – for instance if the reliability of the underlying premises is different for each principle – it becomes much more difficult to apply Alexy's balancing test without actually filling the numbers into the Weight Formula. Alexy's own example on the prohibition of cannabis products, which was deemed constitutional by the German Constitutional Court, illustrates as much.

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[931] Alexy, *supra* note 691 at 442.
[932] Ibid. at 448. See also Klatt and Meister, *supra* note 682 at 694. For criticism of this approach to balancing (as part of his general critique of balancing), see Tsakyrakis, *supra* note 228 at 474.
[933] Klatt and Meister, *supra* note 682 at 700.
[934] Ibid.
[935] Alexy, *supra* note 691 at 444.

Alexy maintains that the cannabis example "allows one to grasp the interplay between the six elements which are relevant in order to determine the concrete weight of a principle in case of a collision of two principles."[936] However, contrary to what could be expected, Alexy does not restrict himself to simply translating the considerations of the German Constitutional Court into the corresponding numbers in his Weight Formula. Instead, he takes the bizarre turn of working *backwards* in explaining the ruling, filling in the blanks in the Weight Formula as needed to, with hindsight, explain the outcome of the case. Let me clarify what I mean by this.

In discussing the cannabis example, Alexy first states that "[t]he abstract weights of the colliding principles P_i [*i.e.* the constitutionally protected liberty to smoke cannabis products] and P_j [*i.e.* the protection of collective goods, especially public health] shall be considered as equal, which allows one to neglect them."[937] The applicable version of the Weight Formula is thus the following, in which both intensity of interference and reliability of the underlying premises are relevant:

$$W_{i,j} = \frac{I_i * R_i}{I_j * R_j}$$

Alexy then identifies two of the remaining four variables, namely R_i and R_j, as being absolutely certain. He holds that "[i]f cannabis products are prohibited, the interference with P_i must be considered as certain. The value of R_i is therefore $2^o = 1$."[938] He then looks at "R_j [,which] stands in our case for the reliability of the empirical assumption of the legislator that the prohibition of cannabis products was necessary in order to avoid dangers for collective goods, especially public health."[939] Alexy finds that the Court "classes R_j as "maintainable"" and he therefore assigns it the value $2^{-1} = \frac{1}{2}$."[940]

Thus far, Alexy's analysis is – on his version of the balancing test – not problematic, because the variables he identifies are clear, from either the facts or the judgment of the Court. However, Alexy then takes a bizarre turn in his attempt to fill in the blanks in the Weight Formula (I_i and I_j, *i.e.* the intensity of interference with each principle). He claims that "[f]rom [the considerations listed immediately above] and the fact that the Court considered prohibition of cannabis products as constitutional, it follows that the interference with P_i is not of the highest degree. Its highest possible value is 2, that is [moderate]. This becomes clear by putting the following values into the Weight Formula:[941]

$$1 = \frac{2 * 1}{4 * \frac{1}{2}}$$

[936] Ibid. at 448.
[937] Ibid. at 447.
[938] Ibid.
[939] Ibid.
[940] Ibid.
[941] Ibid.

Alexy goes on to explain why he reconstructs the Weight Formula as such: "$W_{i,j}$ must not be more than 1, for if it exceeds 1 the prohibition would be unconstitutional. The Court, however, declares the prohibition constitutional. In this constellation the highest possible value which I_i can achieve is 2, that is, moderate, because I_j cannot achieve in the simple triadic model a higher value than 4, that is, [serious]."[942] We thus notice how Alexy assigns two variables – the intensity of interference with both principles – the values they *need* to have in order to be able to lead to the outcome reached by the German Constitutional Court.

By filling in the numbers that are necessary to achieve the result he needs and working backwards from there, Alexy ignores the possibility that, perhaps, his Weight Formula does not function satisfactorily. In doing so, Alexy inadvertently illustrates one of the shortcomings of his balancing test: its obsession with (filling in the right) numbers and its inability to function without those numbers in cases in which more than one factor plays a role. Indeed, it is far from obvious that one should deduce that a case involves a stalemate from the fact that one principle suffers a "certain" and "moderate" interference, while the other suffers a "serious" and "maintainable" interference, without insisting that the numbers 'show' a stalemate, *i.e.* a result of 1.

I submit that a focus on numbers relies too heavily on taking the incommensurability challenge literally. Alexy's balancing test is an attempt at constructing a literal common scale on which competing principles can be measured and weighed against each other. But there is no reason to assume that comparability *requires* such a literal common scale. On the contrary, comparability – and therefore also weak commensurability – can be obtained by comparing reasons in support of each of the two conflicting rights. On such a 'balancing as reasoning' test, the right that should prevail is the right that, in the concrete circumstances of the case at hand, is supported by the strongest reasons.[943]

I have already explained that the only manner in which Alexy's balancing test can function clearly *without* the use of numbers is when the only relevant factor in the balancing exercise is the intensity of interference with each principle. Whenever this intensity of interference is the only relevant variable, one may simply compare its 'value', in terms of "light", "moderate" or "serious", rather than substituting those stages by numbers. Indeed, if one of two conflicting rights suffers "serious" damage and the other only "moderate" damage, one does need numbers to determine that the first right should prevail, provided that intensity of interference is the only relevant factor.[944] However, in those cases, another shortcoming of Alexy's balancing test – stripped of its numbers – becomes painfully obvious: it is overly simplistic. It posits competing principles (in our case conflicting Convention rights) against each other in a strictly binary opposition, in which the description of an interference as "light", "moderate" or "serious" is the only factor that determines the result of the balancing exercise. To add some complexity to his balancing test, Alexy sometimes uses more complex descriptions of

[942] Ibid. at 448.
[943] See, in support, Webber, *supra* note 646 at 197.
[944] See, however, Webber, *supra* note 646 at 195 ("one should not assume that a light interference with one principle is of het same measure as a light interference with another principle.").

infringements, such as "very serious" or "extremely serious", thereby indicating that a more refined scale would be more appropriate, for instance in hard cases.[945]

Alexy actually proposes precisely such a scale, namely a double-triadic scale, consisting of nine steps: *ll*, *lm*, *ls*, *ml*, *mm*, *ms*, *sl*, *sm*, *ss*, in which *l* stands for "light", *m* stands for "moderate" and *s* stands for "serious".[946] According to Alexy, "[i]t is of considerable interest that the descriptions of these nine classes are quite easy to understand."[947] He claims that "[e]verybody understands a statement such as "The infringement is light (*l*)" or a statement as "[t]he infringement is a serious moderate infringement.""[948] With all due respect to Alexy, but I fail to see what a "serious moderate infringement" would consist of and find it particularly difficult to distinguish it from a "light serious infringement", which would actually rank higher on Alexy's double-triadic scale. It is in that respect not all that surprising to note that no one, not Alexy and not any of his followers, have attempted to explain a case with use of the double-triadic scale.[949]

I submit that, rather than by expanding the triadic scale to a double-triadic scale, refinement of the balancing test for the resolution of conflicts between Convention right requires that *other* factors than intensity of interference are examined.[950] This brings me to the third – and most serious – shortcoming of Alexy's balancing test: its reduction of all conflicts to a binary opposition between two principles.[951] Indeed, as Alexy himself explains, "the Law of Balancing concerns exclusively the relation between … two colliding principles".[952] Obviously, intensity of interference is a relevant factor to the resolution of such conflicts, as is the reliability of the underlying premises. I will therefore include both factors in my version of a structured balancing test. But I will incorporate them into one criterion: the impact criterion, which will both gauge the damage suffered by each right and incorporate an element of risk or speculation, whenever relevant. However, apart from the impact criterion, I will also insist on the relevance of criteria that look beyond the binary nature of a particular conflict between Convention rights, to the broader context in which the conflict has arisen. I will, in particular, insist on the inclusion of an additional rights criterion and a general interest criterion. These criteria will respectively assess the relevance of other Convention rights (potentially held by other persons) and of the general interest in resolving a conflict between

[945] Alexy, *supra* note 110 at 139-140; Alexy, *supra* note 908 at 28; Klatt and Meister, *supra* note 242 at 60.
[946] Alexy, *supra* note 691 at 445.
[947] Ibid.
[948] Alexy, *supra* note 92 at 31.
[949] Matthias Klatt and Moritz Meister, for instance, explain the double-triadic scale only to then state that "[t]o simplify matters, we will only apply the basic triadic model here." See Klatt and Meister, *supra* note 242 at 12.
[950] See also Tsakyrakis, *supra* note 228 at 474-475.
[951] See also Webber, *supra* note 646 at 192 ("proponents of the principle of proportionality often prefer to simplify matters and assume only *two* "competing interests." Few rights-claims can fairly be so reduced, as the issues involved are often polycentric." (emphasis in original)); Webber, *supra* note 66 at 106 (referring to a preference among proponents of proportionality to "simplify matters and assume only two 'interests'" and explaining how, in the process, "[t]he lessons of polycentrality are somehow cast aside in favour of simplifying the balancing exercise"). See further Aleinikoff, *supra* note 621 at 1004 (explaining, in a different context, that the United States Supreme Court has "not adequately explored the "mathematics" of balancing. As a way to avoid problems in calculation, it has generally – with little theoretical justification – adopted scaled-down equations that do not take account of all the possible interests.").
[952] Alexy, *supra* note 691 at 441.

two Convention rights. There is no room for any of those considerations under Alexy's balancing test, which approaches a conflict between two principles as a strictly binary opposition, isolated from the broader context in which the conflict has arisen. In Alexy's balancing test, there is also no room for the other criteria that I will propose as part of my structured balancing test, namely the purpose criterion and the responsibility criterion.

In the following chapter, I will propose my version of a structured balancing test for the resolution of conflicts between Convention rights. I will explain how the test aims to overcome the theoretical challenges to and practical shortcomings of (particular approaches to) balancing I have thus far identified. I will finally also point out some of the test's limitations.

CHAPTER IV – A STRUCTURED BALANCING TEST FOR THE RESOLUTION OF CONFLICTS BETWEEN RELATIVE CONVENTION RIGHTS

Section I – The Structured Balancing Test, in Theory and in Practice

The structured balancing test I propose below is inspired by 'balancing as reasoning', *i.e.* a form of practical reasoning, rather than the mechanical 'balancing of interests'. As such, it aims to avoid the objections raised against literal metaphors of balancing between rights,[953] interests[954] or values.[955] Such metaphors inevitably conjure up the image of scales, weight and the associated problem of the lack of a common metric to perform the balancing exercise.[956] To avoid those negative connotations, I aim to elaborate a rational and workable 'balancing as reasoning' test that does away entirely with the idea of weight and the need for numbers.

The structured balancing test I have in mind focuses on comparing reasons in support of, or against, each of the rights in conflict.[957] To allow for such comparison, I suggest the use of a multi-factorial balancing test composed of an exhaustive list of seven criteria: a value criterion, an impact criterion, a core-periphery criterion, an additional rights criterion, a general interest criterion, a purpose criterion and a responsibility criterion.[958] Further on, I

[953] See, for instance, S. J. Catlin, 'A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights', 69 *Notre Dame Law Review* (1994), 771-813; Greer, *supra* note 380 at p. 412 (describing how it "is common-place for judges to seek to resolve conflicts between … "human" rights … by "balancing" one against the other"). This is also the preferred language of the ECtHR, which often refers to the need to balance rights in conflicting Convention rights cases. See, for instance, *Appleby*, *supra* note 44 at para. 40; *Von Hannover (No. 2)*, *supra* note 44 at paras. 100, 106 and 108; *Fernández Martínez*, *supra* note 507 at para. 79; *Pfeifer*, *supra* note 39 at para. 38; *Schüth*, *supra* note 44 at para. 57; *Evans*, *supra* note 44 at para. 90.

[954] See, for instance, Tsakyrakis, *supra* note 228 at 470 (referencing Justice Frankfurter's and Justice Harlan's view that what is weighed in balancing tests are interests); Scanlon, *supra* note 61 at 78; P. Lambert, 'Conflits de droits de l'homme – Propos introductifs', in X. (ed.), *Annuaire international des droits de l'homme – Volume IV/2009* (Brussels: Bruylant, 2009) at 35; McFadden, *supra* note 93 at 625 (explaining that judges have admitted – both in their extrajudicial writing and in their opinions – that they balance interests). The ECtHR also often refers to the need to balance interests in conflicting Convention rights cases. See, for instance, *K. and T.*, *supra* note 610 at para. 194; *Palomo Sánchez*, *supra* note 730 at para. 54; *Pfeifer*, *supra* note 39 at para. 49; *Fernández Martínez*, *supra* note 507 at para. 89; *Odièvre*, *supra* note 1 at para. 49; *Evans*, *supra* note 44 at para. 83. Note that the Court uses the language of balancing of rights and balancing of interests interchangeably. See, for instance, *Pfeifer*, *supra* note 39 at paras. 38 and 49; *Evans*, *supra* note 44 at paras. 83 and 90; *Fernández Martínez*, *supra* note 507 at paras. 79 en 89.

[955] Scanlon, *supra* note 61 at 1478-1479; Alexy, *supra* note 60 at 93 (referencing the approach of the German Constitutional Court in the *Lüth* judgment). The ECtHR has, under certain circumstances, also referred to the balancing of values. See, for instance, *Axel Springer*, *supra* note 6 at para. 84; *MGN Limited*, *supra* note 3at para. 142; ECtHR, *Krone Verlag GmbH v. Austria*, app. no. 27306/07, 19 June 2012, para. 49.

[956] Möller, *supra* note 614 at 715; McFadden, *supra* note 93 at 596 and 623-624.

[957] See, similarly, Peczenik, *supra* note 821 at 2; Peczenik, *supra* note 769 at 154 and 203; Möller, *supra* note 614 at 721; Webber, *supra* note 66 at 97-98.

[958] These criteria are inspired by the work of several other scholars. See, in particular, Brems, *supra* note 8 at 4-5; Brems, *supra* note 9 at 303-304; Sullivan, *supra* note 16 at 821-823; S. Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Oxford: Hart Publishing, 2005) at 445; Oliver De Schutter, as reflected in E. Brems 'Recente Ontwikkelingen in de Rechtspraak van het Europees Hof voor de Rechten van de Mens', in W. Debeuckelaere and D. Voorhoof (eds.), *En Toch Beweegt het Recht* (Brugge: die Keure, 2003) at 243-244; Ducoulombier, *supra* note 4 at 559 and 566; Thomson, *supra* note 87 at 89; Barak, *supra* note 194 at 362; Barak,

will explain in detail what each of these criteria entails and how they can function in the ECtHR's practice. Here, I will limit myself to briefly indicating the idea behind each criterion.

The **value criterion** is intended to allow the Court to factor in the abstract value, within the Convention system, of the rights in conflict. As I will explain below, relative Convention rights are, in the abstract, generally considered to be of equal value, *i.e.* worthy of equal respect. However, I will insist that there is one exception, namely the right to life of art. 2 ECHR, which is considered to be a higher-ranking value in the Convention system.[959]

The **impact criterion** is intended to allow for the examination of two relevant factors, namely the damage suffered by (or impact on) each of the conflicting Convention rights, as well as the risk that such damage will actually occur. The latter factor is relevant, because it allows the Court to distinguish damage that is certain from damage that involves a degree of speculation.

The **core-periphery criterion** is intended to allow the Court to assess whether damage is done to a central or to a peripheral aspect of the Convention rights in conflict. As I will explain below, the core-periphery distinction is best understood as representing a continuum, in the sense that an aspect of a right can be closer to (or farther removed from) that right's core or periphery. In that respect, the reasons for finding in favour of a right are stronger when it suffers an interference with an aspect that lies closer to its core than with one of its more peripheral aspects.

The **additional rights criterion** is intended to allow for a more holistic consideration of a conflict between Convention rights. It specifically allows the Court to assess the potential relevance of other Convention rights, held by one of the parties to the conflict or by other persons, over and above the two rights that make up the primary conflict.

The **general interest criterion** is likewise intended to allow the Court to take the broader context behind a conflict between Convention rights into account. It specifically allows the Court to determine whether one – or both – of the conflicting Convention rights is supported by a relevant general interest.

The **purpose criterion** is, as I will explain below, expected to have a rather limited area of applicability. It is intended to allow the Court to factor in the fact that certain Convention rights stand in function of other Convention rights, in the sense that one of their purposes is to ensure adequate protection of the latter rights. As I will explain below, the purpose criterion will be particularly relevant to the resolution of conflicts in which the best interest of the child is a primary consideration.

The **responsibility criterion**, finally, is intended to allow the Court to assess the relevance of the correlative of Convention rights, namely duties. However, because under the Convention system such duties cannot be directly imposed on private individuals, including the parties to

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supra note 93 at 10-11; Kosař, *supra* note 570 at 376-377; Alexy, *supra* note 691 at 436 and 446; Coffin, *supra* note 615 at 23.

[959] See, for instance, *Odièvre*, *supra* note 1 at para. 45.

a conflict between Convention rights, the function of the responsibility criterion will also be rather limited. It will prove especially valuable in the context of conflicts involving freedom of expression, given that art. 10 ECHR explicitly states that the exercise of that freedom "carries with it duties and responsibilities".[960] However, as I will explain below, it is vital to not misunderstand that reference as a *carte blanche* to expect journalists, for instance, to comply with anything similar to a "less restrictive alternative" requirement.

The above seven criteria, of which the structured balancing test is composed, specifically aim at enabling the ECtHR to look at a conflict from the perspective of both Convention rights.[961] The criteria invite the elaboration of reflective arguments, which assess reasons in support of or against both Convention rights in conflict, as well as the strength of those reasons. As a result, it becomes possible to make *comparative* judgments of the reasons in support of both conflicting Convention rights.[962] This in turn allows the Court to rationally determine which right should prevail in the concrete circumstances of the case at hand. Thus, the test is able to overcome the incommensurability challenge and tackle the problem of preferential framing.[963]

At the same time, the structured balancing test is designed to avoid any unwarranted reduction of the conflict to a binary opposition between two rights. Instead, it allows for the assessment of conflicts between Convention rights in a broader context. More specifically, the test factors in the relevance of other rights, potentially held by other right holders, and of the general interest. As a result, a more holistic picture of the conflict is presented, rather than an artificial one that pits one right against another right in apparent isolation from the context in which the conflict has arisen.

The seven criteria of the structured balancing test are moreover intended to 'work' together in the construction of nets of arguments in support of each of the conflicting Convention rights. One net will offer reasons in support of the first right, while another net will offer reasons in support of the other right. A comparison of the strength of both sets of reasons will allow the Court to determine which Convention right should prevail in the case at hand. The construction of such nets of arguments, on the basis of an exhaustive number of clear and transparent criteria, is moreover expected to ensure greater coherence of the Court's legal reasoning.[964] Reliance on nets of arguments will also reduce subjectivity and minimise the threat of arbitrariness in the Court's legal reasoning, *inter alia* by avoiding the need for an intuitive moment as the ultimate basis of the balancing exercise and by forcing the Court to lay all relevant cards on the table.[965] However, the structured balancing test does not aim at

[960] Art. 10 ECHR.
[961] On the need for balancing of reasons and counter-arguments in hard cases, see Peczenik, *supra* note 769 at 154.
[962] Mather, *supra* note 636 at 366.
[963] See also Moral Soriano, *supra* note 695 at 297 (arguing that "reasons are the main tool to justify rationally choices between incommensurable goods").
[964] On the link between coherence and structured argumentation frameworks, see Stone Sweet and Mathews, *supra* note 254 at 89-90.
[965] On the need for legal orders to provide "transparent criteria as to how the weighing of legal rights should be achieved", and on how this is "crucial if weighing is to amount to anything other than a purely subjective exercise in moral judgment", see Besson, *supra* note 958 at 448. See also Ducoulombier, *supra* note 4 at 336. On

completely removing all intuitive thought processes from the Court's legal reasoning. Instead, it rather aims at guiding any intuitive judgments, immediately 'perceived' by the Judges, through a deliberative reasoning process, which may either confirm, modify or overrule them. The structured nature of the test, composed of an exhaustive number of reflective criteria, will assist in achieving this aim.[966]

The structured balancing test will, as a result of all the above, assist the Court in developing and presenting a more objective and rational legal reasoning in conflicting Convention rights cases.[967] This will in turn lead to increased transparency and predictability of the Court's reasoning, thereby offering more concrete guidance to national legislators and domestic courts.[968]

However, as I will explain in more detail in the coming chapters, there are limitations to what the structured balancing test can achieve. Firstly, it is only designed to assist in the resolution of conflicts between relative Convention rights. It is thus inapplicable to conflicts between an absolute and a relative Convention right and to conflicts between two instances of an absolute Convention rights. Both types of conflicts are therefore treated separately, in Chapters VI and VII respectively. Secondly, the structured balancing test is able to overcome the challenge of weak incommensurability, but it cannot offer guidance in cases of strong incommensurability. More specifically, as I will argue in Chapter V, application of the test will not yield any clear results in certain cases of dilemma. It will thus not be possible to rationally determine which right should prevail. I will argue that in such cases of strong incommensurability, the margin of appreciation should play a crucial role. Thirdly and finally, the margin of appreciation will also impact on the application of the structured balancing test in 'standard' cases of conflicts between Convention rights (*i.e.* cases that do not involve a dilemma). I will present my views on the role of the margin of appreciation in the application of the structured balancing test in the last section of this chapter (Section II).

Here, I will first explain how the seven criteria of the structured balancing test should function, in theory and in practice. I will initially examine each of the seven criteria of the structured balancing test separately. I will explain how each criterion should function in theoretical terms and will relate it to the Court's case law on conflicting Convention rights. I will show how the structured balancing test draws on useful elements already present in the Court's case law and is thus analytically compatible with that case law. In that respect, the structured balancing test does not entail a complete overhaul of the Court's legal reasoning in conflicting Convention rights cases. Rather, it aims to assist the Court in overcoming the

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the need for openness in balancing and candor in legal reasoning, see Coffin, *supra* note 615, specifically at 22-23; Shapiro, *supra* note 834.

[966] On how scripts, checklist and multifactor tests increase judges' reliance on deliberative reasoning and thus make it less likely that they will rely on intuition when doing so is inadvisable, see Guthrie et. al., *supra* note 838 at 42.

[967] On the importance of candor - the requirement that judges openly explain the reasons for their decision in their judgments - see Shapiro, *supra* note 834 at 737. See also Scharffs, *supra* note 631 at 1423.

[968] On the link between rationality and predictability of legal reasoning, see Peczenik, *supra* note 769 at 211. On how the adoption of a methodological framework for the balancing test may lead to increased legal certainty, see Van Drooghenbroeck, *supra* note 219 at 710-711; Hottelier, *supra* note 289 at 119.

deficiencies of its current approach to balancing conflicting Convention rights by adding much needed structure, rationality, transparency and objectivity.

After having presented each criterion separately, I will illustrate how the structured balancing test, taken in its entirety, should function in practice, by applying it to the conflict between freedom of expression and the right to reputation in *Palomo Sánchez and Others v. Spain*. I will explain that such application requires normative arguments. I will moreover demonstrate how the 'balancing as reasoning' of the structured balancing test offers support to a different normative result in *Palomo Sánchez* than the outcome the Court reached on the basis of its open ended and *ad hoc* balancing test.

1. The Criteria of the Structured Balancing Test

i. The Value Criterion

The value criterion is intended to allow the Court to assess the abstract value, within the Convention system, of the rights in conflict. The premise underlying the criterion is that there are strong reasons for resolving a conflict between Convention rights to the benefit of the right that holds a higher abstract value within the Convention system.[969] Thus, if the Court is confronted with a conflict between Convention right A – a higher ranking right in the Convention system – and Convention right B – a lower ranking right in the Convention system – then there are strong reasons for resolving the conflict to the benefit of right A.

A number of different approaches are available to further develop the value criterion. One *could*, along with Peggy Ducoulombier, rely on hierarchical elements to suggest a soft ordering of the rights enumerated in the Convention, carefully outlining each right's ranking within the Convention system.[970] However, I propose to avoid that route. Instead, I submit, the role of the value criterion should be kept rather minimal. The primary reason for restricting its role is that, in light of the indivisibility and interrelatedness of all human rights,

[969] See also Besson, *supra* note 958 at 437-438 (referring to the relevance of the qualitative priority some rights hold over others by virtue of the higher importance of the interests they protect, while pointing out that "[o]ne difficulty with [that] idea … is that all the duties a right may ground are not equally strong in relation to the interests protected by the right they are grounded on."). On the latter idea, *i.e.* that it is not because certain rights are more important than others that every duty associated with these rights is more important than any duty associated with other rights, see Waldron, *supra* note 32 at 515. It is for this reason that I do not advocate, in absolute terms, that certain Convention rights outrank others, but rather insist that their higher abstract value is only one of the factors to be considered in balancing such rights against other Convention rights.

[970] Ducoulombier, *supra* note 4 at 521-525 (arguing, in terms of abstract weight, that art. 5 ranks highest among the relative rights, followed by arts. 9, 10 and 11, then art. 6, then art. 8 and finally the articles of Protocol 1, most notably art. 3 of Protocol 1). See also J. Rivers, 'Proportionality, Discretion and the Second Law of Balancing', in G. Pavlakos (ed.), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Oxford – Portland : Hart Publishing, 2007) at 178-179 (ranking the right to life higher than the right to physical integrity, which he in turns ranks higher than liberty, which he considers more important than the right to property; viewing the ranking of privacy and equality as more controversial); Zucca, *supra* note 26 at 140-141 (arguing that "free press should be recognised as having qualified priority" over privacy and explaining how such qualified priority may be overruled in elaborating sophisticated arguments); Barak, *supra* note 93 at 10 (arguing that not all rights are of equal importance and pointing towards the relative importance of the rights to life, human dignity, equality and freedom of expression).

it is not desirable to construct a hierarchy between the human rights enumerated in the Convention.[971] [972] Instead, as already explained above, I rely on the idea – also endorsed by the Court – that all Convention rights deserve, in principle, to be treated with equal respect.[973] This equality argument particularly applies to conflicts between relative Convention rights.[974]

Yet, there arguably exists an exception to the principled equal value of relative Convention rights. And it is in respect of that exception that the value criterion finds its place in the structured balancing test. The exception at issue is the right to life of art. 2 ECHR. Given that enjoyment of the right to life is a precondition for the enjoyment and exercise of all other Convention rights,[975] it is generally considered, also by the Court, to be "a higher-ranking value guaranteed by the Convention".[976] In case of conflict between the right to life and other relative Convention rights, the Court should therefore accord special protection to the former. If other factors do not sway the balance towards conflicting relative Convention rights, the Court should – and will – find in favour of the right to life, since it ranks higher in the value system of the Convention.

An example of a case to which the value criterion, as just described, could be sensibly applied is the domestic violence case of *Opuz v. Turkey*.[977] The case revolved around a woman who had suffered frequent abuse at the hands of her husband and was eventually murdered by him. In its defence, the government of Turkey, which stood accused of having failed to take sufficient steps to protect the woman, argued that it "could not be expected to separate the applicant and her husband and convict the latter while they were living together as a family, as this would amount to a breach of their rights under Article 8 of the Convention."[978] The government thus raised an argument based on a conflict of Convention rights, namely between the woman's right to life under art. 2 ECHR and the couple's right to family life

[971] Regardless of the theoretical and practical feasibility of constructing such a hierarchy.
[972] T. Meron, 'On a Hierarchy of International Human Rights', 80 *The American Journal of International Law* (1986), 1-23; Besson, *supra* note 958 at 444-445; Van Drooghenbroeck, *supra* note 126 at 382-383; Cariolou, *supra* note 61 at 260-261; Brems, *supra* note 9 at 303.
[973] See *supra* note 756 and accompanying text. *Axel Springer*, *supra* note 6 at para. 87; *Von Hannover (No. 2)*, *supra* note 44 at para.106.
[974] Ibid. See also Cariolou, *supra* note 61 at 261. Matters are different for what concerns absolute Convention rights. Given that interference with absolute Convention rights can never be justified, also not for the protection of relative Convention rights, they are not principally equal to relative Convention rights. Instead, they principally trump relative Convention rights. It is for that reason that this chapter only deals with conflicts between relative Convention rights, while conflicts involving absolute Convention rights are reserved for separate chapters. See *infra* Chapters VI and VII.
[975] *Pretty*, *supra* note 36 at para. 37 ("Article 2 … safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory."). See also A. Legg, *The Margin of Appreciation in International Human Rights Law – Deference and Proportionality* (Oxford: Oxford University Press, 2012) at 202-203.
[976] *Odièvre*, *supra* note 1 at para. 45. See also *Pretty*, *supra* note 36 at para. 37 ("[t]he Court's case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention"); ECtHR, *Huohvanainen v. Finland*, app. no. 57389/00, 13 March 2007, para. 92; *Osman*, *supra* note 44 at para. 116. See further A. Ieven, 'Privacy Rights in Conflict: In Search of the Theoretical Framework behind the European Court of Human Rights' Balancing of Private Life against Other Rights', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008) at 52; Klatt and Meister, *supra* note 242 at 11; Legg, *supra* note 975 at 202-203.
[977] *Opuz*, *supra* note 309.
[978] Ibid. at para. 123.

under art. 8 ECHR. Above, I have already rejected this argumentation insofar as it implies that *Opuz* involved an intrapersonal conflict between the woman's art. 2 and art. 8 rights.[979] Here, I will deal with the remaining argument of the government, *i.e.* that the case involved a conflict between the woman's right to life and her husband's right to family life. In evaluating the authorities' decision to resolve that conflict to the benefit of the latter right, by refusing to separate the family, it is crucial to note that they were well aware of the threat posed by the husband, given that he had issued numerous death threats against his wife. The husband had moreover been detained and prosecuted on several occasions. Nevertheless, the authorities refused to take available protective measures, for instance an order for the husband to vacate the matrimonial home and/or a restraining order. I submit that it is here, in evaluating the government's (in)actions, that the value criterion plays a key role. Its application provides a strong – nigh invincible – reason for giving prevalence to the wife's right to life, in the face of a real and immediate risk that her husband would murder her. Indeed, the ECtHR recognised as much in *Opuz* by ruling that Turkey had violated its positive obligation to protect the wife's right to life.[980]

However, it is important to clarify that the value criterion can only play such a decisive role if, as the Court has duly held, "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 from the criminal acts of a third party".[981] Indeed, conflicts between the right to life and other relative Convention rights necessarily entail an element of speculation or risk. A potential infringement of the right to life will – at the time of consideration of a conflict by the domestic authorities – be, to a greater or lesser degree, uncertain. When the relevant elements of the case are insufficient to rule that there was a real and immediate risk to the right to life of an identified individual, the value criterion should not play a decisive role. Such was the case in *Osman v. the United Kingdom*, in which the applicants claimed that the domestic authorities had failed to protect the right to life of Mr. Osman, the applicants' husband and father. Mr. Osman had been shot dead by a former teacher of his son. The applicants argued that there were sufficient indications that the teacher, who had become infatuated with Mr. Osman's son, posed a real and imminent threat to the lives of Mr. Osman and his son (the son had been wounded in the shooting). However, at the relevant time – *i.e.* before the shooting took place – the threat the teacher posed to the lives of Mr. Osman and his son was necessarily speculative. It was precisely because the risk was, in the opinion of the Court, insufficiently substantiated that it ruled against the applicants. Instead, the Court held that, since the domestic authorities were also under an obligation to guarantee the art. 5 and 8 rights of the teacher and because they did not know or ought to have known that the lives of Mr. Osman and his son were at real and immediate risk from the teacher, the right to life of Mr. Osman and his son had not been violated.[982] The Court further clarified its ruling in terms of a conflicting rights argument:

[979] See *supra* notes 309-313 and accompanying text.
[980] *Opuz*, *supra* note 309 at para. 136.
[981] See, for instance, ibid. at para. 129; *Osman*, *supra* note 44 at para. 116.
[982] *Osman*, *supra* note 44 at paras. 116 and 121-122.

> "the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results."[983]

The *Osman* case thus illustrates how the existence of an element of risk or speculation may lead the Court to decide a conflict involving the right to life and other relative Convention rights to the benefit of the latter, notwithstanding the fact that the right to life is "a higher-ranking value" in the Convention system. The *Osman* case also demonstrates why elements of speculation or risk need to be incorporated into my structured balancing test. I will include these elements under the impact criterion, discussed immediately below.

ii. The Impact Criterion

As already explained, the impact criterion allows for the examination of two relevant factors, namely (i) the damage suffered by each of the conflicting Convention rights and (ii) the likelihood that such damage will actually occur.

The underlying premise of the first factor is that, all other things being equal, a conflict between Convention rights should be resolved to the benefit of the right that would suffer the greatest damage, if the other right would be allowed to prevail.[984] Thus, in case of a conflict between the directly invoked Convention right (Convention right A) and the competing Convention right (Convention right B), the Court should first assess the damage done to Convention right A by the State, which allowed Convention right B to prevail.[985] It should then make the opposite assessment, *i.e.* a determination of the damage that Convention right B would suffer if Convention right A were allowed to prevail. The Court should finally compare both assessments to determine which right would suffer the greatest damage. If all other things are equal, *i.e.* if all other factors do not – on balance – offer reasons in favour of either right, the Court should resolve the conflict to the benefit of the right that would suffer the greatest damage.

However, this is only part of the story. The impact criterion also incorporates a second factor, namely one of risk or speculation. Indeed, it is insufficient to merely determine the damage

[983] Ibid. at para. 121.
[984] Alexy, *supra* note 691 at 436; Sullivan, *supra* note 16 at 821; Brems, *supra* note 9 at 304; Thomson, *supra* note 87 at 89; Ducoulombier, *supra* note 4 at 559; Kosař, *supra* note 570 at 377.
[985] Often, the damage to the invoked Convention right has already occurred at the domestic level, for instance if the domestic authorities have interfered with a Convention right to protect another Convention right. In that case, the damage suffered by the invoked Convention right will be revealed by the facts of the case at hand. However, the damage that the other right would have suffered if the domestic authorities had ruled otherwise has per definition not occurred. The Court thus needs to imagine what that damage would have been. The same holds true for a conflict in which the domestic authorities refused to interfere with a Convention right to protect another Convention right. In that case, it may even be the case that the damage suffered by both rights cannot be established on the basis of the facts.

suffered by each of the conflicting Convention rights. The Court also needs to determine how certain it is that such damage will actually occur.[986] The premise underlying the second factor is thus that, all other things being equal, a conflict between Convention rights should be resolved to the benefit of the right that is *most likely* to suffer damage. Therefore, if Convention right A is more likely to suffer damage than the competing Convention right B *and* if all other things are equal, *i.e.* if all other factors do not – on balance – offer reasons in favour of either right, the Court should resolve the conflict to the benefit of Convention right A.

Two Sets of Scales

In order to operationalise the two factors of the impact criterion, we need two sets of scales: one scale on which we can assess the damage suffered by Convention rights and another on which we can evaluate the likelihood that such damage will occur.

As for the first set of scales, I propose the use of a scale that lies somewhere in between Alexy's single triadic scale – which I consider to be too simplistic – and his double triadic scale – which I find unworkable. A five stage scale appears to fit the bill perfectly. The five stages, which express the damage suffered by Convention rights, could be "very serious", "serious", "moderate", "light" and "very light". Such a five stage scale is sufficiently flexible and complex to allow for a reasonable determination of the damage suffered by a Convention right, yet not so complex as to become unworkable.

As for the second set of scales, I propose – for reasons of symmetry – to also work with five stages. The stages, which express the likelihood that a Convention right would suffer damage, could be "certain", "a real and immediate risk",[987] "reliable", "maintainable" and "unlikely". We may be tempted to add a sixth stage, such as "merely speculative". However, as I have argued in Part I, when the involvement of one of the Convention rights is "merely speculative", there can be no genuine conflict between Convention rights. As a result, there would be no conflict to resolve. Therefore, it is not necessary to include a stage "merely speculative" in the scale that expresses the likelihood that damage will occur.

The Aim and Limits of the Two Scales

Use of the two scales is intended to infuse the assessment under the impact criterion with a necessary dose of rationality and objectivity. Of course, application of the scales cannot hope to remove all arbitrariness and subjectivity from the Court's legal reasoning, since the determination of the appropriate stage of each scale will still depend on normative arguments.

[986] Alexy, *supra* note 691 at 446; Coffin, *supra* note 615 at 23; Barak, *supra* note 194 at 362; Klatt and Meister, *supra* note 242 at 112; Van Drooghenbroeck, *supra* note 219 at 272-273. *Cf.* my discussion of *Osman v. the United Kingdom*, *supra* notes 981-983 and accompanying text.

[987] This particular stage relies directly on the Court's own case law. See, for instance, *Osman*, *supra* note 44 at para. 116; *Huohvanainen*, *supra* note 976 at para. 98.

However, their use does force the Court to be transparent and candid in giving reasons in support of its judgments. It moreover allows the Judges to check their intuitions through reflective reasoning, thereby at least minimising the threats of arbitrariness and subjectivity. In that respect, the fact that one of the conflicting Convention rights would suffer "certain" and "serious" damage, while the other right would suffer "reliable" and "moderate" damage, offers an objective, rational and accessible reason in favour of a resolution of the conflict to the benefit of the former right.

However, in other scenarios application of the impact criterion will not be so evident. It is for instance more difficult to understand how a "real and immediate risk" of "serious" damage to one right relates to "certain", but "moderate" damage to the competing right. Application of the impact criterion will indeed not be straightforward in those circumstances in which one of the conflicting Convention right 'scores better' on one scale, but 'worse' on the other. In such circumstances of competing classifications on both scales, further normative arguments are required as to whether – and if so, how – the reasons in favour of each right should still differ in strength. A defensible argument could, in that respect, be made in favour of preventing "certain" infringements, provided that they are sufficiently serious, over preventing "unlikely" infringements, even if they would be "very serious". In that sense, if one of the conflicting Convention rights would suffer "certain" and "moderate" damage, while the other would suffer "very serious", but "unlikely" damage, the reasons for finding in favour of the first right are arguably stronger than those for finding in favour of the latter right. Conversely, if the first right suffers "reliable" and "light" damage, while the competing right would suffer "maintainable" and "very serious" damage, the reasons for finding in favour of the latter right are arguably stronger.

There will, however, inevitably be instances in which it is impossible to argue – in a sufficiently convincing manner – that the impact criterion offers reasons in favour of either of the Convention rights in conflict. Instead, the results of its application will be indeterminate. For instance, if the first Convention right faces a "real and immediate risk" of suffering "serious" damage, while the competing Convention right faces a "reliable" risk of suffering "very serious" damage, it appears impossible to determine which holds the stronger position. In those circumstances, the impact criterion does not offer reasons in favour of – nor against – either of the conflicting Convention rights. It can therefore not assist in the resolution of the conflict.

Applying the Two Sets of Scales

Thus far, I have focused on describing the impact criterion in abstract terms. To illustrate how the criterion functions in practice, I will rely on a number of examples from the Court's case law, analysed immediately below. Further on, once I have described all seven criteria of the structured balancing test separately, I will explain how balancing with use of the test may function in practice.[988] In the process, it will become clear how application of the impact

[988] See *infra* '2. Applying the Structured Balancing Test in Practice'.

criterion contributes to the rational balancing of conflicting Convention rights. Here, however, I will restrict myself to presenting arguments on the determination of the appropriate stage of both scales, since – for our current purposes – it is paramount to demonstrate the usefulness of those scales.

A first set of examples draws on the Court's defamation case law. In defamation cases, a conflict arises between one party's freedom of expression and another's right to reputation.[989] In such cases, the likelihood that freedom of expression will suffer damage can always be labelled as "certain", given that protection of the right to reputation requires measures that will inevitably impact on freedom of expression (*e.g.* an order prohibiting publication, the imposition of a criminal sentence, an order to publish a reply or apology, or an award of civil damages). The likelihood that the right to reputation will suffer damage will, conversely, generally not be "certain". Given that the effects on one's reputation depend on subjective interpretation, both by the subject of the publication and the audience that reads it, the likelihood of damage will usually fall to be labelled as "a real and immediate risk" or "reliable". The likelihood may be even further reduced when the subject of the publication is a person, a politician for instance, who is in a position that allows her to decrease the likelihood that her reputation will suffer damage, for instance through a reply.[990] A politician moreover knows that her actions will be the subject of public scrutiny. As a result, she is expected to show a higher degree of tolerance to criticism than a private individual.[991] These elements can be translated in terms of the impact criterion. Indeed, a statement will generally cause less damage to a politician's right to reputation than the same statement uttered in respect of a private individual, given that the former is expected to show greater tolerance and may be in a position that allows her to mitigate any damage done to her reputation, while neither of those elements apply to a private individual.

As a result of the above, the damage to the right to reputation can range from "very light" (for instance in the case of legitimate and factually supported criticism, expressed in moderate terms, against a politician), over "light" (for instance in the case of the same factual criticism, expressed in harsh terms), to "moderate" (for instance in the case of criticism of a politician in the form a value judgment, expressed in harsh terms), "serious" (for instance in the case of allegations of a criminal offence, in the absence of a court judgment or prosecution) and all the way up to "very serious" (for instance in case of grave insults of a private individual).[992] The damage suffered by the right to reputation of a person who is the subject of an allegedly defamatory statement will moreover depend on the nature and tone of the speech at issue. Particularly where the speech is uttered by way of satirical expression (for instance, by way of a cartoon), the damage done to the right to reputation will be less grave than if the same speech would be uttered in an objective and/or serious tone, given the fact – well known to both the subject of the publication and the public at large – that satire *per definition* relies on a large degree of exaggeration and provocation.

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[989] Smet, *supra* note 38.
[990] See, in this respect, *Niskasaari*, *supra* note 698 at para. 75.
[991] For the principle, see *Lingens*, *supra* note 275 at para. 42; *Lindon, Otchakovsky-Laurens and July*, *supra* note 40 at para. 46.
[992] For concrete examples, see the case law analysis presented in Smet, *supra* note 38.

As for the damage suffered by freedom of expression in defamation cases, this may range from "moderate" (for instance in the case of an order to publish a reply), over "serious" (in the case of interferences that may have a chilling effect on speech, such as an award of civil damages or an order to publish an apology)[993] to "very serious" (for instance in the case of censorship or criminal conviction).[994] I submit that the damage done to freedom of expression should never be labelled as "light" or "very light", given that any infringement on freedom of expression in a democratic society should not be taken lightly.[995]

The impact criterion would function in an analogous, but slightly different manner in cases concerning the publication of photographs, for instance of a public figure, in the press. As for the damage suffered by freedom of expression, as well as the likelihood thereof, similar considerations would apply as the ones mentioned above in relation to defamation cases. The damage may thus be "very serious", "serious" or "moderate", while the likelihood of damage will be "certain". The likelihood of damage to the right to private life of the public figure will also be "certain", given that the publication of the photographs itself causes damage to a public figure's right to private life. Of course, the extent of the damage may range from less to more serious, depending on the subject of the photographs and the circumstances in which they are taken. In line with the case law of the Court, the damage may be labelled as "serious" if the subject of the photographs is "very personal or intimate" or if the photographs are taken in a situation of "continual harassment" by photographers.[996] If the photographs are taken in public and in the absence of continual harassment, the damage could conversely be labelled as "moderate" or even "light", depending on the subject matter of the photographs and how widely they were disseminated.[997] By contrast, if the publication at issue does not concern photographs of a public figure, but for instance the publication of the HIV-status of a private individual, the damage may be characterised as "very serious".[998]

In case of yet another type of conflict, namely between a religious employer's freedom of religion (in terms of her religious autonomy) and the right to private life of an employee who has been dismissed for breaching religious principles, the likelihood of damage to both Convention rights would be "certain".[999] Indeed, the dismissal of the employee for actions taken in her private life necessarily causes damage to her right to private life, while barring a religious employer from dismissing that employee (or forcing her to reinstate the employee) necessarily causes damage to her religious freedom. However, the extent of the damage may vary according to the circumstances of the case at hand. In the case law of the ECtHR, the

[993] On the role of the "chilling effect" principle in the art. 10 case law of the ECtHR, see R. Ó Fathaigh, 'Article 10 and the Chilling Effect Principle', *European Human Rights Law Review* (2013), 304-313.
[994] For examples, see ECtHR, *Cumpănă and Mazăre v. Romania*, app. no. 33348/96, 17 December 2004, para. 115; *Dupuis*, *supra* note 606 at paras. 46 and 48; *Niskasaari*, *supra* note 698 at para. 77; *Axel Springer*, *supra* note 6 at para. 109.
[995] See, in this respect, *Appleby*, *supra* note 44 at para. 48 and the partly dissenting opinion of Judge Maruste in ibid.
[996] *Von Hannover*, *supra* note 44 at paras. 59 and 68; *Von Hannover (No. 2)*, *supra* note 44 at para.103. See also *A. v. Norway*, *supra* note 88 at para. 72; ECtHR, *Egeland and Hanseid v. Norway*, app. no. 34438/04, 16 April 2009, para. 61.
[997] *Von Hannover (No. 2)*, *supra* note 44 at paras. 112 and 122-123.
[998] *Biriuk*, *supra* note 501 at para. 41.
[999] See for instance *Obst*, *supra* note 291; *Schüth*, *supra* note 44; *Fernández Martínez*, *supra* note 507.

ability of the employee to find a new job is one of the relevant factors for the resolution of the conflict.[1000] The ability to easily find a new job may thus be considered to be a mitigating factor, limiting the damage to the employee's right to private life. However, it always remains the case that she was dismissed for actions related to her private life. Regardless of whether she can find a new job, that breach can never be undone. Therefore, I submit that the damage should not be labelled as less than "moderate". Depending on the aspect of private life at stake, it arguably falls to be labelled as "moderate" or "serious", if the employee can find a new job easily, and "serious" or "very serious", if that is not the case. The damage to the religious employer's freedom of religion is more difficult to classify. How one classifies it depends on the views one takes on the importance of religious autonomy in these matters. If one considers religious autonomy to be a crucial aspect of the religious freedom of a religious employer, the damage falls to be classified as "serious" or even "very serious". However, if one focuses more on the fact that a religious employer remains an employer and should thus be subject to similar constraints in its hiring and firing policies as other employers, regardless of her religious autonomy, one could classify the damage as "moderate" or "serious". I submit that the first approach is preferable, since it relies on a subjective view of what is important to the religious employer herself, rather than on the objective view of what should – from the viewpoint of the objective observer – be important to her. Nevertheless, because the damage to the religious freedom of the religious employer *qua* collective body appears to be less serious than, for instance, the damage done to an individual believer who is forced to act against her conscience (for instance in the case of forced military conscription of Jehovah's Witnesses), it arguably falls to be characterised as "serious", rather than "very serious".

A final example that may serve to illustrate how the scales of the impact criterion function in practice is that of child care measures taken to protect children from abuse or neglect. If a child is taken into care to protect her from neglect or abuse by her parents, the likelihood of damage to the rights to physical integrity and private life of the child and to the right to family life of the parents both fall to be labelled as "certain". As for the damage itself, this may be labelled as "very serious" with respect to the right to physical integrity and private life of the child.[1001] The damage to the right to family life of the parents, conversely, may at first sight be "serious" or even "very serious", given that their child is taken away from them and put into care.[1002] However, that damage can be mitigated by additional measures such as access rights, the limited duration of the order and the forecast of family reunification.[1003] When those measures are put in place, the damage to the right to family life of the parents arguably falls to be labelled as "moderate". But if those measures are not taken or not effectively implemented, the damage to the right to family life of the parents becomes – or remains – "very serious", since they would lose all contact with their child and the prospect of being

[1000] See, for instance, *Schüth*, *supra* note 44 at para. 73.
[1001] For an example, see *K. and T.*, *supra* note 610 at para. 269. See also, *mutatis mutandis*, *Neulinger and Shuruk*, *supra* note 609 at paras. 147-148.
[1002] See *K. and T.*, *supra* note 610 at para. 268.
[1003] See ibid. at para. 269; ECtHR, *Ageyevy v. Russia*, app. no. 7075/10, 18 April 2013, para. 143.

reunited with her.[1004] In the absence of (effective) additional measures, the right to family life of the child suffers similar damage.[1005] Conversely, if the parents take measures to remove the threat of abuse or neglect, the likelihood that the child's right to physical integrity will suffer future damage will become less certain. It could then be labelled as "maintainable" or even "unlikely", depending on the measures taken by the parents. This may in turn have an effect on the evaluation of the additional measures taken to protect the child, such as a complete bar on access rights or putting the child up for adoption.

Room for 'Less Restrictive Alternative' Reasoning?

The existence of 'less restrictive alternatives' in restricting fundamental rights lies at the heart of the 'necessity' step of the structured proportionality test, as utilised by the German Constitutional Court and detailed by proportionality scholars like Robert Alexy.[1006] In structured proportionality analysis, the 'necessity' requirement functions as an independent test, which is examined *prior* to any balancing between the conflicting principles (proportionality *stricto sensu*). The idea behind the 'necessity' test is that, whenever the *same* level of protection of a principle (*e.g.* national security) can be obtained through means that less intensively interfere with the competing principle (*e.g.* the right to personal liberty), those 'less restrictive' means should be chosen.[1007] Therefore, if a State has two options at its disposal that would equally effectively protect national security, but nevertheless chooses the option that most intrusively interferes with the right to personal liberty, the 'necessity' test is not met. The chosen measure is automatically disproportionate and there is no need to examine its proportionality *stricto sensu*, through balancing.

In recent years, the ECtHR has increasingly relied on the ideas behind the 'necessity' test, formulated in the sense of a 'less restrictive alternative' requirement.[1008] Indeed, in several cases the Court has found a violation, because the domestic authorities had either refused to resort to available less restrictive alternatives or failed to examine the possibility thereof.[1009]

Below, I will reject the relevance of any 'less restrictive alternative' requirement to the resolution of conflicts between Convention rights insofar as such a requirement would be imposed on Convention right holders.[1010] However, there may well be cause for the Court to evaluate the availability of 'less restrictive alternatives' to the State in tackling conflicts between Convention rights. Indeed, before a conflict reaches Strasbourg, the national

[1004] For examples, see *K. and T.*, *supra* note 610 at para. 277; *Vojnity*, *supra* note 610 at para. 41; *Ageyevy*, *supra* note 1003 at paras. 144 and 151. See also, *mutatis mutandis*, ECtHR, *Görgülü v. Germany*, app. no. 74969/01, 26 February 2004, para. 48.
[1005] Ibid.
[1006] Alexy, *supra* note 60 at 398; Barak, *supra* note 194 at 317.
[1007] Alexy, *supra* note 60 at 398; Barak, *supra* note 194 at 338.
[1008] Brems and Lavrysen, *supra* note 251.
[1009] See, among others, ECtHR, *Glor v. Switzerland*, app. no. 13444/04, 30 April 2009, para. 94; *Nada*, *supra* note 36 at para. 183; ECtHR, *Arsovski v. the former Yugoslav Republic of Macedonia*, app. no. 30206/06, 15 January 2013, para. 59; ECtHR, *Stanev v. Bulgaria*, app. no. 36760/06, 17 January 2012, para. 242; ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, para. 75.
[1010] See *infra* '*vii. The Responsibility Criterion'*.

authorities of the relevant Member State will invariably have intervened in the case at hand. Whenever the national authorities have determined that one of the conflicting Convention rights should prevail over the other, they will either have taken measures that interfered with the other right *or* they will have failed to take measures to protect it. Therefore, as I have explained in detail in Part I, the Court may be confronted with two distinct types of conflicts: (i) those in which the State failed to protect one of the conflicting Convention rights and (ii) those in which the State actively interfered with one of the conflicting Convention rights.[1011] The former scenario for instance occurs when the national authorities have refused to grant a person (A) a judicial order forcing another person (B) to undergo a DNA test, in order to establish whether B could be A's biological father.[1012] In refusing to grant the judicial order, the national authorities omitted to protect A's art. 8 rights in order to protect the art. 8 rights of B. The latter scenario, conversely, occurs when the national authorities *do* grant the judicial order, thereby actively interfering with B's art. 8 rights in order to protect the art. 8 rights of A. Importantly, the availability of 'less restrictive alternatives' is arguably only of immediate relevance to the second scenario, *i.e.* the scenario under which the State has resolved the conflict by actively interfering with one of the parties' Convention rights. Indeed, if the State omits to take measures to protect Convention rights, there appear to be no 'less restrictive alternative' measures to evaluate.

Nevertheless, the possibility for the State to resolve a conflict between Convention rights by employing less restrictive measures might be a crucial element for the ECtHR to incorporate in its legal reasoning. Therefore, the framework I am developing in these chapters needs to be able to accommodate 'less restrictive alternative' argumentation. To that end, I propose to incorporate any 'less restrictive alternative' reasoning directly into the structured balancing test and, more particularly, the impact criterion. In order for the structured balancing test to function in concrete terms, allowing the Court to thoroughly evaluate both sides of a conflict between Convention rights, I have argued that the impact criterion should look at the damage – and actuality thereof – suffered by *both* Convention rights. Thus, if the State has actively interfered with one of the conflicting Convention rights, concrete evaluation of the ensuing damage (*e.g.* "serious") as well as its actuality (*e.g.* "certain") is part and parcel of the application of the impact criterion and – by extension – the structured balancing test. Nevertheless, the structured balancing test should grant the Court the necessary room to indicate when measures taken by the State are excessive.

In particular, the availability of 'less restrictive alternatives' becomes central when the Court deems that – but for the gravity of the measures imposed on the ‘losing’ right at the domestic level – the national authorities would have struck the correct (or an acceptable) balance under the Convention. The impact criterion, with its focus on the evaluation of the damage suffered by each of the conflicting Convention rights, is ideally suited to incorporate such 'less restrictive alternative' argumentation. Indeed, application of the structured balancing test does not preclude the Court from ruling that, on balance, it might or would have found in favour of the Convention right that prevailed at the national level, but for the gravity of the measures

[1011] See *supra* notes 262-273 and accompanying text.
[1012] *Cf. Mikulić*, *supra* note 459.

imposed on the competing Convention right. The Court will thus find a violation, but only because the State has imposed draconian penalties on the 'losing' Convention right at the domestic level. The Court would thereby indicate that, had the State resorted to 'less restrictive alternatives', the balance might have swayed differently, since the impact on the 'losing' Convention right would have been less serious. This shows that the structured balancing test is perfectly able to accommodate reasoning on the basis of 'less restrictive alternatives'.

It is crucial to note that the Court already relies on such reasoning in its case law on conflicts between Convention rights, particularly in defamation cases such as the Grand Chamber case of *Cumpănă and Mazăre v. Romania*.[1013] *Cumpănă and Mazăre* involved a conflict between the freedom of expression of two journalists and the right to reputation of a civil servant, whom the former accused of a number of offences, including corruption. The journalists were convicted for defamation at the domestic level. The national courts *inter alia* imposed a prison sentence of seven months on both journalists. In its judgment, the Grand Chamber of the Court ruled that "in the circumstances of the case ... the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression."[1014] The Grand Chamber thus agreed with the domestic courts that the conflict between the journalists' freedom of expression and the civil servant's right to reputation should be resolved to the benefit of the latter. However, the Grand Chamber did not end its enquiry there. Instead, it went on to examine the consequences the domestic authorities had attached to their balancing exercise, namely the sanctions they had imposed on the journalists' freedom of expression to protect the civil servant's right to reputation. In evaluating those sanctions, the Grand Chamber held that "[t]he circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect."[1015] As a result, the journalists' freedom of expression had been violated, even though it had 'lost' the conflict with the civil servant's right to reputation. Such a ruling on the part of the Grand Chamber was made possible due to the fact that the national authorities had imposed excessive sanctions on the journalists' freedom of expression in order to protect the civil servant's right to reputation. Such reasoning is perfectly consonant with the thoughts presented in the preceding paragraphs, on incorporating 'less restrictive alternative' reasoning into the structured balancing test.

iii. The Core – Periphery Criterion

The core – periphery criterion is intended to gauge the centrality of the aspects of the conflicting Convention rights at stake, within the respective Convention rights. The criterion particularly invites the Court to assess whether damage is done to a central or to a peripheral

[1013] *Cumpănă and Mazăre*, *supra* note 994.
[1014] Ibid. at para. 110.
[1015] Ibid. at para. 116.

aspect of the Convention rights in conflict. The underlying premise of the criterion is that there are stronger reasons for finding in favour of a right that suffers an interference with an aspect that lies closer to its core than there are for finding in favour of a right that suffers an interference with one of its more peripheral aspects.[1016] In order to fully grasp the intricacies of this criterion, further insights into the concepts of core and periphery of human rights are required.

In the literature, several approaches can be found to the concept of the core of human rights. A first view is offered by proportionality scholars, who insist that the concept of the core of a human right does not add anything that is not already captured by the proportionality principle.[1017] In their view, a right's core can only be understood in relative terms: it cannot be defined or known in the abstract, but only identified as the result of a concrete balancing exercise.[1018] On the relativist view, a right's core thus does not have an independent meaning. For that reason, certain proportionality scholars even call for the abandonment of the concept, arguing that it is practically useless and/or only serves to confuse matters.[1019]

The first view can be contrasted with a conception of the core in absolute terms. On such an absolutist conception, a right's core is the inalienable aspect that lies at the very heart of the right.[1020] It is considered absolute, in the sense that its infringement can never – under any circumstances – be justified.[1021] As a result, "there is no balance to talk about in the first place."[1022] The main problem with the absolutist view is, of course, that it can only function in the ECHR context if the Court is able to define a right's core independently of the specific circumstances of a particular case. Only if it is possible to determine *beforehand* what the core of each human right consists of, can it function in absolute terms. However, in the absence of clear guidance offered by the Convention or the Court,[1023] it has thus far proven difficult – if not impossible – to independently define the core of the Convention's human rights.[1024] The available analyses in the literature are limited to suggestions that certain specific aspects are (or should be) located in the core or the periphery of Convention

[1016] Kosař, *supra* note 570 at 376; Brems, *supra* note 9 at 303-304; Barak, *supra* note 194 at 362.
[1017] Alexy, *supra* note 60 at 193-196; Klatt and Meister, *supra* note 242 at 67-68; van der Schyff, *supra* note 89 at 166.
[1018] Ibid.
[1019] Rivers, 'Proportionality and Variable Intensity of Review', 65 *Cambridge Law Journal* (2006) at 184-187; van der Schyff, *supra* note 89 at 167; van der Schyff, 'Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008) at 136.
[1020] Tsakyrakis, *supra* note 228 at 492-493.
[1021] Ibid.; Besson, *supra* note 958 at 445 (stating that the core of a fundamental right is in principle absolute, but immediately adding that, in reality, it can be weighed and balanced against other rights when a certain threshold of infringement of those other rights is attained).
[1022] Tsakyrakis, *supra* note 228 at 493.
[1023] Herein lies a crucial difference with the International Covenant on Economic, Social and Cultural Rights and the General Comments of the Comittee on Economic, Social and Cultural Rights, which identify the minimum core obligations of the Contracting Parties under the Covenant in abstract terms.
[1024] Rivers, *supra* note 1019 at 186-187.

rights.[1025] No detailed and holistic attempt at defining the core of each right has been successfully undertaken, in the literature nor in the jurisprudence of the Court.

Moreover, an absolutist conception of the core ignores the fact that – in practice – there will nearly always be specific circumstances under which even a core aspect of a right can be justifiably overridden.[1026] This is also the case under the case law of the ECtHR. Although the Court often speaks of the "very essence", the "(very) substance" or the "very heart" of a Convention right,[1027] it does not attach absolutist consequences to such descriptions.[1028] Instead, the Court treats this "core"[1029] as a relevant element of its proportionality test.[1030] The Court has in individual cases thus for instance ruled that the measures at issue "cannot be regarded as disproportionate to the legitimate aim pursued and ... [do] not, *therefore*, impair the very essence of the applicant's "right of access to a court""[1031] or that "there was a reasonable relationship of proportionality between the means used and the aim pursued ... Consequently, the restriction in question did not impair the very essence of the applicant's right to education."[1032]

Nevertheless, I submit, the concepts of core and periphery of Convention rights *are* relevant to the resolution of conflicts between Convention rights by the ECtHR. I propose to maintain both concepts without, however, considering the core in absolute terms. I also propose to consider both concepts as forming a continuum, instead of a binary opposition – standing in clear isolation from one another. This continuum is best imagined in the form of a circle. The circle itself represents a Convention right, *e.g.* freedom of expression. Within the circle, we

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[1025] See, most notably, Gerards, *supra* note 7 at 112-113; Gerards, *supra* note 196 at 195; Van Drooghenbroeck, *supra* note 219 at 408-471; Ducoulombier, *supra* note 4 at 450-451; Brems, *supra* note 7 at 289-290; Brems, *supra* note 9 at 304.

[1026] Klatt and Meister, *supra* note 242 at 67-68; Besson, *supra* note 958 at 445.

[1027] See, among many authorities, *Young, James and Webster*, *supra* note 232 at para. 57; *Appleby*, *supra* note 44 at para. 47; *Obst*, *supra* note 291 at para. 44; ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, app. no. 42202/07, 15 March 2012, para. 64; ECtHR, *Sørensen and Rasmussen v. Denmark*, app. nos. 52562/99 and 52620/99, 11 January 2006, para. 54; ECtHR, *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000, para. 62.

[1028] Although there are – especially early – judgments in which the Court has treated the examination of a breach of the "very essence" of a right and the question of proportionality as analytically distinct matters (see for instance ECtHR, *Stubbings and Others v. the United Kingdom*, app. nos. 22083/93 and 22095/93, 24 September 1996; ECtHR, *Lithgow and Others v. the United Kingdom*, app. nos. 9006/80, 9262/81 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, 8 July 1987), it is particularly worth noting that the Court has almost never found that, since a measure constitutes an infringement on the very essence of a right, therefore – *ipso facto* – that right has been violated. Instead, the Court has nearly always examined or pronounced a ruling on the measure's proportionality. An exception can be found in ECtHR, *O'Donoghue and Others v. the United Kingdom*, app. no. 34848/07, 14 December 2010, paras. 91-92 (concerning restrictions on the right to marry under art. 12).

[1029] See, however, Ducoulombier, *supra* note 4 at 447-448 (arguing that the core of a right and the inalienable substance of a right need to be distinguished).

[1030] See, among many other examples, *Young, James and Webster*, *supra* note 232; *Röman*, *supra* note 609; *A. v. the United Kingdom*, *supra* note 71; ECtHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, app. no. 42527/98, 12 July 2001; *Leyla Şahin*, *supra* note 479; *Sørensen and Rasmussen*, *supra* note 1027; *Catan*, *supra* note 1039. See further van der Schyff, *supra* note 1019 at 140; Cariolou, *supra* note 61 at 257.

[1031] *Prince Hans-Adam II*, *supra* note 1030 at para. 69 (emphasis added). See also the concurring opinion of Judge Costa in ibid. (criticising the use of the word "therefore", because he prefers an absolutist approach to the very essence of the right to access to court under art. 6). See, in a similar vein, ECtHR, *Oleynikov v. Russia*, app. no. 36703/04, 14 March 2013, para. 72.

[1032] *Leyla Şahin*, *supra* note 479 at paras. 159 and 161.

can then identify certain aspects as lying closer to the centre of the circle – *i.e.* closer to its core – and others as being located closer to its outer edges – *i.e.* more peripheral. As such, we can express the idea that certain aspects are more central to a Convention right than others, without having to commit ourselves to an unworkable and dichotomous view on the right's core and periphery.

For example, political speech is generally considered to be a more central aspect of freedom of expression than commercial speech.[1033] Yet, political speech is not an absolute aspect of freedom of expression. It can be overridden under certain circumstances. Nevertheless, in locating political speech closer to the centre of freedom of expression than commercial speech, we express the idea that an interference with the former will require stronger justificatory reasons than an interference with the latter.[1034] This idea can be utilised in balancing conflicting Convention rights, since it allows for the making of a *comparative* argument on the location of the relevant aspects, within their respective rights, of the Convention rights in conflict. If all other things are equal, *i.e.* if all other factors do not – on balance – offer reasons in favour of either right, a conflict between Convention right A, which suffers damage to one of its more central aspects, and Convention right B, which suffers damage to one of its more peripheral aspects, should thus be resolved to the benefit of Convention right A.

However, for the core-periphery criterion to function in practice we require at least some idea on where different aspects of a Convention right fall to be located within that right. In other words, we need to know which aspects of a Convention right can be considered more central and which more peripheral. In this respect, the existing case law of the ECtHR is of great use. It offers valuable insights on which aspects of a right the Court considers more central, as well as some – more limited – insights on which aspects of a right the Court considers more peripheral.[1035] Analysis of the Court's case law shows that the Court considers, among others, the following aspects to be more central aspects of Convention rights: sexual identity, the protection of health data, the right to the protection of one's image and the freedom to engage in relationships under art. 8;[1036] religious autonomy under art. 9;[1037] political speech under art. 10;[1038] the right to form an association and the individual freedom not to join an association under art. 11; the right to access to education under art. 2 of Protocol 1;[1039] and the right to

[1033] This goes at least for systems, such as the ECHR, that partly conceptualise freedom of expression in terms of its role in a democratic society
[1034] Brems, *supra* note 9 at 304.
[1035] See further, for overviews of the Court's case law, Gerards, *supra* note 7 at 112-113; Gerards, *supra* note 196 at 195; Van Drooghenbroeck, *supra* note 219 at 408-471; Ducoulombier, *supra* note 4 at 450-451; Brems, *supra* note 7 at 289-290.
[1036] ECtHR, *Dudgeon v. the United Kingdom*, app. no. 7525/76, 22 October 1981, para. 52; ECtHR, *Z. v. Finland*, app. no. 20972/92, 25 January 1997, para. 95; *Biriuk*, *supra* note 501 at para. 39; *Von Hannover (No. 2)*, *supra* note 44 at para. 96; *Schüth*, *supra* note 44 at paras. 71-72.
[1037] *Obst*, *supra* note 291 at para. 44; *Schüth*, *supra* note 44 at para. 58; *Fernández Martínez*, *supra* note 507 at para. 80.
[1038] *Lingens*, *supra* note 275 at para. 42.
[1039] ECtHR, *Catan and Others v. Moldova and Russia*, app. nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 140.

vote and the right to stand for elections under art. 3 of Protocol 1.[1040] The Court's case law on more peripheral aspects of Convention rights yields comparably scarcer results.[1041] Nevertheless, analysis reveals that the Court considers, among others, the following aspects of Convention rights to be more peripheral: tax surcharges under art. 6;[1042] professional exchanges under art. 8;[1043] commercial speech under art. 10;[1044] and the label accorded to one's association in law under art. 11.[1045] In the literature, some additional classifications can be found, for instance on the "right to give birth at home"[1046] as a peripheral aspect of the right to private life.[1047]

Of course, there will inevitably be instances in which it is difficult – or impossible – to pinpoint the location of the aspect of the Convention rights at stake, within that right. In those cases, the core – periphery criterion will be less useful or even inapplicable. There will also be many cases in which the location is roughly equal for both conflicting rights (both more central, both more peripheral or both somewhere "in the middle"). In those cases, the core – periphery criterion does not offer reasons in support of or against either of the conflicting Convention rights.

An example from the Court's case law may serve to illustrate how the core – periphery criterion can be a particularly useful element in the balancing of conflicting Convention rights.[1048] One of the determining factors in the Court's ruling in *Biriuk v. Lithuania*, a case concerning the publication of a private individual's HIV status in a newspaper, can be explained in terms of the core – periphery criterion. *Biriuk* involved a conflict between the applicant's right to private life and the newspaper's freedom of expression. Yet, different aspects of each right were at stake. In respect of the applicant's right to private life, the Court held that: "protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by art. 8 of the Convention … especially … as regards the protection of the confidentiality of a person's HIV status".[1049] As mentioned above, the protection of health data is a core aspect of the right to private life. With regard to the newspaper's freedom of expression, conversely, the Court stated that: "the publication of the article in question, the purpose of which was apparently to satisfy the prurient curiosity of a particular readership and boost the defendant's commercial interests, cannot be deemed to contribute to any debate of general interest to

[1040] ECtHR, *Ždanoka v. Latvia*, app. no. 58278/00, 16 March 2006, para. 104.
[1041] A particularly interesting judgment is ECtHR, *Butt v. Norway*, app. no. 47017/09, 4 December 2012, para. 76 (in which the Court explicitly *rejected* the government's argument "that the private- and family life interests at stake were only at the fringes of the Article 8 rights").
[1042] ECtHR, *Jussila v. Finland*, app. no. 73053/01, 23 November 2006, para. 43.
[1043] ECtHR, *Michaud v. France*, app. no. 12323/11, 6 December 2012, para. 92.
[1044] *Ashby Donald*, *supra* note 44 at para. 39.
[1045] *Gorzelik*, *supra* note 238 at para. 105.
[1046] ECtHR, *Ternovszky v. Hungary*, app. no. 67545/09, 14 December 2010, para. 22.
[1047] J. Gerards, 'The Scope of ECHR Rights and Institutional Concerns – The Relationship between Proliferation of Rights and the Caseload of the ECtHR', in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press 2013), 84-106.
[1048] See also, for instance, *Von Hannover*, *supra* note 44.
[1049] *Biriuk*, *supra* note 501 at para. 39.

society."[1050] As mentioned above, sensationalist publications with a purely commercial interest fall within the periphery of freedom of expression. *Biriuk* thus involved a conflict between a more central aspect of one right (the applicant's right to private life) and a more peripheral aspect of another right (the newspaper's freedom of expression). The Court resolved the conflict to the benefit of the first right, primarily because of the great disparity in the importance of the aspects of each right at stake. This outcome can be explained in terms of the core – periphery criterion: there were stronger reasons for finding in favour of the right that suffered damage to one of its more central aspects than for finding in favour of the other right, which would suffer damage to one of its more peripheral aspects.

iv. The Additional Rights Criterion

The additional rights criterion allows the Court to assess the relevance of other Convention rights, held by one of the parties to the conflict or by other persons, over and above the two Convention rights that make up the immediate conflict.[1051] It thus invites a more holistic approach to conflicts between Convention rights by moving beyond a strictly binary consideration thereof.

When the Court is confronted with a conflict between Convention right A of X and Convention right B of Y, the additional rights criterion allows the Court to factor in the relevance of, for instance, Convention right C held by X and/or Convention right D held by other persons, for instance X's relatives. If those additional rights – *i.e.* Convention rights C and/or D – would suffer damage if the conflict would be resolved in favour of Convention right B of Y, then there *may* be cause to rule differently, namely in favour of Convention right A of X.

However, the premise underlying the additional criterion is not as strict as that of the preceding criteria. Even if all other things are equal, *i.e.* if all other factors do not – on balance – offer reasons in favour of either of the conflicting Convention rights, the additional rights criterion does not necessarily offer *conclusive* reasons for the resolution of the conflict. Indeed, resolution of a conflict between Convention rights should not be reduced to a game of numbers, in which the claim supported by the most Convention rights prevails. It is not because, in the above example, X can invoke multiple Convention rights (A and C) in support of her claim that her position will necessarily be stronger than that of Y, who can only invoke one Convention right (B). In other words, even if all other things are equal, Convention rights A and C held by X do *not* necessarily trump Convention right B held by Y. Similarly, it is not because Convention right D held by other persons will suffer damage if the conflict is resolved to the benefit of Convention right B of Y that the conflict should necessarily be resolved to the benefit of Convention right A of X. In other words, even if all other things are

[1050] Ibid. at para. 42.
[1051] Sullivan, *supra* note 16 at 823; Kosař, *supra* note 570 at 377; Brems, *supra* note 9 at 304; Ducoulombier, *supra* note 4 at 509; Barak, *supra* note 194 at 362; Thomson, *supra* note 87 at 89. See further Xu and Wilson, *supra* note 200 at 47-48.

equal, Convention rights A held by X and D held by other persons do *not* necessarily trump Convention right B held by Y.

Nevertheless, the additional rights criterion remains relevant to the treatment and resolution of conflicts between Convention rights. Its relevance stems from the fact that it *does* say something about the strength of (one of) the parties' positions. Indeed, it is logical to hold that a party's position will be stronger if it is supported by multiple Convention rights than if it is only supported by one of those Convention rights. In case of a conflict between Convention right A of X and Convention right B of Y, the reasons for finding in favour of X will logically be stronger if *both* her Convention rights A and C are at stake, rather than only her Convention right A (A + C > A). Similarly, if a ruling against Convention right A of X would cause damage to Convention right D of other persons, the reasons for ruling in favour of X are stronger than would be the case if Convention right D of other persons would not be at stake (A + D > A). In that sense, application of the additional rights criterion does say something about the strength of one party's position, even if it does not function as a conclusive reason in favour of that position. A few examples from the Court's case law may serve to illustrate the above.

The additional rights criterion may firstly be relevant in cases involving persons who are forced to join a trade union under a closed shop agreement, against their personal convictions and opinions. Such cases entail a conflict between the art. 11 rights of the persons forced to join the trade union and the art. 11 rights of the union itself. The additional rights criterion is of immediate relevance to those cases, because persons who are forced to join a trade union against their convictions and personal opinion not only suffer damage to their art. 11 rights, but also to their art. 9 and 10 rights. The Court has recognised as much by holding, in closed shop agreement cases, that:

> "[t]he right to form and to join trade unions is a special aspect of freedom of association, and the notion of a freedom implies some measure of freedom of choice as to its exercise … Furthermore, regard must also be had ... to the fact that the protection of personal opinions guaranteed by Articles 9 and 10 of the Convention is one of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both a positive and a negative right to freedom of association."[1052]

The additional rights criterion is also relevant in defamation cases that involve allegations of criminal acts for which the person in question has not (yet) been convicted. In such cases, not only the person's right to reputation under art. 8 is at stake, but also her right to presumption of innocence under art. 6 § 2. As the Court puts it:

> "[w]here … there is question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Article 8 of the Convention … regard must be had to the fair balance which has to be struck between the competing interests at

[1052] *Sørensen and Rasmussen*, *supra* note 1027 at para. 54. See also *Young, James and Webster*, *supra* note 232 at para. 57.

> stake [*i.e.* freedom of expression and the right to reputation]. Also of relevance for the balancing which the Court must carry out … is that, under Article 6 § 2 of the Convention, everyone has the right to be presumed innocent of any criminal offence until proven guilty."[1053]

Such defamation cases also allow us to further illustrate why the additional rights criterion does not necessarily offer conclusive reasons for the resolution of a conflict. Indeed, there is no reason to assume that – even if all other things are equal – the combination of a person's right to reputation and presumption of innocence necessarily trumps the freedom of expression of another. Nevertheless, the presumption of innocence of the former *is* a relevant factor, since it renders her position stronger than it would be if only her right to reputation would have been at stake.

As already mentioned, the additional rights criterion also invites the Court to consider the relevance of Convention rights held by other persons than the parties to the immediate conflict. The case of *Odièvre v. France* offers a perfect illustration of this second aspect of the additional rights criterion. *Odièvre* involved a conflict between a woman's right to know her origins under art. 8 and the right to private life of her mother, who had chosen to give birth anonymously. In its judgment, the Court specifically held that not only the Convention rights of the applicant and her mother were at stake, but also those of other persons:

> "[i]n addition to that conflict of interest [between the Convention rights of the applicant and those of her mother], the problem of anonymous births cannot be dealt with in isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of the natural family. The Court notes in that connection that the applicant is now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life."[1054]

Once again, this does not mean that those additional rights, which support a ruling against the applicant and in favour of the right to private life of her mother, *decisively* settle the conflict. However, they *are* relevant factors to be considered in the structured balancing test proposed here, since they offer a reason in favour of one of the conflicting Convention rights and against the other.[1055]

The Convention rights of other persons are also a relevant factor in child custody cases. The primary conflict in such cases is often one between the right to family life and private life of the mother and the same right of the father. However, the best interest of the child, in terms of her own right to family life and private life, is a primary consideration for the resolution of the

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[1053] ECtHR, *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, app. no. 17550/03, 22 May 2008, para. 63. See also ECtHR, *Campos Dâmaso v. Portugal*, app. no. 17107/05, 24 April 2008, para. 32; *Axel Springer*, *supra* note 6 at para. 96; *Ageyevy*, *supra* note 1003 at para. 226.
[1054] *Odièvre*, *supra* note 1 at para. 44. See also *Röman*, *supra* note 609 at para. 51.
[1055] Further on, I apply the structured balancing test in its entirety to *Odièvre v. France*. See *infra* Chapter V.

conflict. Indeed, the Court has, in custody cases, repeatedly held that "the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 … of the Convention."[1056] However, contrary to what applied above, the best interest of the child is generally a *decisive* factor for the resolution of the conflict. I will therefore deal with it separately, under the purpose criterion, since that criterion better expresses the decisive role of the best interest of the child in the balancing test.

v. The General Interest Criterion

The general interest criterion is, like the additional rights criterion, intended to take the broader context behind a conflict between Convention rights into account. It specifically allows the Court to determine whether one – or both – of the conflicting Convention rights is supported by a relevant general interest.[1057] The underlying premise of the criterion is that there are stronger reasons for finding in favour of a Convention right supported by a general interest than for the same Convention right, unsupported by a general interest. However, just like the additional rights criterion, the general interest criterion does not necessarily offer conclusive reasons for the resolution of a conflict, even if all other things are equal, *i.e.* if all other factors do not – on balance – offer reasons in favour of either of the conflicting Convention rights. The general interest criterion does strengthen one of the Convention rights in conflict, but it does so without saying everything there is to say about the *comparative* strength of that Convention right, *i.e.* its strength in relation to the other Convention right.

In order to operationalise the general interest criterion, it is moreover necessary to distinguish two types of general interests as potentially relevant to the resolution of conflicts between Convention rights.

On the one hand, a general interest may directly express part of what is at stake in the conflict, in terms of value to society. For instance, in conflicts involving freedom of expression the determination that a publication tackles a topic of public interest or deals with a debate of general interest is vital to express what is at stake for broader society.[1058] The fact that the speech at issue serves a general interest – to inform the public – strengthens the position of freedom of expression in the conflict, for instance with the right to reputation or the right to private life of the subject of the publication.

On the other hand, a general interest may be relevant to the resolution of a conflict between Convention rights even if it does not directly express the societal value of one of the conflicting rights. For instance, economic costs and legal certainty may be relevant factors in the resolution of conflicts between Convention rights, yet they express a different kind of

[1056] *Hokkanen*, *supra* note 459 at para. 58; ECtHR, *Ignaccolo-Zenide v. Romania*, app. no. 31679/96, 25 January 2000, para. 94. See also ECtHR, *Dore v. Portugal*, app. no. 775/08, 1 February 2011, para. 43.
[1057] Brems, *supra* note 9 at 304; Ducoulombier, *supra* note 4 at 566.
[1058] Brems, *supra* note 9 at 304.

general interest than, for instance, the societal value in freedom of expression on issues of public concern.

I submit that the first kind of general interest, *i.e.* the one that expresses a societal value attached to one of the conflicting Convention rights, should offer stronger reasons in support of (a) conflicting Convention right(s) than the second. This differentiation of strength – and thus also of relevance in the resolution of conflicts between Convention rights – allows us to recognise general interests as a relevant factor to the balancing of Convention rights, while simultaneously keeping a sense of rights as strong, *i.e.* as having *a priori* higher status than public interests.[1059] The suggested distinction between two kinds of general interests maintains that idea by insisting that the kind of general interests that would normally not easily outweigh rights should act as less strong reasons in the balancing between Convention rights than the kind of general interests that directly express the societal value of (one of) the conflicting Convention right(s).

It is important, however, to stress the need to avoid 'double counting' in the application of the structured balancing test. There exists, in particular, a risk that the societal importance of the conflicting Convention rights would be counted twice: once here, under the general interest criterion, and once under the core-periphery criterion. One way to ward against double counting is to combine both criteria where relevant. The Court could, for instance, express the idea that political speech lies closer to the core of freedom of expression with reference to its importance to the general interest, *i.e.* to inform the public on matters of political interest. Conversely, the Court could hold that commercial speech lies closer to the periphery of freedom of expression, because the societal value associated to speech in the public interest is missing in the case of commercial speech. An alternative way to prevent double counting is to ensure a strict separation between the core-periphery criterion and the general interest criterion, for instance by interpreting the former rather narrowly. Application of the core-periphery could thus be limited to expressing the centrality of the right in relation to the person exercising it (*e.g.* political speech as important to politicians), while expression of the societal importance of the right would be reserved for the general interest criterion (*e.g.* speech in the public interest).

The General Interest Criterion in the Court's Case Law

The approach to the general interest suggested here – *i.e.* one that distinguishes between two types of general interests: those that express a societal value and those that do not – arguably finds support in the Court's case law. In *Mariapori v. Finland*, a case concerning allegedly defamatory statements made by an expert witness against the prosecutor in the course of a trial, the Court for instance held that:

[1059] On the paradox created by recognising that non-rights considerations can help resolve a conflict of rights under a view of rights as "being directly opposed to concerns like utility … and social good", see Rice, *supra* note 80 at 562. I believe my approach, viewed in light of the model of rights I suggest in Part I, successfully addresses Rice's concerns.

> "[t]he parties' freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, the Court refers to its case-law to the effect that it is only in exceptional circumstances that restriction ... of for example defence counsel's freedom of expression can be accepted as necessary in a democratic society ... For the Court, similar considerations should apply in respect of statements made by witnesses testifying before a court."[1060]

The authority of the judiciary – which is of the second type of general interest described above – thus functioned as a relatively weak reason in favour of the prosecutor's right to reputation and against the applicant's freedom of expression, in line with what I have proposed immediately above.

A few examples from the Court's case law may serve to further illustrate the functioning of the general interest criterion and the difference between the two kinds of general interests.[1061] As already mentioned, a general interest that expresses a societal value attached to one of two conflicting Convention rights is, for instance, the public's right to be informed on matters of public interest.[1062] The importance thereof is reflected in the Court's case law, which is generally very protective of political speech and press freedom in matters of public interest,[1063] because "news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders"[1064] or "given the interest a democratic society has in ensuring and preserving freedom of the press".[1065] This importance can easily be translated in terms of the general interest criterion: the position of freedom of expression is – in case of conflict with the right to reputation or the right to private life – strengthened by the societal value attached to the speech at issue, when the speech concerns a topic of public interest. However, when speech does *not* concern a topic of public interest, the position of freedom of expression in the conflict will be comparably weakened.[1066]

Another example of a general interest that represents a societal value attached to a Convention right, and which was considered relevant to the balancing exercise between the conflicting Convention rights by the Court, can be found in *Odièvre*:

[1060] *Mariapori*, *supra* note 269 at para. 62.

[1061] Apart from the examples offered in the text, see also, for instance, *Dupuis*, *supra* note 606 at para. 44 (on the relevance of protecting the secrecy of a judicial investigation "both for the administration of justice and for the right of persons under investigation to be presumed innocent").

[1062] See *contra* Zucca, *supra* note 26 at 127. Zucca considers the public's right to know as "only the right of each individual to receive information", not as a general interest. However, for similar reasons to those explained in Part I, I consider the public's 'right' to be informed to represent a general interest, rather than an aggregation of individual rights. See *supra* Part I, Chapter IV, Section II – 'Public Interests and the Problems of Speculation and Aggregation'.

[1063] See, among many authorities, ECtHR, *Observer and Guardian v. the United Kingdom*, app. no. 13585/88, 26 November 1991; *Axel Springer*, *supra* note 6; *Von Hannover (No. 2)*, *supra* note 44; ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, app. no. 32772/02, 30 June 2009; ECtHR, *Cihan Öztürk v. Turkey*, app. no. 17095/03, 9 June 2009; ECtHR, *Dalban v. Romania*, app. no. 28114/95, 28 September 1999; ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, app. no. 38433/09, 7 June 2011.

[1064] *Centro Europa 7 S.r.l. and Di Stefano*, *supra* note 1063 at para. 131.

[1065] ECtHR, *Fressoz and Roire v. France*, app. no. 29183/95, 21 January 1999, para. 62.

[1066] See *Von Hannover*, *supra* note 44 at paras. 63-65 and 76-77; *Biriuk*, *supra* note 501 at paras. 42-43; *Von Hannover (No. 2)*, *supra* note 44 at para. 110; *Ashby Donald*, *supra* note 44 at para. 39.

> "[t]here is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure."[1067]

An example of the second kind of general interest, apart from the example of protecting the authority of the judiciary offered above, is the need to ensure legal certainty. In *Röman v. Finland*, the Court for instance referred to the relevance of the general interest of legal certainty as a factor to take into account in a conflicting Convention rights case:

> "[a] person has a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity and eliminate any uncertainty in this respect ... On the other hand, a putative father's interest in being protected from claims concerning facts that go back many years cannot be denied. Finally, in addition to that conflict of interest, other interests may come into play, such as those of third parties, essentially the putative father's family, and *the general interest of legal certainty*."[1068]

The Court usually references the general interest in ensuring legal certainty when the national legislator has incorporated a certain solution to a conflict between Convention rights in national law, thereby striking a categorical balance between both rights.[1069] If that is the case, legal certainty plays a role in subsequent judicial examinations of the conflict between both rights in concrete cases. Indeed, if the Court were to overrule the balance as struck by the national legislator, the general interest in legal certainty would suffer damage. Nevertheless, because legal certainty does not express any societal value attached to either of the conflicting Convention rights, I submit that it should act as a relatively weak reason in the resolution of the conflict. Protection of legal certainty should for instance not function as a reason that is able to offset a balance in favour of a Convention right that suffers "serious" damage, when the other right only suffers "light" damage. However, if the strength of the other reasons in favour of and against each Convention right are roughly equal, the interest in legal certainty may cast the die in favour of the Convention right that prevails under national legislation. It is moreover crucial to note that the margin of appreciation will have an impact on the strength of legal certainty as a reason for not overruling the balance struck by the legislator. As I will explain in Section II of this chapter, when the margin of appreciation is wide, application of

[1067] *Odièvre*, *supra* note 1 at para. 45. See, however, the dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in ibid., para. 9 ("[a]s regards the general interest, the Court relied, *inter alia*, on the need to avoid illegal abortions ... However, it should be noted that at present there is no reliable data to support the notion that there would be a risk of an increase in abortions, or even of cases of infanticide, if the system of anonymous births was abolished.").
[1068] *Röman*, *supra* note 609 at para. 51 (emphasis added). See also ECtHR, *Laakso v. Finland*, app. no. 7361/05, 15 January 2013, paras. 45-46.
[1069] Ibid; *Evans*, *supra* note 44 at para. 89.

the structured balancing test should be procedural rather than substantive. As a result, the factor of legal certainty – where relevant – will also gain in strength.[1070]

vi. The Purpose Criterion

The purpose criterion allows the Court to factor in the fact that certain Convention rights stand in function of other Convention rights, in the sense that one of their purposes is to ensure adequate protection of those other rights. However, the applicability of the criterion should be limited, given that it is at odds with the idea that all Convention rights principally deserve equal respect on their own terms. Therefore, Convention rights should – in principle – not be defined in function of (protection of) other rights. However, there are a few exceptions. I have already indicated that the right to life holds a higher abstract value within the Convention system, because its enjoyment is the prerequisite for the enjoyment and exercise of all other Convention rights. Here, under the purpose criterion, I will add another exception, namely that of the best interest of the child.

I submit that the purpose criterion is particularly relevant to the resolution of conflicts between Convention rights in which the best interest of the child is a primary consideration. Such conflicts may take on different forms. They may be binary, *i.e.* between the Convention rights of the child and those of her parents (*e.g.* in certain child care cases or education cases).[1071] They may be triadic, *i.e.* between the Convention rights of the child, the Convention rights of one parent and the Convention rights of the other parent (*e.g.* in custody cases, international abduction cases, certain child care cases and certain cases involving paternity claims).[1072] Or they may be multipolar, *i.e.* between the Convention rights of the child, the Convention rights of her parents and the Convention rights of others, such as adoptive parents, stepparents or foster care 'parents' (*e.g.* in adoption cases, certain cases involving paternity claims or certain child care cases).[1073]

Although the form of the conflict may differ, all these cases share one common element: "the best interest of the child must be the primary consideration" in the balancing exercise to be conducted between the conflicting Convention rights.[1074] The reason for focusing the enquiry on the best interest of the child – in terms of the protection of her Convention rights to

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[1070] For an application, see *infra* Chapter V, in which I apply the structured balancing test to *Evans v. the United Kingdom* (*supra* note 44). In the process, I offer an argument on the relationship between the general interest criterion, the margin of appreciation and legal certainty in upholding bright line rules.

[1071] See, for instance, *K. and T.*, *supra* note 610; ECtHR, *K.A. v. Finland*, app. no. 27751/95, 14 January 2003; *Folgerø*, *supra* note 232.

[1072] See, for instance, ECtHR, *Sommerfeld v. Germany*, app. no. 31871/96, 8 July 2003; *Neulinger and Shuruk*, *supra* note 609; *Vojnity*, *supra* note 610; ECtHR, *R. v. the United Kingdom*, app. no. 10496/83, 8 July 1987; *Mikulić*, *supra* note 459.

[1073] See, for instance, *Görgülü*, *supra* note 1004; ECtHR, *Krisztián Barnabás Tóth v. Hungary*, app. no. 48494/06, 12 February 2013; ECtHR, *P., C. and S. v. the United Kingdom*, app. no. 56547/00, 16 July 2002; ECtHR, *Aune v. Norway*, app. no. 52502/07, 28 October 2010.

[1074] *Neulinger and Shuruk*, *supra* note 609 at para. 134. See also, among many other authorities, *Sommerfeld*, *supra* note 1072 at paras. 62 and 64; *K. and T.*, *supra* note 610 at para. 154; *Krisztián Barnabás Tóth*, *supra* note 1073 at para. 32; *Görgülü*, *supra* note 1004 at para. 41; ECtHR, *Kearns v. France*, app. no. 35991/04, 10 January 2008, para. 79.

physical integrity, private life and/or family life – can be located in the relationship between the child's rights and those of the other relevant parties to the conflict. Indeed, the Convention rights of these other parties (*e.g.* the child's parents) have a dual function. On the one hand they offer protection to these parties' interest. However, on the other hand they also stand *in function of* the Convention rights of the child, in the sense that their exercise is (to be) geared towards the best interest of the child. This is exactly the approach taken by the Convention on the Rights of the Child (CRC), which provides that "States Parties shall respect the responsibilities, rights and duties of parents ... the members of the extended family or community ... or other persons legally responsible for the child, to provide ... appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention",[1075] while simultaneously insisting that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration"[1076] and that "[t]he best interests of the child will be [the] basic concern [of the child's parents and legal guardians]."[1077]

This approach is also in line with the Court's views on the centrality of the best interest of the child, as for instance expressed in *Görgülü v. Germany*: "in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development."[1078] In *Folgerø and Others v. Norway*, the Court similarly described the right of parents to ensure that their child's education takes place in conformity with their religious and philosophical convictions in function of the child's own right to education: "[i]t is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education."[1079] I submit that it is because the purpose of the parents' Convention rights is – in

[1075] Art. 5 CRC.
[1076] Art. 3 (1) CRC.
[1077] Art. 18 (1) CRC. See also art. 9 (1) CRC ("States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."); art. 14 CRC ("1. States Parties shall respect the right of the child to freedom of thought, conscience and religion. 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."); art. 19 (1) CRC ("States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.") and art. 27 CRC ("1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.").
[1078] *Görgülü*, *supra* note 1004 at 43.
[1079] *Folgerø*, *supra* note 232 at para. 84 (in which the Court described art. 2 of Protocol 1 as "a whole that is dominated by its first sentence"; the first sentence of the article protects the right to education, while its second

these cases – directly tied to the protection of the Convention rights of the child that, in case of conflict, the latter should be the primary consideration in the balancing exercise.[1080]

vii. The Responsibility Criterion

The final criterion of the structured balancing test is the responsibility criterion. This criterion allows the Court to assess the potential relevance of the correlative of Convention rights – duties – by imposing certain responsibilities on persons exercising their Convention rights.[1081] However, the function of the responsibility criterion should remain limited. The Court should, in particular, refrain from requiring right holders to exercise their rights in a manner that causes the least damage to the rights of others. Adherence to a 'less restrictive alternative' requirement can be demanded of States,[1082] but it should not be imposed on right holders.[1083] In that respect, it is deeply troubling to note the Court's increasing reliance on arguments along the lines of a 'less restrictive alternative', in certain freedom of expression cases.[1084] The Court has, for instance, held in *PETA Deutschland v. Germany* that "the applicant has not established that it did not have other means at their (sic.) disposal of drawing public attention to [its message]"[1085] and in *Ciuvică v. Romania* that "les termes employés par le requérant n'étaient pas indispensables pour la communication de son message".[1086] Such arguments impose unacceptable duties on right holders in the exercise of their freedom of expression, which traditionally protects also statements that "offend, shock or disturb"[1087] and includes room for exaggeration and provocation.[1088]

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sentence protects parents' right to ensure that their child's education takes place in conformity with their own religious and philosophical convictions).

[1080] See also M. Levinet, 'La conciliation du droit à l'instruction de l'enfant et de l'obligation de respecter les convictions religieuses des parents, à la lumière de la Convention européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* (2011), 481-498 (arguing in favour of according priority to the right to education of the child when it conflicts with the right of parents to respect for their religious convictions).

[1081] De Schutter, *supra* note 958 at 244.

[1082] On the role of the less restrictive alternative test in the Court's case law, see Brems and Lavrysen, *supra* note 251. See also the cases mentioned *supra* in note 1009.

[1083] See also the partly dissenting opinion of Judge David Thór Björgvinsson in *MGN Limited*, *supra* note 3 at para. 4 ("at least some of the principles applied by the House of Lords are not relevant in the balancing exercise. I refer in this regard to Baroness Hale's opinion that it was "not necessary to publish any further information ..." … The test implied in that opinion is the wrong one. From the point of view of journalistic discretion in the presentation of a legitimate story, it is the restriction on freedom of expression that must be justified by reference to 'necessity' and not the publication as such.").

[1084] See also the dissenting opinion of Judge Loucaides in *Öllinger*, *supra* note 582 ("[i]f the applicant's aim was to contest the legality of this provocative gathering, the proper way to do so was indisputably through legal means or peaceful demonstrations against the authorities who allowed the gatherings, and certainly not through a confrontation in a cemetery on All Saints' Day."); *Verlagsgruppe News GmbH and Bobi*, *supra* note 731 at para. 89 (indicating that the Austrian Supreme Court had relied on a similar argument by arguing "that the claimant's interest in the protection of his image prevailed, as it was possible to inform the public adequately about the matter at issue by reporting the specific facts and referring to the existence of a photograph or photographs as evidence [instead of publishing the photographs].").

[1085] *PETA Deutschland*, *supra* note 435 at para. 50.

[1086] *Ciuvică*, *supra* note 697 at para. 55.

[1087] *Handyside*, *supra* note 387 at para. 49.

[1088] ECtHR, *Prager and Oberschlick v. Austria*, app. no. 15974/90, 26 April 1995, para. 38.

Nevertheless, the responsibility of, in particular, members of the press in exercising their freedom of expression *can* be a relevant factor in the resolution of conflicts between freedom of expression and other Convention rights, specifically the right to reputation and the right to private life.[1089] Indeed, art. 10 ECHR explicitly states that the exercise of freedom of expression "carries with it duties and responsibilities".[1090] The responsibility criterion is intended to allow the Court to take these duties and responsibilities into account. However, its application should not go beyond the requirement that journalists and other members of the media act "in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" when publishing statements that may cause damage to someone's right to reputation or right to private life.[1091] In that respect, the responsibility criterion allows the Court to factor in such elements as whether or not journalists have taken sufficient steps to verify her information, whether or not they have presented a distorted view of reality and whether or not their statements were intended as a gratuitous personal insult or attack.[1092]

The responsibility criterion should, however, *not* be utilised to impose content or style restrictions on journalists, in the sense that they could have phrased their message in a manner that would have caused less damage to the rights of others. Since it will almost always be possible to present one's message in less damaging terms, imposing such a 'less restrictive alternative' requirement will inevitable eradicate all room for exaggeration and provocation in the exercise of freedom of expression. In that sense, the Court should – in applying the responsibility criterion – continue to adhere to its principle that "it is not for this Court, nor for the national courts … to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists … [since] Article 10 … protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."[1093]

[1089] *Egeland and Hanseid*, *supra* note 996 at para. 59; *Axel Springer*, *supra* note 6 at para. 82. See also *Ashby Donald*, *supra* note 44, particularly at para. 42 (involving a conflict between commercial freedom of expression and the right to intellectual property).

[1090] Art. 10 (2) ECHR.

[1091] *Cumpănă and Mazăre*, *supra* note 994 at para. 102; ECtHR, *Novaya Gazeta and Borodyanskiy v. Russia*, app. no. 14087/08, 28 March 2013, para. 40. See also, using a slightly different formulation, *Axel Springer*, *supra* note 6 at para. 93; *MGN Limited*, *supra* note 3 at para. 141 (both referring to the requirement of journalists to act "in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism").

[1092] See, for instance, *Cumpănă and Mazăre*, *supra* note 994 at para. 103; *Axel Springer*, *supra* note 6 at para. 82; ECtHR, *Kwiecień v. Poland*, app. no. 51744/99, 9 January 2007, para. 54; ECtHR, *Europapress Holding D.O.O. v. Croatia*, app. no. 25333/06, 22 October 2009, paras. 66-68; ECtHR, *Mahmudov and Agazade v. Azerbaijan*, app. no. 35877/04, 18 December 2008, para. 40; ECtHR, *Petrina v. Romania*, app. no. 78060/01, 14 October 2008, para. 48; ECtHR, *Oberschlick v. Austria (No. 2)*, app. no. 20834/92, 1 July 1997, para. 33; ECtHR, *Dumas v. France*, app. no. 34875/07, 15 July 2010, paras. 49-50.

[1093] *Jersild*, *supra* note 414 at para. 31; *Stoll*, *supra* note 238 at para. 146; *Radio France*, *supra* note 278 at para. 39; *Von Hannover (No. 2)*, *supra* note 44 at para. 102; ECtHR, *De Haes and Gijsels v. Belgium*, app. no. 19983/92, 24 February 1997, para. 48.

2. Applying the Structured Balancing Test in Practice

Above, I have explained the functioning of the structured balancing test in a rather fragmented manner, discussing each criterion separately. Application of the test in its entirety of course requires the creation of links between the various criteria. I have already argued that those links should be constructed in the form of nets of arguments, in which reasons drawn from the application of the seven criteria mutually support each other.[1094] Here, I will illustrate how the structured balancing test may function in practice, by applying it to *Palomo Sánchez and Others v. Spain*. In the process, I will further explicate how reasoning on the basis of the structured balancing test requires normative arguments. I will also demonstrate that application of the test leads to a different outcome in *Palomo Sánchez* than the one reached by the majority of the Grand Chamber of the Court. Instead, the reasoning of the dissenting Judges is more consistent with the structured balancing test, as I apply it here.

As already explained above, *Palomo Sánchez* involved a conflict between the freedom of expression of trade union representatives and the right to reputation of two of their fellow employees and of the human resources manager of the company. The facts of the case took place in the context of labour disputes. In one of the newsletters of their trade union, the applicants reported on a court ruling that partly upheld some of the claims they had initiated against their company. The cover of the newsletter featured a cartoon, which depicted the human resources manager of the company sitting behind a desk and a person sitting on all fours underneath of it (only his legs could be seen sticking out from underneath the desk). Although the cartoon did not depict the act itself, it was clear that the person beneath the desk was offering sexual services to the resource manager. Two employees of the company – recognisable from their faces – were standing in line in front of the desk, clearly waiting for their turn to sexually please the resource manager. The newsletter further featured two articles in which the applicants vehemently denounced the fact that those two particular employees had testified in favour of the company in the proceedings at issue. The company dismissed the applicants on grounds of serious misconduct, namely for impugning the reputations of the persons depicted in the cartoon and attacked in the articles.

In its judgment, the majority of the Grand Chamber ruled that the dismissal of the applicants, as confirmed by the Spanish courts, did not violate their freedom of expression. The majority described a number of elements as particularly important in the balancing exercise. Firstly, the majority pointed out that the publications at issue contained "criticism and accusations, not directly against the company but against the two non-salaried deliverymen and the human resources manager."[1095] In that respect, the majority reiterated "that the extent of acceptable criticism is narrower as regards private individuals than as regards politicians or civil servants acting in the exercise of their duties."[1096] Secondly, although the majority did consider the publications to be "at least a matter of general interest for the workers of the company",[1097] it brushed aside the trade union aspect of the case, finding that "the applicants' trade union

[1094] See *supra* notes 825-832 and accompanying text.
[1095] *Palomo Sánchez*, *supra* note 730 at para. 71.
[1096] Ibid.
[1097] Ibid. at para. 72.

membership did not play a decisive role in their dismissal."[1098] Instead, the majority emphasised the fact that "the existence of ... a matter [of general interest] cannot justify the use of offensive cartoons or expressions, even in the context of labour relations"[1099] and held that "certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations."[1100] The majority then ruled that "in addition to being insulting, the cartoon and texts in issue were intended more as an attack on colleagues for testifying before the courts than as a means of promoting trade union action *vis-à-vis* the employer."[1101] In that respect, the majority also considered it relevant that "the remarks did not constitute an instantaneous and ill-considered reaction, in the context of a rapid and spontaneous oral exchange, as is the case with verbal exaggeration. On the contrary, they were written assertions, published in a quite lucid manner and displayed publicly on the premises of the company".[1102] The majority finally held that the cartoon and articles were particularly damaging to the subjects' right to reputation: "[an] attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions."[1103] Taking all those elements together, the Court concluded that "the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more lenient measure."[1104]

Above, I have already criticised the majority's reasoning in *Palomo Sánchez* for leaving certain – *prima facie* relevant – criteria unaddressed and/or downplaying their relevance without satisfactorily explaining why this is appropriate.[1105] I have tied these shortcomings to the open ended nature of the Court's current balancing test, which – I have argued – does not offer sufficient guarantees to prevent arbitrariness and subjective preferences from determining the outcome of the Court's balancing exercise.[1106] Here, I will explain how application of my structured balancing test – appropriately infused with normative arguments – is able to overcome these shortcomings and how it consequently leads to a different outcome in *Palomo Sánchez* than the one reached by the majority of the Grand Chamber.

I will first apply each criterion of the structured balancing test separately and then explain how their combination supports an outcome in favour of the applicants' freedom of expression.

The first criterion of the structured balancing test, the value criterion, is irrelevant to *Palomo Sánchez*, given that the case involved a conflict between two Convention rights that, in principle, deserve equal respect. We may therefore disregard the value criterion.

[1098] Ibid. at para. 52.
[1099] Ibid. at para. 73.
[1100] Ibid. at para. 76.
[1101] Ibid. at para. 74.
[1102] Ibid. at para. 73.
[1103] Ibid. at para. 76.
[1104] Ibid. at para. 77.
[1105] See *supra* notes 775-784 and accompanying text.
[1106] See *supra* Chapter III, Section II, 3. 'The Threats of Arbitrariness and Subjectivity'.

The second criterion of the structured balancing test, the impact criterion, is applicable. Under the impact criterion, we first need to examine the damage suffered by the conflicting Convention rights in the case at hand. A few elements are relevant to this assessment. As for the damage suffered by the right to reputation, one particularly relevant element - as pointed out by the majority of the Court - is that the statements were directed at private individuals, against whom "the extent of acceptable criticism is narrower ... than as regards politicians or civil servants".[1107] Another relevant element is the insulting, crude and vulgar language used in both the cartoon and articles, as well as the insinuations of sexual obedience made in the cartoon. When we combine those elements, we may be inclined to describe the damage suffered by the right to reputation as "very serious", in line with what I set out above.[1108] This also appears to have been the opinion of the majority, which described the publications at issue as "an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment [which] is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions."[1109] However, in doing so, the majority ignored one vital countervailing element, namely the fact that the statements at issue were – at least in part – uttered in a satirical form (this is particularly true of the cartoon).[1110] As a result of the (partly) satirical nature of the statements at issue, the damage suffered by the employees' right to reputation must be considered somewhat mitigated. For instance, it is clear that the sexual obedience depicted in the cartoon was not to be taken literally, but functioned as a metaphor for the obedience the employees showed towards the company when asked to testify in its favour. This of course remains a serious allegation, but it is less serious than the literal meaning of the cartoon. As a result, the damage suffered by the employees' right to reputation falls more appropriately to be described as "serious".

As for the damage suffered by the applicants' freedom of expression, the ruling of the majority is surprisingly silent in this respect. The majority did not make any relevant mention of the damage done to the applicants' freedom of expression. As such, it engaged in what may be termed the one-sided application of the impact criterion, in which the damage suffered by one of the conflicting Convention rights is assessed, but not the damage suffered by the other right.[1111] The dissenting Judges, however, did pay specific attention to this latter factor. They specifically held that "[a]s to the *seriousness of the sanction*, the applicants received ... undoubtedly the harshest possible sanction that can be imposed on workers."[1112] They also pointed out that "[t]he imposition of such a harsh sanction on trade union members ... is likely to have ... a "chilling effect" on the conduct of trade unionists".[1113] Both elements are indeed of immediate relevance to the determination of the damage suffered by the freedom of expression in *Palomo Sánchez*. Given the harshness of the imposed sanction and its "chilling

[1107] *Palomo Sánchez*, *supra* note 730 at para. 71.
[1108] See *supra* note 992 and accompanying text.
[1109] *Palomo Sánchez*, *supra* note 730 at para. 76.
[1110] See also the joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in ibid. at para. 11.
[1111] See Smet, *supra* note 38 at 206-207.
[1112] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in *Palomo Sánchez*, *supra* note 730 at para. 15 (emphasis in original).
[1113] Ibid. at para. 17.

effect" on trade union freedom of expression, the damage may be labelled as "very serious".[1114]

Having determined the damage suffered by each of the conflicting Convention rights, we now need to assess – still under the impact criterion – the likelihood that that damage will actually occur. The damage suffered by the freedom of expression is, clearly, "certain": the applicants were dismissed and their dismissal constituted the damage. The likelihood of the damage suffered by the right to reputation is, per definition, less certain. Indeed, as explained above, it depends on a subjective assessment by the subjects of the publication themselves, as well as by the persons who view or read it. In *Palomo Sánchez*, those latter persons are the other employees of the company. Given the circumstances of the case – in particular (i) the gravity of the acts depicted in the cartoon, (ii) the fact that it was accompanied by articles in which the applicants expressed their criticism in crude and vulgar language, and (iii) the fact that the trade union newsletter was displayed on the premises of the company – the likelihood of the damage suffered by the right to reputation arguably falls to be categorised as "a real and immediate risk".

To sum up, application of the impact criterion yields the following results: the damage suffered by the applicants' freedom of expression is "very serious" and "certain", while the damage suffered by the employees' right to reputation is "serious" and constitutes "a real and immediate risk". Taken in isolation, the impact criterion thus offers stronger reasons in support of the applicants' freedom of expression than in support of the employees' right to reputation.

The third criterion of the structured balancing test – the core - periphery criterion – is also instructive. Both the majority and the minority ruling in *Palomo Sánchez* are scarce in terms of arguments that may be relevant to the application of the core - periphery criterion, but at least the dissenting opinion offers *some* useful elements in this regard. The dissenting Judges specifically pointed out that they "share the view that "since trade unions play an important role, in that they express and defend ideas of public interest in professional and employment-related matters, their freedom to put forward opinions warrants a high degree of protection"."[1115] This indicates that the dissenting Judges considered trade union freedom of expression to be located rather close to the core of freedom of expression. There is something to be said for this argument, particularly given the parallels that can be drawn between press freedom and trade union freedom of expression in matters of public interest. Both the press and trade unions fulfil a "watchdog" function, even if the latter fulfil it on a more limited scale (*i.e.* to the benefit of the employees of the company or sector at issue) and even though this function is more directly tied to freedom of expression in case of the press (*cf.* trade unions play their role in a variety of manners, including through negotiations with employers, that do not immediately fall under the protection of freedom of expression). Indeed, it appears desirable to locate trade union freedom of expression closer to the core than to the periphery of freedom of expression, even if not necessarily as close as political speech or press freedom.

[1114] See *supra* notes 992-994 and accompanying text.
[1115] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in *Palomo Sánchez*, *supra* note 730 at para. 5.

In any event, trade union freedom of expression is clearly more central to art. 10 than, for instance, commercial speech, which falls to be regarded as a rather peripheral aspect of freedom of expression.[1116]

As for the right to reputation of the employees, a few observations can be made. Firstly, it should be noted that the right to reputation is, in general, not as central an element of the right to private life as the core aspects mentioned above (*e.g.* the protection of health data and the right to the protection of one's image).[1117] Particularly when the publication at issue addresses a topic of public interest and does not reveal private information, the right to reputation falls to be located – comparatively – further away from the core of the right to private life. This argument is also reflected in the Court's case law. Indeed, the Court has imposed a threshold for the application of art. 8 in reputation cases, holding that "[i]n order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."[1118] This indicates that the Court views reputation, in general, as a less central aspect of the right to private life than the publication of photographs or of health data, in respect of which the Court does not impose a similar threshold.[1119] In this respect, the argument of the dissenting Judges in *Palomo Sánchez* that "[t]he harsh criticism did not relate to the intimacy of the individuals or to other rights pertaining to their private lives" is of particular relevance.[1120] However, it should not be forgotten that the criticism was directed at private individuals. Indeed, private individuals have less opportunities at their disposal to counter statements that are potentially damaging to their reputation. They also do not fulfil public functions, for which they can expect to be – and are used to being – publicly scrutinised. As such, there may be cause to locate their reputation closer to the heart of their right to private life than in the case of politicians, in respect of statements that do not contain any private information, but are limited to offering 'professional' criticism.

We are thus confronted with two relevant factors as far as the centrality of the right to reputation in *Palomo Sánchez* is concerned: one pulling in the direction of the centre of art. 8 (the fact that the publication concerned private individuals) and another pulling away from the centre of art. 8 (the fact that reputation is principally located farther away from the centre of art. 8 than other aspects, in light of the fact that the publication did not reveal intimate or private information). It thus appears sensible to locate the right to reputation at issue somewhere "in the middle" of art. 8, but perhaps still in an area closer to the core of the article than to its periphery.

[1116] See *supra* note 1044 and accompanying text.
[1117] See *supra* note 1036 and accompanying text.
[1118] *Axel Springer*, *supra* note 6 at para. 83.
[1119] Compare *Von Hannover*, *supra* note 44 at para. 103 (the publication of photographs "is ... an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family"); *Biriuk*, *supra* note 501 at para. 39 ("protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention … especially … as regards the protection of the confidentiality of a person's HIV status").
[1120] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in *Palomo Sánchez*, *supra* note 730 at para. 12.

In sum, the core - periphery criterion, as applied to *Palomo Sánchez*, yields less clear results than the impact criterion. I have located both trade union freedom of expression and the right to reputation, *in casu*, somewhere between the "middle" and the "core" of the respective Convention rights. As a result, the core - periphery criterion does not offer reasons in favour of, nor against either of the conflicting Convention rights in *Palomo Sánchez* (or, in other words, it offers equally strong reasons in favour of both rights).

The fourth criterion of the structured balancing test – the additional rights criterion – plays to the advantage of the applicants' freedom of expression. Not only their art. 10 rights, but also their art. 11 rights were at stake. Indeed, the applicants were the founding members and representatives of one of the trade unions active in the company. They were dismissed for exercising their freedom of expression *in the context of* a trade union dispute. Their dismissal moreover resulted in the *de facto* disbanding of their trade union. Yet, the trade union aspect of the case was largely suppressed in the majority judgment. The majority did mention that "the facts of the present case are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context" and announced that it would examine the case under art. 10, interpreted in light of art. 11.[1121] However, the majority immediately brushed aside any practical relevance of art. 11 by finding that "the applicants' trade union membership did not play a decisive role in their dismissal."[1122] In doing so, it lent support to the domestic courts' observations "that there had been no interference with the right to trade-union freedom, since the dismissals had been the result of the actual content of the offending newsletter and not the applicants' membership of the union."[1123] The majority's reasoning was severely criticised by the dissenting Judges, who particularly lamented the fact that "[b]oth in assessing the facts and in balancing the interests at stake, the majority give scant consideration to the fact that the applicants were members of a trade union, or that they were expressing professional and employment-related claims."[1124] Indeed, even if not necessarily decisive, the fact that also the applicants' art. 11 rights were at stake *is* a relevant factor in the balancing exercise.[1125] More particularly, the position of the applicants as trade union founders and representatives *strengthens* their art. 10 claim. To fully appreciate this argument, one need only consider the same cartoon and articles being put on the notice board by an employee who is not a trade union representative and is not in charge of a trade union newsletter, but simply wishes to express his discontent at the testimony given by his fellow employees to the benefit of the company. This other employee would be in a comparatively weaker position than the applicants in *Palomo Sánchez*, because the latter's trade union freedom under art. 11 lends context and support to their (freedom of) expression.

The fifth criterion – the general interest criterion – is, as described above, of particular relevance in cases that involve speech in the public interest.[1126] As acknowledged by both the majority and the minority, the statements at issue in *Palomo Sánchez* concerned a matter of

[1121] *Palomo Sánchez*, *supra* note 730 at para. 52.
[1122] Ibid.
[1123] Ibid. at para. 64.
[1124] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in ibid. at para. 4.
[1125] Ibid. at para. 6.
[1126] See *supra*, around note 1058 and accompanying text.

general interest.[1127] Even if the intended public of the cartoon and articles was rather limited, the debate in the context of which they were published was "not a purely private one [but] at least a matter of general interest for the workers of the company."[1128] The general interest criterion thus offers a reason for finding in favour of the applicants' freedom of expression, albeit a less strong one than what would have been the case if similar statements had been published in the press, in the context of a debate of general interest to society at large.

The sixth criterion of the structured balancing test – the purpose criterion – is not relevant to the resolution of the conflict in *Palomo Sánchez*.

The relevance of the seventh and final criterion – the responsibility criterion – is perhaps the most controversial. In *Palomo Sánchez*, the majority of the Grand Chamber strongly relied on arguments that relate to the responsibility criterion, as described above.[1129] The majority particularly treated the cartoon and articles at issue as "insulting" and "intended more as an attack on colleagues for testifying before the courts than as a means of promoting trade union action *vis-à-vis* the employer."[1130] If this were true, it would lend support to a finding in favour of the right to reputation and against the applicants' freedom of expression, given that the applicants had exercised their rights in an unacceptable / irresponsible manner. However, as rightly pointed out by the dissenting Judges, the majority's finding did not have any basis in the facts of the case at hand. Instead, it "[amounted] to speculation" and only became possible by "[dissociating] the impugned texts from their context".[1131]

Indeed, there is no reason, other than perhaps an unacceptable reliance on subjective preferences on the part of the majority, to assign a certain intention – *i.e.* to launch a personal attack on colleagues – to the applicants, different from that of protecting their trade union interests. In the absence of any convincing reasons for holding that the applicants' statements constituted a gratuitous personal attack, the responsibility criterion is irrelevant to the resolution of the conflict in *Palomo Sánchez*. That being said, it is, of course, true that the applicants chose poor (insulting, crude and vulgar) language to express their opinion. It was, without a doubt, possible to express the same opinion in less vigorous terms. However, as I have argued above, the responsibility criterion should not be employed to impose a "less restrictive alternative" requirement on the applicants, since doing so would eradicate any room for exaggeration and provocation in freedom of expression.[1132] Obviously, the tone and content of the publication at issue *are* relevant factors to the balancing exercise, but they should be – and have *in casu* been – factored into account under the impact criterion, in the assessment of the damage caused to the right to reputation.

Having analysed each of the seven criteria of the structured balancing test separately, we are now in a position to bring all arguments together, in order to construct a net of arguments in

[1127] *Palomo Sánchez*, *supra* note 730 at para. 72; Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in ibid. at para. 12.
[1128] *Palomo Sánchez*, *supra* note 730 at para. 72.
[1129] See *supra* notes 1081-1093 and accompanying text.
[1130] *Palomo Sánchez*, *supra* note 730 at para. 74.
[1131] Joint dissenting opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popović and Vučinić in ibid. at para. 13.
[1132] See *supra* notes 1081-1088 and accompanying text.

favour of one of the conflicting Convention rights. I have argued that a number of criteria are entirely irrelevant to the balancing exercise, namely the value criterion, the purpose criterion and the responsibility criterion. Of the other four criteria, the core - periphery criterion did not offer reasons in support of or against either right. The result of the balancing exercise thus depends on the remaining three criteria. If we compare the arguments made under each of those three criteria, we notice that – under all three – stronger reasons were found in favour of the applicants' freedom of expression than in favour of the right to reputation of the employees. In particular, the damage done to the applicants' freedom of expression was labelled as "very serious" and "certain", while the damage done to the employees' right to reputation was described as "serious" and at "real and immediate risk", *i.e.* comparably less serious and less likely to occur. Moreover, the position of freedom of expression was found to be strengthened by the presence of additional rights, namely the art. 11 rights of the applicants, and by the relevance of a general interest. In and of themselves, these latter reasons would not be decisive.[1133] However, when combined with the clear reasons in favour of freedom of expression under the impact criterion, they allow us to construct a coherent net of arguments in favour of the applicants' freedom of expression. Because (i) the applicants' freedom of expression suffered more damage, which was moreover more likely to occur, (ii) because their art. 11 rights were also at stake *and* (iii) because they expressed their opinion in the context of a debate of general interest, (iv) without resorting to a gratuitous personal attack on the employees, the conflict should have been resolved to the benefit of their freedom of expression.

Section II – The Role of the Margin of Appreciation in the Application of the Structured Balancing Test

In the previous section I focused on explaining how the structured balancing test may assist in the substantive resolution of conflicts between relative Convention rights. In doing so, I left the role of the margin of appreciation and of procedural checks largely aside. In this section, I will clarify the role of both in the application of the structured balancing test. I will first introduce the margin of appreciation doctrine in general terms. Subsequently, I will analyse and criticise the Court's use of the margin of appreciation in cases involving a conflict between Convention rights cases. I will specifically argue that, *pace* the Court, there is no cause to automatically award a wide margin in such cases. Instead, I will argue that the 'default' position in conflicting Convention rights cases should be the granting of a "certain" margin of appreciation. I will moreover insist that the final determination of the breadth of the margin should be made with reference to the 'traditional' factors, application of which may lead to its widening or narrowing. Finally, I will present my views on the role of the margin of appreciation in the application of the structured balancing test and briefly explain the relevance of procedural checks by the Court. In Chapter V, I will apply the structured balancing test to two conflicting Convention rights cases in which the margin of appreciation

[1133] See *supra* notes 1051-1052 and accompanying text and around note 1057 and accompanying text.

plays an important role, thereby further illustrating how the test may function in such situations.

1. The Margin of Appreciation Doctrine

The margin of appreciation, a hotly debated concept that lies at the heart of a deeply contested doctrine,[1134] does not currently feature in the Convention itself.[1135] Nevertheless, the Court has, throughout its case law, developed it into a key principle of the Convention system. However, the Court has never explained what the margin of appreciation exactly is, nor has it offered detailed reasons as to why it should be an inherent aspect of the supranational Convention system. Legal scholars have attempted to fill the gap, but many of them have found the concept to be particularly elusive.[1136] Attempts at describing the margin of appreciation have led to a variety of – often incompatible – definitions, ranging from "a margin of error"[1137] over "the other side of the proportionality principle"[1138] to "an expression of the concept of subsidiarity".[1139]

[1134] Several scholars consider the margin of appreciation doctrine to be redundant, unjustified and/or dangerous. See, for instance, Letsas, *supra* note 7 at 86-87, 89 and 122-123; J. A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 *Columbia Journal of European Law* (2005), 113-150. Certain ECtHR Judges have also expressed firm criticism of the doctrine and its application by the Court. See, for instance, the partly dissenting opinion of Judge De Meyer in *Z. v. Finland*, *supra* note 1036 ("[i]n the present judgment the Court once again relies on the national authorities' "margin of appreciation". I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies … where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not."). See also the concurring opinions of Judge Rozakis in *Egeland and Hanseid*, *supra* note 996 and in *Odièvre*, *supra* note 1 (from the latter: "when, as in the present case, the Court has in its hands an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself and embarks on a painstaking analysis of them, reference to the margin of appreciation should be duly confined to a subsidiary role."). Although the general debate on the justification and application of the margin of appreciation is extremely fascinating, I will not engage with it in this dissertation. Instead, I will restrict myself to critically examining the Court's application of the margin of appreciation in cases that entail a conflict between Convention rights.

[1135] Note that an explicit reference to the margin of appreciation in the Preamble to the Convention is foreseen in Draft Protocol No. 15 of the Convention. See Council of Europe Steering Committee for Human Rights - Committee of Experts on the Reform of the Court, *Draft Protocol No. 15 of the Convention*, DH-GDR(2012)R2 Addendum III, Article 1 ("[a]ffirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.").

[1136] Lord Hester of Herne Hill has for instance famously stated that "[t]he concept of the "margin of appreciation" has become as slippery and elusive as an eel." See Lord Lester of Herne Hill, 'General Report on Theme 2', in X. (ed.), *Yearbook of the European Convention on Human Rights: 8th International Colloquy on the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 1997) at 233. See also Brauch, *supra* note 1134 at 125 (describing the margin of appreciation doctrine as vague and largely undefined).

[1137] On the margin of appreciation as a "margin of error", see Van Drooghenbroeck, *supra* note 219 at 506-509 (describing the position as held by others and offering references to various authors, without himself sharing their views).

[1138] Y. Arai-Takahashi, *The Margin of Appreciation and the Priniciple of Proportionality in the Jurisprudence of the ECHR* (Antwerp – Oxford – New York: Intersentia, 2001) at 14 (literally, Arai-Takahashi writes "[i]t is possible to consider the application of the proportionality principle as the other side of the margin of

As I will explain immediately below, the first description of the margin of appreciation – as a "margin of error" – is both inaccurate and objectionable, insofar as it implies that it is under certain circumstances acceptable for the Member States to *unjustly* (*cf.* error) infringe individuals' Convention rights. Of the remaining two conceptions of the margin of appreciation, *i.e.* "the other side of the proportionality principle" and "an expression of the concept of subsidiarity", the conception that relates the margin to the subsidiarity principle is the only one able to offer an explanation as to *why* the Court considers the concept to be central to the Convention system.[1140] Although the margin of appreciation certainly has an influence on the proportionality test, the reason for its existence is best understood in terms of subsidiarity.

The subsidiarity principle entails that the Contracting States carry the primary responsibility for the protection of the human rights enumerated in the Convention,[1141] whereas the Court's role is of a subsidiary nature, *i.e.* one of supervision in case the Contracting States fail to adhere to the Convention's standards.[1142] The margin of appreciation doctrine is an immediate expression of the subsidiary role of the Court. It emphasises a number of aspects that are central to the Court's understanding of its relationship with the Contracting States and its central actors, *i.e.* the national legislator, executive and judiciary.

A first aspect is the recognition on the part of the Court that, in certain areas, there may be multiple ways to guarantee protection of the Convention rights.[1143] The Court therefore grants the national authorities, at all levels, some leeway in choosing their preferred means to ensure protection, provided that the minimum standards developed in the Court's case law are respected.[1144] It is tempting to understand this leeway as a "margin of error". However, describing it as such would be inaccurate. The existence of a variety of means to satisfy the protective standards of the Convention does not mean that the national authorities would be justified in erring on the wrong side of those standards. On the contrary, they must stay within

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appreciation"; since this implies that the same goes the other way around, I have taken the liberty to invert the relationship in the text).

[1139] Legg, *supra* note 975 at 61.

[1140] Ibid. at 38.

[1141] Brems, *supra* note 7 at 300; Van Drooghenbroeck, *supra* note 219 at 694.

[1142] Legg, *supra* note 975 at 107.

[1143] See, for instance, *Odièvre, supra* note 1 at para. 46; *Von Hannover (No. 2), supra* note 44 at para. 104. The Court thus does not go searching, in each and every case, for a single right answer that expresses the truth about that case, but rather accepts that – in the Convention context – there may be different answers that are equally correct. Therefore, the Court leaves it up to the Contracting States to choose among them. On the "one-right-answer" thesis, see Dworkin, *supra* note 51 at 285-286; R. Dworkin, 'No Right Answer?', 53 *New York University Law Review* (1978), 1-32. See *contra* Peczenik, *supra* note 769 at 305-306 (arguing that "[a]lthough some legal questions have the one right answer, other have many competing right answers."). On law as pursuing a claim to correctness rather than truth in the scientific, objective sense of the term, see Peczenik, *supra* note 769 at 45-46 and 212; R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Clarendon Press, 2002) at 35-36.

[1144] Brems, *supra* note 7 at 302.

the margins.[1145] In that respect, the fact that national authorities may choose between a variety of measures that satisfy the Convention's standards does *not* grant them a "margin of error".

The second aspect of the subsidiary nature of the Court's role is the recognition that there are areas, such as socio-economic policy and urban planning, in which the national authorities are better placed than the Court to assess local needs and requirements.[1146] In those areas, the Court principally grants the authorities more leeway in determining whether an interference with a Convention right is "necessary in a democratic society".[1147]

A third and final subsidiarity-related reason that leads the Court to grant a (wide) margin of appreciation is related to the absence of a common ground among the Contracting States on specific issues.[1148] In the absence of a European consensus, the Court may feel ill placed to impose a uniform standard across the entire Council of Europe region on the matter in question. One reason that drives the Court's hesitance in these areas is acceptance of local difference. Another is a fear of loss of legitimacy, a currency the Court desperately needs if it is to successfully fulfil its supervisory role.[1149]

The above three elements immediately tie the margin of appreciation to the Court's subsidiary role in the protection of the Convention rights. The link between the principle of subsidiarity and the margin of appreciation doctrine also explains why the Court consistently clarifies that the granting of a margin, no matter its breadth, is always subject to European supervision.[1150] Indeed, the subsidiarity principle necessarily entails that the Court can and will play a supervisory role. However, the scrutiny with which the Court will play this role depends on the breadth of the margin granted to the national authorities. It is in that sense that the margin of appreciation has a direct influence on the proportionality test, generally employed by the Court to determine whether or not an interference with a relative Convention right was necessary in a democratic society. If the margin of appreciation is wide, the Court will exercise its supervisory role in a less stringent manner, often restricting itself to a purely

[1145] *Evans*, *supra* note 44 at para. 91; D. Spielmann, 'En jouant sur les marges. La Cour européenne des droits de l'homme et la théorie de la marge d'appréciation nationale: Abandon ou subsidiarité du contrôle européen?', in X., *Actes de la Section des Sciences Morales et Politiques - Volume XIII* (2010) at 227.
[1146] See, for instance, *Hatton*, *supra* note 262 at para. 97; *Chapman*, *supra* note 236 at para. 91.
[1147] Ibid.
[1148] See for instance *Handyside*, *supra* note 387 at para. 48; *A., B. and C.*, *supra* note 149 at paras. 232 and 234-237.
[1149] Gerards, *supra* note 7 at 114 ("[i]ts flexibility makes the doctrine [of the margin of appreciation] very attractive as an instrument to negotiate between the Court's task to protect human rights as effectively as possible, and its need to respect national sovereignty and make its judgments acceptable for national authorities.").
[1150] See, among many other authorities, *Handyside*, *supra* note 387 at para. 49; *Dudgeon*, *supra* note 1036 at para. 59; *Open Door and Dublin Well Woman*, *supra* note 390 at para. 68; *A., B. and C.*, *supra* note 149 at para. 238; *Axel Springer*, *supra* note 6 at paras. 85-86; *Eweida*, *supra* note 328 at para. 84; ECtHR, *Paksas v. Lithuania*, app. no. 34932/04, 6 January 2011, para. 96. See further Legg, *supra* note 975 at 28 and 174 (describing the factors that determine the breadth of the margin of appreciation as second-order reasons, which affect the weight accorded to the relevant first-order reasons, but without withdrawing or diminishing the final responsibility of the Court to decide the case).

procedural check.[1151] Conversely, if the margin of appreciation is narrow, the Court will closely and strictly scrutinise the measures taken at the national level.

In addition to the three subsidiarity-related elements named above, there are others that impact on the breadth of the margin of appreciation. These other elements thus also directly influence the level of scrutiny employed by the Court in determining whether the measures taken by the national authorities do or do not violate any Convention rights.[1152] They are, for instance, the nature of the right at stake, the nature of the activities at issue and the importance of the right to the applicant.[1153] Further on, I will deal with all these elements in more detail.[1154] For our current purposes, however, the above general sketch of the role of the margin of appreciation in the Convention system will suffice.

2. The Court's Use of the Margin of Appreciation Doctrine in Conflicting Convention Rights Cases

For our current concerns with conflicts between Convention rights, it is crucial to note that the Court has developed an argument that specifically applies to cases involving conflicting Convention rights. In *Chassagnou v. France*, the Court held that

> "[t]he balancing of individual interests [protected by Convention rights] that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention.".[1155]

Initially, it appeared as though this principle would not play a major role in the Court's case law. Indeed, Peggy Ducoulombier and Sébastien Van Drooghenbroeck have convincingly demonstrated that the Court did not actually apply it in the period immediately following the

[1151] Gerards, *supra* note 7 at 105-106.
[1152] It falls to be noted that one of the main problems with the Court's application of the margin of appreciation doctrine is the lack of clarity as to what happens when, in the concrete circumstances of a case, several of these elements pull in opposite directions – some towards a narrow margin of appreciation, others in the direction of a wide margin. See Gerards, *supra* note 7 at 114. For an example of two elements pulling in the *same* direction (wide + wide), leading to the granting of a "particularly wide" margin of appreciation, see the somewhat awkwardly formulated conclusion in ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (adm.), app. no. 40397/12, 19 February 2013 ("the nature of the information at hand [*i.e.* not of public interest], and the balancing interest mentioned above [*i.e.* the principle that the State benefits from a wide margin of appreciation when balancing competing Convention rights], both are such as to afford the State a wide margin of appreciation which, when accumulated as in the present case, makes the margin of appreciation particularly wide"). See also *Ashby Donald*, *supra* note 44 at paras. 40-41.
[1153] See for instance *Dudgeon*, *supra* note 1036 at para. 52; *Chapman*, *supra* note 236 at para. 91; *Dickson*, *supra* note 265 at paras. 77-78.
[1154] See *infra* '3. The Reinterpreted Role of the Margin of Appreciation in Conflicting Convention Rights Cases'.
[1155] *Chassagnou*, *supra* note 35 at para. 113.

Chassagnou judgment.[1156] However, in recent years the Court has reinvigorated the principle.[1157] Moreover, over the course of the past decade a new version of the principle has surfaced, based on a different strand of case law.[1158] In a myriad of recent cases involving conflicting Convention rights, the Court has stated that it

> "generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights"[1159]

or that

> "[t]he Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights."[1160]

The latter, wider iteration of the principle should be discarded, since it is entirely useless and principally objectionable. Its overly broad formulation is clearly out of line with the actual practice of the Court. The Court has on many occasions emphasised that the "search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" is "inherent in the whole of the Convention".[1161] As a result, the Court treats the vast majority of cases as – at some level – requiring a balance to be struck between "competing private and public interests or Convention rights".[1162] Yet, clearly the Contracting States are *not* automatically awarded a wide margin of appreciation in each and every case. Indeed, the Court does *not* usually grant the national authorities of the Contracting States a wide margin of appreciation. Instead, in a plethora of judgments the Court has held that "the boundaries between the State's positive and negative obligations ... do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the *fair balance* that has to be struck *between the competing interests* of the individual and of the community as a whole; and in both contexts the State enjoys a *certain* margin of appreciation."[1163] This principle,

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[1156] Ducoulombier, *supra* note 4 at 360-364; Van Drooghenbroeck, *supra* note 219 at 541-542. To my knowledge, the only two instances in which the Court has reiterated the principle in the same terms as those used in *Chassagnou*, are *Ashby Donald*, *supra* note 44 at para. 40 and *MGN Limited*, *supra* note 3 at para. 142.

[1157] See *infra* notes 1194-1195 and accompanying text.

[1158] See *infra* '*i. The 'Competing Rights' Principle is Inconsistent with its Own Historical Origins*'.

[1159] *Eweida*, *supra* note 328 at para. 106. See also *A. v. Norway*, *supra* note 88 at para. 66; *Egeland and Hanseid*, *supra* note 996 at para. 55; *MGN Limited*, *supra* note 3 at para. 142; *Fáber*, *supra* note 44 at para. 42; *Ashby Donald*, *supra* note 44 at para. 40; *Neij and Sunde Kolmisoppi*, *supra* note 1152.

[1160] *Kearns*, *supra* note 1074 at para. 74. See also ECtHR, *Moretti and Benedetti v. Italy*, app. no. 16318/07, 27 April 2010, para. 63; *Obst*, *supra* note 291 at para. 42; *Schüth*, *supra* note 44 at para. 56; *Siebenhaar*, *supra* note 291 at para. 39; ECtHR, *Kautzor v. Germany*, app. no. 23338/09, 22 March 2012, para. 70; *Fernández Martínez*, *supra* note 507 at para. 78. See further, in non-conflicting rights cases, *S.H.*, *supra* note 387 at para. 94; *Ahrens*, *supra* note 291 at para. 68; *Hristozov*, *supra* note 524 at para. 118.

[1161] See, among many authorities, the Grand Chamber judgments of ECtHR, *N. v. the United Kingdom*, app. no. 26565/05, 27 May 2008, para. 44; ECtHR, *Christine Goodwin v. the United Kingdom*, app. no. 28957/95, 11 July 2002, para. 72; ECtHR, *Öcalan v. Turkey*, app. no. 46221/99, 12 May 2002., para. 88.

[1162] Ducoulombier, *supra* note 4 at 362.

[1163] See, among many authorities, *Hatton*, *supra* note 262 at para. 98; *Odièvre*, *supra* note 1 at para. 40; ECtHR, *Nunez v. Norway*, app. no. 55597/09, 28 June 2011, para. 68; *Aksu*, *supra* note 107 at para. 62; *Röman*, *supra* note 609 at para. 45 (emphases added). See also *Dickson*, *supra* note 265 at para. 77; ECtHR, *Gardel v. France*, app. no. 16428/05, 17 December 2009, para. 60; *Van der Heijden*, *supra* note 294 at paras. 56-58 (employing a

which is omnipresent in the Court's case law, squarely contradicts the increasingly cited principle that "[t]he Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights."[1164] The former principle offers a more accurate picture of the Court's case law, in which the granting of a wide margin is not the rule, but an exception, usually the result of the presence of one of the factors mentioned above, *e.g.* the lack of a European consensus or the fact that the national authorities are deemed better placed to assess the local needs and sensitivities.[1165] The granting of a wide margin *should* moreover remain exceptional in order for the Court to be able to fulfil its countermajoritarian function. Thus, the principle that "[t]he Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests" should be abandoned, since it does not make sense and because it is unacceptable in principle.[1166]

However, the narrower principle that the Court "generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights" (hereafter: 'competing rights' principle) cannot be dismissed as easily. Its formulation is markedly narrower than the rejected broader principle. Since the 'competing rights' principle is applicable to a particular segment of the Court's case law, rather than to its entirety, it is not as strikingly nonsensical and objectionable as the broader principle. Yet, the 'competing rights' principle is noticeably underdeveloped in the Court's case law. In most conflicting rights judgments that cite it, the Court simply posits the principle without explaining *why* the State should be granted a wide margin of appreciation.[1167] In the absence of such an explanation, the argument appears hopelessly circular: the domestic authorities should be granted a wide margin when balancing conflicting Convention rights, because they have a wide margin of appreciation when balancing Convention rights. In that sense, it falls to

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different formulation of the same principle: "[s]ince the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment.").

[1164] Note, however, that in *Dickson*, *supra* note 265, the Court, in a bizarre move, mentioned at the end of the very next paragraph that "[t]here will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights." *Dickson*, *supra* note 265 at para. 78. The ensuing contradiction, in the space of two paragraphs, indicates how deeply seeded the automatic and unreflective referencing of certain general principles in the drafting of the Court's judgments can be. See also the concurring opinion of Judge Rozakis to *Egeland and Hanseid*, *supra* note 996.

[1165] Ibid. at para. 78. In *A., B. and C. v. Ireland*, the Court for instance explicitly tied the wide margin of appreciation of the State in striking a balance between the protection of the public interest (the protection accorded under Irish law to the right to life of the unborn) and the Convention rights of the applicants, to the acute sensitivity of the moral and ethical issues raised by the question of abortion. See *A., B. and C.*, *supra* note 149 at para. 233 ("[t]here can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.").

[1166] See also Ducoulombier, *supra* note 4 at 363.

[1167] See for instance *A. v. Norway*, *supra* note 88 at para. 66; *Eweida*, *supra* note 328 at para. 106; *Neij and Sunde Kolmisoppi*, *supra* note 1152; *Kearns*, *supra* note 1074 at para. 74; *Moretti and Benedetti*, *supra* note 1160 at para. 63; *Obst*, *supra* note 291 at para. 42; *Siebenhaar*, *supra* note 291 at para. 39; *Fernández Martínez*, *supra* note 507 at para. 78.

be reminded that, whenever the Court refuses to offer reasons for the granting of a wide margin and then hides behind that very margin to hold in favour of the government, "it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate."[1168] Indeed, the 'competing rights' principle stands in need of justification, of some explanation as to *why* the State should enjoy a wide margin of appreciation in dealing with conflicts between Convention rights. Without such an explanation, the principle may be immune from many charges, because it is impossible to dispute reasons that are not given, but it fatally leaves itself open to the most damaging of all charges: circularity and arbitrariness.

Interestingly, a number of judgments that feature the 'competing principle' offer some hints as to its (ir)relevance. Firstly, in certain conflicting Convention rights cases the Court applies more developed factors in determining the breadth of the margin of appreciation, besides the 'competing rights' principle. In those cases, the Court tends to rely primarily on the more developed factors to determine the breadth of the margin and formulates the 'competing rights' principle as an *additional* element (*e.g.* "[t]here will *also* usually be a wide margin if the State is required to strike a balance between competing private and public interests or different Convention rights").[1169] Secondly, in certain conflicting rights cases the 'competing rights' principle does not function independently, as in and of itself determining the breadth of the margin of appreciation. Instead, it is the result of an already drawn conclusion on another factor, such as the absence of a European consensus.[1170] The wide margin therefore flows directly from that latter factor: because there is no European consensus, the Court grants the domestic authorities a wide margin in balancing the conflicting Convention rights. Crucially, this is no longer a circular argument.

In what follows, I will assess the value of the 'competing rights' principle in further detail. I will first argue that the principle has been erroneously deduced from the case law in which its origins lie. I will go on to demonstrate that the principle is out of line with the Court's broader case law on conflicting Convention rights, in which it does *not* automatically grant a wide margin of appreciation. Finally, I will turn towards a more promising iteration of the 'competing rights' principle, namely the *Chassagnou* iteration, which ties the principle immediately to the argument that the national authorities are "better placed" to balance conflicting Convention rights. I will argue that the "better placed" argument offers a better

[1168] R. St. J. Macdonald, 'The Margin of Appreciation', in R. St. J. Macdonald et. al. (eds.), *The European System for the Protection of Human Rights* (Dordrecht – Boston – London: Martinus Nijhoff Publishers, 1993) at 85. See also Letsas, *supra* note 7 at 83-84.

[1169] See, for instance, *Schüth*, *supra* note 44 at para. 56; *Kautzor*, *supra* note 1160 at para. 70 (emphasis added). See, however, *Kearns*, *supra* note 1074 at para. 74 (in which the Court inversed the formulation: "[t]he Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights. This applies all the more where there is no consensus within the member States of the Council of Europe as to the relative importance of the interest at stake or as to the best means of protecting it."). See also *Moretti and Benedetti*, *supra* note 1160 at para. 63. I will explain below why these judgments present an inaccurate picture of the judgment in *Evans v. the United Kingdom*, to which they refer as a source. *Evans*, *supra* note 44. See *infra* '*i. The 'Competing Rights' Principle is Inconsistent with its Own Historical Origins*'.

[1170] See, for instance, *Egeland and Hanseid*, *supra* note 996 at paras. 54-55. See also ECtHR, *Fretté v. France*, app. no. 36515/97, 26 February 2002 and *Evans*, *supra* note 44, both discussed below. See *infra* '*i. The 'Competing Rights' Principle is Inconsistent with its Own Historical Origins*'.

understanding of the 'competing rights' principle. However, I will insist that it is still fundamentally flawed insofar as it implies the *automatic* granting of a *wide* margin of appreciation in conflicting Convention rights cases. Instead, I will argue that the Contracting States should – as a 'default' position – be granted a "certain" margin of appreciation in resolving conflicts between Convention rights. I will argue that the final determination of the breadth of the margin of appreciation in conflicting Convention rights cases should be made with reference to the 'traditional' factors from the Court's case law, such as the nature and importance of the Convention rights at stake and the absence or presence of a European consensus on the matter.

i. The 'Competing Rights' Principle is Inconsistent with its Own Historical Origins

As already indicated above, in most judgments the Court merely posits the 'competing rights' principle – *i.e.* the principle according to which "the Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights" – without explaining *why* a wide margin is being granted. I have already argued above that this iteration of the principle is empty. Here, I will argue that the emptiness of the 'competing rights' principle should not surprise us, since the Court has erroneously deduced it from the judgments in which its origins lie. These judgments are *Fretté v. France* (2002), *Odièvre v. France* (2003) and *Evans v. the United Kingdom* (2007).

The recent judgments that posit the 'competing rights' principle with reference to earlier case law all cite *Evans v. the United Kingdom* as its source.[1171] *Evans* itself refers back to *Fretté v. France* and *Odièvre v. France* as the source of the principle.[1172] However, closer examination of all three cases demonstrates that the Court has inaccurately portrayed the language on the margin of appreciation used in these judgments as supporting a naked claim that can, in fact, not be located therein. Throughout its journey in the Court's case law, the 'competing rights' principle has thus been shaped into something it originally was not. This 'mutation' of the principle explains why the Court does not generally offer any explanation as to *why* the 'competing rights' principle entails the automatic granting of a wide margin of appreciation in cases of competing Convention rights: no such reason exists.

As already mentioned, the formulation of the 'competing rights' principle can be traced back to *Evans*. Indeed, in *Evans* the Court explicitly held that "[t]here will also usually be a wide margin if the State is required to strike a balance between competing … Convention

[1171] See, for instance, *Obst*, *supra* note 291 at para. 42; *Schüth*, *supra* note 44 at para. 56; *Siebenhaar*, *supra* note 291 at para. 39; *Fernández Martínez*, *supra* note 507 at para. 78; *Eweida*, *supra* note 328 at para. 106. For an apparent exception, see *Kautzor*, *supra* note 1160 at para. 70 (referencing *S.H.*, *supra* note 387 as the source of the principle; the relevant paragraph of *S.H.*, however, refers to *Evans*). A few judgments do not contain any reference to earlier judgments. See for instance *A. v. Norway*, *supra* note 88 at para. 66; *Egeland and Hanseid*, *supra* note 996 at para. 55. For these judgments, either the granting of a wide margin of appreciation was actually tied to other factors, such as the lack of a European consensus (*Egeland and Hanseid*), or rejection of the naked principle – without any reference – flows from the arguments offered below (*A. v. Norway*). See *infra* '*ii. The 'Competing Rights' Principle Does Not Cohere with the Court's Wider Case Law*'.

[1172] *Evans*, *supra* note 44 at para. 77.

rights."[1173] Before analysing *Evans* itself, I will examine the judgments from which the Court deduced the principle: *Fretté* and *Odièvre*. Interestingly, neither of those judgments actually ties the granting of a wide margin of appreciation to the fact that the case involved a conflict between Convention rights. In *Odièvre*, the Court did not even mention the term "wide margin of appreciation". Instead, it spoke of a "certain" margin of appreciation in setting out the principle,[1174] held that – in view of the lack of a European consensus on the matter – "States must be afforded a margin of appreciation",[1175] and concluded that France had not overstepped "the" margin afforded to it.[1176] *Odièvre* can thus not be the literal origin of the principle. In *Fretté*, the Court *did* explicitly grant a wide margin of appreciation to the State.[1177] However, it did so because of the lack of common ground between the Contracting States on the issue of adoption by same sex couples.[1178] The wide margin left to the national authorities in the balancing of the conflicting interests was therefore the direct result of a different factor, *i.e.* the lack of a European consensus. The wide margin did *not* apply simply because of the presence of conflicting interests. As a result, *Fretté* can also not function as the origin of the naked claim that "the Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights."

Furthermore, close examination of *Evans* reveals that that judgment does not support the naked claim either. Also in *Evans*, the granting of a wide margin of appreciation was the result of other factors than the mere presence of conflicting Convention rights. The determining factors were instead (i) the fact that the case concerned a morally and ethically delicate issue (IVF) and (ii) the lack of a European consensus on the issue. It is worth quoting the relevant paragraph in full, so the reader may appreciate the total absence of any reference to conflicting rights in the determination of the breadth of the margin of appreciation:

> "[i]n conclusion, therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one."[1179]

[1173] Ibid.
[1174] *Odièvre*, *supra* note 1 at para. 40 ("[t]he boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation.")
[1175] Ibid. at para. 47.
[1176] Ibid. at para. 49 (tying this margin to "the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents").
[1177] *Fretté*, *supra* note 1170 at paras. 41-42.
[1178] Ibid. at para. 41.
[1179] *Evans*, *supra* note 44 at para. 81.

This wide margin of course had an influence on the room left to the national authorities in balancing the competing Convention rights,[1180] but this was a logical *consequence* of the granting of a wide margin, *not* the cause thereof.

A few of the more recent judgments that contain the 'competing rights' principle partially reflect – but at the same time also distort – the language used in *Evans*. These judgments state that "[t]he Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights. This applies all the more where there is no consensus within the member States of the Council of Europe as to the relative importance of the interest at stake or as to the best means of protecting it."[1181] They refer to *Evans* in positing the latter claim, but appear to forget that the absence of a consensus was the primary reason for the granting of a wide margin in *Evans*, not a secondary one (as suggested by the use of "[t]his applies all the more").

It should by now be sufficiently clear that any general principle that claims that the presence of conflicting Convention rights automatically leads to the granting of a wide margin of appreciation to the State is not only empty, but also inconsistent with the history of the principle in the Court's case law. Somewhere along the lines, the Court has lost sight of the real reasons why it has at times granted a wide margin of appreciation in the balancing of conflicting Convention rights.[1182] However, this 'blindness' is not omnipresent in the Court's case law. In a large number of conflicting Convention rights cases, in the majority of cases in fact, the Court does *not* grant a wide margin of appreciation to the domestic authorities in balancing the conflicting rights. As a result, the 'competing rights' principle does not cohere with the Court's wider case law on conflicts between Convention rights.

ii. The 'Competing Rights' Principle Does Not Cohere with the Court's Wider Case Law

In the previous section, I have set out a historical account of the origins of the 'competing rights' principle in the Court's case law to demonstrate how the Court has erroneously deduced it from a limited number of judgments in conflicting Convention rights cases. In this section, I will present an empirical argument to the effect that the 'competing rights' principle does not cohere with the Court's wider case law.

The 'competing rights' principle maintains that "[t]here will … *usually* be a wide margin if the State is required to strike a balance between competing … Convention rights" or that "the Court *generally* allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights" (emphases added). In both its

[1180] Ibid. at para. 91.
[1181] *Kearns*, *supra* note 1074 at para. 74; *Moretti and Benedetti*, *supra* note 1160 at para. 63 (positing the same principles, but in French).
[1182] Note that an alternative explanation is possible, in the sense that the Court has purposively reinterpreted the prior cases in accordance with a developing principle that the Member States should be granted a wide margin of appreciation in resolving conflicts between Convention rights. I am grateful to Eva Brems for this suggestion.

iterations, the principle implies that the granting of a wide margin of appreciation in conflicting Convention rights cases is the norm, rather than the exception. However, analysis of the Court's case law demonstrates that the truth is quite different. Indeed, the granting of a wide margin in conflicting Convention rights cases remains the exception. Indeed, in most conflicting rights cases the Court either grants a "certain" margin of appreciation or even narrows the margin *due to the presence of conflicting Convention rights*.[1183] A few examples may serve to illustrate the point.

In *Sørensen and Rasmussen v. Denmark*, the presence of conflicting Convention rights led the Court to *narrow* the margin of appreciation. The Court held that a reduced margin of appreciation should apply to the question of closed shop agreements, because these pit the article 11 rights of the union directly against the article 11 rights of individuals. Conversely, in all other union related matters, *i.e.* those that would not lead to a conflict between Convention rights, a wide margin of appreciation applied due to the presence of sensitive social and political issues and the lack of a European consensus. Both elements combine in the following paragraph of the judgment, offering a perfect illustration of how no automatic link between conflicting Convention rights and the granting of a wide margin of appreciation exists:

> "[i]n the area of trade union freedom and in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured. However, where the domestic law of a Contracting State permits the conclusion of closed-shop agreements between unions and employers which run counter to the freedom of choice of the individual inherent in Article 11, the margin of appreciation must be considered reduced."[1184]

In *TV Vest As & Rogaland Pensjonistparti v. Norway*, the Court went even further. The case concerned an absolute ban on political advertising on television, regardless of the size of the political party requesting airtime for their advertisements. The applicant *in casu* was the small Pensioners Party, which had won only 2.5 % of the vote at an earlier election and did not get any airtime in general programming. Political advertising was therefore its only means of reaching out to its electorate. In its judgment in *TV Vest*, the Court held that it did "not find it appropriate in the instant case to attach much weight to the various justifications for allowing States a wide margin of appreciation with reference to Article 3 of Protocol No. 1" because

[1183] See, among many authorities, *Odièvre*, *supra* note 1 at para. 40; *Öllinger*, *supra* note 582 at para. 33; *Jäggi*, *supra* note 146 at para. 37; ECtHR, *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom*, app. no. 11002/05, 27 February 2007, para. 46; *Axel Springer*, *supra* note 6 at paras. 85-88; *Von Hannover (No. 2)*, *supra* note 44 at paras. 104-105 and 107; *Aksu*, *supra* note 107 at paras. 62-63 and 67. Nearly all judgments entailing a conflict between freedom of expression and the right to reputation could be added to this list, since in virtually none of them the Court grants a wide margin of appreciation to the Contracting State. See also Ducoulombier, *supra* note 4 at 362 (finding that the reference to a wide margin of appreciation was, after *Chassagnou*, largely replaced with a reference to a "certain" margin of appreciation).

[1184] *Sørensen and Rasmussen*, *supra* note 1027 at para. 58.

"that might lead to results incompatible with the privileged position of free political speech under Article 10 of the Convention."[1185] Thus, the possibility of a conflict between both Convention rights led the Court to explicitly *reject* all arguments in favour of a wide margin, thereby paving the way for the finding of a violation of article 10.[1186]

In *Godelli v. Italy*, finally, the Court indicated that it was the nature of the rights in conflict that determined the breadth of the margin of appreciation,[1187] rather than the conflict itself:

> "[l]a Cour rappelle que le choix des mesures propres à garantir l'observation de l'article 8 de la Convention dans les rapports interindividuels relève en principe de la marge d'appréciation des Etats contractants. Il existe à cet égard différentes manières d'assurer le respect de la vie privée et la nature de l'obligation de l'Etat dépend de l'aspect de la vie privée qui se trouve en cause ... Or, l'ampleur de cette marge d'appréciation de l'Etat dépend non seulement du ou des droits concernés mais également, pour chaque droit, de la nature même de ce qui est en cause. La Cour considère que le droit à l'identité, dont relève le droit de connaître son ascendance, fait partie intégrante de la notion de vie privée. Dans pareil cas, un examen d'autant plus approfondi s'impose pour peser les intérêts concurrents."[1188]

Moreover, as already noted above,[1189] even if the Court grants a wide margin in a case involving conflicting Convention rights, it usually ties this finding to another factor, such as the lack of a European consensus or the presence of sensitive social and political issues, rather than to the presence of conflicting Convention rights as such.[1190]

Finally, when the Court grants a wide margin of appreciation to the national authorities in balancing conflicting Convention rights, this will usually be in specific types of situations.[1191] As soon as the circumstances change, the Court may drastically reduce the margin of the national authorities in balancing the same interests. The case of *K. and T. v. Finland*, concerning protective measures taken by the social services against the parents of minor children, illustrates this perfectly. In its judgment, the Court held that:

> "[t]he margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the

[1185] *TV Vest*, *supra* note 313 at para. 66.
[1186] Ibid. at para. 78. It should be noted that I have excluded *TV Vest* from the category of genuine conflicts between Convention rights in Part I. See *supra* note 313. However, the judgment of the Court is still relevant for our current concerns, because it illustrates perfectly how the Court may genuinely believe it is confronted with a case involving conflicting Convention rights, yet explicitly refuse to grant a wide margin of appreciation.
[1187] See also Ducoulombier, *supra* note 4 at 360 and 368.
[1188] *Godelli*, *supra* note 718 at para. 65.
[1189] See *supra* '*i. The 'Competing Rights' Principle is Inconsistent with its Own Historical Origins*'.
[1190] See, for instance, *A., B. and C.*, *supra* note 149 at para. 233; *Evans*, *supra* note 44 at para. 81; ECtHR, *Murphy v. Ireland*, app. no. 44179/98, 10 July 2003, paras. 67 and 81; *Kautzor*, *supra* note 1160 at paras. 71-72; ECtHR, *Redfearn v. the United Kingdom*, app. no. 47335/06, 6 November 2012, para. 48; *Eweida*, *supra* note 328 at para. 109; *Otto-Preminger-Institut*, *supra* note 36 at para. 50.
[1191] See also the analysis of *Fáber* (*supra* note 44), *infra* note 1195 and accompanying text.

> other hand, the aim to reunite the family as soon as circumstances permit ... The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access ... Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed."[1192]

The crucial factor for the determination of the breadth of the margin of appreciation in *K. and T.* was thus not the presence of conflicting Convention rights, but the risk that the rights at stake may suffer irreparable damage. The Court granted a wide margin of appreciation to the national authorities in balancing the children's article 3 and article 8 rights against the parents' article 8 rights insofar as the decision to take the children into care was concerned. It did so, because there was a great (potential) risk to the rights of the children, while the risk that the parents' rights would immediately suffer irreparable damage was small.[1193] However, with regard to the subsequent balancing between the same rights in relation to additional measures, such as restrictive access, the Court drastically reduced the margin by indicating that it would exercise "a stricter scrutiny". It did so, because the parents' article 8 rights and those of the children – *i.e.* their right to one day be reunited with their parents in a safe environment – were at an increased risk of suffering irreparable damage if such additional measures were taken.

iii. The 'Competing Rights' Principle, Reinterpreted on the Basis of the "Better Placed" Argument

In what preceded, I have presented sceptical arguments on the value of the 'competing rights' principle in its naked form. I have labelled the principle empty, circular and nonsensical. I have also argued that it is inconsistent with its own origins and does not cohere with the Court's wider case law on conflicting Convention rights. Nevertheless, I will not call for its abandonment. Instead, I will argue for its reinterpretation by building upon its most promising iteration, *i.e.* the *Chassagnou* iteration, which ties the 'competing rights' principle directly to the argument that the national authorities are "better placed" to resolve conflicts between Convention rights. This argument can be found in a limited number of ECtHR judgments, in which the Court explains that

> "[t]he balancing of individual interests, which may well be contradictory, is a difficult matter and Contracting States must have a broad margin of appreciation in this respect *since the national authorities are in principle better placed* than this Court to assess

[1192] *K. and T.*, *supra* note 610 at para. 155. See also *Görgülü*, *supra* note 1004 at 42.
[1193] The fact that the decision must be taken quickly - in a situation of urgency, uncertainty and/or time pressure - is also a reason to grant the domestic authorities some leeway in erring on the safe side (*i.e.* in favour of intervention to protect the children). However, this is arguably only so because the initial effects on the rights of the parents are minimal.

> whether or not there is a "pressing social need" capable of justifying an interference with one of the rights guaranteed by the Convention."[1194]

In the recent case of *Fáber v. Hungary*, the Court has further clarified the "better placed" argument, in the following terms:

> "a wide discretion is granted to the national authorities, not only because the two competing rights do, in principle, deserve equal protection that satisfies the obligation of neutrality of the State when opposing views clash, but also because those authorities are best positioned to evaluate the security risks and those of disturbance as well as the appropriate measures dictated by the risk assumption."[1195]

In arguing that the national authorities are "better placed" or "best positioned", the Court has offered a reason for the existence of the 'competing rights' principle. As a result, the "better placed" iteration of the principle is no longer empty. Three interrelated reasons further explain why this iteration of the 'competing rights' principle is, *prima facie*, more convincing than the naked version thereof.

The first reason is related to the indivisibility of all human rights. Indeed, as argued throughout this dissertation, conflicting Convention rights in principle deserve to be treated with equal respect.[1196] In that sense, a second reason strongly argues in favour of granting a certain amount of leeway to the national authorities in resolving conflicts between Convention rights. That second reason is related to the countermajoritarian function of the Convention's rights and the subsidiary nature of the ECtHR's role. I have already argued, in Part I, that the countermajoritarian function of human rights explains why the human rights enumerated in the Convention should be granted principled, even if not conclusive, priority over non-rights considerations.[1197] This priority-to-rights principle is of immediate relevance when the State has restricted Convention rights in pursuit of the public interest. In those circumstances, the countermajoritarian function of Convention rights acts as an argument against the automatic granting of a wide margin of appreciation to the State, since – as the Court has repeatedly acknowledged – limitations on Convention rights are principally to be interpreted restrictively.[1198] However, the countermajoritarian function is, at first glance, much less relevant in cases of conflicts between Convention rights. In conflicting Convention rights cases, there is no principled reason for the Court to adopt a stance of 'suspicion' *vis-à-vis* the State's intentions. There is no cause for concern that the State will unjustly limit individuals' Convention rights in pursuit of majoritarian goals and objectives, thereby abusing its power. On the contrary, no matter which position the State takes in resolving a conflict between Convention rights, it will always be one that furthers one (or both) of the conflicting

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[1194] *Chassagnou*, *supra* note 35 at para. 113; *MGN Limited*, *supra* note 3 at para. 142 (emphasis added). See also *Ashby Donald*, *supra* note 44 at para. 40. Note that in the latter case the Court had already determined that a wide margin applied because of the nature of the right at stake (purely commercial freedom of expression, without any relevance to a debate of general interest; para. 39). The cumulation of both elements led the Court to grant "une marge d'appréciation particulièrement importante" (para. 41).

[1195] *Fáber*, *supra* note 44 at para. 42.

[1196] See, most notably, *supra* note 756 and accompanying text.

[1197] See *supra* notes 229-235 and accompanying text.

[1198] See *supra* note 238 and accompanying text.

Convention rights. In that sense, there is no principled reason to doubt the State's ability and willingness to treat both Convention rights with the equal respect they deserve. As a result, an argument can be made to the effect that the Court should leave ample room for the resolution of the conflict through the democratic process.

This argument from democracy leads us to the third and final reason why granting the national authorities a wide margin of appreciation in resolving conflicts between Convention rights is not immediately objectionable. This final reason is related to the role of the legislator, which is ideally suited – more so than the supranational ECtHR – to minimise the effects of (apparent) conflicts between Convention rights, either by avoiding such conflicts altogether (*cf.* positive instances of fake conflict) or by reaching a compromise between the conflicting rights (*cf. praktische Konkordanz*). Crucially, as explained above, both approaches – *i.e.* defusing conflicts as positive instances of fake conflict and *praktische Konkordanz* – offer the most optimal ways to guarantee that both conflicting Convention rights are treated with equal respect.[1199] The fact that the national legislator is better suited than the ECtHR to successfully employ these techniques provides a strong argument in favour of granting the State a margin of appreciation in tackling conflicts between Convention rights. However, even when a conflict can only be resolved by having one of the rights prevail over the other, incorporation of such a 'priority rule' in national legislation has the clear benefit of providing increased legal certainty and of being enacted by a body with greater democratic legitimacy than the supranational ECtHR. In that sense, the (ideological) debate that precedes the making of a clear choice between conflicting Convention rights is likely to ensure that both rights are treated with equal respect in the national legislative process.

The above three reasons offer some measure of support to the Court's principle that the national authorities should be granted a margin of appreciation in resolving conflicts between Convention rights, because they are better placed than the supranational ECtHR to satisfactorily deal with such conflicts. Nevertheless, I do not consider those reasons to warrant the granting of an *automatic* and *wide* margin of appreciation in each and every case of conflict. Indeed, several countervailing reasons explain why the national authorities are not *necessarily* better placed to deal with conflicting Convention rights cases.

The first countervailing reason has to do with the fact that States may, also in resolving conflicts between Convention rights, signal majoritarian bias and/or abuse of power. States may firstly be prone to grant priority to Convention rights that they associate most clearly with a majoritarian interest. This process can be seen at work in *Otto-Preminger-Institut v. Austria*,[1200] in which the Austrian authorities came down strongly in favour of the interests of the 87% Roman Catholic believers in Tyrol, formulated in terms of their right not to be insulted in their religious feelings.[1201] When given ample leeway, States may secondly be prone to abuse their power by (overreacting in) restricting certain 'unpopular' Convention

[1199] See *supra* Chapter II, Section II – 'Defusing Conflicts as Fake' and Section III – 'Achieving a praktische Konkordanz between Conflicting Convention Rights'.
[1200] Note that, in Part I, I have argued that *Otto-Preminger-Institut* does not entail a genuine conflict. See *supra*, around note 494 and accompanying text. However, both the Austrian government and the Court treated the case as one involving a conflict between Convention rights. Therefore, the argument presented in the text stands.
[1201] *Otto-Preminger-Institut*, *supra* note 36 at para. 52.

rights, which they consider should not be exercised in a certain manner, in order to protect 'more popular' Convention rights. *Otto-Preminger-Institut* again serves as a case in point. But such abuse of power in the resolution of conflicts between Convention rights also happens in other cases, for instance when political freedom of expression conflicts with the right to reputation of politicians or Heads of State.[1202] Crucially, in all the above scenarios there is every bit as much cause as in 'traditional' human rights cases to insist on the countermajoritarian function of Convention rights, which precludes the automatic granting of a wide margin of appreciation to the State.

A second countervailing reason is related to the need to 'soften' bright line rules adopted in national legislation. Indeed, the striking of a categorical balance between conflicting Convention rights in law not only has the advantage of increasing legal certainty, it also brings a risk of decreased individual justice with it. Insofar as it precludes contextualisation, the striking of a categorical balance between conflicting Convention rights will often be objectionable in and of itself. For instance, legislation that would automatically grant priority to the right to private life whenever it enters into conflict with freedom of expression would violate, rather than uphold, the indivisibility of all human rights. Therefore, the adoption of bright line rules in national legislation should be an exceptional measure. In Chapter V, I will argue that such bright line rules may nevertheless, under certain circumstances, be acceptable. However, the reasons for their acceptance are related to *other* reasons than the mere presence of a conflict between Convention rights.[1203] I submit that, in the absence of such further reasons, resolution of conflicts between Convention rights calls for contextualisation and – therefore – *ad hoc* balancing. Crucially, such *ad hoc* balancing, intended to 'soften' or contextualise the abstract resolution of the conflict provided for in national legislation, will usually be the business of the courts. For instance, the application of national defamation legislation will almost always call for contextualisation. In case of dispute, such contextualisation is the prerogative of the courts. Once we acknowledge as much, the reasons for the supranational ECtHR to rely on a principled position of deference, for instance in recognition of the greater legitimacy of the national legislator, drastically diminish. Indeed, if the contextualisation and 'softening' of the effects of national legislation in concrete cases of conflict between Convention rights is the prerogative of the courts, there is little reason to dispute the role of the ECtHR – which provides the "final authoritative interpretation" of the Convention[1204] – in this regard.

The third and final countervailing reason is related to the practical (im)possibility of the national authorities to *really* provide the optimal solution to a conflict between Convention rights. Although there are no principled reasons to doubt their ability to arrive at such an optimal solution, the practice demonstrates that national authorities are not necessarily capable or willing to do so. Indeed – and paradoxically – one of the judgments in which the

[1202] See, for instance, *Colombani*, *supra* note 361 (in which France restricted the applicants' freedom of expression to protect the reputation of the King of Morocco); *Cumpănă and Mazăre*, *supra* note 994 (in which Romania criminally convicted the applicants for having defamed a former deputy mayor and a judge).
[1203] See *infra* Chapter V.
[1204] *Opuz*, *supra* note 309 at para. 163; High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 20 April 2012, available at http://hub.coe.int/20120419-brighton-declaration (last accessed 7 October 2013).. See also Ducoulombier, *supra* note 4 at 357.

Court raised the claim that the national authorities are "better placed" to resolve conflicts between Convention rights, indicates why this is not necessarily the case.[1205] In *Fáber*, the Court explicitly stated that the domestic authorities should be granted a wide margin of appreciation in tackling the conflict, because the Court considered them to be "best positioned" to assess the security risks involved and to determine the measures needed to avoid them. Nevertheless, the Court found a violation, because the authorities had overestimated the security risk, which had led them to unduly restrict the applicant's right to participate in a peaceful demonstration:

> "the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act on such an occasion ... In the absence of additional elements, the Court, even accepting the provocative nature of the display of the flag ... cannot see the reasons for the intervention against the applicant. In this connection, the Court reiterates that, "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance" ... Given the applicant's passive conduct, the distance from the MSZP demonstration and the absence of any demonstrated risk of insecurity or disturbance, it cannot be held that the reasons given by the national authorities to justify the interference complained of are relevant and sufficient."[1206]

Fáber indicates that, in practice, the national authorities are *not* necessarily better placed to optimally resolve conflicts between Convention rights. Indeed, those authorities may overreact when faced with a conflict, for instance by completely restricting one of the rights involved to the benefit of the other, while a compromise solution – striking a *praktische Konkordanz* – was available.

The above discussion has revealed that strong reasons can be offered in favour of *and* against the argument that the State should be granted a wide margin of appreciation in resolving conflicts between Convention rights. While the reasons in favour offer principled support to the position, the countervailing reasons demonstrate the limitations thereof. To accommodate both sets of reasons, I argue for a reinterpretation of the 'competing rights' principle. In particular, I submit that the Contracting States should not *automatically* be granted a *wide* margin of appreciation in conflicting Convention rights cases. Indeed, as explained above, that position puts overzealous faith on the first set of reasons. Instead, and bringing both sets of reasons together, I argue that the 'default' position should be one under which the State is granted a "certain" margin of appreciation in resolving conflicts between Convention rights. However, this should not be an automatic process. Instead, the final determination of the breadth of the margin of appreciation should be made with reference to the 'traditional' factors that the Court employs to this effect. Those factors may lead the Court to either broaden the margin (*e.g.* in the absence of a European consensus on the matter or if the conflict involves sensitive moral or ethical issues) or narrow it (*e.g.* in light of the importance of the rights at

[1205] For another example, see *Ageyevy*, *supra* note 1003 at paras. 144, 147 and 151.
[1206] *Fáber*, *supra* note 44 at para. 47.

stake or in the presence of a common European approach to the issue). In the next section I will further explain the reinterpreted role of the margin of appreciation in conflicting Convention rights cases. I will also explain how the margin impacts on the application of the structured balancing test.

3. The Reinterpreted Role of the Margin of Appreciation in Conflicting Convention Rights Cases

i. The Relevance of the 'Traditional' Factors

The 'traditional' factors that influence the breadth of the margin of appreciation granted to the national authorities of the Contracting States are manifold.[1207] These factors are, among others, (i) the type of aim pursued by the rights-restricting measure; (ii) the nature of the right at stake, the type of activities pursued by the right holder and the importance of the right to the right holder; (iii) the (lack of a) European consensus; and (iv) the recognition that the national authorities are better placed to tackle the issue.[1208]

As explained above, the first and fourth factor – *i.e.* the type of aim pursued by the rights-restricting measure and the recognition that the national authorities are better placed to tackle the issue – combine to justify the granting of a "certain" margin of appreciation to the national authorities in conflicting Convention rights cases. Indeed, if the aim pursued by a rights-restricting measure is the protection of another Convention right, there is cause to grant a "certain" margin of appreciation to the national authorities, in recognition of the fact that they are well placed to provide a first attempt at resolving the conflict. As already indicated, this is particularly true for the Contracting States' ability to provide a general solution to the conflict by way of legislation.[1209]

In respect of a potential widening of that margin of appreciation, the pursuit of other aims that have traditionally led the Court to grant a wide margin of appreciation – *e.g.* socio-economic

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[1207] For general literature on these factors and the margin of appreciation, see Brems, *supra* note 7; Spielmann, *supra* note 1145; Van Drooghenbroeck, *supra* note 219 at 511 and following; Gerards, *supra* note 7. I will not offer a general critique of these factors in this dissertation, but will instead take their existence within the Court's case law as an empirical fact that may have an influence on the balancing of conflicting Convention rights. For criticism of several of these factors, and of the margin of appreciation generally, see for instance G. Letsas, 'Judge Rozakis's Separate Opinions and the Strasbourg Dilemma', in D. Spielmann et. al. (eds.), *The European Convention on Human Rights, A Living Instrument – Essays in Honour of Christos L. Rozakis* (Brussels: Bruylant, 2011) at 321-322; Letsas, *supra* note 7 at 81-98 and 121-123; Brauch, *supra* note 1134; F. De Londras and K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B & C v Ireland*, Decision of 17 December 2010', 62 *International and Comparative Law Quarterly* (2013), 250-262 (specifically on the Court's approach to the margin of appreciation in *A., B. and C.*, *supra* note 149).

[1208] *Chapman*, *supra* note 236 at para. 91; *Dudgeon*, *supra* note 1036 at para. 52; *Handyside*, *supra* note 387 at para. 48. Note that although these factors are here presented separately for analytical purposes, they often combine in the Court's case law. For instance, references to the protection of morals as the aim pursued by a rights-restrictive measure will usually go hand in hand with a reference to the lack of a European consensus and/or the fact that the national authorities are better placed.

[1209] See *supra*, around note 1199 and accompanying text.

policies,[1210] the protection of morals[1211] and the integrity of the judiciary[1212] – will only rarely be relevant in conflicting Convention rights cases. One particular aim that has led the Court to grant a wide margin of appreciation to the national authorities is, however, more closely related to the protection of the rights of others: the protection of religious feelings in freedom of expression cases like *Otto-Preminger-Institut v. Austria* and *Murphy v. Ireland*.[1213] However, I have already excluded these cases from the category of genuine conflicts between Convention rights in Part I.[1214] I will therefore not further examine them here.

The second factor – the nature of the right at stake, the type of activities pursued by the right holder and the importance of the right to the right holder[1215] – will often be of direct relevance to the final determination of the breadth of the margin of appreciation granted to the national authorities in conflicting Convention rights cases. Certain elements will call for the narrowing of the margin of appreciation.[1216] The margin should for instance be reduced if the conflict involves a most intimate aspect of an individual's private life,[1217] if its resolution threatens to completely curtail important interests,[1218] or if it involves political speech.[1219] Other elements may call for a widening of the margin of appreciation, for instance if the conflict involves commercial speech.[1220]

The third factor – the (lack of a) European consensus[1221] – may also have a direct effect on the margin of appreciation in conflicting Convention rights cases. If there is no European consensus regarding the resolution of a conflict between Convention rights, for instance on sensitive moral or ethical issues, the margin granted to the Contracting States will be

[1210] See, for instance, *Hutten-Czapska*, *supra* note 418 at para. 166; *Yordanova*, *supra* note 192 at para. 118; *James*, *supra* note 418 at para. 46; *Hatton*, *supra* note 262 at paras. 97-101 and 123.
[1211] See, for instance, *Handyside*, *supra* note 387 at para. 48; *A., B. and C.*, *supra* note 149 at para. 232; *Müller*, *supra* note 387 at para. 35.
[1212] See, for instance, *Sunday Times*, *supra* note 238 at para. 59.
[1213] *Otto-Preminger-Institut*, *supra* note 36 at para. 50; *Murphy*, *supra* note 1190 at para. 67.
[1214] See *supra*, around note 494 and accompanying text.
[1215] See, for instance, *Dudgeon*, *supra* note 1036 at para. 52; *Chapman*, *supra* note 236 at para. 91; *A., B. and C.*, *supra* note 149 at para. 232; *Catan*, *supra* note 1039 at para. 140.
[1216] Note that this does not necessarily mean that the margin will effectively be narrowed. It is for instance possible that, due the lack of a European consensus, the margin is left broad(er) despite the presence of, for instance, a most intimate aspect of an individual's private life. See for instance *Odièvre*, *supra* note 1; *Mikulić*, *supra* note 459.
[1217] *Jäggi*, *supra* note 146 at para. 37. Note that *Jäggi* did not involve a genuine conflict between Convention rights on my account, because the person from whom a DNA sample was sought had already deceased. However, similar considerations on the centrality of the right to an identity as an integral part of the right to private life apply when the biological parent is still alive. See, for instance, *Godelli*, *supra* note 718 at para. 65. See further, outside the context of conflicting Convention rights, ECtHR, *Smith and Grady v. the United Kingdom*, app. nos. 33985/96 and 33986/96, 27 September 1999, para. 89; *Dudgeon*, *supra* note 1036 at para. 52.
[1218] *K. and T.*, *supra* note 610 at para. 155; *Görgülü*, *supra* note 1004 at 42.
[1219] *Lindon, Otchakovsky-Laurens and July*, *supra* note 40 at paras. 46 and 48.
[1220] *Ashby Donald*, *supra* note 44 at para. 39.
[1221] See for instance *Paksas*, *supra* note 1150 at para. 96; *A., B. and C.*, *supra* note 149 at para. 232; *Handyside*, *supra* note 387 at para. 48.

widened.[1222] If there *is* a European consensus on the matter, however, the margin should be reduced.

ii. The Role of the Margin of Appreciation in the Application of the Structured Balancing Test

In what preceded, I have argued that there exist important links between the margin of appreciation and conflicting Convention rights. I have particularly argued in favour of a 'default' position under which a "certain" margin of appreciation is granted to the national authorities in resolving conflicts between Convention rights. However, I have insisted that the final determination of the breadth of the margin of appreciation should be made with reference to the other 'traditional' factors mentioned above.

Here, I will further explain in what sense the margin, once determined, will have an impact on (i) the stringency with which the Court will exercise its supervisory role and, as a result, on (ii) the room left to the national authorities in balancing conflicting Convention rights.[1223]

The role of the margin of appreciation in the application of the structured balancing test can perhaps best be explained through graphical representation. Below, I offer two figures that respectively represent the substantive application of the structured balancing test, *i.e.* without any impact of the margin of appreciation (*e.g.* if the Court narrows the margin of appreciation because of the importance of the rights at stake), and its application *with* impact of the margin of appreciation (*e.g.* in case of the 'default' position of a "certain" margin of appreciation or in case of a widened margin, for instance due to the lack of a European consensus).

To further explain how the substantive application of the structured balancing test should function, let us imagine a case in which the national authorities – *i.e.* the legislator, executive and/or judiciary – have resolved a conflict between Convention right A and Convention right B to the benefit of the latter and that the holder of Convention right A has claimed a violation of her right at the ECtHR. If the margin of appreciation is narrow (*e.g.* due to the importance of the rights at stake), the Court should apply the structured balancing test in the substantive manner explained in Section I of this chapter.[1224] Figure 1 represents such substantive use of the structured balancing test, application of which may lead to three possible results.[1225] The Court may firstly find that – on balance – the conflict should be resolved to the benefit of Convention right A. The Court will thus conclude that there has been a violation of the Convention. This first result is graphically depicted by the lower (black) area in Figure 1,

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[1222] See for instance *Evans*, *supra* note 44 at para. 81; *Egeland and Hanseid*, *supra* note 996 at paras. 54-55; *Fretté*, *supra* note 1170 at paras. 41-42.
[1223] Van Drooghenbroeck, *supra* note 219 at 504.
[1224] See *supra*, Section I – 'The Structured Balancing Test, in Theory and in Practice'.
[1225] See also Ronald Dworkin's representation of judges' decisions in hard cases in the form of a "scale of confidence running from a left-hand point at which the judge is confident that the proposition favoring the applicant is true, through points at which he believes that proposition is true, but with progressively less confidence, to a right hand-side with points representing progressively more confidence that the proposition favouring the defendant is true. Then the tie point is the single point at the center of this scale." Dworkin, *supra* note 51 at 285.

which represents the finding of a violation (*i.e.* a ruling in favour of Convention right A). The Court may secondly determine that the balancing exercise sways in favour of Convention right B. In that case, the Court agrees with the domestic authorities and will thus not find a violation of the Convention. This result is graphically depicted by the higher (dark grey) area in Figure 1, which represents the finding of no violation (*i.e.* a ruling in favour of Convention right B). A third and final possibility is that application of the structured balancing test does not yield a clear result in favour of either of the conflicting Convention rights. In such a case of stalemate, strong incommensurability of both Convention rights obtains.[1226] In that scenario, the Court should decline to overrule the balancing exercise conducted at the domestic level.[1227] Instead, the Court should defer to the national authorities' resolution of the conflict. It should thus not find a violation. This final result is graphically depicted by the middle (light grey) area in Figure 1. The area is small in order to reflect the idea, indicated above, that cases of strong incommensurability are extremely rare.[1228]

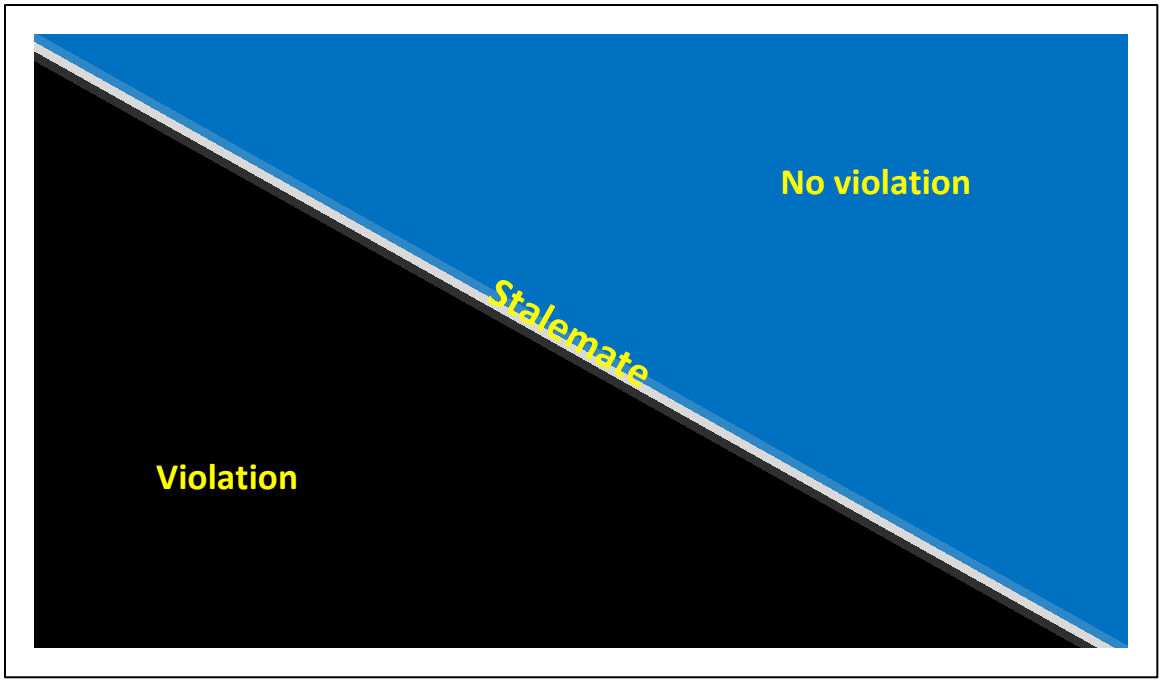

Figure 1. Substantive application of the structured balancing test

While Figure 1 represents the substantive application of the structured balancing test, Figure 2 represents the procedural application of the test, *i.e.* the application in light of the margin of appreciation granted to the State (*i.e.* either the 'default' position of a "certain" margin of appreciation applies or the margin is widened, for instance due to the lack of a European consensus). Once the breadth of the margin has been determined as "certain" or "wide", the Court should still perform a supervisory role by checking the balancing exercise conducted at

[1226] See *infra* Chapter V.
[1227] See also Barak, *supra* note 194 at 366-367; Alexy, *supra* note 691 at 443; Alexy, *supra* note 60 at 411.
[1228] See *supra* note 685 and accompanying text.

the national level.[1229] Indeed, as the Court has repeatedly held, the "domestic margin of appreciation ... goes hand in hand with a European supervision."[1230] In performing its supervisory role, the Court will verify whether the balance struck at the national level – *i.e.* generally in a judicial ruling applying national legislation – is in line with the Convention's standards.[1231] I submit that, in doing so, the Court should take the criteria of the structured balancing test as its reference point. It should verify whether the domestic authorities have taken all relevant criteria into account and whether they have applied them correctly.[1232] However, since the Court has granted the domestic authorities a margin of appreciation, it will not 'overrule' the balance struck at the national level as long as it is in line with the Convention's standards.[1233] This attitude on the part of the Court is graphically represented by the larger middle (light grey) area in Figure 2, in which the Court should take a deferential position. The larger middle area represents the idea that, the wider the margin of appreciation granted, the stronger the reasons for 'overruling' the balance struck by the domestic authorities will need to be. The size of the margin of appreciation could thus be graphically represented by enlarging or narrowing the middle (light grey) area in Figure 2. As it stands, Figure 2 could be taken to represent a case in which a certain margin of appreciation is granted to the Contracting State.

In order to further explain Figure 2, let us assume that the same background conditions apply as the ones mentioned in relation with Figure 1, *i.e.* the domestic authorities have resolved a conflict between Convention rights A and B to the benefit of the latter. Figure 2 then represents the three possible results of the Court's exercise of its supervisory role, taking into account the margin of appreciation granted to the national authorities. In verifying the balance struck at the national level against the backdrop of the criteria of the structured balancing test, the Court may come to three conclusions. The Court may firstly conclude that the balance was struck erroneously and that, even taking the margin of appreciation into account, the domestic authorities have violated the Convention.[1234] The Court should thus 'overrule' the balance struck at the national level by concluding that Convention right A should have prevailed in the conflict. This first conclusion is graphically represented by the lower (black) area in Figure 2. This area is smaller than the same area in Figure 1, thereby representing the idea that, the wider the margin of appreciation granted to the State, the less likely it is that the Court will 'overrule' the balance struck at the national level. The Court may secondly conclude that the domestic authorities have struck the correct balance. In expressing its agreement with the national authorities, the Court should thus find that the Convention has not been violated.[1235] This result is graphically depicted by the higher (dark grey) area in Figure 2, in which the Court will confirm that the balance was correctly struck in favour of Convention right B. The Court may finally conclude that the balance struck by the domestic authorities fell within the

[1229] *Handyside*, *supra* note 387 at paras. 48-50.
[1230] Ibid. at para. 49. See also *Axel Springer*, *supra* note 6 at para. 86.
[1231] *A., B. and C.*, *supra* note 149 at para. 238; *Axel Springer*, *supra* note 6 at para. 86.
[1232] *Axel Springer*, *supra* note 6 at para. 88.
[1233] Spielmann, *supra* note 1145 at 227.
[1234] See, for instance, *A. v. Norway*, *supra* note 88 at para. 74; *Axel Springer*, *supra* note 6 at para. 110.
[1235] See, for instance, *Egeland and Hanseid*, *supra* note 996 at para. 65; *Von Hannover (No. 2)*, *supra* note 44 at paras. 124 and 126.

acceptable limits of the Convention's standards. The Court should thus refuse to substitute its own views for that of the domestic authorities. In the absence of sufficiently strong reasons to 'overrule' the balance struck at the national level, the Court should instead defer to the domestic authorities and find no violation of the Convention.[1236] This third and final result is graphically depicted by the middle (light grey) area in Figure 2, which represents the situations in which the Court will assume a deferential position in application of the margin of appreciation.

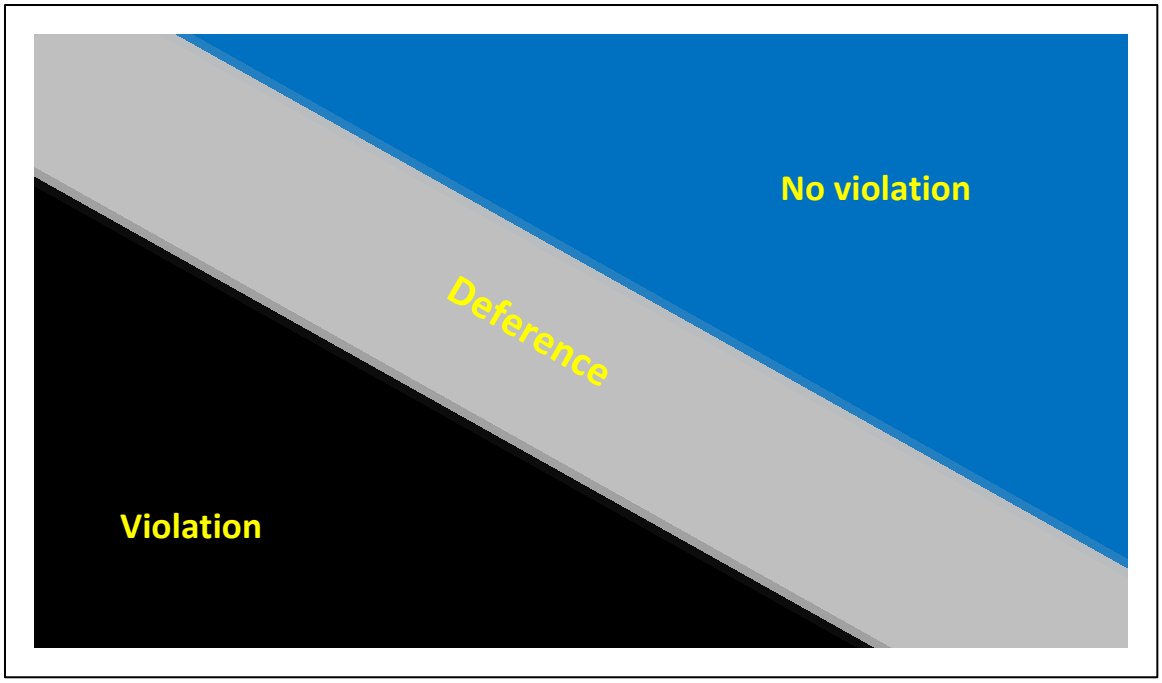

Figure 2. Procedural application of the structured balancing test

iii. The Role of Procedural Requirements

The above picture on the role of the margin of appreciation in the application of the structured balancing test tells us part of the story, but not all. We also need to factor in the importance of procedural requirements, as the last piece of the puzzle. When the Court grants the national authorities a (wide) margin of appreciation in balancing conflicting Convention rights, these procedural requirements take on a specific role. They function distinctly from any substantive considerations on the resolution of a conflict between Convention rights.

Procedural requirements may firstly operate *instead of* any substantive considerations on the resolution of a conflict between Convention rights. The Court should, for instance, continue to require that the national authorities take all relevant interests into account in conducting their balancing exercise and allow the applicant the opportunity to challenge the reasons for the measures taken against him. Whenever the national authorities have not respected these procedural obligations, the Court should – as it currently already does – find a violation of the Convention, regardless of the breadth of the margin of appreciation granted.

[1236] See, for instance, *MGN Limited*, *supra* note 3 at paras. 150 and 155.

A first example of this type of procedural requirement can be found in *Röman v. Finland*, a case involving the applicant's inability to institute a paternity claim due to the imposition of a rigid time-limit for the introduction of such a claim under national law. In its judgment, the Court found that

> "the national courts did not have any possibility to balance the competing interests but only concluded that the applicant's claim was time-barred. Thus, the national courts could not consider at all whether or not the general interest in protecting legal certainty of family relationships or the interest of the father and his family outweighed the applicant's right to have an opportunity to seek a judicial determination of paternity."[1237]

The Court concluded that

> "even having regard to the margin of appreciation left to the State … the application of a rigid time-limit for the exercise of paternity proceedings and, in particular, the lack of any possibility to balance the competing interests by the national courts, impaired the very essence of the right to respect for one's private life under Article 8 of the Convention. In view of the above, the Court finds that a fair balance was not struck in the present case between the different interests involved and, therefore, that there has been a failure to secure the applicant's right to respect for her private life."[1238]

Another example of the first type of procedural requirements can be found in *Lombardi Vallauri v. Italy*. The case involved a conflict between a professor's freedom of expression and the right to freedom of religion (in the sense of religious autonomy) of his employer, a Catholic university. The university had refused to prolong the professor's contract, because he had voiced opinions contrary to Catholic teachings. In its judgment, the Court did not substantively resolve the conflict, but instead found a procedural violation. The Court ruled that the applicant's Convention rights had been violated, because he had not been informed of the reasons for his dismissal and was therefore unable to defend himself against the allegations.[1239]

Procedural requirements may not only operate *instead of* substantive considerations, as in the examples given above, but also *in addition to* substantive considerations. This second type of procedural requirements is particularly relevant when the Court grants the national authorities a (wide) margin of appreciation in the resolution of a conflict between Convention rights. In such cases, the Court may decline to substitute its own views for the balance struck by the domestic authorities, but nevertheless find a violation, because the authorities should have provided alternative procedures that would have allowed the relevant party to vindicate her rights. Such procedural requirements are, for instance, relevant in cases involving paternity claims in countries where the law does not provide a means to compel an alleged parent to comply with a court order to undergo a DNA test. In those countries, the law thus categorically resolves the conflict between a child's right to have her personal identity

[1237] *Röman*, *supra* note 609 at para. 58.
[1238] Ibid. at para. 60.
[1239] *Lombardi Vallauri*, *supra* note 291 at para. 52.

established and her alleged parent's right to physical integrity to the benefit of the latter right. In its case law, the Court has repeatedly refused to 'overrule' the categorical balance struck at the national level, instead holding that it can "in principle be considered to be compatible with the obligations deriving from Article 8, taking into account the State's margin of appreciation."[1240] However, the Court has not stopped its enquiries there. Instead, it has gone on to find that the State should have provided procedural alternatives:

> "[t]he Court considers, however, that under such a system the interests of the individual seeking the establishment of paternity must be secured when paternity cannot be established by means of DNA testing. The lack of any procedural measure to compel the alleged father to comply with the court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily."[1241]

Whenever such alternative procedural measures are not available, the Court has ruled that the applicant's Convention rights have been violated.[1242] This illustrates how procedural requirements can function *in addition to* substantive considerations on the resolution of a conflict between Convention rights.

[1240] *Mikulić*, *supra* note 459 at para. 64. See also ECtHR, *Ebru and Tayfun Engin Çolak v. Turkey*, app. no. 60176/00, 30 May 2006, para. 95. For more on the acceptability of categorical balancing under the Convention, see *infra*, Chapter V.
[1241] Ibid.
[1242] *Mikulić*, *supra* note 459 at paras. 64-66; *Ebru and Tayfun Engin Çolak*, *supra* note 1240 at paras. 95-96.

CHAPTER V – THE LIMITS OF THE STRUCTURED BALANCING TEST? DILEMMAS IN THE CASE LAW OF THE ECTHR

Section I – Introduction

In the previous chapter, I have presented a structured balancing test for the resolution of genuine conflicts between relative Convention rights that cannot be resolved through *Praktische Konkordanz*. The structured balancing test is, *inter alia*, designed to overcome the incommensurability challenge, *i.e.* the challenge for the rational resolution of conflicts between Convention rights that arises due to the absence of a common metric to adequately express the relationship between the conflicting rights. I have argued that the structured balancing test is able to overcome the challenge from weak incommensurability (*i.e.* the absence of a common metric), since it allows for the rational comparison of conflicting Convention rights. However, I have indicated that there are limits to what the structured balancing test can achieve. In particular, the test is incapable of resolving those rare conflicts in which strong incommensurability obtains. As explained above, strong incommensurability is the "sort of incommensurability that can leave us paralysed, not knowing what to choose".[1243] The structured balancing test is not able to rationally resolve conflicts in which such strong incommensurability obtains, because – per definition – *rational* choice between strongly incommensurable rights is not possible. In order to explore the limits of the structured balancing test – the objective of this chapter – we therefore have to determine when strong incommensurability obtains.

I submit that strong incommensurability is particularly likely to obtain in those ECtHR cases that have been characterised, in the literature and in the Court's case law, as involving a dilemma. I will therefore explore the Court's case law on dilemmas in this chapter. I will start by taking a closer look at the concept of "dilemma", in Section II. Initially, I will define the notion broadly, as a conflict involving an element of tragic choice. I will then, in Section III, analyse two high profile ECtHR cases that conform to this broad definition: *Odièvre v. France* and *Evans v. the United Kingdom*. I will, in particular, determine whether or not those cases can be rationally resolved through application of the structured balancing test. The analysis will reveal that, while *Odièvre* can be rationally resolved *Evans* cannot. The latter case thus presents us with a situation of strong incommensurability, which I consider to be the defining characteristic of *genuine* dilemmas. I will argue that the Court should adopt a deferential stance to such genuine dilemmas, leaving their resolution to the national legislator.

[1243] Waldron, *supra* note 202 at 815-816.

Section II – The Concept of Dilemma: Tragic Choices and Strong Incommensurability

In presenting his substantive theory on 'constitutional dilemmas', Lorenzo Zucca has listed four characteristics as central to his definition of (constitutional) dilemmas: (i) joint incompatibility of fundamental legal rights; (ii) the existence of a (constitutional) tragedy, which "lurks behind these types of conflicts"; (iii) the inevitability of loss for one of the parties involved; (iv) and the inability to determine one rational right answer to solve the case.[1244] Two elements – tragic choice and strong incommensurability – appear to lie at the core of Zucca's definition, which offers a useful starting point for the analysis of dilemmas in the case law of the ECtHR.[1245] The first and fourth characteristic mentioned by Zucca – *i.e.* the joint incompatibility of fundamental legal rights and the inability to determine one rational right answer to solve the case – point towards the existence of a conflict between fundamental rights in which *strong incommensurability* obtains. The second and third consideration – *i.e.* the existence of a (constitutional) tragedy and the inevitability of loss for one of the parties involved – serve to emphasise the *tragic choice* involved in the conflict.[1246]

Further insights into the identification of dilemmas can be found in David Martínez Zorilla's comment on Zucca's work.[1247] Martínez Zorilla has clarified that "the expression "moral dilemma" is not normally used to refer to a case of (moral) normative conflict."[1248] Instead, he submits, "the label is only used in situations of especially relevant or intense conflict."[1249] Martínez Zorilla has also described the two main positions on dilemmas, proposed by scholars to set them apart from "simple" conflicts between rights.[1250] He explains that the first position focuses on the element of indeterminacy (*i.e.* on the inability to provide a rational solution to a conflict; strong incommensurability), while the second position emphasises the tragic element involved (*i.e.* the inevitability of a serious loss).[1251]

I have already – indirectly – addressed the concept of dilemma at the start of Chapter III, where I have discussed the difference between weak and strong incommensurability.[1252] There, I argued that strong incommensurability precludes rational choice, while weak incommensurability does not. I submitted that weak incommensurability can be overcome, provided that a test can be developed to rationally compare weakly incommensurable item (in our case Convention rights). To provide for such rational comparison, I developed a structured balancing test. The test offers a number of criteria designed to allow for the rational resolution of conflicts between relative Convention rights by the ECtHR. It is only when the

[1244] Zucca, *supra* note 26 at 26. See also Zucca, *supra* note 758 at 447 (however, here Zucca is less clear on what he considers to constitute a genuine dilemma).
[1245] See Bomhoff and Zucca, *supra* note 660 at 430-431 and 441.
[1246] See also on the element of tragic choice, S. Alvarez, 'Constitutional Conflicts, Moral Dilemmas and Legal Solutions', 24 *Ratio Juris* (2011) at 61-63 and 66-68.
[1247] D. Martínez Zorrilla, 'Constitutional Dilemmas and Balancing', 24 *Ratio Juris* (2011), 347-363.
[1248] Ibid. at 349.
[1249] Ibid.
[1250] Ibid.
[1251] Ibid. at 349-350. Martínez Zorrilla explains that some scholars – including himself – give priority to the first element, while others prefer the second. See ibid. at 350.
[1252] See *supra* Chapter III, Section I – 'Balancing and the Theoretical Challenge of Incommensurability'.

test fails, *i.e.* when rational choice proves to be impossible, that the Court will be faced with strong incommensurability. I have thus adopted a view of weak incommensurability as a state that obtains *prior to* an attempt at rational resolution of a conflict between Convention rights, while I have considered strong incommensurability to be the result that will – in rare situations – obtain *after* that attempt has failed. Here, I submit that those rare situations in which strong incommensurability obtains present the Court with *genuine* dilemmas, characterised by the inability to rationally choose between conflicting Convention rights.[1253]

The above considerations relate solely to the second position on dilemmas, as described by Martínez Zorilla: the focus lies on the element of strong incommensurability, *i.e.* on the inability to provide rational solutions to a conflict. I consider this characteristic to be central to the definition of a *genuine* dilemma. However, I have argued that we can only learn about the existence of such strong incommensurability *after* we have attempted to rationally resolve a case of conflicting Convention rights. We are thus faced with a problem: how do we select the relevant cases in the first place? We indeed need a way to identify those cases in which strong incommensurability is most likely to obtain. To that end, I suggest to track the broad contours of a dilemma. The second element highlighted by Zucca and Martínez Zorilla – *i.e.* the element of tragic choice – is particularly useful for that purpose. The sense that a case presents us with a tragic choice offers a rudimentary – but inconclusive – indication that allows us to distinguish (potential) dilemmas from 'standard' conflicts between Convention rights.[1254] The absence of a sense of tragedy allows us to weed out genuine conflicts between Convention rights in which a loss to one of the parties is inevitable, but which can nevertheless be resolved rationally (*e.g.* defamation cases).[1255] The presence of an element of tragedy, conversely, signals that a conflict *may* involve a genuine dilemma: a particularly intense conflict that cannot be resolved rationally.

I thus submit that both elements highlighted by Zucca and Martínez Zorilla – tragic choice and strong incommensurability – need to be combined in order to identify genuine dilemmas.[1256] I suggest to start off with a broad definition of dilemmas, as conflicting Convention rights cases that entail a tragic choice. This broad definition allows us to identify those cases that *may* involve the second element: strong incommensurability. In order to determine whether or not that is the case, we need to attempt to resolve the relevant cases with use of the structured balancing test proposed in Chapter IV. If application of the test offers a clear, rational solution to the conflict, it does not involve a *genuine* dilemma, since the required element of strong incommensurability is absent. Conversely, if the structured balancing test is not able to provide a rational solution to the conflict, we are faced with a genuine dilemma, *i.e.* one in which strong incommensurability obtains. I will argue that, in the latter case, the Court should defer to the national legislator.

[1253] See also Martínez Zorrilla, *supra* note 1247 at 350. On the connection between incommensurability and moral dilemmas, see Raz, *supra* note 136 at 359.
[1254] See also Sunstein, *supra* note 648 at 859.
[1255] Alvarez, *supra* note 1246 at 63 and 66-68; Martínez Zorrilla, *supra* note 1247 at 351.
[1256] See also Alvarez, *supra* note 1246.

Section III: Analysis of the Court's Case Law on Dilemmas

1. Selection of Cases

When exploring the Court's vast case law in search of those cases that might entail a genuine dilemma, a number of high profile cases spring to mind in which the Court was faced with a particularly intense conflict: *Odièvre v. France*, *Evans v. the United Kingdom* and *Gäfgen v. Germany*.[1257] These three Grand Chamber cases involved conflicts in which tragic choices were inevitable. They thus conform to the broad definition of dilemmas offered above.

The case of *Odièvre* involved a conflict between the applicant's right to know her origins and the right to decisional privacy of her mother, who had given birth to her daughter anonymously. The conflict in *Odièvre* entailed an inevitable and tragic choice between both persons' Convention rights, with wider repercussions for the system of anonymous birth in France. In its judgment, the Court confirmed as much by referring to "the ethical dilemma posed by the right to give birth anonymously",[1258] while concurring Judge Rozakis emphasised "the obvious dilemma" inherent in the case.[1259]

The *Evans* case involved a conflict between the applicant's decisional privacy to become a genetic parent and the decisional privacy of her former partner, who had revoked his consent to use the embryos for IVF treatment. The characterisation of *Evans* as a dilemma is primarily due to the fact that the applicant had ovarian cancer and the IVF treatment in question was her last and only chance to become a genetic parent, since her ovaries had been removed once the necessary eggs for the IVF treatment had been extracted. These unfortunate circumstances infused the conflict with the particular kind of intensity that rendered a tragic choice

[1257] Other cases that spring to mind are those on assisted suicide (for instance, *Pretty*, *supra* note 36; and ECtHR, *Haas v. Switzerland*, app. no. 31322/07, 20 January 2011) and abortion (see, for instance, *A., B. and C.*, *supra* note 149; *R.R.*, *supra* note 536; *P. and S.*, *supra* note 536). See, for instance, Rietiker, *supra* note 519 at 86 (describing *Haas* as involving a dilemma); Zucca, *supra* note 26 at 160-161 (describing physician assisted suicide as a constitutional tragedy); Gerards, *supra* note 664 at 122 (describing abortion cases at the ECtHR as moral dilemmas). However, I will not deal with these cases here, for different reasons. I will not deal with the cases on assisted suicide, because – as I explained in Part I – I do not consider them to entail a genuine (intrapersonal) conflict between Convention rights. See *supra* notes 518-523 and accompanying text. I will not deal with the abortion cases for two distinct reasons. I will not deal with the potential dilemma inherent in abortion cases generally, as it arose in *A., B. and C. v. Ireland*, because the current research focuses on conflicts between Convention rights, while – as I explained in Part I – *A., B. and C.* involved a conflict between a Convention right and a constitutional right that is not recognised as a human right under the ECHR. See *supra* notes 389-393 and accompanying text. I will also not deal with the personal dilemma faced by doctors who refuse to perform an abortion, because they consider it to go against their religious convictions, a situation that arose in *R.R. v. Poland* and *P. and S. v. Poland*. I do not deal with that personal or ethical dilemma here, because the cases in question do not involve a legal dilemma for the Court. Indeed, as indicated above, the conflict in both cited cases can be dissolved as fake by imposing a duty on the State to "organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation." See *R.R.*, *supra* note 536 at para. 206; *P. and S.*, *supra* note 536 at para. 106. See *supra* notes 536-538 and accompanying text. See further on cases that involve an ethical or moral dilemmas to the parties, but do not involve a legal dilemma for courts, Alvarez, *supra* note 1246 at 64-68.

[1258] *Odièvre*, *supra* note 1 at para. 19.

[1259] Concurring opinion of Judge Rozakis in ibid.

inevitable. Indeed, *Evans* has been repeatedly described as a dilemma, in the Court's judgment and in the literature.[1260]

The case of *Gäfgen*, finally, involved police officers threatening to torture a kidnap suspect in an attempt to force him to disclose the location of his victim, an 11-year old boy who – the police assumed – was still alive.[1261] The conflict in *Gäfgen* involved a tragic choice between torturing a suspect and saving a young boy's life (even if, in reality, it was not possible to save the boy's life, since he had already been killed at the time of the suspect's interrogation). This is confirmed by the description of the case in the literature and in the Court's own judgment.[1262] The dissenting Judges, for instance, described the situation faced by the police officers as "extremely serious and tragic".[1263]

In this chapter, I will not deal with the last case – *Gäfgen v. Germany* – since the purpose of the current chapter is to determine whether or not the structured balancing test proposed in Chapter IV is able to offer a rational solution to conflicts that can be broadly described as dilemmas. Crucially, the structured balancing test is only designed to deal with conflicts between *relative* Convention rights. The *Gäfgen* case, however, entails a conflict between an absolute Convention right (art. 3) and a relative Convention rights (art. 2). As such, it falls outside the purview of the structured balancing test. For that reason, I will not engage with *Gäfgen v. Germany* here, but will instead deal with the case later, in Chapter VII. There, I will argue that the legal resolution of the conflict in *Gäfgen* is straightforward: the absolute Convention right prevails over the relative Convention right. In that respect, *Gäfgen* immediately illustrates that a case that involves a dilemma – broadly defined as a conflict involving a tragic element – can nevertheless have a rational and straightforward solution. This will be confirmed by the in depth analysis of *Odièvre*, presented immediately below. The analysis will demonstrate that the conflict in *Odièvre* can be resolved rationally through application of the structured balancing test. However, the opposite holds true for *Evans*. I will demonstrate that *Evans* resists rational resolution through application of the structured balancing test. I will argue that, therefore, *Evans* is one of those rare cases in which strong incommensurability obtains. Ultimately, of the three identified cases, *Evans* will thus be the only case in which a *genuine* dilemma arises: a particularly intense conflict between Convention rights that involves an element of tragedy *and* cannot be rationally resolved.

[1260] *Evans*, *supra* note 44 at para. 73; Bomhoff and Zucca, *supra* note 660 at 430-431; Zucca, *supra* note 758 at 447.
[1261] *Gäfgen*, *supra* note 2.
[1262] See, for instance, S. Greer, 'Should Police Threats to Torture Suspects always be Severely Punished? Reflections on the Gäfgen Case', 11 *Human Rights Law Review* (2011) at 69 (describing *Gäfgen* as a dilemma); W. Wierenga and S. Wirtz, 'Case of *Gäfgen versus Germany*: How Absolute is the Absolute Prohibition of Torture? The Outcome of an Ethical Dilemma', 16 *Maastricht Journal of European and Comparative Law* (2009) at 365 (describing *Gäfgen* as a dilemma).
[1263] Partly dissenting opinion of Judges Casadevall, Kovler, Mijović, Jaeger, Jočienė and López Guerra in *Gäfgen*, *supra* note 2 at para. 1.

2. *Odièvre v. France*: The Success of the Structured Balancing Test

i. The Facts and the ECtHR Judgment

The applicant in *Odièvre* was a woman – 37 years old at the time of the Grand Chamber judgment – whose biological mother had given birth anonymously. The applicant's mother had specifically requested that the birth be kept secret, a possibility catered for under French law. At the age of three, the applicant was adopted by Mr. and Ms. Odièvre. Two decades later, at the age of 25, she consulted her file as a person formerly in the care of the Children's Welfare Service and managed to obtain non-identifying information about her natural family. The information included a description of the applicant's mother and father, as well as her mother's surname (but not her father's). The file further described the living conditions of her parents and indicated that the applicant's father, who was married to another woman, "refuses to have anything to do with [the applicant] and says that he cannot take on this new burden."[1264] The file finally also described the applicant mother's attitude in the face of the impending abandonment of her daughter, noting that she "appears to have no will of her own and is content to go along with her partner's wishes. She has not visited her daughter at the clinic, saying that she does not wish to become attached. She did not see her daughter until today and greeted their separation with total indifference."[1265]

In 1998, at the age of 32, the applicant requested a court order for the "release of information about her birth and permission to obtain copies of any documents, birth, death and marriage certificates, civil-status documents and full copies of long-form birth certificates."[1266] The applicant filed the request after she discovered that her biological parents had three other children, all of which were boys and two of which were born after the applicant's birth in 1965. The applicant claimed that "now that she knew of her siblings' existence, she was entitled to seek an order for the release of information about her own birth."[1267] However, her request was refused. The relevant court did not even examine the applicant's claim. Instead, the registrar informed her that she "should consider applying to the administrative court to obtain, if possible, an order requiring the authorities to disclose the information, although such an order would in any event contravene the [applicable legislation]."[1268]

The applicant subsequently brought her case to the ECtHR, where the Grand Chamber ruled against her. The Court recognised that the case involved a conflict between the applicant's right to know her origins under art. 8 and the right to decisional privacy of the applicant's mother, also under art. 8.[1269] As mentioned above, the Court described the conflict as a "dilemma",[1270] which it resolved to the detriment of the applicant's Convention rights.[1271]

[1264] *Odièvre*, *supra* note 1 at para. 12.
[1265] Ibid.
[1266] Ibid. at para. 13.
[1267] Ibid.
[1268] Ibid. at para. 14.
[1269] Ibid. at para. 44.
[1270] See *supra* note 1258 and accompanying text.

The Grand Chamber judgment in *Odièvre* is perhaps best known for Judge Rozakis' concurring opinion, in which he insisted that "when, as in the present case, the Court has in its hands an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself and embarks on a painstaking analysis of them, reference to the margin of appreciation should be duly confined to a subsidiary role."[1272] Rozakis continued: "[i]f one reads the judgment carefully, one realises that the Court has proceeded to an analysis of the competing interests involved, applying explicitly or implicitly its own case-law in order to find which of the competing interests ... are more worthy of protection and for which reasons."[1273]

ii. Applying the Structured Balancing Test

In what follows, I will apply the structured balancing test of Chapter IV to the conflict in *Odièvre*, in order to determine whether it can be resolved rationally. The analysis will show that the concurring opinion of Judge Rozakis was spot-on. Indeed, throughout the Court's judgments a variety of arguments can be found that – when organised in terms of the structured balancing test – provide rational support for the Court's ruling. Application of the structured balancing test will thus reveal that *Odièvre* does not involve a genuine dilemma, since the conflict inherent in the case has a rational solution.

However, before applying the structured balancing test to *Odièvre*, we first need to assess the role of the margin of appreciation in the case at hand, since the margin will have an impact on the balancing exercise. In *Odièvre*, the Court granted the State a certain margin of appreciation in securing respect for the art. 8 rights of the applicant.[1274] It tied this margin directly to the absence of a European consensus on the matter and to the fact that the case involved a complex and sensitive issue.[1275] Since it is not the objective of the current research to present a general critique on the role of the margin of appreciation in the Court's case law, I will take the margin of appreciation granted by the Court in *Odièvre* as a given.[1276] This margin will have an impact on the application of the structured balancing test, as will become clear below.

As already explained above, application of the structured balancing test is a two-step process, which is moreover influenced by the role of the margin of appreciation granted to the Contracting State in question. First, in step one, I will apply the seven criteria of the structured balancing test separately to the conflict in *Odièvre*, in order to determine (i) whether the

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[1271] The Court's reasoning is reproduced immediately below, in the analysis of the judgment.
[1272] Concurring opinion of Judge Rozakis in *Odièvre*, *supra* note 1.
[1273] Ibid.
[1274] *Odièvre*, *supra* note 1 at para. 40.
[1275] Ibid. at paras. 47 and 49.
[1276] For criticism of the majority's approach to the margin of appreciation in *Odièvre*, see the dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre*, *supra* note 1 at paras. 10-16. If these arguments are accepted, the margin would of course be reduced. Nevertheless, the outcome of the case would remain the same, since - as the application of the structured balancing test in the text demonstrates - the reasons for finding against the applicant are stronger than those for finding in her favour.

criteria offer reasons in favour of either of the conflicting Convention rights; and (ii) how strong those reasons are. Once I have examined all criteria separately, I will – in step two – combine all relevant arguments by weaving them into nets of arguments. I will demonstrate that comparison of these nets offers a rational, supportive structure for the Court's ruling in *Odièvre* against the applicant and – thus – in favour of her mother's Convention right. As will become clear, the margin of appreciation plays an important role in both steps of the process.

As already mentioned, I will start off by considering the seven criteria of the structured balancing test separately. The first criterion – the value criterion – is inapplicable to the conflict in *Odièvre*, given that both conflicting Convention rights are protected by art. 8, which is not a Convention right that – in my argument – should be granted a higher abstract weight in the balancing test.

In examining the second criterion of the structured balancing test – the impact criterion – we need to answer two questions. The first relates to the damage done to each of the conflicting Convention rights, the second to the likelihood that the damage will actually occur. To assess the damage done to each of the conflicting rights, let us first imagine that the conflict is resolved to the benefit of the mother's Convention right, as was the case in the domestic proceedings in *Odièvre*. In that case, the damage done to the applicant's Convention right could – in the absence of mitigating factors – be described as "serious", since she was deprived of the possibility to obtain information about her origins. However, as pointed out by the Court, the damage done to the applicant's Convention right was in fact mitigated: "the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots."[1277] That information included the surname of her mother, a physical description of her mother and father and a description of the circumstances that caused her mother to give birth anonymously. However, other crucial pieces of information, such as the place of birth, the mother's first name and the father's name, remained inaccessible to the applicant. As a result, the damage done to her right to know her origins was merely mitigated, not erased. It therefore appears appropriate to label that damage as "moderate".

If we now imagine the opposite scenario, in which the conflict would be resolved to the benefit of the applicant's Convention right, the mother's request for secrecy would be overruled. As a result, the mother's right to decisional privacy would suffer damage that can be labelled as "serious". Moreover, in her case, no possibility would exist to mitigate that damage, since it takes its full effect as soon as the secrecy is lifted.

Turning our attention to the second question, on the likelihood that the damage would take effect, we notice that the damage is "certain" in both scenarios. Indeed, both conflicting Convention rights would inevitably suffer damage if the conflict were to be resolved to the benefit of the other Convention right.

[1277] *Odièvre*, *supra* note 1 at para. 48.

Thus, to sum up, application of the impact criterion gives us the following results: the applicant's Convention right would suffer "certain" and "moderate" damage, while her mother's Convention right would suffer "certain" and "serious" damage.

Moving on to the third criterion – the core-periphery criterion – it becomes clear that this was the *locus* of disagreement between the majority and the minority in *Odièvre*. The majority appeared to be of the opinion that the applicant's Convention right was located close to the periphery of art. 8. Indeed, the majority insisted that "people have a right to know their origins, that right being derived from *a wide interpretation* of the scope of the notion of private life."[1278] The dissenting Judges, conversely, argued that a core right of the applicant was at stake:

> "certain aspects of the right to private life are peripheral to that right, whereas others form part of its inner core. We are firmly of the opinion that the right to an identity, which is an essential condition of the right to autonomy ... and development ... is within the inner core of the right to respect for one's private life."[1279]

The dissenting Judges arguably presented the stronger argument. Indeed, the applicant's right to know her origins is closely tied to her right to an identity and therefore falls to be located closer to the core of art. 8 than to its periphery, where such rights as the right to give birth at home dwell.[1280] However, neither the majority, nor the minority assessed the other Convention right at stake: that of the mother. Her right to decisional privacy arguably also falls to be located closer to the core of art. 8 than to its periphery. Application of the core-periphery criterion does therefore not add any arguments in favour of – nor against – either of the conflicting Convention rights. It is difficult – indeed, impossible – to claim that one of the rights is located closer to the core of art. 8 than the other.

In terms of the additional rights criterion, the majority in *Odièvre* insisted that the conflict was not limited to the Convention rights of the applicant and her mother, but also involved those of other persons:

> "[i]n addition to that conflict of interest [*i.e.* between the applicant and her mother], the problem of anonymous births cannot be dealt with in isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of the natural family. The Court notes in that connection that the applicant is now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for

[1278] *Odièvre*, *supra* note 1 at para. 44 (emphasis added).
[1279] Dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in ibid. at para. 11.
[1280] *Cf. Jäggi*, *supra* note 146 at para. 37 ("the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests."). See also Besson, *supra* note 756 at 151 (interpreting the cited passage in *Jäggi* as a confirmation that "the right to identity, and hence to know one's origins, belongs to the inner core of the right to respect for one's private life").

> the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life."[1281]

Indeed, the conflict in *Odièvre* was not a binary one, but – as correctly indicated by the majority – a multipolar one. However, we should not overestimate the extent to which the Convention rights of the persons listed by the majority were actually at stake. It is particularly difficult to appreciate how the right to respect for private and family life of the adoptive family would be affected by the applicant – now an adult woman – obtaining information about her origins.[1282] The rights of the adoptive family are, in that respect, irrelevant to the balancing exercise.

Matters are different, however, for what concerns the rights of the applicant's biological father. Under the circumstances of the case it is safe to assume that he would have preferred to not see his identity disclosed. His right to private life was thus effectively at stake in the conflict.

As for the right to respect for the private and family life of the applicant's siblings, it is impossible to assess how these rights affected the balancing exercise under the circumstances of the case at hand, since we have no information on the siblings' knowledge and preferences. The siblings may not even have known about the applicant's existence, in which case it is impossible to gauge the relevance of their right to respect for private and family life. As a result, the siblings' right to private and family life cannot play a role in the application of the additional rights criterion.

In sum, the only additional right that offers reasons in favour of one of the conflicting Convention rights in *Odièvre* is the right to respect for the biological father's private and family life. His right clearly plays to the benefit of the mother's right. However, its relevance cannot decide the case on its own, since – as indicated above – the presence of additional rights does not, in the absence of other distinguishing factors, offer conclusive reasons for the resolution of a conflict.[1283] The (additional) rights of the biological father thus offer a presumptive, but inconclusive reason for resolving the conflict to the benefit of the mother's Convention rights. This factor needs to be weaved into the nets of arguments that will be constructed once all criteria of the balancing test have been assessed separately.

The fifth criterion – the general interest criterion – also featured explicitly in the Court's judgment in *Odièvre*. Indeed, the majority held that

> "[t]here is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value

[1281] *Odièvre*, *supra* note 1 at para. 44.
[1282] See also the dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in ibid. at para. 8 ("[a]s to the need to protect the adoptive parents, a factor also relied on by the majority, there is nothing in the case file to suggest that they were opposed to the applicant's actions").
[1283] See *supra* notes 1051-1052 and accompanying text.

> guaranteed by the Convention, is thus one of the aims pursued by the French system."[1284]

For reasons set out in Part I, the reference to "the right to respect for life" should not be read as entailing a further conflict between Convention rights. Because the 'right' in question was only speculatively at stake *and* was held by indeterminate individuals, it cannot be regarded as a Convention right that conflicted with the actual Convention right held by the applicant, an identified individual. Instead, the Court's reference to the general interest at the start of the cited passage more accurately describes what is also – in addition to the conflict between the Convention rights of the applicant and her mother – at stake in *Odièvre*: the protection of a general interest, namely the value of life.

However, the minority in *Odièvre* disagreed:

> "[a]s regards the general interest ... it should be noted that at present there is no reliable data to support the notion that there would be a risk of an increase in abortions, or even of cases of infanticide, if the system of anonymous births was abolished."[1285]

The dissenting Judges also compared the French system to the system adopted in other Council of Europe State. They specifically noted that

> "[i]t has not been established, in particular by statistical data, that there has been a rise in the number of abortions or cases of infanticide in the majority of the countries in the Council of Europe that do not have legislation similar to that existing in France."[1286]

I submit that it is here, in the assessment of the role played by the general interest in the resolution of the conflict in *Odièvre*, that the margin of appreciation becomes particularly relevant.[1287] When the Court grants a certain margin of appreciation to the State in determining the measures needed to secure protection of the relevant Convention rights, a certain measure of deference is called for when the Court assesses whether those measures adhere to the Convention's standards. If the margin of appreciation has any substantive meaning, it indeed calls for acceptance of the fact that different Council of Europe States tackle the same problem in different manners and that all those approaches *can* be in line with the Convention's standards.[1288] The Court would thus need convincing evidence to the

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[1284] *Odièvre*, *supra* note 1 at para. 45.
[1285] Dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre*, *supra* note 1 at para. 9.
[1286] Ibid.
[1287] It should be noted that the arguments offered in the text relate solely to the impact of the margin of appreciation on the reasoning of the Court in assessing the relevance of a general interest invoked *in the context of a conflict between Convention rights*. They cannot necessarily be translated to cases of direct opposition between a Convention right and a general or public interest, to which the Court's version of the proportionality test applies, as argued in Part I, Chapter III, Section III – 'The 'Argument from Procedure': Underestimating the Complexities of Conflicting Convention Rights Cases'.
[1288] Garlicki, *supra* note 867 at 391. This idea was expressed as follows by the majority in *Odièvre*, *supra* note 1 at para. 49: "[t]he Court observes ... that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling [competing] interests". The dissenting Judges of course rejected the majority's argument that France enjoys a margin of appreciation in resolving the conflict in *Odièvre*.

contrary before it would be able to dismiss France's argument that its system contributed to the protection of the general interest. However, under the circumstances, no such evidence existed. The dissenting Judges only referred to the *absence* of evidence, which is arguably insufficient to 'overrule' the margin of appreciation granted by the majority. Indeed, it is difficult to maintain that the system of anonymous births does not have the capacity to contribute to the protection of the general interest mentioned by the majority. Therefore, it must at least be accepted that that general interest was effectively at stake in the case, even if the extent to which it is at stake remains uncertain. Once that premise is accepted, it is undeniable that the general interest criterion plays to the benefit of the Convention right of the biological mother. Similarly to the additional rights criterion, it thus provides a presumptive, but inconclusive reason for resolving the conflict in *Odièvre* in favour of the mother's Convention right.[1289]

In the particular circumstances of the *Odièvre* case, the sixth and seventh criterion – the purpose criterion and the responsibility criterion – are not applicable. They can thus be disregarded.

Having examined all seven criteria of the structured balancing test separately, we can now move on to the second step of the test by weaving all arguments into nets. The basic structure of both nets – *i.e.* the net that comprises the arguments in favour of the applicant's Convention right and the net that comprises the arguments in favour of her mother's Convention right – is provided by the impact criterion, under which I argued that the Convention right of the applicant suffered "certain" and "moderate" damage, while the Convention right of her biological mother would suffer "certain" and "serious" damage if the conflict were to be resolved to the benefit of the applicant's Convention right. Under the impact criterion, the reasons for finding in favour of the mother's Convention right are thus stronger than those for finding in favour of the applicant's Convention right. This preliminary conclusion is not altered by the core-periphery criterion. Indeed, since both Convention rights at stake lie equally close to the core of art. 8, the core-periphery criterion does not offer reasons in favour of either right. The additional rights criterion and the general interest criterion, however, offer clear reasons in favour of the mother's Convention right and thus strengthen the basic structure of her net. Since the purpose criterion and the responsibility criterion are not applicable to the case at hand, they are not able to alter that conclusion. Application of the structured balancing test thus leads to the conclusion that, under three of the relevant criteria, the reasons for finding in favour of the mother's Convention right are stronger than those for finding in favour of the applicant's Convention right. The remaining criteria are either inapplicable or do not offer reasons in favour of either right. It is thus clear that the conflict in

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Instead, they argued that the "fairest scrutiny was called for when weighing up the competing interests." See the dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre*, *supra* note 1 at para. 11. If the minority's argument on the margin of appreciation would be accepted, the assessment under the general interest criterion would, of course, change. If a narrow margin of appreciation (strict scrutiny) would apply, France could indeed be expected to prove that its system contributed effectively to the reduction of abortions, particularly illegal ones, and of child abandonments outside the proper procedures. In the absence of such proof, the dissenters' argument on the general interest would be the correct one: it would become irrelevant to the resolution of the conflict.

[1289] See *supra*, around note 1057 and accompanying text.

Odièvre was correctly resolved – by the majority of the Grand Chamber – to the benefit of the mother's Convention right, since her right is supported by stronger reasons than the applicant's Convention right. The conclusion that the majority correctly decided the case is further strengthened by the fact that the State enjoyed a certain margin of appreciation. Indeed, in light of the margin of appreciation granted to the State, the Court would have needed clear evidence that the balance was struck erroneously before it could find a violation of the Convention.

Since the application of the structured balancing test to the conflict in *Odièvre* offers a rational solution thereto, it also becomes clear that the case did not entail a *genuine* dilemma: it did not involve a situation of strong incommensurability. The ECtHR case I will examine next, however, did.

3. *Evans v. the United Kingdom*: The Limits of the Structured Balancing Test

i. The Facts and the ECtHR Judgment

The applicant in *Evans* was a woman who wished to undergo IVF treatment in order to have a genetic child. However, she was precluded from doing so because her former partner (J.) withdrew his consent for the use of the embryos. A few years earlier, when the applicant and J. were still together, they were undergoing medical treatment to increase their chances of having genetic children. In the process, preliminary tests revealed that the applicant had serious pre-cancerous tumours in both ovaries. She was informed that her ovaries would have to be removed. She was also told that, because the tumours were growing slowly, it would be possible to first extract some eggs for *in vitro* fertilisation. The applicant and her partner were informed that they would each have to sign a form consenting to the IVF treatment and that, in accordance with the applicable legislation, it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus. Both partners signed the requisite form. Eleven of the applicant's eggs were subsequently harvested and fertilised with J.'s sperm. Six embryos were eventually created and consigned to storage. Afterwards, Ms. Evans underwent an operation to remove her ovaries, which meant that the use of the stored embryos would be her last and only chance to have a genetic child. However, before it became possible to implant the embryos, the couple's relationship broke down. J. subsequently withdrew his consent for the further use and storage of the embryos. Ms. Evans knew that she would, as a result, not be able to undergo the IVF treatment and instituted judicial proceedings, seeking an injunction order requiring J. to restore his consent to the use and storage of the embryos. However, the domestic courts dismissed her claims. The Court of Appeal found the interference with her private life to be justified and proportionate, ruling in particular that

> "[t]he less drastic means contended for here [*i.e.* by the applicant] is a rule of law making the withdrawal of [J.'s] consent non-conclusive. This would enable [the

> applicant] to seek a continuance of treatment because of her inability to conceive by any other means. But unless it also gave weight to [J.'s] firm wish not to be father of a child borne by [the applicant], such a rule would diminish the respect owed to his private life in proportion as it enhanced the respect accorded to hers. Further, in order to give it weight the legislation would ... require a balance to be struck between two entirely *incommensurable* things."[1290]

Ms. Evans eventually brought her case to the ECtHR, where the Grand Chamber of the Court held against her, finding no violation of her art. 8 rights. In its judgment, the Court described the case as a dilemma:

> "[t]he dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos J. will be forced to become a father, whereas if J.'s refusal or withdrawal of consent is upheld the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated."[1291]

By using terms such as "entirely irreconcilable" and "wholly frustrated", the Court arguably emphasised the inevitability of tragic choice inherent in the case. The Court's use of the term "dilemma" thus falls to be interpreted in the broad sense described above: as a particularly intense conflict in which a tragic choice has to be made.[1292]

The Court subsequently held that, in its judgment, it had "to determine whether, in the special circumstances of the case, the application of a law which permitted J. effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests."[1293] The Court moreover awarded the State a wide margin of appreciation, "since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the member States."[1294] The Court eventually ruled that the applicant's art. 8 rights had not been violated, "given the lack of European consensus on [the matter], the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests." Regarding the balance struck between the conflicting Convention rights under UK law, the Court ruled as follows:

[1290] *Evans*, *supra* note 44 at para. 25 (emphasis added).
[1291] Ibid. at para. 73.
[1292] Note that the Court mentioned the term incommensurability, but did so only in reference to the judgment of the Court of Appeal: "[i]n addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, *what the Court of Appeal described as* "entirely incommensurable" interests." (emphasis added). Ibid. at para. 89.
[1293] Ibid. at para. 83.
[1294] Ibid. at para. 81.

> "[a]s regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point … it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically related child with her."[1295]

The ECtHR thus found against the applicant. However, it did so without indicating that her Convention rights were less worthy of protection than those of her former partner. Indeed, the Court held that "it does not consider that the applicant's right ... *should be accorded greater weight than* J.'s right" (emphasis added). Crucially, the Court did *not* rule that the applicant's right should be accorded less weight than J.'s right, nor – the equivalent – that J's right should be accorded greater weight than the applicant's right.[1296] The Court instead appeared to indicate that it could not – or did not need to – determine which of both Convention rights ought to be granted "greater weight". The hesitance on the part of the Court can be perfectly explained in terms of the wide margin of appreciation granted to the United Kingdom. The Court indeed referred to "the lack of any European consensus" in justifying its ruling that "it does not consider that the applicant's right ... should be accorded greater weight than J.'s right". However, as I will explain immediately below, the Court's ruling can also be explained in terms of strong incommensurability.

Below, I will demonstrate that the structured balancing test of Chapter IV is incapable of offering a rational solution to the conflict between Convention rights under the – rare – circumstances of the *Evans* case. I will argue that this impossibility of rational choice between the conflicting Convention rights offers a strong reason for the Court to defer the resolution of the conflict to the national legislator, over and above the reasons drawn from the granting of a wide margin of appreciation to the State.

ii. Strong Incommensurability as a Reason for Deference

If we attempt to apply the structured balancing test of Chapter IV to *Evans*, we immediately notice that a large number of its criteria are entirely irrelevant to the case at hand. In particular, the value criterion, the additional rights criterion, the purpose criterion and the responsibility criterion are all inapplicable. The value criterion is irrelevant, since the conflict in *Evans* is one between two instances of art. 8, to which the value criterion does not apply. The additional rights criterion is inapplicable, because the conflict is a strictly binary one, *i.e.* between two individual right holders. No other – additional – rights were at stake in the case. Finally, the purposes for which both rights were exercised did not stand in direction relation

[1295] Ibid. at para. 90.
[1296] See also Afonso da Silva, *supra* note 643 at 298.

to each other and the responsibility of each right holder in exercising his or her rights were not at issue. Therefore, the purpose and responsibility criterion do not apply.

As a result, we are left with three potentially relevant criteria for the resolution of the conflict: the impact criterion, the core-periphery criterion and the general interest criterion.

In terms of the impact criterion, it is clear that – whatever damage both Convention rights (would) suffer – the damage is "certain" to occur in respect of both rights. Under the actual circumstances of the case, Ms. Evans' Convention right to decisional privacy to have a genetic child suffered "certain" damage, while J.'s Convention right to decisional privacy would have suffered equally "certain" damage if the conflict would have been resolved to the benefit of Ms. Evans.[1297] As for the extent of the damage done, this arguably falls to be classified as "serious" – or even "very serious" – with regard to both Convention rights. In the actual circumstances of the case, Ms. Evans was precluded from ever having a genetic child, thus seeing her decisional privacy "wholly frustrated", as the Court put it.[1298] Conversely, if the case had been decided differently, J. would have been forced to become a genetic parent against his express will, thus also seeing his decisional privacy wholly frustrated.[1299] Because total damage is (or would be) done to the decisional privacy of both parties (not) to become a genetic parent, such damage can only be described as equally "serious" or "very serious" with respect to both conflicting rights.[1300] As a result, application of the impact criterion does not

[1297] The Court acknowledged this in *Evans*, *supra* note 44 at para. 73: "each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos J. will be forced to become a father, whereas if J.'s refusal or withdrawal of consent is upheld the applicant will be denied the opportunity of becoming a genetic parent."

[1298] Ibid. ("[i]n the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated.").

[1299] Ibid.

[1300] I should point out that the *Evans* case teaches us something important, namely that the results of the structured balancing may fluctuate, depending on the manner in which one qualificaties the conflicting Convention rights. In the text, I have followed the Court in characterising *Evans* as involving a conflict between two instances of the right to decisional privacy, as related to the decision to (not) become a genetic parent. See ibid. at para. 90. However, if we qualify the conflicting rights differently, the results of the structured balancing test are liable to change as well. If we for instance qualify Ms. Evans' and J.'s rights as, respectively, the right to become a genetic parent and the right *not* to become a genetic parent, we could very well question whether the impact on both rights would still be the same. The damage to Ms. Evans' right to become a genetic parent would be total, given that the IVF treatment at issue was her last opportunity to have a genetic child. The damage should thus be qualified as "very serious" and "certain". J.'s right not to become a genetic parent would suffer certain damage as well. However, we may question whether the extent of the damage is really of the same gravity as the damage suffered by Ms. Evans' right, given that 'all' J. would have to live with would be the knowledge that there is a genetic child of his out there in the world. Seemingly, this causes less serious damage to J's rights than Ms. Evans' inability to ever have a genetic child causes to hers. Thus, the application of the structured balancing test changes. Yet, we could once more requalify the rights to be balanced, this time as the right (not) to become a parent (in all possible senses, not necessarily genetic). In this scenario, nothing would change for J., but things *would* change for Ms. Evans. Indeed, the damage done to her right to become a parent would certainly be less serious than the damage done to her right to become a *genetic* parent, given that she could - for instance - adopt a child. What I aim to demonstrate here is that it is vital to be aware of the importance of the qualification of the rights we attempt to balance. In keeping with the Court's characterisation of the *Evans* case, I personally consider the balance to be struck to be one between both parties' right to decisional privacy (not) to become a genetic parent. The application of the structured balancing test offered in the text is based on that premise. Certainly, if one were to contest that premise – for instance by insisting that the conflict is one between both parties' right to (not) become a genetic parent – the application of the structured balancing test may very well lead to a different result. See also *infra* note 1301.

offer reasons in favour of – nor against – either of the conflicting Convention rights at stake: in respect of both rights, the damage is "certain" and "serious" (or "very serious").

Turning to the next criterion – the core-periphery criterion – we are forced to conclude that, as already mentioned in the analysis of the impact criterion, the aspect of both Ms. Evans' and J.'s right to private life at stake is their respective decisional privacy (not) to become a genetic parent. Since both are identical, they are – obviously – located equally close to the core of art. 8. The core-periphery criterion thus also fails to offer reasons in favour of – or against – either of the conflicting Convention rights.[1301]

The final criterion left to be examined is the general interest criterion. Speaking directly to the relevance of this criterion, the Court held in *Evans* that "the case does not involve simply a conflict between individuals; the legislation in question also served a number of wider, public interests, in upholding the principle of the primacy of consent and promoting legal clarity and certainty, for example."[1302] Insofar as it relates to J.'s right to decisional privacy under art. 8, the "primacy of consent" has already been taken into account under the impact criterion. Any residual general interest expressed by the Court's reference to "the primacy of consent" arguably falls to be read in light of the additional reference to legal certainty. Indeed, under the applicable UK legislation, legal certainty is served by a bright line rule under which the primacy of consent – *in casu*, J.'s – is upheld.

Yet, I have already noted above that – in principle – the general interest in legal certainty offers less strong reasons in favour of a certain resolution of the conflict than more substantive, rights-oriented general interests, such as the societal value in freedom of expression on issues of public concern.[1303] However, I have also indicated that the margin of appreciation will have an impact on the strength of legal certainty as a reason for the Court to accept the – *in casu* categorical – balance struck at the domestic level.[1304] In *Evans*, we are presented with precisely such a situation in which the – wide – margin of appreciation has an impact on the role of legal certainty in the Court's approach to the conflict. Given the wide margin granted to the State, it is arguably not up to the Court to overrule the categorical balance struck by the national legislator. The reason for this is directly related to the fact that the conflict between Ms. Evans' and J.'s Convention rights involves strongly incommensurable rights and the resulting inability to resolve it rationally.

To fully appreciate the argument, we first – hypothetically – have to disregard the relevance of legal certainty by insisting that an *ad hoc* balance needs to be struck between the

[1301] Note that, as indicated immediately above (see *supra* note 1300), it is possible to contest the premise on which this argument is based, namely that the conflicting rights at stake were the parties' rights to decisional privacy (not) to become a genetic parent. If one were to contest that premise, for instance by arguing that the rights to be balanced were the parties' rights (not) to become a genetic parent, the results of the core-periphery criterion may very well be different. Indeed, it would become plausible to argue that Ms. Evans' right to become a genetic parent was located closer to the core of her right to private life than J.'s right *not* to become a genetic parent.
[1302] *Evans*, *supra* note 44 at para. 74.
[1303] See *supra*, around notes 1058-1059 and accompanying text.
[1304] See *supra*, around footnote 1070 and accompanying text.

conflicting Convention rights, as the dissenting Judges in *Evans* claimed.[1305] However, if we look for such a concrete resolution to the conflict, we are forced to conclude that no rational one exists. No rational solution to the conflict is possible, since – if the relevance of legal certainty is temporarily cast aside – the criteria of the structured balancing test do not offer reasons in favour of – nor against – either of the conflicting Convention rights in *Evans*. We can either characterise the ensuing situation as one of stalemate (both rights are equally worthy of protection) or of incomparability (it is also not the case that both rights are equally worthy of protection).[1306] Crucially, however, no matter which characterisation we prefer, it remains impossible to make a rational choice *between* the conflicting rights. Therefore, both Convention rights are strongly incommensurable and the conflict between them constitutes a genuine dilemma.[1307] As a result, the only possible choice between the conflicting Convention rights is an *arational* choice, *i.e.* one based on subjective preferences or intuition.[1308] Once we have established as much, it becomes clear that the ECtHR is not the appropriate body to make that choice. If a subjective choice has to be made – and such a choice is inevitable to cover the circumstances of the *Evans* case – the national legislator is better placed to make it, because it has the required democratic legitimacy and the necessary knowledge of the moral and subjective preferences of the population of the country in question.[1309] Therefore, the Court should – in the face of strongly incommensurable Convention rights – defer to the national legislator.[1310]

In the United Kingdom, the legislator ruled that the continued consent of *both* parties should be the primary consideration in the context of IVF treatment. It therefore decided to strike a categorical balance in case of conflict, in the sense that the withdrawal of consent by one of

[1305] Dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele in *Evans*, *supra* note 44 at para. 7.

[1306] The analysis under the impact criterion – "serious" (or "very serious") and "certain" damage in respect of both conflicting rights – may tempt us to conclude that *Evans* entailed a case of stalemate: both rights were equally worthy of protection. However, the case may just as easily be described as entailing incomparability if we concede that, given the paucity of available distinguishing factors and in recognition of the tragic choice involved in the case, we are not able to adequately express the relationship between the conflicting rights in rational terms, also not in terms of their being "equally worthy of protection".

[1307] Zucca, *supra* note 26 at 26; Afonso da Silva, *supra* note 643 at 276 and 292. *Cf.* Dworkin, *supra* note 1143 at 31 ("[i]f there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability").

[1308] Mather, *supra* note 636 at 366 and 388 (arguing that "[w]hen confronted with conflicting goods or instantiations that are rationally incommensurable, lawmakers … can use intuition to make arational choices", *i.e.* choices that are "permitted by reason", but are "not made for any articulable reason yielding a judgment about the comparative merits of the available alternatives"). See also Waldron, *supra* note 202 at 816 ("if the choice problem [under strong incommensurability] is acute enough, the agent's behaviour will eventually reveal a preference for one consideration or another. However the strong incommensurability thesis holds that such a preference reveals only a particular preference or choice ... Different people will decide differently... and nothing much in the way of reason can be adduced.").

[1309] See also Alder, *supra* note 202 at 719.

[1310] See also Afonso da Silva, *supra* note 643 at 276, 292 and 300 (arguing in terms of "parity" or stalemate – *i.e.* the identification, through balancing, of equivalent reasons for two competing options – between both rights in the *Evans* case, which he claims is the ground for discretion in deciding); Klatt, *supra* note 691 (arguing that, if balancing leads to a stalemate – *i.e.* the competing principles have the same concrete weight – this is a case of structural discretion).

the partners would settle the conflict to the benefit of that party.[1311] Once we factor the element of legal certainty back into the equation, it becomes clear that the wide margin of appreciation granted to the UK – given the lack of a European consensus and the fact that the issue at stake was a sensitive and moral one – has an important role to play here. It is this wide margin that, combined with the fact that both Convention rights are strongly incommensurable, justifies the legislator's choice for a categorical balance to protect legal certainty (expressed in terms of the primacy of consent).[1312] This conclusion is even stronger than the one offered above with regard to *Odièvre*. Unlike in *Odièvre*, in the circumstances of the *Evans* case it is *impossible* to strike a rational balance between the conflicting Convention rights at stake. Therefore, even if we were to accept the dissenters' argument that an *ad hoc* balance needs to be struck, the Court would simply be unable to determine what that balance should be. In *Evans*, the Court was thus faced with a genuine dilemma between strongly incommensurable Convention rights. Under those circumstances, the Court was justified in deferring to the bright line rule introduced by the national legislator,[1313] given that the alternative would have been a subjective solution, imposed by an unelected judiciary.[1314]

Section IV – Conclusion

In this chapter, I set out to explore the limits of the structured balancing test of Chapter IV. I hypothesised that those limits could most likely be found in the application of the test to ECtHR cases that involve a dilemma. To test the hypothesis, I first painted – in broad strokes – a picture of dilemmas in the Court's case law. I initially tied the notion to the presence of an element of tragic choice in the case. On the basis of that broad conception of a dilemma, I identified two ECtHR cases that were particularly worth exploring. I demonstrated that the structured balancing test was able to offer a clear, rational solution to the conflict inherent in the first case, *Odièvre v. France*. As a result, I concluded that *Odièvre* did not, upon closer examination, entail a genuine dilemma. Instead, I insisted, such a genuine dilemma would only arise in case of strong incommensurability of the conflicting Convention rights at stake, *i.e.* in case of failure of the structured balancing test to enable rational choice between both rights.

[1311] This is confirmed by the repeated reference, both by the domestic courts during the domestic proceedings and by the government in front of the ECtHR, to the fact that the relevant consent was given by each party to undergo treatment *together*. See *Evans*, *supra* note 44 at paras. 21, 24 and 67.

[1312] *Cf.* ibid. at para. 89 ("the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as "entirely incommensurable" interests."). See also Zucca, *supra* note 758 at 448; Möller, *supra* note 614 at 720 ("where two (or more) values are strongly incommensurable and the elected branches give preference to one of them, their decision is constitutionally legitimate").

[1313] See *contra* Ducoulombier, *supra* note 4 at 564 (arguing against the granting of a wide margin of appreciation in *Evans*, *supra* note 44 and in favour of a resolution of the conflict by the ECtHR, without – however – indicating how the Court could have resolved the case).

[1314] See Zucca, *supra* note 758 at 448 (arguing that the dissenters' argument that the applicant's right should take priority "does not sound more than an entrenched preference").

I then demonstrated that such strong incommensurability obtained in the second case under examination, *Evans v. the United Kingdom*. I showed that the tragic conflict inherent in *Evans* could not be successfully resolved through application of the structured balancing test. Therefore, I concluded, the case entailed strong incommensurability and – thus – a genuine dilemma. I argued that the Court was right to defer the resolution of that dilemma to the national legislator, which was – by virtue of its greater democratic legitimacy – better placed than the supranational ECtHR to make the inevitable subjective choice between the Convention rights in conflict. Such circumstances, under which subjective choice between conflicting Convention rights is inevitable – given that no rational choice is possible – provide a backdrop against which the striking of a categorical balance under national law should be considered acceptable under the Convention system. This conclusion applies all the more in light of the wide margin of appreciation granted to the national authorities in tackling the dilemma inherent in the *Evans* case.

CHAPTER VI – CONFLICTS BETWEEN AN ABSOLUTE AND A RELATIVE CONVENTION RIGHT[1315]

In Part I, I have argued that there exist three types of conflicts between Convention rights: (i) conflicts between relative Convention rights; (ii) conflicts between a relative and an absolute Convention right; and (iii) conflicts between absolute Convention rights. In the preceding chapters (Chapters III to V), I have dealt extensively with the resolution of the first type of conflicts. In this chapter, I will analyse the second type of conflicts, *i.e.* conflicts between a relative and an absolute Convention right. The resolution of such conflicts is relatively straightforward. Indeed, as I have indicated in Part I, they are to be resolved through application of the absolute right, which functions as a rule. I have particularly argued that, in an important sense, the outcome of the conflict is predetermined: since the absolute right cannot be outweighed by other considerations, including the relative rights of others, it prevails.[1316] In this chapter, I aim to analyse the implications of those arguments by examining conflicts between one person's freedom to manifest her religion (relative Convention right) and the freedom of others to have or hold a religion (absolute Convention right).[1317]

Section I – Introduction

A Jehovah's Witness is criminally convicted for proselytising a private citizen;[1318] three military officers, members of the Pentecostal Church, are convicted for the same offence committed against lower-ranked military personnel and civilians;[1319] a public schoolteacher is

[1315] This chapter is based, in large part, on Smet, *supra* note 475.
[1316] See *supra* note 200 and accompanying text.
[1317] Other conflicts of this type may, for instance, involve the absolute Convention rights of art. 3 and art. 7, when they (appear) to conflict with relative Convention rights. On art. 3, see *Gäfgen*, *supra* note 2 at paras. 107 and 176-177. For a more elaborate analysis of *Gäfgen v. Germany*, see *infra* Chapter VII. On art. 7, see W. A. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights', 9 *Journal of International Criminal Justice* (2011) at 615 (arguing that "the Court sometimes applies Article 7 rather flexibly, especially when the alleged criminal behaviour is aimed at 'human dignity and human freedom' or where it violates the right to life."). However, in the relevant cases cited by Schabas, the Court held that the applicants, who claimed that their criminal conviction had violated their art. 7 right of *nullum crimen sine lege*, should have known that the acts they had engaged in did in fact constitute a crime under national or international law. The Court did thus *not* rule that the absolute art. 7 rights of the applicants were outweighed by the Convention rights of others. Instead, it concluded that the applicants could not rely on the protection granted by art. 7. See ECtHR, *C.R.. v. the United Kingdom*, app. no. 20190/92, 22 November 1995, paras. 40-44; ECtHR, *Streletz, Kessler and Krentz v. Germany*, app. nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, paras. 79-89 and 105; ECtHR, *Kononov v. Latvia*, app. no. 36376/04, 17 May 2010, paras. 236-239. In that respect, the relevant judgments are consonant with the arguments defended in the text: (i) absolute Convention rights function as rules; (ii) if they apply, they prevail over relative Convention rights; and – consequently – (iii) in cases involving an apparent conflict between an absolute and a relative Convention right, everything revolves around the correct identification of the conflict, since once identified the conflict is immediately resolved: the absolute Convention right prevails.
[1318] ECtHR, *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993.
[1319] *Larissis*, *supra* note 257.

prohibited from wearing the Islamic headscarf in class;[1320] and a student is banned from wearing it at university.[1321] These ECtHR cases share a common characteristic: they all appear to involve a conflict between an absolute and a relative Convention right. In each of the cited cases, the domestic authorities interfered with the applicant's freedom to manifest her religion (partly) in order to protect others' freedom to have or hold a religion. Art. 9 ECHR guarantees both these rights, in the following terms:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[1322]

From the structure of art. 9, it transpires that the Convention distinguishes the freedom to have or hold a religion or belief (*forum internum*) from the freedom to manifest it (*forum externum*). While the latter is subject to the limitation clause of art. 9 (2), the same does not hold true for the former. Thus, the so-called *forum internum* receives absolute protection under the ECHR, while the *forum externum* receives relative protection.[1323] Or, as the Court puts it, "[the] aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified", while the freedom to manifest one's religion is necessarily relative, since "the manifestation by one person of his or her religious belief may have an impact on others, [leading] the drafters of the Convention [to qualify] this aspect of freedom of religion in the manner set out in Article 9 § 2".[1324]

The difference between the *forum internum* and the *forum externum* is particularly relevant in resolving the cases mentioned above. Indeed, if one person uses her freedom to manifest her religion (relative Convention right) in a manner that impairs the freedom of another to hold her religion (absolute Convention right), it appears sensible to argue that the latter right should prevail, since it is absolute. As a result, everything turns on the correct identification of the conflict, for as soon as the conflict is identified as genuine, it is immediately resolved: the absolute right prevails. We thus require a set of tools that will allow us to carefully examine whether the relevant cases involve a genuine conflict or whether the conflict is merely apparent. The relevant tools can be found in the proselytism case law of the Court, which I will examine first. Afterwards, I will apply these tools to the most important 'headscarf cases'

[1320] *Dahlab*, *supra* note 297.
[1321] *Leyla Şahin*, *supra* note 479.
[1322] Art. 9 ECHR.
[1323] I. Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer', 30 *Cardozo Law Review* (2009) at 2673-2674; D. McGoldrick, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Oxford – Portland: Hart Publishing, 2006) at 246.
[1324] *Eweida*, *supra* note 328 at para. 80.

of the Court. The analysis will demonstrate that those cases do not entail a genuine conflict between a relative and an absolute Convention right.

Section II – Proselytism, Autonomy and Coercion: A Set of Tools for the Resolution of Conflicts between Freedom of Religion and Freedom from Religion

At first glance, proselytism[1325] cases involve a conflict between a relative and an absolute Convention right, since the proselytiser and the addressee may, respectively, invoke their freedom to manifest their religion and their freedom to have or hold a religion.[1326] Indeed, the proselytiser may argue that preventing her from performing her religious duty to convert others violates her (relative) freedom to manifest her religion. The addressee, conversely, may argue that the proselytiser unduly interferes with her (absolute) freedom to have a religion and that she should be protected from such behaviour. The ECtHR has dealt with the difficulties raised by this conflict in a number of cases, the most important two of which will be analysed here.

1. Kokkinakis v. Greece[1327]

Mr. and Ms. Kokkinakis are Jehovah's Witnesses. In accordance with a central tenet of their religion, which involves attempting to convert others to their religious views, they rang at the house of Ms. Kyriakaki and engaged her in a discussion on religious convictions. Upon learning about the discussion, Ms. Kyriakaki's husband notified the police. Mr. and Ms. Kokkinakis were arrested on suspicion of proselytism, which was – at the relevant time – punishable by law in Greece. The law in question defined the crime of proselytism as:

> "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion … with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety."[1328]

While Ms. Kokkinakis was eventually acquitted, Mr. Kokkinakis was found guilty and sentenced to a pecuniary penalty. The Court of Appeal held that he had had "the intention of changing [Ms. Kyriakaki's] beliefs, by taking advantage of her inexperience, her low intellect and her naivety",[1329] despite the testimony by Ms. Kyriakaki that "[t]hey may have said

[1325] For the purposes of this chapter, proselytism will be understood as 'expressive conduct undertaken with the purpose of trying to change the religious beliefs of others.' See T. Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law', *BYU Law Review* (1999) at 255.
[1326] See also Danchin, *supra* note 48 at 265.
[1327] *Kokkinakis*, *supra* note 1318.
[1328] Ibid. at para. 16.
[1329] Ibid. at para. 10.

something to me at the time with a view to undermining my religious beliefs ... [However,] the discussion did not influence my beliefs."[1330]

Mr. Kokkinakis filed an application with the Court, complaining of a violation of his freedom of religion. Importantly, the Court held that acts of proselytism are in principle protected by art. 9:

> "freedom to manifest one's religion … includes in principle the right to try to convince one's neighbour, … failing which … "freedom to change [one's] religion or belief" … would be likely to remain a dead letter."[1331]

The Court eventually found a violation of art. 9 in *Kokkinakis*, because the domestic courts had not sufficiently specified in what way the applicant had attempted to convince Ms. Kyriakaki by improper means.[1332] Since the Court found a violation on essentially procedural grounds, it is not possible to deduce tools from the judgment for the substantive resolution of the conflict between Kr. Kokkinakis' freedom to manifest his religion and Ms. Kyriakaki's freedom from religion. Nevertheless, the manner in which the Court introduced a difference – in its ruling – between 'proper' and 'improper' proselytism offers some indications. In its judgment, the Court held that

> "a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up ... under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian ... The latter represents a corruption or deformation of it … [and] is not compatible with respect for the freedom of thought, conscience and religion of others."[1333]

The report to which the Court referred insists that "[p]roselytism embraces whatever violates the right of the human person ... to be free from external *coercion* in religious matters".[1334] The reference to "coercion", indirectly endorsed by the Court in *Kokkinakis*, indicates that the impact on the addressees' autonomy is the prime consideration in assessing whether or not proselytism goes beyond the threshold of what is acceptable under the Convention and becomes "improper", *i.e.* "not compatible with respect for the freedom of thought, conscience and religion of others". The hypothesis that autonomy plays a crucial role in the Court's reasoning will be confirmed immediately below, in the analysis of *Larissis and Others v. Greece*.

[1330] Ibid.
[1331] Ibid. at para. 31.
[1332] Ibid. at para. 49.
[1333] Ibid. at para. 48. Note that it is remarkable that the Court would simply endorse the distinction made by the Catholic Church, without attempting to offer its own definition of 'improper' proselytism. This peculiar element in the Court's judgment arguably signals a bias towards mainstream forms of Christianity. See Smet, *supra* note 475 at 128.
[1334] Stahnke, *supra* note 1325 at 255 (emphasis added).

2. Larissis and Others v. Greece[1335]

The three applicants in *Larissis and Others* were officers of the Greek air force and members of the Pentecostal Church, a Protestant Christian denomination which propagates the duty of all believers to engage in evangelism. In domestic criminal proceedings, all three were found guilty of proselytism of both civilians and lower ranked military officers, attempting to convert them to the Pentecostal Church.

In its judgment in the case, the ECtHR distinguished between the proselytism of civilians and subordinated military officers, finding the former acceptable under the Convention, but the latter not. The Court thereby offered important insights into how conflicts between freedom of religion and freedom from religion may be resolved.

Regarding the lower ranked military officers, the Court held that, due to the hierarchical structures inherent in the armed forces,

> "what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power."[1336]

The Court consequently ruled that, even if pressure was not applied consciously, the applicants' manifestation of their religion had nonetheless led to a situation in which the airmen "felt themselves *constrained* and subject to a certain degree of *pressure* owing to the applicants' status as officers" and "must have felt to a certain extent *constrained*, perhaps *obliged* to enter into religious discussions with the applicants, and possibly even to convert to the Pentecostal Faith".[1337]

However, the Court ruled in the opposite manner with regard to the proselytism of civilians. Most notably, it did not consider their autonomy to have been at risk:

> "[t]he Court finds it of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen."[1338]

Two important conclusions can be drawn from the *Larissis* judgment. First, the (lack of) existence of a relationship of power between the proselytiser and the addressee of proselytism is an important element in the Court's reasoning. Secondly, the Court's use of the terms "constrained" and "obliged", in describing the impact of the proselytism on the lower ranked military officers, indicates that it considered them to be the victims of coercion on the part of the proselytisers. Both elements – a relationship of power and a threat of coercion – signal that the Court attaches a decisive role to autonomy in resolving conflicts between the proselytiser's (relative) freedom to manifest her religion and the addressee's (absolute)

[1335] *Larissis*, *supra* note 257.
[1336] Ibid. at para. 51.
[1337] Ibid. at paras. 52-53 (emphases added).
[1338] Ibid. at para. 59.

freedom to have or hold a religion. The Court's ruling in *Larissis* can thus be read as proposing a specific set of tools – relationship of power, coercion and autonomy – for the resolution of conflicts between one person's freedom to manifest her religion and another's freedom to have or hold a religion, inherent in proselytism cases.

The proffered resolution is in line with the hypothesis presented above concerning the relationship between the *forum internum* and the *forum externum*. If a genuine conflict arises between both, the absolute freedom to have or hold a religion prevails over the relative freedom to manifest a religion. Therefore, everything turns on the correct identification of the conflict. The impact on the addressee's autonomy – described in terms of a relationship of power and the threat of coercion – is crucial to such identification. In line with the Court's case law, we may indeed argue that, if the proselytiser stands in a position of authority or power *vis-à-vis* the addressee, measures may be taken to protect the latter's autonomy, *provided that* it is effectively impaired by coercion exercised by the proselytiser.[1339] Conversely, if the proselytism does not effectively impair the addressee's autonomy, the conflict is decided in favour of the proselytiser. In fact, the latter situation does not – on the definition offered in Part I – entail a genuine conflict between Convention rights.[1340] Indeed, in the absence of any effective coercion, it is difficult to perceive how the addressee's freedom of religion has been affected at all. Such situations, in which the addressee's autonomy has not been impaired, therefore fail the 'converse situation' test,[1341] which is part and parcel of my definition of genuine conflicts between Convention rights.[1342]

Now that we have a set of tools at hand for the correct identification and resolution of conflicts between the relative freedom to manifest a religion and the absolute freedom to hold a religion, we are able to apply them to a further set of ECtHR cases, the so-called 'headscarf cases'. In analysing these cases, I will demonstrate that application of the relevant tools – autonomy, relationship of power and the threat of coercion – leads to the conclusion that those cases do not entail a genuine conflict between Convention rights. There was (*pace* the Court) therefore no reason to restrict the applicants' (relative) freedom to manifest their religion in order to protect others' (absolute) freedom from religion.

Section III – The Set of Tools Misapplied: The 'Proselytising Effect' of Headscarves?

Over the past decade, the ECtHR has dealt with several applications by teachers/professors and pupils/students who were banned from wearing the Islamic headscarf in school or at

[1339] *Cf. Vojnity*, *supra* note 610 at para. 38 ("there is no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm. It is true that the expert appointed by the District Court considered that the applicant's participation in the boy's life was harmful, notably because of his insistence on proselytism ... but *no convincing evidence was presented to substantiate a risk of actual harm*, as opposed to the mere unease, discomfort or embarrassment which the child may have experienced on account of his father's attempts to transmit his religious beliefs." (emphasis added)).
[1340] See *supra* note 499 and accompanying text.
[1341] See *supra*, around notes 478-479 and accompanying text.
[1342] See *supra*, around note 503 and accompanying text.

university.[1343] Since the applicants in these cases did not wear the headscarf with the intention to convince others to change their religion, they raise different issues from the proselytism cases discussed above. However, this has not stopped the Court from connecting a proselytising effect to the headscarf, thus reading a conflict between different persons' freedom of religion into the so-called 'headscarf cases'. This section will demonstrate why the Court's assumptions are erroneous and why these cases, upon closer reflection, do not entail a genuine conflict between Convention rights.

1. Dahlab v. Switzerland

Ms. Dahlab was a teacher in a public primary school who, subsequent to her conversion to Islam, started wearing the headscarf in class. Four years later, and despite the absence of any complaints, the Directorate General for Primary Education prohibited Ms. Dahlab from continuing to wear her headscarf at school. The Directorate General argued that her headscarf constituted "an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system".[1344] The applicant appealed against the decision, but it was upheld by the Swiss courts.

In her application to the ECtHR, Ms. Dahlab argued that the prohibition violated her freedom of religion. The Court declared her application inadmissible. In its decision, the Court was well aware that there had not been any specific complaints against the attitude or the teaching quality of the applicant.[1345] It also accepted that the applicant did not "appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs".[1346] The Court therefore had to resort to a rather abstract argument to justify declaring the application manifestly ill-founded:

> "[t]he Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and

[1343] Apart from the cases discussed here, see also ECtHR, *Kervanci v. France*, app. no. 31645/04, 4 December 2008; ECtHR, *Dogru v. France*, app. no. 27058/05, 4 December 2008; ECtHR, *Köse and 93 others v. Turkey* (adm.), app. no. 26625/02, 24 January 2006; ECtHR, *Kurtulmuş v. Turkey* (adm.), app. no. 65500/01, 24 January 2006.
[1344] *Dahlab*, *supra* note 297 at 2.
[1345] Ibid. at 13.
[1346] Ibid.

non-discrimination that all teachers in a democratic society must convey to their pupils".[1347]

The Court concluded that, having regard to the tender age of the children, the national authorities had not exceeded their margin of appreciation and dismissed the application.

The Court's decision in *Dahlab* has been heavily criticized by scholars.[1348] This criticism is certainly justified, especially where it concerns the Court's inappropriate statements on the Islamic headscarf and its gender argument. In *Dahlab*, the Court ignored the different streams and attitudes within Islam towards the headscarf, disregarded the varying reasons why Muslim women wear it and denied these women, including Ms. Dahlab, agency.[1349] Since the gender criticism road has been well travelled in previous scholarly work,[1350] it does not require further treading here. Yet, another element of the *Dahlab* case has received comparably less scholarly attention. It is to that element that I will now turn.

The Court's negative statements on Islam and Muslim women in *Dahlab* appear to have been wholly unnecessary, since the Court – in the first part of the quote above – had already raised a *prima facie* valid argument to support its ruling. This argument was (implicitly) based on a conflict between Ms. Dahlab's freedom to manifest her religion (*forum externum*) and her pupils' freedom from religion (*forum internum*). The Court relied on the interconnection between (i) the young age of the children, (ii) the position of authority of Ms. Dahlab, and (iii) the proselytising effect her headscarf may have had on the children, to justify a restriction of her freedom to wear the headscarf.

If we were to apply the set of tools for the resolution of conflicts of freedom of religion identified above, it appears possible to construct a *theoretical* argument in defence of the pupils' freedom from religion – and thus also of the Court's ruling in *Dahlab*. But does it hold water? The argument, which at first sight may appear convincing, would run somewhere along the lines of Joel Feinberg's child's right to an open future.[1351]

Because young children of the age of the pupils in *Dahlab* (four to eight years old) only have a limited – slowly growing – potential for autonomy, they are generally considered to not

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[1347] Ibid.

[1348] See, for example, C. Evans, 'The "Islamic Headscarf" in the European Court of Human Rights', 7 *Melbourne Journal of International Law* (2006); J. Ringelheim, 'Droit et religion dans l'Europe des juges – La jurisprudence de la Cour européenne des droits de l'homme', in X. (ed.), *Convictions philosophiques et religieuses et droits positif. Textes présentées au colloque international de Moncton (24-27 Août 2008)* (Brussels: Bruylant, 2010) at 515.

[1349] Evans, *supra* note 1348 at 65-66; J. Ringelheim, *Diversité culturelle et droits de l'homme. l'Émergence de la problématique des minorités dans le droit de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2006) at 133, with references to further sources; J. W. Scott, 'Sexularism', *Ursula Hirschmann Annual Lecture on Gender and Europe, RSCAS Distinguished Lecture 2009/01* (2009) at 9-12, available at http://cadmus.eui.eu/bitstream/handle/1814/11553/RSCAS_DL_2009_01.pdf?sequence=1 (last accessed 7 October 2013); J. Borneman, 'Veiling and Women's Intelligibility', 30 *Cardozo Law Review* (2009), 2745-2760.

[1350] See ibid.

[1351] J. Feinberg, 'The Child's Right to an Open Future', in R. Curren (ed.), *Philosophy of Education: An Anthology* (Oxford: Blackwell, 2007) at 112-123.

have a right to freedom of religion in the same sense as adults do.[1352] Young children are simply not able to critically reflect upon (non-)religious views, nor are they able to develop their own.[1353] Assigning them a full-fledged right to freedom of religion is therefore not possible, nor desirable. However, what is possible – and desirable – is granting children what Feinberg terms 'anticipatory autonomy rights'.[1354] These are "rights that are to be saved for the child until he is an adult, but which can be violated "in advance", so to speak, before the child is even in a position to exercise them".[1355] Under Feinberg's reasoning, young children's freedom of religion would fall in this category of rights that may be violated when undue influence exercised by an authority figure limits their future autonomy.

Certainly this sort of argument should be discarded as overly paternalistic when considering older children (of secondary school age). Their developing autonomy and ability to critically reflect on (non-)religious views should be recognised.[1356] Rather than being hindered by exposure to the (non-)religious views of others, older children will arguably benefit from contact with religious diversity in the development of their own (non-)religious convictions and their identity. Secondary school teachers should thus not be banned from wearing the headscarf to protect the freedom from religion of their pupils. But do not at least young children in primary schools deserve to receive an education in public schools free from religion? Does their anticipatory autonomy right to freedom of religion not deserve protection from coercion exercised by their teacher, who they regard as a role model and may wish to emulate? Those appear to be the arguments relied on by the Court in *Dahlab*.

Thus formulated, the argument from the child's right to an open future may appear to offer strong support to the Court's ruling in *Dahlab*. However, several counterarguments can be raised that drastically undercut it and ultimately deprive it of most, if not all, of its strength. In its most convincing form, the argument presupposes that the pupils were being indoctrinated by Ms. Dahlab. Yet, Ms. Dahlab was merely wearing her headscarf. Unlike the applicants in *Larissis* she had no proselytising intentions and did not behave in a manner that may on any reasonable understanding of the term be construed as indoctrination of her pupils. If the argument is weakened to one based on *influence* rather than indoctrination to accommodate the first objection, it loses much of its strength. Many environmental factors influence children's development and their (non-)religious views.[1357] Why single out the potential influence of the teacher as a factor to be eliminated? Moreover, barring any strong form of indoctrination, children retain the possibility to change their views later on in life, mitigating

[1352] Ibid. at 112; H. Brighouse, 'How Should Children Be Heard?', 45 *Arizona Law Review* (2003) at 704; S. B. Benporath, 'Autonomy and Vulnerability: On Just Relations Between Adults and Children', 1 *Journal of Philosophy of Education* (2003) at 132.
[1353] R. W. Hood Jr. et. al., *The Psychology of Religion: An Empirical Approach* (New York: The Guilford Press, 2007) at 79, 82 and 126.
[1354] Feinberg, *supra* note 1351 at 112. Harry Brighouse uses the similar concept of future agency interests: Brighouse, *supra* note 1352 at 701.
[1355] Feinberg, *supra* note 1351 at 112.
[1356] Hood Jr. et. al., *supra* note 1353 at 79, 82 and 126. E. Brems, 'Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights', 14 *International Journal of Children's Rights* (2006) at 131.
[1357] Hood Jr. et. al., *supra* note 1353 at 111; S. Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis', 16 *International Journal of Children's Rights* (2008) at 478.

any damage done to their anticipatory autonomy rights. Furthermore, the argument based on undue influence by teachers on their pupils rests on the unspoken but widespread assumption that pupils view their teachers as role models that they wish to emulate (in Ms. Dahlab's case the fear would be that non-Muslim pupils in her class would turn Muslim because they want to be like their teacher or that young Muslim girls would start wearing the headscarf under their teacher's influence).[1358] Yet, no empirical evidence exists to support this assumption.[1359] Rather to the contrary, recent studies have indicated that pupils do not see their teachers as role models that they want to emulate.[1360]

Ultimately, no evidence exists to substantiate the unsupported claim in *Dahlab* that exposure to a headscarf worn by a teacher may in any way influence even very young children's religious convictions. In this respect it is worth noting that the ECtHR, in its recent *Lautsi* judgment on the display of crucifixes in Italian public classrooms, explicitly recognised that no evidence exists "that the display of a religious symbol on classroom walls may have an influence on pupils".[1361] One of the shortcomings of the *Dahlab* decision is precisely the unsubstantiated suppositions by the Court on the 'proselytising effect' of the headscarf and the lack of appraisal of the actual evidence in front of it. Instead, the theoretically defensible argument based on the need to protect the anticipatory autonomy rights of Ms. Dahlab's pupils fails when considering the concrete evidence countering it. Applying the *Lautsi* reasoning *ex post facto*, it is indeed difficult to imagine how Ms. Dahlab, who is moreover an individual exercising her freedom to manifest her religion and not a State using its power to order the display of a religious symbol in a public institution, could have influenced the pupils in her classroom by wearing a religious symbol, in the absence of any proselytising behaviour on her part.[1362] As a result, and *pace* the Court, *Dahlab* did not entail a genuine conflict between Ms. Dahlab's (relative) freedom to manifest her religion and her pupils' (absolute) freedom to have or hold a religion.

2. Leyla Şahin v. Turkey[1363]

The case of *Leyla Şahin* did not concern a teacher in a primary school, but a student at university. Following the issuance of a new circular at Istanbul University, which called upon university personnel to bar students wearing the headscarf or a beard from admission to university premises, Ms. Şahin was denied access to classes and exams.[1364] After her

[1358] P. Bricheno and M. Thornton'Role Model, Hero or Champion? Children's Views concerning Role Models', 49 *Educational Research* (2007) at 383-384.
[1359] Ibid.
[1360] Ibid. at 383-386 (referencing further studies and demonstrating that out of a sample of 379 pupils (aged 10 and 11 and 14 to 16) a mere 2.4 per cent referred to their teacher as a role model. The study concludes that children may look up to and respect their teachers, but do not appear to wish to be like them).
[1361] *Lautsi*, *supra* note 59 at para. 66.
[1362] Note though that the Court attempted, unconvincingly, to distinguish *Lautsi* from *Dahlab*, presumably in an attempt to save its standing case law on the headscarf. Ibid. at para. 73.
[1363] *Leyla Şahin*, *supra* note 479.
[1364] Before the circular was issued, a university resolution, which was promulgated before Ms. Şahin joined Istanbul University, already prohibited the wearing of the headscarf.

participation in a protest against the new circular, Ms. Şahin was suspended for one semester. She subsequently decided to leave Istanbul University and completed her studies in Vienna.

In her application to the ECtHR, Ms. Şahin complained that the headscarf ban at Istanbul University had violated her freedom of religion. The Grand Chamber of the Court dismissed her claim, relying in essence on three arguments: gender equality, protection of the rights of others and protection of secularism.

The Court emphasised the role of gender equality, after having reiterated its statement in *Dahlab* that the wearing of the headscarf "is hard to reconcile with the principle of gender equality".[1365]

The Court also held that "when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."[1366] The Court thereby expressed a fear of proselytism, that somehow Ms. Şahin would impair the religious freedom of others by wearing the headscarf, which was described by the Court as "a symbol that is presented or perceived as a compulsory religious duty."[1367] Since the majority of the Turkish population is Muslim, the Court can reasonably be understood to have meant that other women should be free to choose not to wear the headscarf and that Ms. Şahin's wearing the headscarf may somehow indoctrinate them in this regard.[1368] Indeed, in later cases on similar issues, the Court explicitly held that "the manifestation by pupils of their religious beliefs on school premises [should] not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion."[1369]

Apart from the proselytism argument, the Court's concern for the rights of others in *Leyla Şahin* also extended to a fear of extremism. The Court explicitly referenced the existence of "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts".[1370]

The Court summarised the context of the ban on the headscarf as follows:

> "it is the principle of secularism, … which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In … a context … where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature

[1365] *Leyla Şahin, supra* note 479 at paras. 111 and 115.
[1366] Ibid. at para. 115.
[1367] Ibid.
[1368] S. Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR', 55 *International and Comparative Law Quarterly* (2006) at 932.
[1369] *Dogru, supra* note 1343 at para. 71. See also *Köse, supra* note 1343 ("it is incumbent on the competent authorities to be very careful to ensure … that when … they permit students to manifest their religious beliefs on school premises, such manifestation does not become ostentatious and thus a source of pressure and exclusion").
[1370] *Dogru, supra* note 1343 at para. 71.

of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn."[1371]

The Court's judgment in *Leyla Şahin* has been widely criticized in the scholarly literature.[1372] Yet the court has found support within academic circles as well.[1373] Although I consider that all arguments raised by the Court fall to be rejected,[1374] for our current purposes only the proselytism argument is of immediate relevance, as it is the only one that (implicitly) draws on the existence of a conflict between Ms. Şahin's (relative) right to manifest her religion and the other students' (absolute) right to have or hold a religion.

When looking at the case as one potentially involving a conflict between Ms. Şahin's freedom to manifest her religion and the freedom from religion of her fellow students, it is clear that the case for a conflict is even weaker than in *Dahlab*. Ms. Şahin was a university student, a peer to her fellow students. Unlike Ms. Dahlab she thus did not hold a position of authority or power. Moreover, the potential victims of any – unintended – 'indoctrination' by Ms. Şahin were not very young children, but adults pursuing university studies.[1375] It is thus safe to assume that their autonomy would not be affected when being confronted with Ms. Şahin's headscarf. Therefore, not even a theoretical argument for the protection of the freedom from religion of others could be construed in support of the proselytism argument raised in *Leyla Şahin*, let alone a convincing one. As a result, like *Dahlab* the case of Ms. Şahin did not entail a genuine conflict between her (relative) right to manifest her religion and the (absolute) right to have or hold a religion of others.

Section V – Conclusion

In this chapter, I moved away from balancing between relative Convention rights and towards the subsumptive reasoning required for the resolution of conflicts between absolute and relative Convention rights. I suggested that the resolution of such conflicts is – *prima facie* – straightforward: through its very nature, the absolute Convention right should prevail. This argument is in line with the Court's art. 3 case law on the matter, in which the Court has ruled that "[t]orture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk" and that "[a]rticle 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the

[1371] Ibid. at para. 116.
[1372] See for example Evans, *supra* note 1348; Ringelheim, *supra* note 1348 and note 1349; B. D. Bleiber, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Şahin v. Turkey*', 91 *Cornell Law Review* (2005) at 129-169 (on the Chamber judgment in *Leyla Şahin v. Turkey*).
[1373] See for example K. Bennoune, 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law', 45 *Columbia Journal of Transnational L*aw (2007), 367-426.
[1374] See Smet, *supra* note 475 at 124-127.
[1375] This argument was also raised by Ms. Şahin, but the Court did not address it. See *Leyla Şahin*, *supra* note 479 at para. 101.

person concerned and the nature of the offence at issue".[1376] As a result, resolution of a conflict between an absolute and a relative Convention right 'only' requires answering one – *prima facie* simple – question: does the absolute Convention right apply? For as soon as it does, the conflict is immediately resolved: since it cannot be 'outbalanced' by other considerations – including relative Convention rights – the absolute right prevails.

However, throughout this chapter I aimed to demonstrate that rule-like application of absolute Convention rights is not always as straightforward as it may appear. In applying the rule-like formula to conflicts between freedom *of* religion and freedom *from* religion, I indicated that its application may well require deep deontological arguments on the value of absolute Convention rights and on what it exactly means for them to be really at stake. I, in particular, relied on arguments from autonomy to demonstrate that, while the Greek proselytism cases at the Court entailed a genuine conflict between the absolute *form internum* and the relative *forum externum*, the headscarf cases did not. Instead, I argued that the absolute freedom from religion of the persons confronted with the headscarf (minor pupils and university students) was not at stake in the latter cases. I thus effectively argued that the headscarf cases fall to be characterised as positive instances of fake conflict, rather than as genuine conflicts. I concluded that, since the Convention rights of others were not actually and sufficiently at stake, there was (*pace* the Court) no cause to restrict the applicants' right to manifest their religion in order to protect others' freedom from religion.

[1376] *Gäfgen*, *supra* note 2 at para. 107.

CHAPTER VII – CONFLICTS BETWEEN ABSOLUTE RIGHTS[1377]

In the preceding chapters, I have dealt with conflicts between relative Convention rights and with conflicts between relative and absolute Convention rights. In this chapter, I will focus on the possibility and resolution of the last type of conflicts to be examined, *i.e.* conflicts between absolute Convention rights. I will particularly argue that the resolution of such conflicts – which are at least a theoretical possibility under the ECHR – requires deontological reasoning, as opposed to the consequentialist reasoning of the structured balancing test proposed in Chapter IV.

Section I – Introduction

Can absolute Convention rights conflict? Is it permissible to torture a person to save others from torture? And to what extent can or should legal reasoning draw on moral philosophy? In this chapter I will provide answers to all three questions. I will start off by considering the ECtHR case of *Gäfgen v. Germany*, concerning threat of torture by the police against a suspect in a kidnapping case, in order to force him to disclose the whereabouts of his victim. After having demonstrated that *Gäfgen* did not entail a genuine conflict between absolute rights, I will construct a hypothetical case that does involve such a conflict. The hypothetical case will concern a threat of torture by the police against a suspect (negative right), in order to save another person from torture by the suspect's accomplice (positive right). The hypothetical case will thus pose a dilemma between conflicting instances – one negative, one positive – of the prohibition of torture in art. 3 ECHR.

I will demonstrate that the hypothetical dilemma cannot be resolved by relying on existing strands of legal reasoning available in the case law of the ECtHR. Instead, I will claim, recourse must be had to moral philosophy. In discussing one of moral philosophy's most persistent conundrums – the Trolley Problem – I will demonstrate that the distinction between negative and positive duties is key to unravelling the dilemma. Translating the moral argument into legal reasoning, I will argue that, in principle and all other things being equal, negative obligations trump positive obligations when two instances of the same (absolute) right conflict. I will go on to combine that insight with the distinction between direct and indirect agency, arguing that, in case of such conflicts, negative rights *can* be balanced against positive rights under certain conditions, but only when interference with the negative right does not entail treating a person as a means to an end. I will submit that, whenever that last criterion is not met, there can be no question of balancing.

In applying these principles to the hypothetical case, I will conclude that the dilemma between the two absolute instances of the prohibition of torture presented therein should be resolved to the benefit of the negative right of the suspect.

[1377] This chapter is – in large part – a reproduction of S. Smet, 'Conflicts between Absolute Rights: A Reply to Steven Greer', 13 *Human Rights Law Review* (2013), 469-498.

Section II – *Gäfgen v. Germany* and the Hypothetical Case of *X*.

1. *Gäfgen v. Germany*: No Conflict between Absolute Convention Rights

The *Gäfgen* case at the ECtHR revolved around the abduction of an eleven-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,[1378] Mr. Gäfgen confessed that he had killed Jakob and revealed the location of the boy's body.

In an interesting article on the case, Steven Greer has argued that *Gäfgen* involved a conflict between absolute rights: the art. 3 rights of Mr. Gäfgen (in their negative dimension) and the art. 3 rights of Jakob (in their positive dimension).[1379] Greer reproaches all actors involved in the *Gäfgen* case for having failed to acknowledge as much:

> "the central moral question, which none of the judges framed, is this: why should the right of a suspect--virtually certain to have been involved in the kidnapping of a child for ransom--to be spared the short-lived psychological suffering caused by the threat of torture to compel him to disclose the whereabouts of his victim, take precedence over the victim's rights to avoid the much more severe, and much more prolonged, physical and mental suffering and imminent death, occasioned by the kidnapping itself?"[1380]

However, Greer's characterisation of the case as involving conflicting absolute Convention rights is misleading and erroneous, for the following reason: the primary concern of the police in *Gäfgen* 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. Gäfgen'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.[1381] The second paragraph of art. 2 ECHR already describes a number of situations in which the negative right

[1378] *Gäfgen*, *supra* note 2 at para. 131.
[1379] Greer, *supra* note 1262 at 68 and 86-87.
[1380] Ibid. at 86-87.
[1381] See, generally, Feinberg, *supra* note 65 at 98 (arguing that the right to life cannot be absolute).

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".[1382] 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:

> "where 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."[1383]

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 (art. 5) and right to private life (art. 8).[1384] 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 in case of an insufficiently established risk to the rights of others.

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 art. 3 – the State is arguably under an absolute obligation to put an end to it.[1385] 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.[1386] But there can be no question of balancing the art. 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.[1387]

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 *Gäfgen*, the Court dismissed the Government's defence that the

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[1382] Article 2 (2) ECHR.
[1383] *Osman*, *supra* note 44 at para. 116.
[1384] Ibid.
[1385] See, for instance, ECtHR, *M. and Others v. Italy and Bulgaria*, app. no. 40020/03, 31 July 2012, paras. 99 and 102-103.
[1386] Ibid. at para 102.
[1387] See *contra* Greer, *supra* note 1262 at 82 (arguing that, although the Court's "jurisprudence on the positive obligation to prevent violations of Article 3 by third parties does not appear expressly to include the proviso that other Convention rights should be respected, it is difficult to avoid the analogy with Article 2").

police officers were obliged under the Convention to protect Jakob's right to life:[1388] "[while 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."[1389] 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",[1390] since "neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3."[1391] In that respect, the conflict in *Gäfgen* is of the type discussed in Chapter VI, *i.e.* a conflict between an absolute and a relative Convention right. In terms of human capital, the facts of the *Gäfgen* case may have presented an excruciating dilemma to the police officers involved, a scenario in which – they felt – tragic choices had to be made. In legal terms, however, the resolution of the case was relatively straightforward: since it cannot be balanced against other considerations, including protection of the right to life, the absolute art. 3 prevails.[1392] The sad truth of the matter is, moreover, that no possible action taken by the police could have saved Jakob, since he had already been killed at the time when Mr. Gäfgen became a suspect.

2. The Hypothetical Case of *X.*: A Genuine Conflict between Absolute Rights

The considerations presented in the preceding section render it difficult to characterise *Gäfgen* 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 *Gäfgen* 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 *X.*

Let us imagine that, similar to Mr. Gäfgen, X has abducted a child, Z, in a Council of Europe member State. X is subsequently arrested by the police, while picking up the ransom he demanded in return for Z's release. However, contrary to *Gäfgen*, let us imagine that the child, Z, is still alive when X is arrested. Let us also imagine that the police is aware of this fact, because they discovered a live video feed in X's apartment, in which the police can see that Z is being tortured by Y, who is known to be X's wife. Let us further imagine that the police submits X to torture, because he refuses to disclose Z's location. Regardless of whether X subsequently reveals Z's location or not, this hypothetical case – expressed in ECHR terms –

[1388] *Gäfgen*, *supra* note 2 at para. 177.
[1389] Ibid.
[1390] Ibid. at para 107.
[1391] Ibid. at para. 176.
[1392] Resolution of the case is, of course, only straightforward if one insists – like the ECtHR did – on upholding the absolute character of art. 3 ECHR, a position I support. If one denies that absolute character, the conflict transforms into one between two relative Convention rights, rendering its solution much less straightforward. For more on the absolute character of art. 3 ECHR, see S. Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?', in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR - The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2013), 273-293.

appears to involve a genuine conflict between absolute rights. This conflict is able to arise because the domestic authorities in *X.* are at the same time under a (negative) obligation under art. 3 ECHR not to torture X and under a (positive) obligation under the same article 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?[1393] And if so, how can it be resolved? These are the questions I will now turn to.

Section III – 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.[1394] Indeed, the dilemma only arises if the prohibition of ill-treatment in art. 3 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 art. 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.[1395] 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?[1396]

1. The Negative Dimension of Article 3: An Absolute Prohibition of Torture by State Agents[1397]

The ECtHR has repeatedly and consistently held, in almost mantra-like fashion, that "Article 3 is absolute",[1398] that it "enshrines one of the most fundamental 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"[1399] and that "the philosophical basis underpinning the absolute nature of the right under Article 3 does not

[1393] See Feinberg, *supra* note 65 at 97-98 (arguing that "unavoidable conflict between one person's absolute right and another persons' absolute right of the same type" is a logical impossibility). Although I present *X.* as a genuine conflict between absolute rights, I ultimately agree with that conclusion. Indeed, below I argue that "the conflict [in *X.*] between the suspect's (negative) right to be free from torture and his victim's (positive) right to be free from torture [should be] resolved to the benefit of the former[, which] *logically means that the positive right emerges less absolute from the conflict*." (emphasis added). See *infra*, around note 1502 and accompanying text.

[1394] A fitting description for the *prima facie* contradictory concept of a conflict between absolute rights. On 'constitutional dilemmas', see Zucca, *supra* note 26.

[1395] See also Addo and Grief, *supra* note 200 at 516. See *contra* De Schutter and Tulkens, *supra* note 200 at 181. On conflicts between an absolute Convention right and a relative Convention right, see *supra* Chapter VI.

[1396] Addo and Grief, *supra* note 200. See also Greer, *supra* note 219 at 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).

[1397] For a more detailed analysis, see Smet, *supra* note 1392.

[1398] *Labsi*, *supra* note 305 at para. 118.

[1399] *M.S.S.*, *supra* note 417 at para. 218.

allow for any exceptions or justifying factors or balancing of interests."[1400] As a result, application of art. 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 has introduced a threshold requirement:

> "in 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."[1401]

It is important to note that, although the threshold for application of art. 3 is variable, the provision does not allow for any proportionality assessment or balancing. Ill-treatment that falls within the scope of art. 3 can under no circumstances be justified as a proportionate response to protect public interests, such as national security or public order.[1402] It can also not be outweighed by the Convention rights of other individuals, including their right to life.[1403] Instead, the only relevant element for application of art. 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 art. 3 in others.[1404] For example, arbitrary use of force by the police against random persons in the streets would fall foul of art. 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).[1405] 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 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 art. 3.

Once the context-dependent threshold for application of art. 3 is met, the provision thus prohibits ill-treatment by State agents in absolute terms, without allowing any considerations

[1400] *Gäfgen*, *supra* note 2 at para. 107.
[1401] Ibid. at para. 88.
[1402] Ibid. at para. 87.
[1403] Ibid. at para. 107.
[1404] See also Addo and Grief, *supra* note 200 at 515-516.
[1405] See, for example, ECtHR, *Ribitsch v Austria*, app. no. 18896/91, 4 December 1995, para 38.

of proportionality or balancing to enter the Court's reasoning.[1406] The negative dimension of art. 3 can therefore be considered absolute under the Court's case law.[1407]

2. The Positive Dimension of Article 3: An Absolute Obligation to Protect Individuals from Torture?[1408]

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 art. 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 art. 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 (the prohibition of *refoulement*), 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).[1409] In its leading expulsion case the Court insisted, in what I submit are unmistakable terms, that art. 3 remains absolute in its positive dimension:

> "the Court cannot accept the argument ... that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory 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."[1410]

[1406] S. Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality', 65 *Cambridge Law Journal* (2006) at 439.

[1407] 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, namely those on solitary isolation and force-feeding, see Smet, *supra* note 1392.

[1408] This section combines the analyses of the positive dimension of art. 3 ECHR presented in Smet, *supra* note 1377 and in Smet, *supra* note 1392.

[1409] See also H. Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed', 22 *Leiden Journal of International Law* (2009) at 600-603 (arguing that, although the Court seems to consider negative obligations to form the core of these cases, the prohibition of *refoulement* can likewise be understood in terms of positive obligations).

[1410] *Saadi*, *supra* note 305 at para. 138 (emphasis added). See also ECtHR, *Chahal v. the United Kingdom*, app. no. 22414/93, 15 November 1996, paras. 80-81. See *contra* Battjes, *supra* note 1409 at 586 and 604-605 (arguing that the application of the prohibition of *refoulement* always involves some form of balancing and that

The Court went on to hold that, since art. 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:

> "it 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."[1411]

It should be noted that the Court has also held fast to the absolute character of art. 3 in expulsion cases when the risk of ill-treatment emanated from private actors, not public officials, in the receiving State.[1412]

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 corporal punishment, domestic violence, severe neglect and sexual abuse. Although it has never stated so explicitly, the Court appears to regard the positive dimension of art. 3 to be absolute in those cases as well, provided – of course – that the domestic authorities are aware (or ought to be aware) of the ill-treatment.[1413] There exists, however, room for confusion in the Court's case law on the matter.[1414]

In certain cases, namely those related to corporal punishment of children by private actors, considerations of proportionality and balancing do not enter the Court's reasoning.[1415] But in other cases, things are not as straightforward. Particularly noteworthy are cases concerning

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the Court's reference to the absolute nature of art. 3 serves to emphasise the interests of the individual to be expelled).

[1411] *Saadi*, *supra* note 305 at paras. 138-139.

[1412] ECtHR, *Hirsi Jamaa and Others v. Italy*, app. no. 27765/09, 23 February 2012, paras. 120 and 122; ECtHR, *Sufi and Elmi v. the United Kingdom*, app. nos. 8319/07 and 11449/07, 28 June 2011, 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 art. 3. See *N. v. the United Kingdom*, *supra* note 1161; *D. v. the United Kingdom*, *supra* note 417. See Battjes, *supra* note 1409 at 585-586, 598 and 611. One way to bring these cases in line with the absolute nature of art. 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 art. 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 art. 3 and therefore in need of amendment. I combine both arguments in Smet, *supra* note 1392.

[1413] *Opuz*, *supra* note 309 at paras. 161-162, 165, 169 and 176; *Z. and Others v. the United Kingdom*, *supra* note 150 at paras. 73-74. See further ECtHR, *E. and Others v. the United Kingdom*, app. no. 33218/96, 26 November 2002.

[1414] For an exploratory analysis of the relevant cases, including *Opuz*, *supra* note 309, and *Z. and Others v. the United Kingdom*, *supra* note 150, see Mavronicola, *supra* note 200 at 737-738 and 756-757 (arriving at a tentative conclusion, similar to the one I defend below, that art. 3 is also absolute in its positive dimension, but reserving an in depth analysis for later research).

[1415] *A. v. the United Kingdom*, *supra* note 71 at paras. 21-24; ECtHR, *Costello-Roberts v. the United Kingdom*, app. no. 13134/87, 25 March 1993, paras. 31-32.

sexual and physical abuse within the family.[1416] In those cases, the Court has indicated that, as soon as domestic authorities are aware (or ought to be aware) that a person is the victim of such abuse, they are under an obligation to put an end to it.[1417] Importantly, the Court does not reference the art. 8 (and/or art. 5) rights of the perpetrator as a factor to be weighed against the art. 3 rights of the victim, like it does with the Convention rights of potential perpetrators in cases concerning the positive obligation to protect life.[1418] However, in establishing the existence of a positive obligation, the Court *does* limit its scope by indicating that the state should take "reasonable steps" to protect the victim.[1419]

The reference to "reasonable steps" can be interpreted in two ways. A first interpretation would read it as *ipso facto* negating the absolute character of the positive obligation. However, along with Stephanie Palmer, I submit that such an interpretation would be erroneous.[1420] It confuses the question of the scope of the positive obligation with the question whether any considerations of public interest or the rights of others might *outweigh* that positive obligation. In the Court's case law, it transpires that domestic authorities are granted some leeway in fulfilling their positive obligation to protect in abuse cases.[1421] Thus, they may require some time to act, for example to prepare a successful rescue operation, without failing to adhere to their positive obligation.[1422] But this does not alter the fact that they are under a positive obligation to protect the victim. If they fail to act at all or do not do all that lies within their power, they will have violated that positive obligation.[1423] Interpreting the reference to "reasonable steps" as limiting the scope of the positive obligation to what lies in the authorities' power does not necessarily contradict the notion of an absolute positive obligation,[1424] provided that no considerations of proportionality or balancing are brought into the Court's reasoning to justify the state's failure to meet its positive obligation.[1425] Thus, the question is not whether the reference to "reasonable steps" *ipso facto* negates the absolute nature of art. 3, but whether it opens the positive obligation up to balancing against the public interest or the Convention rights of others.

[1416] For an example of a case in which the violence was not intrafamilial, see ECtHR, *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, app. no. 71156/01, 3 May 2007, particularly at paras. 111 and 124.
[1417] *E. and Others v. the United Kingdom*, *supra* note 1413 at para. 92.
[1418] See, *contra*, ECtHR, *Đorđević v. Croatia*, app. no. 41526/10, 24 July 2012, paras. 138-140, in which the Court – exceptionally and, it is submitted here, erroneously – held, under the heading 'general principles', that the principles it developed in the *Osman* case (*Osman*, *supra* note 44) also apply to cases of ill-treatment by private actors under art. 3. However, it is important to note that the Court did not apply any of those principles in its assessment of the particular circumstances of the case at hand. Instead, it found that the authorities did not do enough to put a halt to the ill-treatment, without referencing any need to balance the applicant's art. 3 rights against the Convention rights of the perpetrators. See ibid. at paras. 146-150.
[1419] *Opuz*, *supra* note 309 at para. 162; *E. and Others v. the United Kingdom*, *supra* note 1413 at para. 92.
[1420] Palmer, *supra* note 1406 at 446, 448 and 450. See also Mavronicola, *supra* note 200 at 12 and 15-16.
[1421] *Opuz*, *supra* note 309 at para. 165. See also Mavronicola, *supra* note 200 at 12 and 15-16.
[1422] *M. and Others v. Italy and Bulgaria*, *supra* note 1385 at paras. 102-103.
[1423] *Opuz*, *supra* note 309 at paras. 165 and 166-70.
[1424] This interpretation is supported by the language used in *E. and Others v. the United Kingdom*, *supra* note 1413 at para. 92 ("whether [the local authority] took the steps reasonably available to them to protect [the applicants] from that abuse").
[1425] Mavronicola, *supra* note 200 at 16.

To answer this question, it is crucial to distinguish two types of positive obligation. First, the state may be held under a general, abstract obligation to *prevent* ill-treatment contrary to art. 3 by private actors (e.g. domestic violence, rape, severe negligence of children). Second, the state may be held under a concrete obligation to *protect* identified individuals from a specific instance of ill-treatment of which the state is or ought to be aware. Both are positive obligations, but naturally, the former – the abstract obligation to prevent – cannot be regarded as absolute, given the "difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources",[1426] as well as the need to consider the countervailing rights of other individuals to private life and liberty of person. The concrete positive obligation to protect, conversely, *can* function as absolute; and it in fact does so under the Court's case law, as indicated above. Domestic authorities may be granted some leeway in fulfilling their positive obligation to protect in concrete cases, but they cannot justify a failure to act by invoking overriding interests or rights as justification. To put it sharply, budgetary restrictions, physical impossibility and the countervailing rights of others may put limits on the state's ability to prevent each and every instance of rape or physical abuse from occurring, but they cannot justify a failure to act in actual cases of rape or abuse.

There is one case, however, in which the Court appears to reason against the above interpretation of concrete positive obligations to protect. In the child abuse case of *Z. and Others v. the United Kingdom*, the Court acknowledged "the difficult and sensitive decisions facing social services and the important *countervailing* principle of respecting and preserving family life".[1427] The reference to the "countervailing principle of respecting and preserving family life" might entice us to conclude that balancing is possible in concrete positive cases under art. 3 after all. However, I submit that such an interpretation of *Z.* would be mistaken. It seems to me that, rather than being read as allowing for balancing, the statement should be understood as a recognition that the search for a solution within the family may be worth striving for, but under the condition – not to be surrendered, because absolute – that the abuse is put to an end. This reading of *Z.* is further strengthened by the fact that the quoted principle is immediately followed by firm confirmation by 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".[1428] This conclusion is in line with what has been suggested above: domestic authorities may have some leeway in deciding *how* to fulfil their positive obligations, but they cannot rely on countervailing reasons of public interest, nor on the Convention rights of others, to justify a failure to protect victims of abuse. The absolute nature of art. 3, also in its positive dimension, thus seems beyond reproach.[1429]

[1426] *Osman*, *supra* note 44 at para. 116. The Court ruled in this manner under art. 2, but similar considerations clearly apply to the abstract obligation to prevent ill-treatment by private actors under art. 3.
[1427] *Z. and Others v. the United Kingdom*, *supra* note 150 at para. 74 (emphasis added).
[1428] Ibid.
[1429] For further elaboration of the argument that the positive dimension of art. 3 is absolute, see Smet, *supra* note 1392. See, in support, Mavronicola, *supra* note 200 at 734. See *contra* Van Drooghenbroeck, *supra* note 219 at 142-143.

3. No Easy Escape from the Dilemma

Given that both the negative and the positive dimension of art. 3 are absolute, there is no easy way out of the dilemma posed by our hypothetical case of *X*. Since the domestic authorities were aware of the torture of Z by Y, they were under an absolute positive obligation under art. 3 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 art. 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 art. 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.[1430] In line with our intuitions, a workable hypothesis would thus entail that in cases of conflicting absolute art. 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.

Section IV – Turning to Moral Philosophy for Guidance

While some scholars, *e.g.* Ronald Dworkin,[1431] argue that law and morality are necessarily intertwined,[1432] others insist that both fields are (or at least should be kept) separate.[1433] Here, I will not make any broad statements in favour of either of those positions. Instead, I focus on the more modest – and generally uncontested – claim that the law at times draws on moral arguments and principles.[1434] This is certainly true for human rights adjudication by the

[1430] *Z. and Others v. the United Kingdom*, *supra* note 150 at para. 73; *M. and Others v. Italy and Bulgaria*, *supra* note 1385 at para. 99; see also *Opuz*, *supra* note 309 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."). See also Palmer, *supra* note 1406 at 449-450 (arguing that the reference to "reasonable steps" is a matter of determining the scope of the positive obligation, not of proportionality).

[1431] For Dworkin's most recent statement to this effect, see Dworkin, *supra* note 359 at 5 and 400-405.

[1432] See also, for instance, R. Alexy, 'On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique', 13 *Ratio Juris* (2002), 138-147.

[1433] See for instance H. L. A. Hart, *The Concept of Law* (Oxford – New York: Oxford University Press, 1961); O. Beaud, 'Reframing a Debate among Americans: Contextualizing a Moral Philosophy of Law', 7 *International Journal of Constitutional Law* (2009), 53-68.

[1434] Poscher, *supra* note 115 at 224 (arguing that no one would be inclined to defend a very strong separation thesis between law and morality, since it is clear that "the law draws on moral conceptions and principles, just as it draws on conceptions and principles belonging to numerous other fields of knowledge", like mathematics, and that this "does not imply that the validity of legal concepts depends on this reception"). See also J. Waldron,

ECtHR. The principles the Court has developed in its case law reveal that it rejects a utilitarian theory of the Convention's human rights.[1435] 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."[1436] 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."[1437] The Court has therefore time and again insisted that limitations on Convention rights are to be interpreted restrictively.[1438]

In adjudicating individual cases, the ECtHR has at times explicitly engaged in moral reasoning.[1439] In *Lustig-Prean and Beckett v. the 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."[1440] 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).[1441] Another example from the ECtHR's case law is the very weighty reasons test, which the Court applies in cases of, for instance, racial

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'Judges as Moral Reasoners', 7 *International Journal of Constitutional Law* (2009) at 9; S. Mancini and M. Rosenfeld, 'The Judge as Moral Arbiter? The Case of Abortion', in A. Sajó and R. Uitz (eds.), *Constitutional Topography: Values and Constitutions* (The Hague: Eleven International Publishing, 2010) at 299 and 301; Letsas, *supra* note 1207 at 309; R. Dworkin, 'The Judge's New Role: Should Personal Convictions Count?', 1 *Journal of International Criminal Justice* (2003) at 6.

[1435] Cariolou, *supra* note 61 at 249-269.

[1436] *Young, James and Webster*, *supra* note 232 at para. 63; see also *Alekseyev*, *supra* note 233 at para. 81 ("it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority").

[1437] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, *supra* note 237 at para. 5 at 28.

[1438] See, among many authorities, *Perez*, *supra* note 238 at para. 73; *Demir and Baykara*, *supra* note 36 at para. 146; *Stoll*, *supra* note 238 at para. 61; *Sunday Times*, *supra* note 238 at para. 65; *Klass*, *supra* note 238 at para. 42.

[1439] For examples, see ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, app. nos. 31417/96 and 32377/96, 27 September 1999, paras. 89-90; *Konstantin Markin*, *supra* note 144 at para. 143; *M.S.S.*, *supra* note 417 at paras. 251 and 263.

[1440] *Lustig-Prean and Beckett*, supra note 1439 at para. 90.

[1441] On the priority-to-rights principle, see Greer, *supra* note 219 at 196 and 208-210; Van Drooghenbroeck, *supra* note 26 at 313.

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.[1442]

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.

1. 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.[1443] 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 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).[1444] Studies in folk intuitions have demonstrated that this is also the moral opinion of the

[1442] This statement should be understood as referring to negative discrimination only.
[1443] P. Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Oxford: Basil Blackwell, 1978) at 23; J. J. Thomson, 'The Trolley Problem', 94 *Yale Law Journal* (1985), 1395-1415.
[1444] 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, *supra* note 96 at 90-94; J. J. Thomson, 'Turning the Trolley', 36 *Philosophy and Public Affairs* (2008), 359-374 (arguing that it is, after all, not permissible to kill one in order to

vast majority of people confronted with both scenarios.[1445] 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 *versus* allowing; and (iii) direct *versus* indirect agency.[1446] 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.[1447] 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

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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).

[1445] M. D. Hauser et. al., 'A Dissociation between Moral Judgments and Justifications', 22 *Mind & Language* (2007) at 6 (85% of the participants judged it morally permissible for a person to flip the switch in Trolley (Switch), while only 12% 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 B. Huebner and M. D. Hauser, 'Moral Judgments about Altruistic Self-sacrifice: When Philosophical and Folk Intuitions Clash', 24 *Philosophical Psychology* (2011), 88-89 (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" (emphases in original)).

[1446] See F. Cushman et. al., 'The Role of Conscious Reasoning and Intuition in Moral Judgment – Testing Three Principles of Harm', 17 *Psychological Science* (2006) at 1082; J. D. Greene et. al., 'Pushing Moral Buttons: The Interaction between Personal Force and Intention in Moral Judgment', 111 *Cognition* (2009) at 365; F. M. Kamm, 'The Doctrine of Double Effect: Reflections on Theoretical and Practical Issues', 16 *The Journal of Medicine and Philosophy* (1991), 571-585; J. McMahan, 'Revising the Doctrine of Double Effect', 11 *Journal of Applied Philosophy* (1994), 201-212; W. S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing', 98 *The Philosophical Review* (1989), 287-351 [hereinafter Quinn (a)]; W. S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', 18 *Philosophy & Public Affairs* (1989), 334-351 [hereinafter Quinn (b)]; Foot, supra note 1443; Thomson, supra note 1444.

[1447] It should be noted that both case concern different rights: the freedom from torture in *X*. and the right to life in the Trolley Problem. However, for our current purposes this does not reduce their comparability 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 eliminates the difference (*i.e.* 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*.).

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*.

2. 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, which can be traced back to Thomas Aquinas, maintains that it is permissible to perform an action that causes a serious harm (*e.g.* killing one's attacker) as a side effect of promoting some good end (*e.g.* saving one's own live).[1448] 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.[1449] However, it has also met devastating criticism.[1450] 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."[1451] 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."[1452] Frances Kamm has, through the use of several counterexamples, likewise pointed towards the "insufficiency of the [doctrine of double

[1448] A. McIntyre, 'Doing Away with Double Effect', 111 *Ethics* (2001) at 219.
[1449] Ibid. at 219.
[1450] Ibid.; H. L. A. Hart, *Punishment and Responsibility – Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at 119-123; Foot, supra note 1443; Kamm, *supra* note 1446; M. R. Waldmann and J. H. Dieterich, 'Throwing a Bomb on a Person Versus Throwing a Person on a Bomb: Intervention Myopia in Moral Intuitions', 18 *Psychological Science* (2007), 247-253 (arguing, based on empirical psychological research, that the point of intervention, rather than intentions are *primarily* responsible for moral judgment, while leaving room for subsidiary relevance of intentional v. unintended actions).
[1451] Hart, *supra* note 1450 at 122.
[1452] Ibid. at 123.

effect] in accounting for constraints on conduct."[1453] 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 conscious access.[1454] 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.[1455]

Further on,[1456] 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 regards. 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."[1457] 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 (*e.g.* someone violently resisting arrest) *and* in which the force was not intended to kill the person, but nevertheless led to that result.

However, the Court has also reasoned in terms that resonate the ideas behind the doctrine of double effect more directly. For instance, 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."[1458] 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 double effect

[1453] Kamm, *supra* note 1446 at 578.
[1454] Cushman et. al., *supra* note 1446.
[1455] Ibid. at 1086.
[1456] See *infra*, '3. Negative v. Positive Obligations and Direct v. Indirect Agency: The Best Available Moral Theory'.
[1457] ECtHR, *Isayeva v. Russia*, app. no. 57950/00, 24 February 2005, para. 173. For the origin of the principle, see ECtHR, *McCann v. the United Kingdom*, app. no. 19009/04, 13 May 2008, para. 148.
[1458] *Isayeva*, *supra* note 1457 at para. 176.

– will not lead to a violation of those civilians' right to life.[1459] 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 permissibility 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 chapter.

Here, it remains to be noted that the Court seems to have implicitly rejected – albeit by way of *obiter* – the relevance of the doctrine of double effect in another judgment: *Finogenov v. Russia*.[1460] The case concerned the Russian authorities' actions in the context of the hostage-taking in the Dubrovka theatre in Moscow in 2002. A group of 40 terrorists had taken more than 900 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 (*i.e.* 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. 129 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 what extent the gas had contributed to the 129 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."[1461] 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 aircraft believed to be intended for a terrorist attack (thus allowing the possibility to save more people by sacrificing the lives of a few).[1462] 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 (*i.e.* the passengers) would be incompatible with their right to life and human dignity.[1463]

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

[1459] See also ECtHR, *Ergi v Turkey*, app. no. 23818/94, 28 July 1998, particularly at para. 79 (on the death of a civilian who caught a bullet during a shootout between the Turkish authorities and Kurdish separatists).
[1460] ECtHR, *Finogenov and Others v. Russia*, app. nos. 18299/03 and 27311/03, 20 December 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 inerpreted 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 remains the case that its reasoning – even if 'only' implicitly so – is inconsistent with the doctrine of double effect, for the reasons explained in the text.
[1461] Ibid. at para 202. For the judgment of the German Constitutional Court, see BVerfG, 1 BvR 357/05, 15 February 2006.
[1462] *Finogenov*, *supra* note 1460 at para. 231.
[1463] Ibid.

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."[1464] 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 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."[1465] 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."[1466]

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.[1467] Such use of a moral nullifier is out of line with established case law of the ECtHR, which has held, in unmistakable terms, that the conduct of the victim (*i.e.* the person who is being tortured by State agents) is irrelevant to the establishment of the responsibility of the State.[1468] As a result, "the nature of the offence allegedly committed by the applicant [is] ... irrelevant for the purposes of Article 3."[1469] 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.

[1464] Ibid. at para. 232.
[1465] McMahan, *supra* note 1446 at 211.
[1466] Greer, *supra* note 1262 at 84-85.
[1467] See further K. Möller, 'The Right to Life Between Absolute and Proportional Protection', *LSE Law, Society and Economy Working Papers 13/2010* (2010) at 16-17, available at http://eprints.lse.ac.uk/32902/ (last accessed 7 October 2013).
[1468] ECtHR, *Labita v. Italy*, app. no. 26772/95, 6 April 2000, para. 119; *T. v. the United Kingdom*, *supra* note 150 at para. 67. See further *Chahal*, supra note 1410 at para. 79.
[1469] *Labita*, *supra* note 1468 at para. 119.

3. Negative v. Positive Obligations and Direct v. 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.[1470] 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.[1471] 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.[1472] 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 – our 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.

I submit that most people, when confronted with Trolley (Switch*), would most likely regard it impermissible for Jane to switch the tracks.[1473] Whatever reason they may cite for this moral judgement, *e.g.* "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

[1470] Foot, supra note 1443 at 27-29; Thomson, supra note 1444 at 372.
[1471] See also Hart, *supra* note 1450 at 123.
[1472] See for instance M. Otsuka, 'Double Effect, Triple Effect and the Trolley Problem: Squaring the Circle in Looping Cases', 20 *Utilitas* (2008), 92-110; Thomson, supra note 1444.
[1473] E. B. Royzman and J. Baron, 'The Preference for Indirect Harm', 15 *Social Justice Research* (2002) at 175-178 (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.

to kill him, she will have nevertheless violated her negative obligation towards that workman.[1474]

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.[1475] Therefore, *in principle* the negative obligation weighs heavier than the positive obligation to save life.[1476] [1477]

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 art. 2 (2) ECHR, 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.[1478] 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.[1479]

[1474] See also Thomson, supra note 1443 at 1398. On the relevance of intention, drawing on Bentham's distinction between oblique and direct intentions, see Hart, *supra* note 1450 at 119-122. On the distinction between acting with the *intention* to bring about a certain result and acting *intentionally*, see J. Knobe, 'Intentional Action and Side-Effects in Ordinary Language', 63 *Analysis* (2003), 190-193; J. Knobe, 'Intention, Intentional Action and Moral Considerations', 64 *Analysis* (2004), 181-187.

[1475] See also E. Wicks, *The Right to Life and Conflicting Interest* (Oxford – New York: Oxford University Press, 2010) at 153.

[1476] See also Foot, supra note 1443 at 29; Quinn (a), *supra* note 1446 at 289 and 306-308; Kamm, *supra* note 1446 at 100 (making the same claim but in the context of the Organ Transplant Case, which involves a scenario in which one person would be killed in order to harvest his organs to save five others). In the context of the ECHR, Judges Martens and Mascher 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 Mascher to ECtHR, *Gustafsson v. Sweden*, app. no. 15573/89, 25 April 1996, para. 8.

[1477] *Why* that is the case, I, along with Thomson, do not know. But I do consider it irrefutable. See Thomson, supra note 1444 at 372.

[1478] Court of Appeal of England and Wales, *Re A (Children)* [2000] 4 All ER 961.

[1479] See also Dworkin, *supra* note 359 at 376-377. I do not explicitly address abortions for other reasons (*i.e.* when a woman decides she does not want to have a child), because they concern two different rights/interests:

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.[1480]

By adding an element of balancing, the difference in moral judgment between Trolley (Switch*) and Trolley (Switch) can be explained.[1481] 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 100 workmen on the original track, it becomes impossible to maintain that it is categorically impermissible for her to throw the switch.[1482] 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.[1483] 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.[1484] 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 100 workman standing on one track, but can be diverted to one on which 99 workmen are standing, my moral judgment is that the weight of the negative right not to be killed of each of the 99 still outweighs the positive right to be saved of each of the 100. And this may also be the case when there are 95 or even 90 workmen standing on the side track. Research from social psychology also indicates that, when confronted with such a scenario (100 *versus* 99),

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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.

[1480] Möller, *supra* note 1467 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* note 1450 (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, *i.e.* 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)).

[1481] See *contra* Quinn (a), *supra* note 1446 at 304-305 (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).

[1482] 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 100 workmen versus one, my intuition does not hesitate: it tells me it is permissible for Jane to throw the switch.

[1483] See, for instance, Kamm, *supra* note 125 at 248 (considering it permissible to turn a trolley headed towards two people onto a track where one person will be killed).

[1484] See also Quinn (a), *supra* note 1446 at 306-307.

most people would regard it impermissible to divert the trolley, thereby favouring adherence to the negative obligation.[1485] In fact, probably only act utilitarians would consider it permissible to throw the switch in such a scenario.[1486] 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 circumstances – *i.e.*, 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.[1487] 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.[1488] 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).[1489] 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

[1485] See also Royzman and Baron, *supra* note 1473 at 166 (in discussing a dilemma involving the development of a vaccine that would cure a deadly disease, but that unfortunately causes deaths of its own, the authors state that to prevent 100 deaths from the disease a utilitarian would consider 99 deaths from the vaccine acceptable, while their own empirical research demonstrates that many people answer considerably less, some even giving '0' as an answer).

[1486] Ibid.

[1487] Quinn (b), *supra* note 1446 at 343-344. 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 D. R. Mapel, 'Revising the Doctrine of Double Effect', 18 *Journal of Applied Philosophy* (2001) at 269-270; Kamm, *supra* note 1446 at 572. See further, Foot, supra note 1443 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* note 1446 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); Wicks, *supra* note 1475 at 155.

[1488] See also Thomson, supra note 1443 at 1401; Wicks, *supra* note 1475 at 155. For a similar idea, expressed in terms of the inviolability of the (right to life of a) person, see Kamm, *supra* note 125 at 245; Möller, *supra* note 1467.

[1489] See also Wicks, *supra* note 1475 at 155; Hart, *supra* note 1450 at 127; Royzman and Baron, *supra* note 1473 (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 note 1444 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).

killed is nevertheless considered to be outweighed by the positive right to be saved of the five other workmen.[1490]

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.[1491] This position has also been defended, in the context of deprivation of liberty of asylum seekers, by a number of dissenting Judges in *Saadi v. the 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."[1492] If fulfilling 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.[1493] 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.[1494]

4. 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 outweigh positive obligations. I have also argued that those negative obligations *can* nevertheless be outweighed by positive obligations 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

[1490] See also Kamm, *supra* note 125 at 254.
[1491] See *contra* Kumm, *supra* note 242 at 163-164.
[1492] Dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR, *Saadi v. the United Kingdom*, app. no. 13229/03, 29 January 2008.
[1493] See *contra* M. 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', 1 *Legisprudence* (2007) at 230 (arguing that the 'asboluteness' 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).
[1494] See also Kamm, *supra* note 96 at 116 (but arguing that it is the structure of the case, *e.g.* the fact that a threat is redirected, not the presence of rights *per se*, that determines whether or not balancing is permitted).

of him, unless he is paid a ransom by the State authorities. Imagine also that Joe is forcing another 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. However, 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 knock the glass out of Joe's hands, thereby sending it towards Jeff, causing him intense pain and disfiguring his face.[1495] 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.[1496]

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 art. 3 ECHR cannot be balanced against Z's positive right under the same article.[1497] In his analysis of *Gäfgen*, Greer also relies on this Kantian principle, but he applies it differently. He

[1495] 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 (*e.g.* to extract a confession) as well as any context of complete submission to the power of a state agent (*e.g.* in the case of a suspect detained at the police station) is missing. See *Gäfgen*, *supra* note 2 at para. 90 (with reference to the definition of torture in art. 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 art. 3 ECHR. And, like torture, inhuman treatment is prohibited in absolute terms by art. 3. See, among many authorities, *Stanev*, *supra* note 1082 at para. 201.

[1496] See also J. Lee, 'Human Dignity and Inviolability – The Absolute Prohibition on Torture', 12 *UCL Jurisprudence Review* (2005) at 89 (offering the analogous example of a case in which a person (Peter) has to torture one person in order to avert the torture of nine persons by someone else (the 'tyrannical torturer') and arriving at the same conclusion as mine: consequentalist reasoning is not allowed in this case).

[1497] See, similarly, Quinn (b), *supra* note 1446 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.").

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)".[1498] 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.[1499] 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.[1500] Such ill-treatment is the quintessential case of treating a person as a means only, robbing her of her humanity.

Section V – Conclusion

In this chapter, 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 inherent in the hypothetical case. It is, however, important to note that the principles developed in this chapter should only be applied as a measure of last resort, to resolve cases – 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.[1501] 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. 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

[1498] Greer, *supra* note 1262 at 85.
[1499] See also Möller, *supra* note 1467 at 17.
[1500] See *contra* Kumm, *supra* note 242 at 160-162.
[1501] *Compare* Mavronicola, *supra* note 200 at 732 (relying on a specificationist argument to deny the possibility of conflict, since "there is *no* positive duty to act in a way that constitutes a violation of the negative duty encompassed by an absolute right" (emphasis in original) and insisting that resolution of a slightly altered version of the *Gäfgen* case "is a matter of specification of positive duties rather than of certain considerations overriding the positive duties under an absolute right").

victim's (positive) right to be free from torture is resolved to the benefit of the former.[1502] This logically means that the positive right emerges less absolute from the conflict.

But the principles proposed in this chapter 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.[1503] 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')[1504]: 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).[1505]

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.[1506] 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

[1502] Note that there is still room to argue that – in certain extreme situations, including *X.* and *Gäfgen* – the existence of attenuating cirumstances may warrant the imposition of a lighter sanction on the torturer. See Lee, *supra* note 1496 at 92-93 (arguing that, in extreme scenarios, an *ex post* moral evaluation of the torturer justifies "the possibility that the torturer may receive some moral reprieve and a lighter legal sanction for his actions in situations where it may be humanly impossible not to torture in order to save a great many innocent lives"; and clarifying that such *ex post* moral evaluation nevertheless keeps the deontological constraint intact, since "a wrong has still been done to the victim and the torturer is still legally liable for his actions"). See also Greer, *supra* note 1262 at 84 ("[i]f the rationale for Article 3 is to prevent human suffering inflicted by someone for whom the state can be held responsible, it can be argued that the positive obligation on the police should effectively include subjecting Gäfgen to a much less serious violation of his Article 3 rights, if this was the only viable means of rescuing Jakob--*a result achieved by prosecuting the officers concerned afterwards, but punishing them leniently*." (emphasis added)). Note, however, that Greer, contrary to what I argue in the text and contrary to Lee, ultimately goes further by concluding 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." See Greer, *supra* note 1262 at 89.

[1503] On ticking time-bombs generally, see Y. Ginbar, *Why not Torture Terrorists? Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture* (Oxford – New York: Oxford University Press, 2010).

[1504] On these other arguments, see ibid. at 118-154. See also Lee, *supra* note 1496 at 89 (asking the poignant question as to whether, under the ticking time-bomb scenario, torture would also be permissible in a less catastrophic scenario, for instance one in which a thousand would die instead of two thousand).

[1505] See ECommHR, *Ireland v. the United Kingdom*, app. no. 5310/71, 25 January 1976 ("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.").

[1506] Contrary to what the German Constitutional Court held in the *Aviation Security Act Case*. See also Möller, *supra* note 1467 at 14; Kumm, *supra* note 242 at 156.

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.

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 art. 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. Among other things, this chapter has provided convincing reasons for the Court to explicitly rely on such moral arguments in its defence of the absolute nature of art. 3, rather than leaving them implicit.

GENERAL CONCLUSION

At the start of this dissertation, I set out to answer four research questions in relation to, respectively, the existence, conceptualisation, problematisation and resolution of conflicts between human rights in the context of the ECHR. Throughout this dissertation, I have answered all four questions, thereby offering a detailed analytical and normative account of conflicts between human rights in the ECHR context. In the process, I have proposed a number of innovative tools and frameworks that may assist the ECtHR in identifying and resolving conflicts between Convention rights.

Summary of the Research Findings

In answering the first research question – *Can human rights really conflict, in the sense of being incompatible with each other?* – I argued against the specificationist argument that rights cannot conflict. Instead, I demonstrated that conflicts between human rights are an inherent feature of the ECHR system. I insisted that such conflicts need to be properly understood, rather than denied. I thus set the stage for consideration of the third research question, *i.e.* the one related to the conceptualisation of conflicts between human rights in the ECHR context. I also argued that relative Convention rights, *qua pro tanto* rights, function as principles, while absolute Convention rights function as rules, thereby already offering some indications in relation to the fourth research questions related to the resolution of conflicts between Convention rights.

However, before thoroughly considering those third and fourth research questions, I first tackled the second one: *Are conflicts between human rights problematic in the ECHR context (*i.e. *do they raise different issues from the ones raised by 'traditional' human rights adjudication)?* I answered that question in the affirmative. I particularly dismissed the 'argument from principle' – *i.e.* the argument that no normative difference exists between human rights and public or private interests – and the 'argument from procedure' – *i.e.* the argument that such normative differences do exist, but that this does not have an impact on the methods to be employed by the ECtHR in resolving individual cases (the Court's proportionality test reigns supreme). In dismissing the 'argument from principle', I insisted that Convention rights – *qua* human rights – should be granted principled, even if not conclusive, priority over public or private interests invoked to justify their restriction. In dismissing the 'argument from procedure', I argued that conflicts between Convention rights should be resolved through a distinct framework that treats both rights with equal respect, instead of through the Court's version of the proportionality test. I thus further set the stage for my answer to the fourth research question, on the resolution of conflicts between Convention rights.

However, before moving on to that question, I first examined when exactly the Court would be confronted with a genuine conflict between Convention rights. I thus set out to answer the

third research question: *How can conflicts between human rights in the ECHR context be conceptualised?* In answering that question, I focused my attention on two relevant considerations, namely the individualisation of rights and the element of speculation as to whether or not rights are effectively at stake. Based on those considerations, I presented the following definition of a genuine conflict between Convention rights:

> *A genuine conflict between Convention rights arises whenever the State is under incompatible duties to protect/respect the Convention rights of two or more identified or identifiable individuals and/or entities, provided that their Convention rights are actually and sufficiently at stake.*

In order to assess whether this definition is met in a particular case, I proposed the use of a double test: a 'conflicting duties' test that looks at whether "the State is under incompatible duties" and a 'converse situation' test that examines whether both parties' "Convention rights are actually and sufficiently at stake".

Having proposed these tools, which would allow the Court to identify genuine conflicts between Convention rights, I moved on the fourth and final research question: *How can conflicts between Convention rights be resolved by the ECtHR?* In answering that question, I proposed a framework for the resolution of conflicts between Convention rights.

The first step of the framework – defusing conflicts as positive instances of fake conflict – aims at avoiding conflicts altogether. Because it ensures that both Convention rights are kept entirely intact, it provides the most optimal way to tackle apparent conflicts. In order to operationalise this first step of the framework, I proposed the use of the same double test that would allow the Court to identify genuine conflicts between Convention rights. Indeed, the 'conflicting duties' test and the 'converse situation' test are ideally suited to allow the Court to defuse apparent conflicts, since the conflict cannot be genuine if one of both tests is not met. Apparent conflicts can thus be defused (i) if the rights of one of the parties were not effectively affected by the other party exercising her rights, or (ii) if the State is in a position to take measures to ensure the compatibility of its duties towards both parties to the conflict.

Whenever a conflict cannot be avoided, however, it needs to be resolved. In order to provide for an optimal solution to the conflict, I argued that the second step of the framework should be concerned with reaching a compromise between the conflicting Convention rights. In operationalising this step of the framework, I suggested that the Court employ the German doctrine of *praktische Konkordanz*. I argued that, crucially, *praktische Konkordanz* avoids the need to sacrifice one right entirely to the benefit of the other. Instead, it focuses on having both rights make mutual, but minimal sacrifices. As a result, *both* rights can be protected to the maximum extent possible.

Whenever it is not possible to reach a compromise between genuinely conflicting Convention rights, however, the Court needs to determine which of both rights should prevail under the concrete circumstances of the case at hand. In order to allow the Court to rationally, convincingly and transparently do so, I proposed the use of three different resolution methods for the three different types of conflicts: (i) a structured balancing test for the resolution of

conflicts between relative Convention rights; (ii) subsumption in case of conflicts between an absolute and a relative Convention rights; and (iii) deontological reasoning in case of conflicts between absolute Convention rights.

I started off by analysing the first resolution method, *i.e.* structured balancing in the case of conflicts between relative Convention rights. In doing so, I first tackled the primary theoretical challenge to balancing: the incommensurability challenge. In order to overcome that challenge, I argued that a double distinction falls to be made, *i.e.* a distinction between incommensurability and incomparability, and between weak and strong incommensurability. I specifically argued that incommensurability does not necessarily preclude comparability and that, therefore, the challenge from weak incommensurability – *i.e.* the absence of a common metric to express the relationship between (in our case) conflicting Convention rights – could be overcome. In order to overcome that challenge, I proposed the use of a structural balancing test, which relies on 'balancing as reasoning' rather than the mechanical 'balancing of interests'. Before operationalising that test, however, I examined the Court's current approach to balancing conflicting Convention rights, as well as a possible alternative test, namely Robert Alexy's balancing test.

My analysis revealed that the Court's current approach to resolving conflicts between relative Convention rights, through the use of an open ended *ad hoc* balancing test, is problematic in four respects. I argued that the Court's current approach firstly does not offer sufficient guarantees against 'preferential framing', *i.e.* the process under which the Court frames the case to the benefit of the directly invoked Convention rights, disregarding (to a greater or lesser extent) the other Convention rights at stake. I secondly argued that the Court's open ended *ad hoc* balancing test invites a threat of arbitrariness and subjectivity into the Court's legal reasoning. I argued that this threat is the direct result of (i) the Court's ability to freely choose which factors it will consider in its balancing test, without needing to explain why it included those specific factors, while leaving others out; and (ii) the Court's tendency to offer no explanation as to how the employed factors relate to each other, which precludes a comparative judgment on the strength of the invoked arguments. I thirdly argued that coherence should play a central role in the structured balancing test. I specifically built upon Aleksander Peczenik's coherence theory, adapting it to the Court's legal reasoning. The primary modification I made to Peczenik's theory was my insistence on the construction of nets of arguments, intended to avoid the inevitable subjective balancing decision at the end of Peczenik's chains of arguments. I fourthly dealt with the role of intuitions in the Court's legal reasoning. Drawing on insights from cognitive psychology, I argued that the Judges at the Court may be prone to overly rely on intuitive judgments in resolving conflicting Convention rights cases. I argued that this is problematic, since primary reliance on intuitive reasoning invites confirmation bias, rendering alternative solutions to a problem invisible, thereby strengthening preferential framing effect. I argued that the Court's current open ended balancing test does not offer sufficient guarantees against confirmation bias. Instead, I claimed, it invites such bias.

In order to address these shortcomings in the Court's current approach to balancing conflicting Convention rights, I insisted that the Court employ a structured balancing test. Use of such a

test, I argued, would increase the rationality, objectivity, transparency and coherence of the Court's legal reasoning. However, before I presented my own version of such a test, I first examined and rejected Robert Alexy's balancing test, arguing that it is (i) overly arithmetical, in that – in its full statement – it can only function with the use of numbers; (ii) overly simplistic, in that it reduces balancing to a single variable in its most simple statement, which is the only one that is workable without the use of numbers; and (iii) unrealistic, in that it views conflicts as involving a strictly binary opposition between two parties.

Having rejected Alexy's balancing test, I then proposed my own version of a structured balancing test. The test is composed of seven criteria and relies on balancing as reasoning to construct nets of arguments in favour of each of the conflicting Convention rights. A comparison of both nets of arguments then allows the Court – in most situations – to determine which of the conflicting Convention rights should prevail under the concrete circumstances of the case at hand. The seven criteria of the structured balancing test are concerned with (i) determining the abstract weight of the conflicting Convention rights (value criterion); (ii) evaluating the damage done to each right as well as the likelihood that the damage will actually occur (impact criterion); (iii) locating the aspect of the Convention rights at stake within the protective sphere of those Convention rights (core-periphery criterion); (iv) assessing whether there are any other Convention rights (of the parties or of other persons) at stake (additional rights criterion); (v) establishing the role of the general interest in the resolution of the conflict (general interest criterion); (vi) determining whether one of the Convention rights stands (partly) in function of the other right (purpose criterion); and (vii) evaluating the role of any duties on the part of the parties to the conflict (responsibility criterion). In applying the structured balancing test to a specific case of the ECtHR, I illustrated how it could function in practice. However, I also indicated that the test has its limitations.

In particular, I predicted that the structured balancing test would not enable us to make a rational choice between conflicting Convention rights in the face of strong incommensurability. In order to assess that hypothesis, I examined the Court's case law on dilemmas, in search of cases in which such strong incommensurability obtained. In the process, I demonstrated that not all cases that appear to involve a dilemma, broadly defined as a particularly intense case in which tragic choices between conflicting rights have to be made, also involve strong incommensurability. Instead, I showed how the structured balancing test was able to rationally resolve one such case (*Odièvre v. France*), which meant that the case did not entail a genuine dilemma. In another case (*Evans v. the United Kingdom*), however, application of the structured balancing test did not enable us to rationally choose between the conflicting Convention rights. I therefore concluded that the case entailed a genuine dilemma, characterised by the strong incommensurability of the conflicting Convention rights at stake. I concluded that the Court should, in the face of strong incommensurability, which precludes a rational solution to the conflict, defer to the national legislator's resolution thereof.

I subsequently moved away from the structured balancing test and towards the other types of conflicts. I first dealt with conflicts between absolute and relative Convention rights, arguing that the resolution of such conflict is straightforward: the absolute Convention right should

prevail. Therefore, the resolution of the conflict takes the form of subsumption: the only relevant question is whether the absolute Convention right applies to the case at hand. In analysing the Court's case law on proselytism and headscarves, I demonstrated that this does not, however, necessarily render the resolution of a conflict simple. Instead, the potentially difficult question arises as to when exactly an absolute Convention right is effectively at stake. I argued that the Court may need to rely on sophisticated arguments in answering that question. I also argued that, in the proselytism and headscarf cases, those arguments should be related to the autonomy of the person confronted with the contested acts. Relying on such arguments from autonomy, I demonstrated that an absolute Convention right (the *forum internum* of art. 9 ECHR) was effectively at stake in part of the proselytism cases, but not in the headscarf cases. Therefore, I argued, the former cases in part involved a genuine conflict between an absolute and a relative Convention right, which should be resolved to the benefit of the former. The latter cases, however, did not involve a genuine conflict between Convention rights. Instead, they entailed a positive instance of fake conflict, since the Convention rights of the opposite party were not effectively at stake.

I finally also dealt with the possibility of conflicts between absolute Convention rights. I started off considering the case of *Gäfgen v. Germany*. However, I soon discovered that the case did not entail a conflict between absolute Convention rights. Instead, it involved a conflict between an absolute and a relative Convention right. Consequently, it was of the type discussed immediately above and fell to be resolved through subsumption. Yet, I did not end my analysis there. Instead, I developed a hypothetical case that did appear to involve a genuine conflict between absolute Convention rights. I argued that the hypothetical case could not be resolved through the available lines of legal reasoning in the Court's case law. Instead, I insisted, its resolution would require moral reasoning. In order to resolve the case, I relied on deontological reasoning. I proposed two principles that, translated into legal reasoning, would allow us to resolve the case. The first principle I proposed relies on the distinction between positive and negative obligations. It entails that, principally, negative rights trump positive rights when two instances of the same (absolute) right conflict. The second principle complements the first. It relies on the distinction between direct and indirect agency and entails that, in cases of conflicting absolute rights, 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, as was the case in the hypothetical example I developed, the first principle applies in full force. There can be no question of balancing. Instead, the negative right trumps the positive right. This logically means that the positive right emerges less absolute from the conflict. In effect, this also reveals that the conflict was really one of the second type, *i.e.* one between an absolute and a relative Convention right.

Gaps and Areas for Future Research

The above summary of the research presented in this dissertation demonstrates that I have offered a detailed analytical and normative account of conflicts between human rights in the

ECHR context. It also shows how I have proposed a number of innovative tools and frameworks to assist the Court in satisfactorily dealing with such conflicts. Nevertheless, there remain some gaps in the research that are particularly worth exploring.

Firstly, as already indicated in the methodology, the account presented in this dissertation would need to be combined with normative arguments on the scope of the Convention's rights and on the general role of the margin of appreciation before a truly holistic picture of conflicts between Convention rights would emerge.

Secondly, the present dissertation deliberately left other types of conflicts, *e.g.* between Convention rights and constitutional rights or international human rights, out of consideration. However, from the perspective of the user – *i.e.* the right holder – it does not matter in which document her fundamental rights are enumerated. Therefore, from the user's perspective, it would be particularly interesting to also delve into these other types of conflicts. I have already offered a minor contribution to the debate by tentatively arguing that the framework for the resolution of conflicts between Convention rights developed in this dissertation should also be applied in relation to, for instance, conflicts between Convention rights and international human rights.[1507] In that sense, the framework may actually prove useful in the resolution of any type of conflict between human or fundamental rights, regardless of the body to which the conflict is presented.

Thirdly and finally, there remain a number of highly interesting specific research questions in the area of conflicting human rights in the ECHR context. These questions relate to the role of categorical balancing in resolving conflicts and to the impact of the non-discrimination principle on the resolution of conflicts. In respect of the former, this dissertation has offered some arguments, for instance by arguing that *ad hoc* balancing should be the norm, but that the striking of a categorical balance between Convention rights may nevertheless, under certain circumstances, be acceptable. A particularly fruitful area of future research would, in that respect, lie in determining when exactly the striking of a categorical balance is acceptable. In terms of the second element – the impact of the non-discrimination principle – this dissertation has remained largely silent. I have deliberately avoided tackling conflicts between the prohibition of discrimination and other Convention rights in depth, primarily because I considered it likely that the resolution of such conflicts would require a wholly different style of reasoning, namely one that substantively engages with the requirements of the non-discrimination principle and therefore intentionally looks at the conflict from the side of that principle. Nevertheless, I have – in footnote – indicated that certain conflicts that involve the prohibition of discrimination *could* be defused as positive instances of fake conflict. For instance, apparent conflicts between a civil servant's freedom of religion – in terms of conscientious objection – and the right to non-discrimination of LGBT persons wishing to make use of the public service could be defused as fake by having the State reorganise the public service in such a manner that the civil servant would no longer be obliged to, for instance, register same-sex marriages or partnerships. However, I wonder if that 'resolution' really says everything there is to say about the apparent conflict, since it

[1507] See *supra*, around note 420 and accompanying text.

merely deflects the non-discrimination aim of the municipality and – more importantly – ignores the possible role of expressive harm. As a result, it remains doubtful whether the framework developed in this dissertation could be – or should at all be – applied to conflicts involving the prohibition of discrimination.

In recognition of the above, and of the resurgence of religious freedom in contemporary political and legal debate, particularly fertile ground for further research arguably lies in the area of conflicts involving freedom of religion. Such research could, on the one hand, look at the role of categorical balancing between the religious autonomy of religious bodies and the individual human rights of their employees. In dealing with such conflicts, domestic systems and the ECtHR are increasingly resorting to categorical balancing to the benefit of religious autonomy.[1508] Research in the domain of conflicts involving freedom of religion could, on the other hand, also examine the increasingly frequent European cases in which freedom of religion conflicts with the principle of non-discrimination.[1509] Such further research would thus need to examine, *inter alia*, questions related to the relationship between religion and the State, the role of religion in contemporary European societies, the role of the courts in adjudicating 'religious matters', and the role of the non-discrimination principle as a possible trump card in the human rights deck.[1510] There was simply no time and space left to tackle such profound questions in the current research. But I would strongly suggest that such research be undertaken in the future. The approach taken in this dissertation, *i.e.* focusing on conflicts between human rights, may open up particularly promising pathways in respect of defining the relationship between freedom of religion and other human rights in pluralist European democracies.

[1508] See *supra* notes 709-715 and accompanying text.
[1509] See, for instance, *Eweida*, *supra* note 328 (in the applications of Ms. Ladele and Mr. McFarlane).
[1510] See, arguing in favour of the latter, A. Stuart, 'Back to Basics: Without Distinction – A Defining Principle?', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 101-130.

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