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İLİŞKİLER ANABİLİM DALI

POSITIVE OBLIGATIONS OF STATES FOR THE PROTECTION OF PRISONERS' RIGHTS UNDER THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

DOKTORA TEZİ

Güven URGAN

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ONAY SAYFASI

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To my dear father,

who exquisitely proved to me the possibility of having a life full of human love

"I have been studying how I may compare

This prison where I live unto the world:

And for because the world is populous

And here is not a creature but myself,

I cannot do it; yet I'll hammer it out."

from Act V Scene V of King Richard II

William Shakespeare

ÖZ

Günümüz insan hakları hukukundaki yaygın somutlaşma sürecinin önemini takdir etmekle birlikte, bu tez mahkum haklarına özel atıfla insan hakları teorisi ve pratiğinde devletlerin pozitif yükümlülüklerinin sınırlı yapısını ortaya koymayı hedeflemektedir. Devletlerin pozitif yükümlülükleri kavramının genel bir referans noktası olarak kullanılagelmekte olmasına rağmen, tez kavramın mevcut kullanımının insan hakları teorisi ve pratiğinin temel yapısı içinde hala var olmaya devam eden yanlış anlaşılmaların etkisi altında olduğunu öne sürmektedir. Yeterince sorgulanarak anlaşılamadığından dolayı, böylesine yanlış bir varsayım devletlerin kuramsal olarak açık yükümlülüklerinin var olduğu özel bir insan hakları uygulama alanında yapılacak hukuksal yorumların kapsamını ve objektifliğini engellemekte ya da sınırlandırmaktadır. Uluslararası insan hakları koruma mekanizmalarınca taraf devletlere tanınan takdir yetkisinin göreceli sınırlılığına ve insan hakları standartlarının her bir bireye bulunduğu devlette sunulması gereken asgari gereklilikler olduğuna ilişkin yapılan sözde vurguya rağmen, evrensel insan hakları söylemi ve pratiği; Avrupa İnsan Hakları Mahkemesinin analiz edilen içtihadı kapsamında tezin de ifade gösterdiği şekilde, insan hakları teorisinde mevcut dikotomik yanlış anlaşılmadan hala olumsuz olarak etkilenmektedir. Dolayısıyla tez, Avrupa İnsan Hakları Mahkemesi'nin mahkum haklarına ilişkin içtihatlarını değerlendirerek pozitif yükümlülüklerin insan hakları teorisindeki ikincil statüsü hakkında ileri sürdüğü teorik argümanların geçerliliğini analiz etmeye çalışmaktadır.

ABSTRACT

Acknowledging the importance of widespread concretisation process in contemporary human rights law, this dissertation aims at illustrating the limited nature of positive obligations of Acknowledging the importance of widespread concretisation process in contemporary human rights law, this dissertation aims at illustrating the limited nature of positive obligations of States in human rights theory and practice with a special reference to prisoners' rights. Despite the fact that the concept of positive obligations of States has been widely used as a point of reference, the dissertation posits that its practice has still under the impact of misunderstandings which still do exist within the very fabric of human rights theory and practice. Since it has not been appropriately examined and understood, such a misleading assumption can hinder or delimit the scope and objectiveness of legal interpretation in a specific realm of human rights practice within which States do have explicit hypothetical obligations. Despite the ostensible emphasis that the margin of appreciation introduced to State Parties by the international human rights protection mechanisms is relatively limited and that human rights standards are the minimum requirements that should be provided for each and every individual in a given State, universal human rights discourse and practice are still being negatively affected from, as the dissertation proclaims under the light of the analysed case law of the European Court of Human Rights, the dichotomised (mis)understanding in human rights theory. Accordingly, the dissertation reviews the case law of the ECtHR expounded upon prisoners' rights so as to analyse the validity of its theoretical arguments about the secondary status of positive obligations in human rights theory.

// ACKNOWLEDGEMENTS

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHR	: American Convention on Human Rights
AfChHPR	: African Charter on Human and Peoples' Rights
Art.	: Article
BF	: Belgian Franc
BOP	: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CAT	: Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CDDH	: Council of Europe Steering Committee for Human Rights
CDPC	: The European Committee on Crime Problems
CEDAW	: The International Convention on the Elimination of All Forms of Discrimination against Women
CESCR	: Committee on Economic, Social and Cultural Rights
CPT	: Committee for the Prevention of Torture
CRC	: Convention on the Rights of Child
DOTS	: Directly Observed Therapy
ECHR	: European Convention on Human Rights
EComHR	: European Commission on Human Rights
ECOSOC	: Economic and Social Council
ECtHR	: European Court of Human Rights
Ed(s)	: Editor(s)
EPR	: European Prison Rules
ERIC	: *Équipe Rapide Intervention de Crise*
ESCR	: Economic, Social and Cultural Rights
ESMR	: European Standard Rules for the Treatment of Prisoners
etc.	: et cetera (and others)
EU	: European Union
EUR	: Euro
GC	: Grand Chamber
GDFOC	: The General Directorate for Fighting Organised Crime
HRC	: Human Rights Committee
Ibid.	: In the same place

ICCPR	: International Covenant on Civil and Political Rights
ICERD	: The International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	: International Covenant on Economic, Social and Cultural Rights
ILC	: The International Law Commission
I-ACtHR	: Inter-American Court of Human Rights
IJC	: International Court of Justice
MRT	: The Moldavian Republic of Transdniestria
NGO	: Non-governmental Organisation
No.	: Number
p.	: page
pp.	: pages
§	: paragraph
§§	: paragraphs
para.	: paragraph
paras.	: paragraphs
PC-CP	: Council for Penological Cooperation
PTSD	: Post-Traumatic Stress Disorder
SMPR	: *Service Medico-Psychologique Regional*
SMR	: Standard Minimum Rules for the Treatment of Prisoners
UDHR	: Universal Declaration of Human Rights
UK	: The United Kingdom
UN	: United Nations
US	: The United States of America
UYAP	: *Ulusal Yargı Ağı Projesi* (National Judicial Network Project)
v	: versus

INTRODUCTION

It can be truly claimed that human rights is one of the basic and most dynamic subjects of contemporary international law thanks to tragic social and political incidents that specifically took place throughout the 20th century. With the contribution of rights theory in general and of human rights theory in particular, today the concept of international human rights law reserves a special position within the realm of law literature. Nonetheless, since various patterns of human rights violations are still prevalent in today's world, the necessity of questioning analytical borders that human rights theory encompasses and of rethinking over the basic concepts and structures upon which human rights law have been constructed is self-evident. Within such a general context, it can be possible to foresee that the continuation of ongoing studies for the recapitulation of basic human rights concepts will continue in the coming years.

Acknowledging the importance of widespread concretisation process in contemporary human rights law, this dissertation aims at illustrating the limited nature of positive obligations of States in human rights theory and practice with a special reference to prisoners' rights.[1] Despite the fact that the *concept* of positive obligations of States has been widely used as a point of reference, the dissertation posits that its practice has still under the impact of misunderstandings (if not myths) which still do exist within the very fabric of human rights theory and practice. Since it has not been appropriately examined and understood, such a misleading assumption can hinder or (at least) delimit the scope and objectiveness of legal interpretation in a specific realm of human rights practice within which States do have explicit hypothetical obligations. Despite the ostensible emphasis that the margin of appreciation introduced to State Parties by the international human rights protection mechanisms is relatively limited

[1] a) In this context, it is noteworthy that the European Convention on Human Rights (hereinafter ECHR) was also being formulated under the impact of negative/positive rights dichotomy essentially do still exists in human rights theory. Accordingly, it is primarily concerned for the protection of civil and political rights at the expense of economic and social rights.

b) Although legal status of detainees (unsentenced) and convicted (sentenced) inmates legally differ, there is no clearly identifiable difference between these two groups of persons regarding positive obligations of States to be performed for them. Within this perspective, the dissertation will carry on defining these two groups of inmates as prisoners if there is no any explicit reference to 'detainees' or 'remand prisoners'.

and that human rights standards are the minimum requirements that should be provided for each and every individual in a given State, universal human rights discourse and practice are still being *negatively* affected from, as the dissertation proclaims under the light of the analysed case law of the European Court of Human Rights (hereinafter ECtHR), the *dichotomised* (mis)understanding in human rights theory.

Having started from John Locke's theoretical and explicit emphasis upon personal rights and freedoms against the absolute authority of monarchy, human rights theory and judicial practice have continuously focused on limiting the power and competence of State authority.[2] Within the hegemony of such a framework in liberal (human) rights theory, contemporary States too are still not only labelled as the essential protectors of rights but also as their principal violators. Although the frequency and quantity of legal interpretations and jurisprudence upon *positive* obligations of States have substantially increased starting from the end of 1970's, the concept of positive obligations of States, as the dissertation tries to put forward, has not still had a chance of being practiced in a systematised framework as much as the concept of *negative* obligations has already been acknowledged and thoroughly dissected for ages.

By examining the nature of positive obligations of States expounded under the jurisprudence of the ECtHR within the specific realm of prisoners' rights, the dissertation, contrary to popular parlance in human rights discourse, tries to unfold that the European level of judicial supervision on prisons and prisoners' rights does also focus (*not* specifically on positive *but* rather) on negative aspects of State obligations in the sense that national authorities should not take any action to violate prisoners' rights.[3] As a result of the assumed prominence for such (*negatory*) kind of obligations prescribed principally in the form of, for example, not to violate prisoner's right to life, freedom from torture, inhuman or degrading treatment or punishment, positive obligations of States to be fulfilled for securing prisoners' rights are regarded as issues

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[2] John Locke, **The Second Treatise of Civil Government**, 1690, http://www.constitution.org/jl/2ndtreat.htm (20 March 2011).

[3] Within the scope of the dissertation, the term prison denotes official places where detainees are deprived of their liberty, either awaiting charge, undergoing trial, awaiting sentence, following conviction and/or sentencing. In this context, prison can be read as a term covering penal, custodial, correctional facilities or institutions; and in some jurisdictions jails.

of a subordinate level. Accordingly, although physical infrastructure of prisons and methods of official approaches to prisoners (superstructure) have been hypothetically idealised under the contemporary criminal justice systems and their academic derivatives (i.e. criminology and penology), as the dissertation sheds light that they are still far away from being transformed into a practical and effective legal formation effectively scrutinising and securing rehabilitation and re-socialisation of prisoners.

The rights of prisoners are exclusively selected for analysing the scope and the width of positive obligations in an area where States do have more directly attributable responsibilities so as to secure the rights of vulnerable individuals with respect to ordinary individuals. Since prisoners do not have a chance of enjoying their rights effectively as much as the free ones in the society, securing prisoners' rights in a closed and restricted environment exclusively is a litmus test for assessing the real capacity of States so as to ensure their positive obligations in general. The dissertation purports that prisoners' rights are still at their formative stages and not being *effectively* (but rather indirectly, namely by means of soft law instruments and standards articulated at international level) protected by international human rights law. It is put forward that even if international structures and human rights protection mechanisms have developed a relatively comprehensive set of obligations incumbent upon States Parties, non-existence of a clear-cut binding source in international law so as to illustrate the positive obligations of States with respect to prisoners' rights is still a substantial gap in the system, compulsorily giving way to an extensive usage of subsidiary sources of international law. In this vein, judicial decisions and teaching of experts constitute the real base for the development and articulation of the concept of positive obligations. Before examining the ECtHR's case-law on positive obligations of States with regard to prisoners' rights, conceptual framework of positive obligations in some national systems and international law (together with some preliminary and up-to-date rulings from other leading human rights protection mechanisms) is also provided so as to illustrate the position of other jurisdictions on the issue in comparative law.

The content of the dissertation features a multidisciplinary approach including human rights theory, criminology/penology, international law, and international human rights law. Although the latter two disciplines are the prominent ones so as to illustrate legal practicality of positive obligations of States under the case law of the ECtHR, the

former two try to provide a theoretical basis for elucidating the secondary status of positive obligations and prisoners' rights respectively. First of all, by presenting the dichotomous structure of human rights theory with regard to rights and their correlative obligations/duties, the dissertation provides a benchmark for its succeeding parts. Contrary to the widely accepted view in human rights discourse, the presented dichotomous structure of human rights theory provides a justificatory basis for the articulation of the dissertation's main argument. Secondly, acknowledging the development stages of prisoners' rights with the evolution of modern penology and criminology, the dissertation seeks to establish a balanced academic argumentation in between prison discipline and prisoners' rights. Referencing to prison discipline provides that risk and security requirements do still legitimately shape daily prison life and contemporary penitentiary systems in a fundamental way.

Within such a context, the first part of the dissertation tries to put forward the existence of a dichotomised (mis)understanding in human rights theory at the expense of the holistic human rights discourse. Even though there are a number of convincing theoretical and declaratory explanations upon the holistic conception of human rights, counter-arguments critically oppose the very existence of positive rights and accept negative rights as genuine human rights. Acknowledging the importance of the classic liberal view, the dissertation tries to favour the arguments of those defending the idea that positive rights are as important as negative rights. As a complementary part of the discussion, the cleavage between civil and political rights and economic, social and cultural rights is also expressed within the scope of the study. Nonetheless, the next sections of the dissertation specifically deal with the concept of obligations in general and positive obligations in particular. Considering the fact that without fulfilling obligation(s) in question enjoyment of the rights cannot be possible at all, the dissertation takes specifications of duties correlative to rights as a matter for the elimination of possible ambiguities upon the issue. Since Henry Shue's tripartite analysis of obligations in the 1980's has immensely contributed to dissect the very nature and structure of obligations correlative to rights, it is also used as a benchmark in instituting the very structure of the second part of the dissertation.

Emphasising the fact that prisoners do ideally continue to enjoy all the same human rights as free individuals of the society save the right to liberty, remaining part

of the first chapter aims at presenting factual and theoretical aspects of punishment, prisons and prisoners. By presenting common ongoing problems from various penitentiary system of the world, the dissertation tries to set the scene that rehabilitative ideals of contemporary criminology and penology are surrounded by administrative factors based upon risk, discipline and good order. Since penitentiaries are generally known with the abuses of power, the emergence and enjoyment of rights within such a classical [total] institution is not an easy process. Contemporary tendency of imprisonment and its criticism are also presented so as to provide an integrated and balanced approach for penitentiary issues. Then, the dissertation seeks to discover positive obligations of States for the protection of prisoners' rights in international human rights law.

Before focusing on the jurisdiction of the ECtHR expounded upon positive obligations of States for the protection of prisoners' rights, the second part of the dissertation starts with the usage of the concept in international law. Its sources in international law and preliminary case law from other leading international jurisdictions are also provided so as to illustrate positive obligations' practicality and justiciability. Accordingly, the dissertation reviews the case law of the ECtHR so as to analyse the validity of its theoretical arguments about the secondary status of positive obligations in human rights theory. Before attempting to do that, it firstly examines interpretation methodology of the Court, and then provides the origins and evolution of the concept. Judge Wildhaber's analysis in *Stjerna v Finland*[4] conveys a special benchmark for the validity of the dissertation's main argument that the Court has not still thoroughly identified the importance of positive obligations despite the fact that it is highly aware of the growing tendency in other international and domestic jurisdictions which have been increasingly responding to claims for what is positively required of domestic authorities in the name of ensuring human rights.

The case law of the ECtHR is the primary source of the dissertation so as to examine the scope and width of positive obligations incumbent upon State Parties under the Convention. All cases, save cases drawn up solely in French, consisting of the terms 'obligation' in general and 'positive obligation' in particular within the realm of

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[4] Application No. 18131/91, Judgement of 25 November 1994, Concurring Opinion.

prisoners' rights have been searched in database of the case law of the supervisory organs of the ECHR. Thus, the dissertation has undertaken a review of the relevant case law expounded since the inception of the system till 31 December 2012. In doing this, it uses a methodology aiming at discovering the very nature and structure of positive obligations of States within the ambit of the case adjudicated. Due to the limited nature of the dissertation, similar cases are gathered around and their common features are analysed under a randomly selected case exemplifying the very nature of other 'repeat' cases. Cases of the European Court reviewed throughout the study are also categorised under the *tripartite analysis* of Henry Shue. Although enjoyment of each basic right, as the dissertation reiterates, *does* already entail all three layers of obligations, such a systematisation, as will be shown, facilitates our understanding in order to dissect the very fabric of obligation(s) in question.

CHAPTER ONE

THE CONCEPT OF POSITIVE OBLIGATIONS AND ITS PRACTICE WITHIN THE REALM OF PRISONERS' RIGHTS

By emphasising the importance of the Universal Declaration of Human Rights (UDHR)[5] in constituting a common standard of achievement for all peoples and all nations, and with particular reference to the International Covenant on Civil and Political Rights (ICCPR)[6] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[7] the World Conference on Human Rights of 1993 expressed that:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the *duty* of States, regardless of their political, economic and cultural systems, to promote and protect *all* human rights and fundamental freedoms.[8]

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[5] Adopted by General Assembly resolution 217A (III) of 10 December 1948, UN Doc. A/810 (1948), http://www.un.org/en/documents/udhr/index.shtml (12 July 2011).

[6] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, http://www2.ohchr.org/english/law/ccpr.htm (18 August 2011).

[7] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, http://www2.ohchr.org/english/law/cescr.htm (18 August 2011).

[8] United Nations, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc. A/CONF 157/23 (1993), Part I, Paragraph 5 [Emphases added], http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en (15 July 2011). Although the meaning and usage of 'duty' and 'obligation' differ, they also have very similar meanings so much so that they are considered to be synonyms. (http://oxforddictionaries.com/definition/english (15 January 2012)) Viewed from the wider perspective, while the scope of a State's obligation principally arises from a conscious decision of the State to enter into an agreement without coercion or force, State responsibility denotes presumed requirement for the use of authority or coercion to execute. While duty does have a more confined and strict meaning, obligation refers to a more *general* liability or responsibility. Nonetheless, for the sake of simplicity, the dissertation uses them as synonyms. In other words, they are used interchangeably throughout the dissertation as is frequently the case in human rights literature. See also R.B. Brandt, "The Concepts of Obligation and Duty", **Mind**, Vol. 73, No. 291, Oxford University Press (July 1964), pp. 373-393.

While putting stress upon national and regional differences, the World Conference treats internationally recognized human rights holistically. By underlining the importance of States for the promotion and protection of *all* human rights and fundamental freedoms, the value and importance of each human right is emphasized by the existence of an indivisible, interdependent and interrelated structure. More specifically, it obliquely defines the acts and commissions requisite for the promotion and protection of human rights as the duty of States. Even though, Paragraph 5 seems as a resolution dedicated for the realization and enjoyment of all human rights throughout the world, reading it with critical lenses puts forward a vacillation underpinned by a number of recurrently asked questions such as: What does it mean to have a human right? Do *(all)* human rights really exist? Are they really universal, holistic and indivisible? Are they any discernible differences amongst them? Who is specifically responsible for the promotion and protection of human rights?

While seeking for conceptual answers for the questions cited above, first part of the dissertation also tries to put forward differences between human rights and prisoners' rights if there is any. Are prisoners' rights a special category of rights or a group of rights pertinent to be assessed as a part of human rights? Again it claims that identifying the real problem by the terms of *rights* is not very fruitful in the case of prisoners in that the State in question *does* intentionally interfere with the right to liberty of a prisoner. While a human right of a free individual often merely demands of forbearance or omission (*negative obligation*) by the State authorities, guaranteeing the rights with regard to prisoners necessitates *actively* (if not proactively) shaping the imprisonment conditions within which prisoners can actually enjoy their human rights. As has been pointed out by Van Kempen:

> Deprivation of liberty to a large extent complicates, restricts or even removes the possibility that individuals can assert their human rights. This certainly does not mean that a person in detention legally forfeits all his rights merely because of his status as a prisoner. That it will not be possible for every detainee to enjoy all human rights also seems obvious, though. In this respect human rights law is even more complicated in respect of prisoners than it already is in relation to free

> individuals. Perhaps the real difficulty concerns not so much which human rights prisoners have, but which *obligations* rest on the authorities to ensure those rights.[9]

Accordingly, since lawfully practiced restrictions upon prisoners do delimit fully enjoyment of prisoners' rights, the very role and function of the penitentiary systems arise as a concrete realm of responsibility (or rather *positive obligation)* incumbent upon the public authorities.

Nonetheless, before analysing the jurisprudence of the ECtHR expounded on the positive obligations of prisoners' rights, it is analytically pertinent to try to clarify the very scope of the concept of '*positive obligations*' within the structure of human rights theory. Although it might also be a matter of debate whether the European Court does intentionally use the concept in line with the existing boundaries being drawn in theory or rather does take it for granted in practice, analysing the usage and terminology of the term by the Court with a theoretically supported approach is to be evaluated as a methodologically correct way of developing arguments raised throughout the dissertation.

1.1 Ongoing Marginal Status of Positive Rights with Respect to Negative Rights

1.1.1 Theoretical Background of Human Rights Idea

Donnelly states that "[h]uman rights are, literally, the rights that one has simply because one is a human being".[10] Although this simple definition is generally accepted as the leading one of various 'human rights' definitions, defining human rights is a matter of controversy and philosophical debate.[11] Having found Donnelly's formulation as a very

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[9] Piet Hein Van Kempen, "Positive obligations to ensure the human rights of prisoners", in Peter J. P. Tak & Manon Jendly (Eds.), **Prison Policy and Prisoners' Rights**, Wolf Legal Publishers, 2008, p. 21. [Emphasis added]

[10] Jack Donnelly, **Universal Human Rights in Theory & Practice**, 2nd Edition, Cornell University Press, 2003, p. 10. For the same human rights definition see also Peter Jones, **RIGHTS**, 1st Edition, Palgrave macmillan, 1994, pp. 81-93.

[11] James Griffin, **On Human Rights**, First Published, Oxford University Press, 2008, pp. 14-19. Michael Freeman, **Human Rights**, 1st Edition, Polity Press, 2002, pp. 55-75. One of the most formidable, conceptual and moral objections to the very existence of human rights is cultural relativism. [See Freeman, pp. 108-114 for a concise analysis] Rosalyn Higgins, **Problems and Process International Law and How We Use It**, Oxford: Clarendon Press, 1994.

common and very unsatisfactory one, Freeman claims that human rights “are rights of exceptional importance, designed to protect morally valid and fundamental interests, in particular against the abuse of political power”.[12] By arguing their strong ethical importance, Amartya Sen also stresses upon that “[t]hey demand acknowledgement of imperatives and indicate that something needs to be done for the realization of these recognized freedoms that are identified through these rights”.[13] It is seen that morality is expressed as an indispensible pillar of human rights by many contemporary human rights theorists. Among those, Ronald Dworkin’s conception of *rights as trumps*[14] gives human beings the power to raise a moral claim to trump a social or political policy: “rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole”.[15] More clearly, Dworkin maintains that definition of a right carries a high-priority of justified claim to a certain kind of treatment. Even if Dworkin’s approach envisages originally *rights*, it can be analogically deduced that his approach might also be extended to human rights.

In addition to moral grounding, there is also a relationship between the idea of human rights and the law.[16] Likewise, by emphasizing their international character, Nickel defines human rights as the rights that “are international norms that help to protect all people everywhere from severe political, legal, and social abuses”.[17] In the same vein, Hart has argued that people “speak of their moral rights mainly when advocating their incorporation in a legal system”.[18] It is true that the development of

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[12] Freeman, p. 61.

[13] Amartya Sen, **The Idea of Justice**, First Published, London: Penguin Books, 2009, pp. 357-358.

[14] Not specifically *human rights* as trumps but *rights* as trumps in general.

[15] Ronald Dworkin, “Rights as Trumps”, in Jeremy Waldron (Ed.), **Theories of Rights** (pp. 153-167), New York: Oxford University Press, 1984, p. 153. See also Ronald Dworkin, **Taking Rights Seriously**, Cambridge: Harvard University Press, 1977.

[16] Jones, p. 82.

[17] James Nickel, “Human Rights”, Stanford Encyclopaedia of Philosophy, First published Feb 7, 2003 (substantive revision Aug 24, 2010), http://plato.stanford.edu/entries/rights-human/ (10 May 2011).

[18] Herbert L.A. Hart, “Are There Any Natural Rights”, in Jeremy Waldron (Ed.), **Theories of Rights**, Oxford: Oxford University Press, 1984, p. 79.

human rights standards has continued ever since the drafting of the UN Charter.[19] Human rights enlisted in the non-binding UDHR have been codified in legally binding international human rights conventions – including the ICCPR and the ICESCR. Under the current international framework, human rights considerations are to great extent enforced by a number of international protection and judicial mechanisms to punish violators.[20] International law now embodies human rights and has developed complex institutions of adjudication. For example, the ECtHR can consider on cases brought by individuals from the signatory States against alleged violations of human rights. In line with the orientation taking place at international level, there is also a parallel tendency revealing that human rights are also being incorporated into national laws. Although in various forms, examples of this legalization process of human rights (or rather constitutionalization of rights) are also taking place at the domestic level since the early 1970's.[21]

However, maintaining that human rights discourse is merely a concrete part of the existing legal structures is not a commonly accepted view. Supporting this line of argument, Jones maintains that:

> they are rights which all people are thought to possess *whether or not* they are embodied in systems of positive law. They ought, of course, to be recognised in systems of positive law. But people's possession of human rights does not depend on such formal recognition, which is why we can speak of governments and laws 'violating' their human rights.[22]

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[19] Although there is no direct definition of human rights, the Charter uses the term seven times and mandates for the establishment of an Economic and Social Council for setting up commissions "in economic and social fields and for the promotion of human rights", http://www.un.org/en/documents/charter/ (10 April 2011).

[20] Peter Malanczuk, **Akehurst's Modern Introduction to International Law**, Seventh Revised Edition, Routledge, 1997, pp. 209-221. Michael Ignatieff, "Human Rights as Politics and Idolatry", Amy Gutmann (Ed.), in **Human Rights** (pp. 1-52), 3rd Printing, New Jersey: Princeton University Press, 2003, pp. 5-12.

[21] The United Kingdom's incorporation of the main provisions of the ECHR by means of the Human Rights Act of 1998 is a well-known example on this track. See, for example, Ran Hirschl, ""Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order", **Human Rights Quarterly**, Vol. 22 (2000), pp. 1060-1098.

[22] Jones, p. 81.

Although there exist references to the moral dimension of the human rights in international law,[23] as has been pointed out by Sen, "what is being articulated or ratified is an ethical assertion – not a proposition about what is already guaranteed".[24] Thus, rather than solely relying upon what is already enacted as legal norms, securing a dynamic legislation process is more in line with the contemporary human rights idea.

Jones' analysis on human rights also provides an insightful argumentation upon the issue. Using a definition similar to that of Donnelly, he states that human rights are the rights "possessed by all human beings, simply as human beings". In referencing Hart, Jones also demands that human rights are 'general' rights rather than 'special' rights 'since they are universal to all humanity'.[25] Unlike special rights arising from special transactions or special relations amongst people, human rights are not in need of existence of such special linkages. Since 'merely being human is sufficient to make one as a possessor of those rights', the doctrine of human rights is an *egalitarian* one in nature.[26] By attributing equal respect to each and every human being, a personal autonomy arises under principles of the equal worth and dignity of each and every person. Since each person is seen as equal moral agent regardless of who he is and where he stands within this superstructure, everyone is inherently '*entitled* to equal concern and respect'.[27] Griffin also underlines the importance of *personhood* as a ground for human rights by proposing [two] 'ways of understanding the weight of personhood'.[28] In referencing Kant, he states, firstly, that 'persons', unlike 'things' that have equivalents and accordingly have 'price', do have 'dignity' not congruent with anything akin. The other way he proposes to understand personhood is 'personal autonomy' requisite for choosing and pursuing one's own life.

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[23] Each Preamble of the two international covenants recognizes that "these rights derive from the inherent dignity of the human person". (http://www2.ohchr.org/english/law/pdf/ccpr.pdf and http://www2.ohchr.org/english/law/pdf/cescr.pdf respectively)

[24] Sen, p. 359. Jones, p. 82.

[25] *Ibid*, p. 81.

[26] *Ibid*, p. 82.

[27] Donnelly, pp. 44-45.

[28] Griffin, pp. 33-37.

1.1.2 The Alleged Dichotomy between Negative and Positive Rights

So far, the dissertation has sought to question the philosophical grounds of human rights. Despite the existence of criticisms,[29] human rights theorists put it in a cogent way that the very existence of human rights in theory and practice is self-evident. Nonetheless, even though the plausibility of arguments on behalf of the human rights idea is well-grounded, there also exist strong counter-arguments on the integrity of the *apparently holistic* human rights discourse. One of the most well-known of those arguments is the negative/positive human rights distinction (if not cleavage):[30] Under this paradigm while 'negative rights' require omission, non-interference, and restraint on the part of others, 'positive rights', on the other hand, require others (be it a person or institution) to provide action, commission, and active contribution.[31] Examples for the former are the right not to be tortured, not to be assaulted, and right not to have one's property taken; and for the latter are the right to be protected against arbitrary interferences, the right to be provided with welfare benefits, the right to health, education, and work. Libertarian interpretation of this model maintains that negative obligations of non-interference are not subject to feasibility and resource constraints. Accordingly, it would be possible to claim that refraining individually and simultaneously from undertaking a certain action in respect of all others is hypothetically *co-possible*.[32] And since negative rights are cost-free and easily implementable by everyone, they are regarded as the only genuine and universally valid human rights in practice.[33] Whereas costly nature of positive rights makes their enjoyment a matter of cost-effective analysis (if not *unreasonable* at first stage), and then eventuates in a scepticism not only on their universal practicality and but also on

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[29] Freeman, pp. 5-6. *Ibid*, p. 15. Griffin, p. 11. *Ibid*, pp. 14-18. Sen, pp. 361-363.

[30] Brian Orend, **Human Rights Concept and Context**, broadview press, 2002, pp. 31-32.

[31] It is also possible to use the terminology of 'duties' and 'obligations' here. However, assuming that duties and obligations entail special focus for the structural integrity of the dissertation, they will be specifically dealt with below (Section 1.2).

[32] Polly Vizard, "The Contributions of Professor Amartya Sen in the Field of Human Rights", **CASEpaper 91**, London: Centre for Analysis of Social Exclusion, London School of Economics, January 2005, p. 8.

[33] *Ibid*, pp. 8-9. Thomas Nagel, "Personal Rights and Public Space", **Philosophy and Public Affairs**, 24 (1995), pp. 87-93. Henry Shue, **Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy**, 2nd Edition, Princeton, N.J.: Princeton University Press, 1996, pp. 35-36.

their *human rights status*. Since it may not be feasible for a person to perform a particular positive action (such as ‘feeding those in need’), duties correlative to positive rights are not ‘mutually compatible’.[34]

Despite counter-arguments to be expressed later, dominant interpretation of liberal tradition of rights generally explicates rights in the *negative* sense. To exemplify:

> Locke argued that, in the state of nature, individuals possessed both natural rights to their life, liberty and property and an ‘executive right of nature’ to do whatever they deemed necessary *to protect* those rights. When they placed themselves under political authority, men gave up their executive right of nature to that authority... What individuals did not give up was their natural rights to life, liberty and property. The whole point of their establishing political authority was the better *to protect* their rights to life, liberty and property.[35]

Under a ‘strictly *individualist* conception of natural rights’, governments that failed to protect or that ‘systematically and persistently violated the rights of people’ would lost their legitimacy and might be resisted by the people if necessary.[36] Likewise, the French Declaration of the Rights of Man and Citizen of 1789 included that “the end of all political associations is the *preservation* of the natural and imprescriptible rights of man”.[37] Having said that, it is reasonable to argue that human rights theory has traditionally developed out of the need to create a secure shell for each individual in society inside of which others have no right to intervene arbitrarily.[38] Disadvantaged groups such as workers, minorities, and women “asserted their human rights against states that appeared to them principally as instruments of repression and domination”.[39] Considering the immense power of modern State, and human rights abuses and violations by its agents, restraining arbitrary State power against interferences in the personal, social and political lives of individuals is a highly crucial and sensitive issue

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[34] Vizard, p. 9. See for the ‘absolutist’ model of individual rights Robert Nozick, **Anarchy, State and Utopia**, Oxford: Blackwell, 1974.

[35] Jones, p. 76. [Emphases added]

[36] Freeman, p. 21.

[37] Approved by the National Assembly of France, August 26, 1789, http://www.hrcr.org/docs/frenchdec.html (12 February 2011). [Emphasis added]

[38] Sandra Fredman, **Human Rights Transformed Positive Rights and Positive Duties**, First Edition, Oxford University Press, 2008.

[39] Donnelly, p. 35.

in the domain of human rights. In this regard, prevention of possible interferences with individual rights and freedoms by State authorities and other individuals has always been a primary concern of the human rights theory.

Nonetheless, the idea of positive rights is also as old as that of negative rights. Starting from the Enlightenment, liberal philosophers like Locke and Paine, have contributed greatly in the formulation of positive rights.[40] Despite his emphasis on the preservation and enjoyment of the 'negative' right to property, Locke sees redistribution of wealth as a concern for his liberal political theory:[41] Starting from the formation stage of the society, since 'some men are more rational, more talented and more productive' than the others, the natural supply of resources is likely to be shared unequally amongst men and becomes thereupon insufficient for the increasing number of people. And in conditions of scarcity, as Donnelly states, "unlimited accumulation simply will not leave enough for and as good for others, as the *natural law* requires. Therefore, to the extent that positive law allows such accumulation in circumstances of scarcity, it is unjust, and not to be obeyed".[42] It is a reality that Locke favours unlimited accumulation of welfare. Yet, it is also understood that unlimited accumulation in his political theory is possible only where there is abundance. And considering the inherent scarcity nature of resources in real life, excluding exceptional circumstances, there is clearly no realm of practice for *a general right of unlimited accumulation* in Locke. Under the framework of this understanding, redistribution of resources by means of *positive* intervention by State authorities is hypothetically possible in Lockean political theory.

One of the contemporary theorists who considers over this illusionary distinction of rights is Henry Shue. In his (relatively short but) influential book entitled *Basic*

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[40] Griffin, pp. 176-177. Freeman, p. 25. Alan Gewirth, **The Community of Rights**, The University of Chicago Press, 1996, pp. 38-44. Thomas Paine, **The Rights of Man**, Harmondsworth, England: Penguin, 1969, Chapter 5, especially p. 265. "The Rights of Man" is also available at: http://www.ushistory.org/paine/rights/singlehtml.htm (20 March 2011).

[41] *Supra* note 2, Chapter 5, Section 27. Griffin, pp. 213-214. Paine even proposes annual payment to the children and the aged in poor families as not a matter of charity but of 'a right'. (Thomas Paine, "The Rights of Man", 1791-92)

[42] Jack Donnelly, **Universal Human Rights in Theory & Practice**, Cornell University Press, 1989, p. 96. [Emphasis added] 'Natural Law' is the most binding norm of Lockean political theory that "no human sanction can be good, or valid against it". (Locke, Chapter 11, Section 135)

Rights, he develops his own terminology substantially replacing dichotomised classification of conventional rights discourse. According to conventional understanding, as Shue states:

> a right to subsistence would be positive because it would require other people, in the as last resort, to supply food or clean air to those unable to find, produce, or buy their own; a right to security would be negative because it would require other people merely to refrain from murdering or otherwise assaulting those with the right. The underlying distinction, then, is between acting and refraining from acting; and positive rights are those with correlative duties to act in certain ways and negative rights are those with correlative duties to refrain from acting in certain ways. Therefore, the moral significance, if any, of the distinction between positive rights and negative rights depends upon the moral significance, if any, of the distinction between action and omission of action.[43]

While searching for the very existence of 'basic rights', Shue challenges the conventional view and argues that subsistence (positive) rights are not less important than security (negative) rights.[44] By pointing out, in his analysis, that having a right is to be in a position to make demands of others, he tacitly emphasizes the importance of 'correlative duties' for making the enjoyment of rights effective.[45] Nonetheless, *his main argument* focuses on the claim that security rights are not negative and subsistence rights are not positive.

Under the conventional postulate, since positive rights are those that require other people to do more than negative rights require and perhaps more than people can actually do, rights to subsistence seem secondary. Thus people and the State authorities do initially (and naturally) incline to perform their correlative duties related to negative rights. Since effectively securing negative rights with a relatively small amount of resources is possible, their moral significance is relatively higher than the one of

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[43] Shue, pp. 36-37. It should be noted that although 2nd edition of *Basic Rights* used here, its major impact on human rights theory and practice was after its first edition in 1980. (Henry Shue, **Basic Rights: Subsistence, Affluence and U.S. Foreign Policy,** Princeton: Princeton University Press, 1980)

[44] *Ibid*, p. 19. According to Shue, rights, be it negative (security rights) or positive (subsistence rights), are *basic* only enjoyment of them is essential to the enjoyment of all rights.

[45] *Ibid*, p. 13.

positive rights. And *only then* "any remaining resources could be devoted, as long as they lasted, to the positive–and perhaps impossible–task of providing for subsistence".[46]

Arguing the fallacy of the conventional assumption, Shue aims to show:

> (1) that security rights are more "positive" than they are often said to be, (2) that subsistence rights are more "negative" than they are often said to be, and, given (1) and (2), (3) that the distinctions between security rights and substance rights, though not entirely illusory, are too fine to support any weighty conclusion that security rights are basic subsistence rights are not.[47]

For example, as a classical negative right, right to physical security can presumably be secured by merely refraining from one of the ways that can constitute violations. However, making the effective enjoyment of the right by the individuals entails a number of correlative duties. Although forbearance-performance distinction might hypothetically be applied not only to government actions but also to rights-relations between 'private individuals', it can be assumed here that there is a distinct difference between them regarding the nature of their correlative duties. More clearly, while individuals *fulfil* their correlative duties by merely forbearing, governments do *implement* them by essentially using appropriate means if necessary. Since, unlike individuals, primary function of the State is to form an institutional capacity for guaranteeing the rights of individuals, Shue expresses:

> protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; school for training police, lawyers, guards; and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security.[48]

In the same context, other classical negative rights such as rights to private life and freedom of religion can be effectively enjoyed on condition that they are free from arbitrary inferences, including the inferences by the government itself. However, taking into account the interests of an individual peculiar to the rights in question, the very function of the government again necessitates governmental positive actions (programs

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[46] *Ibid*, p. 37.

[47] *Ibid*.

[48] *Ibid*, pp. 37-38.

and policies) for the prevention of possible interventions. Such a protector role for the State can be defined as the 'positive obligation to protect negative freedoms'.[49]

Nonetheless, as history reveals, it should be emphasized that refraining from interfering with important interests of individuals is also a negative duty of the governments. As the principal violator and essential protector of the rights, a State has a dual function for the enjoyment of ('negative') rights.[50] As Gewirth states:

> [e]ven if the protection of negative rights requires active performance by the state, there is the prior normative point that the state's refraining from interfering with the negative right indicates of itself the state's respect for the (negative) freedom of the persons who have the negative right.[51]

Even if the stance of the other individuals in securing negative rights essentially entails forbearance, when the sole conception of rights envisages their negative character, "it may lead to a view of society as consisting of atomized, mutually disregarding, alienated individuals with no positive consideration for cooperation in helping to fulfill one another's needs or interests".[52] It is certain that in any imperfect society there can be some who do not choose not to violate negative rights. Therefore, positive actions and commissions by the State authorities, and implicit support of the general public to those performances as well, for the fulfilment of others' human rights are likely to create a mutual understanding and solidarity that eliminate inefficiencies of the sole negative human rights conception.[53]

As for the positive rights, the primary requirement is essentially performing certain kind of actions that provide assistance and other forms of helps for those who cannot attain or enjoy their basic rights. Nevertheless, if the very cause of the need for assistance originates from 'subsistence-threatening actions' of the government and other

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[49] Gewirth, p. 35. See also Donnelly, pp. 30-31. It is also possible to argue that even positive rights do have negative duties of refrain. For example, the right to health entails a State obligation to do nothing harmful to health; the right to education entails an obligation to do nothing that worsens education. (Victor Abramovich, "The rights-based approach in development", **CEPAL Review**, 88 (April 2006), p. 39)

[50] *Ibid*.

[51] Alan Gewirth, "Are All Rights Positive?", **Philosophy & Public Affairs**, Volume 30, Number 3 (Summer 2001), p. 328.

[52] Gewirth, **The Community of Rights**, pp. 31-32.

[53] *Ibid*, p. 32.

institutions, then refraining from such actions (in the 'negative' sense) can help for the fulfilment of positive rights by the right-holders.[54] As Shue underlines, "[a]ll that is sometimes necessary is to protect the persons whose subsistence is threatened from the individuals and institutions that will otherwise intentionally or unintentionally harm them".[55]

Shue also refuses the assumption that "securing "negative rights" is usually cheaper or simpler than securing "positive rights"".[56] Since relative dimensions of the respective right to be protected, such as its complexity and scope, are the leading factors for its fiscal cost, there is no empirical evidence proving that satisfaction of subsistence rights are more costly than the one necessary for protecting security rights.

Another objection to the distinction between negative and positive rights, Gewirth expresses, is that "there can be no positive rights because all rights are "side-constraints" on the actions of the persons other than the right-holders".[57] That means solely right-holders are the ones to have a right, and all others are debarred from interfering with it. To exemplify, "the right to life is the right not to be killed, the right to property is the right not to be stolen from, and so forth".[58] Having seen a large part of this objection as 'purely verbal', Gewirth puts it that positive rights entail correlative duties for the sake of the right-holder and that "they are positive because the duties consist in giving active assistance".[59]

In this regard, the inference of the alleged dichotomy that "positive rights are not genuine human rights but belongs to a different category" fails to justify its arguments. Taking into consideration the reasoning maintained by Shue and Gewirth, there is no any distinguishable moral difference between the two groups of rights. In fact, as has been pointed out, a human right, in many cases, is "an inseparable mixture of negative and positive elements".[60] As it is assessed, human rights, be it negative or positive, are strictly bound to each other and failure in any one of them is likely to negate all the

[54] *Ibid*, p. 35.

[55] Shue, p. 40.

[56] *Ibid*, pp. 39-40.

[57] Gewirth, pp. 36-37.

[58] *Ibid*, p. 36.

[59] *Ibid*, p. 37.

[60] Shue, p. 192.

others. All in all, it can be basically concluded that positive rights, like negative rights, are in need of protection from possible destructive acts by other people.

1.1.3 Objections to the Very Existence of Positive Rights

In his comprehensive study entitled 'The Community of Rights', Gewirth also thoroughly analyses objections that have been raised against positive rights.[61] According to him, objections to the very existence of positive rights are based on at least three reasons: "first, they are inconsistent with the human right to freedom; second, they are utterly impracticable because of the "overload" of duties they entail; third, they fail various tests of universality".[62]

Regarding the first objection, it is stated that positive rights, unlike negative ones, impose extra (or rather unnecessary even sometimes excessive) obligations on respondents or duty-bearers. It is true that negative rights do also limit persons' freedom. For example, my right not to be tortured serves to invalidate your freedom to torture me (if the latter can be construed as a genuine freedom). Nonetheless, the scope of obligations arising from positive rights differs essentially. For example, the affluent give up some of their property and provide a basis for the basic well-being of the needy.[63] From a liberal economical perspective, such a practice is not cost-effective for the optimality of resources in the economy in that while making the needy better off, it makes the affluent who are taxed worse off. In other words, such a transfer is not in line with the Pareto optimality since it rewards the unsuccessful and penalises the successful.[64] Nonetheless, from a libertarian human rights perspective it is not just a matter of economic efficiency, but an infringement of a *genuine* human right: "I may

[61] Gewirth, pp. 44-70.

[62] *Ibid*, p. 44.

[63] Although dictionary meanings of 'well-being' and 'welfare' cover happiness and a specific level of living standard, the usage of the two words in the human rights literature has a narrower sense referring 'basic needs and goods' essential for having a life of dignity.

[64] *Ibid*, p. 46. The concept of *Pareto Optimality* suggests that a situation is optimal if no non-conflicting improvements can be made (i.e. if no one's situation can be improved without worsening the situation of someone else). See Barry P. Brownstein, "Pareto Optimality, External Benefits and Public Goods: A Subjectivist Approach", **The Journal of Libertarian Studies**, Vol. IV, No. 1 (Winter 1980), pp. 93-106.

choose to give some of it to the needy, but if the government confiscates it, even for the same purpose, it violates my human right to liberty".[65] In its extreme interpretation, such a commission may even be assessed as a forced labour since redistribution of wealth via taxes forces individuals 'to work for a certain time for the state'.[66]

Gewirth prefers using the *criterion of degrees of needfulness for action* for clarifying the issue.[67] When there is conflict between two rights, the *criterion* is used for the selection of the right to take precedence over the other. For example, the right not to be stolen from is to be "overridden by the rights not to starve or to be murdered if the latter rights can be fulfilled only by infringing the former".[68] In this vein, negative rights such as rights to life, health, and positive right to subsistence take precedence over right to property if the former rights can only be fulfilled by infringing the latter. Hence, it can be maintained that there is sufficient ground to support the morality of securing a right to basic well-being of the needy at the expense of undermining the negative right to property of the affluent. Gewirth's criterion of degrees can also help in solving the disputed issue of relative importance of negative and positive rights. Within the scale of the criterion, funding subsistence rights is clearly as important as securing right to property. Furthermore, taxing a certain portion of someone's income is not a threat to the right in question but rather is a dynamic gain for the society alleviating (potential or existing) social problems in it. In other words, positive duties to be performed for the needy do not just concern the targeted person(s) but also hinder the prospect of alienated, hostile generations in the future".[69] An additional point to be expressed here is that fulfilling positive rights is not a stable incentive for a perpetual recipient or a parasite establishing a permanent dependence upon the agency (or rather rights of others). It is, however, an action merely granting support for the needy and thus enabling them to be agents capable of controlling their own lives.[70] Another counter argument which can also be developed here is a that a State's relation for the fulfilment

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[65] Griffin, p. 179.

[66] *Ibid.*

[67] A genuine Gewirthian concept that he also enumerates references for its origins. (Gewirth, p. 45)

[68] *Ibid.*

[69] Griffin, pp. 178-179.

[70] Gewirth, p. 52.

of positive rights on behalf of the needy is not a matter of coercion but rather depends on an implicit consent of the general public. Furthermore, the extents and scopes of the positive obligations of a State emanating from the fulfilment of the right in question are also justified by the approval (or disapproval) of the citizens in free elections. In any case, by simply depending on altruistic support from voluntary individuals, it is highly immoral to accept the existence of formal indifference in the face of positive human rights violations: "To leave the fulfillment of this duty solely to voluntary groups would allow many persons, as "free riders," to shirk their duty".[71]

The second argument raised against the justification of positive human rights focuses on the "general extent and limits of the duties they impose".[72] Under this objection it is argued that due to widely prevalent patterns of human rights violations throughout the world, affluent persons are overloaded by "unlimited, open-ended positive obligations that require a drastic, indeed revolutionary, change in whole ways of life".[73] Given the ever-closer nature of the contemporary globalising world, a global sensitivity or rather moral responsibility arises when persons' well-beings are threatened by natural disasters such as disease, famine, and other severe harms and sufferings. And considering the scope and the width of positive rights violations, the impact of individual remedies is highly limited. Hence, groups of persons (NGOs), institutions and specifically governments come to the fore as real respondents or duty-bearers to fulfil the rights in question.

The ground of this counter-argument essentially emanates from membership of a community. The special relationship between the members of the community is based on a common understanding that 'justifies claims to certain mutual concern and help'.[74] As Griffin points out reciprocity between the right-holder and duty-bearer can activate the commission.[75] Such a community based approach can also be broadened to global scale. And in line with the arguments of the universality claim of human rights and duties, individuals are the ultimate respondents of the rights. Nonetheless, given

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[71] *Ibid*, p. 59.

[72] *Ibid*, p. 54.

[73] *Ibid*, p. 55.

[74] Griffin, p. 178.

[75] *Ibid*.

individuals' limited capacity, governments do take precedence for coordinating and implementing the commission requisite for the fulfilment of the positive rights of the needy.

Another important point to be emphasized here is that primarily domestic institutions are responsible for the implementation. Accordingly institutional designation and capacity of States are also a concern for effectively coping with the issue.[76] However, if the internal capacity of the State in question is not sufficient, then support of the other governments and of international organisations is also a moral requirement 'in cases of emergencies'.[77] Again fulfilment of the duty of individuals from other countries does not have to be performed on a permanent basis and accordingly there is no continuous recipience or dependence on the agency of the affluent societies. Thus rather than being overloaded by performing correlative duties, it is a "more finite set of institutional policies that are based on analysis of the specific static and dynamic steps that can fulfill the positive rights in question".[78]

One last point to be expressed is that even if indifference in the face of such difficulties for the enjoyment of positive rights is morally acceptable, countering the limits of individual responsibility is also important.[79] In answering this issue, Gewirth states that in case of difficulties when the needy face difficulties in enjoying their rights:

> the helpers, the respondents of the duties, should also be able to act in pursuit of *their* own purposes, in accordance with their own rights to freedom and well-being. An accommodation must, then, be reached between persons' duties to help others and their rights to be free purposive agents on their own behalf.[80]

The third, and the last objection, is about the failure of positive rights in meeting the test of universality. In negative human rights understanding, all human agents are both the subjects or right-holders and also respondents or duty-bearers of rights. For example, under the model of the right to life everyone has the right not to be killed and

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[76] Deen Chatterjee, **Democracy in a Global World: Human Rights and Political Participation in the 21st Century**, London: Rowman & Littlefield, 2008, p. 2.

[77] Gewirth, p. 58.

[78] *Ibid*, p. 59.

[79] *Ibid*, pp. 60-62.

[80] *Ibid*, p. 61. [Emphasis is original]

the correlative duty to refrain from killing other persons as well.[81] In other words, *all* individuals can presumably benefit from the protection of 'negative rights' since they are the right-holders of them. This is in fact one of the cores of universal human rights discourse. However, as to the universality test of positive rights, they can just be claimed by certain members of the society, and they can be essentially claimed from their own society. Thus, while the duty-bearers of negative rights can be clearly specified, determining the exact respondents of positive rights is problematic. For example, in case of starvation:

> it is objected that there cannot be such universality or mutuality: only some persons have the right: those who are threatened by starvation or deprivation; and only some other persons have the duty: those who are able to prevent or relieve this starvation or deprivation by giving aid.[82]

Accordingly, since specifying the duty-bearers pertinent to positive rights does not function in a universally automatic framework, authoritative social institutions are their leading determinants. Basing her dispute over their pre-institutionalisation nature, O'Neill points out the *indeterminacy* problem of welfare rights.[83] According to her, since specifying the correlative duties they impose and their actual perpetrators as well is difficult, the very content of welfare rights remains unclear.

In answering this objection, Gewirth puts that *principally* (or rather 'within the limits of practicability') "all persons equally have the right and all equally have the duty".[84] In some cases any person can be in need of being rescued from deprivation, and it is also the duty to help if he has the ability to do so. According to him, it is:

> a matter of everyone's always having, as a matter of principle, the right to be treated in the appropriate way when he has the need, and the duty to act in accord with the right when the circumstances arise that require such action and when he then has the ability to do so, this ability including consideration of cost to himself.[85]

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[81] Griffin, pp. 48-51. Gewirth, p. 62.

[82] *Ibid.*

[83] Onora O'Neill, **Faces of Hunger: An Essay on Poverty, Justice and Development**, London: Allen & Unwin, 1986, p. 141.

[84] Gewirth, p. 63.

[85] *Ibid.*

The reference made to authoritative social institutions and their determinative role upon the prospective duty-bearers can also be refuted with the dissertation delineated above that government and its institutions principally do function as the representatives of their citizens. Accordingly, "[i]nsofar as individuals are in this way the beneficiaries of government, they have the duty to support its morally justified institutions, such as fair trials and education".[86]

Arguments upon the inabilities of physically and mentally handicapped individuals present an objection upon the universality of positive human rights. Their incapability of controlling their action is not in line with the widely accepted view that rights belong to *all* humans. Hence, it is possible to argue that positive rights again present an exceptional case not harmonious with the *equality* principle of human rights discourse.[87] Nonetheless, it is also possible to counter-argue that, just in the case of the needy expressed above, when there is greater need to sustain their basic well-being, an equal concern is also justifiable for meeting basic well-being of the handicapped:

> In the limiting case of humans who have no ability of agency at all, they still have rights to life and to other goods of agency which are capable of having; and insofar as they may recover to the extent of being physically capable of action, they have the rights that such potential abilities of their agency be protected and fostered.[88]

The last argument developed so as to oppose the universality of positive rights idea bases its objection on cultural relativism. Claiming that human rights standards are mainly based upon Western culture, cultural relativists rebut the claim of universal human rights idea.[89] Since there are deep cultural, social, and economical differences amongst the societies in the world, securing the same human rights standards in every part of the world is not realistic. Again ongoing resistance against the Western cultural and economic imperialism also creates a suspicion not only against human rights idea

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[86] *Ibid*, pp. 64-65.

[87] *Ibid*, p. 65.

[88] *Ibid*.

[89] Freeman, pp. 108-114. Donnelly provides a vivid discussion on it (Donnelly, pp. 88-106). See also Jack Donnelly, "Cultural Relativism and Universal Human Rights", **Human Rights Quarterly**, Vol. 6, No. 4 (November 1984), pp. 400-419, http://www.agoraproject.eu/papers/Donnelly_cultural_relativisim.pdf (5 May 2012).

but also against its implementation.[90] Gewirth's response against this objection points out the very idea of human rights:

> The universality of human rights, as including political as well as economic rights, is a direct consequence of the universality of the needs of agency among all human beings. Insofar as those needs cannot be fulfilled in some countries, they are to be helped by others; but the political bases of these inabilities must be given special attention.[91]

Although Freeman excludes some intolerant cultures, human rights principles can generally be found in all historical and modern cultures.[92] At the very least, differences regarding human rights principles amongst various cultures are 'the exception rather than the rule'.[93] In this regard, although some international human rights protection systems, such as the ECtHR's *margin of appreciation* principle, justify the importance of national differences for their legal interpretation, such deviations fall within the scope of the exception rather than the one of the rule. All in all, as has been stated in the Universal Declaration of Human Rights, human rights principles aim at reaching 'a common standard of achievement for all peoples and all nations'.[94]

1.1.4 Distinction between Civil and Political Rights & Economic, Social and Cultural Rights

The inclusion of economic and social rights into the category of genuine human rights is a cause of another noteworthy debate in parallel with the ongoing dichotomous division of human rights.[95] As Beetham puts it "[w]hen human rights are mentioned, it is typically civil and political rights that spring to mind".[96] Having acknowledged the

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[90] *Ibid*, p. 97. See also Michael Hardt & Antonio Negri, **İmparatorluk**, Ayrıntı, Dördüncü Basım, 2002.

[91] Gewirth, p. 67.

[92] Freeman, pp. 108-109.

[93] Donnelly, p. 105.

[94] In PREAMBLE, http://www.un.org/en/documents/udhr/index.shtml (12 July 2011).

[95] David Beetham, "What Future for Economic and Social Rights?", **Political Studies**, XLIII (1995), p. 41. See also Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the ICESCR", **Human Rights Quarterly**, 9 (1987), pp. 157-160.

[96] *Ibid*.

disparity between two groups of rights, the UN Committee on Economic, Social and Cultural Rights, in its statement to the Vienna World Conference of 1993, declares that:

> [t]he shocking reality ... that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.[97]

It is a commonly accepted view that classical human rights documents such as the American Declaration of Independence[98] and the French Declaration of Rights of Man and Citizen[99] do not contain any explicit reference or clause regarding economic and social rights. Nonetheless, the UDHR's final clauses list a number of distinct socioeconomic rights including the right to work, the right to education, protection against unemployment and poverty, the right to join trade unions and the right to just and favourable remuneration. Those rights have also been enumerated in the ICESCR in more detail.

Even though the ICCPR and the ICESCR were originally planned as constituent parts of a single convention, ideological divisions of the Cold War era entailed the formulation of two parallel documents each of which was favoured by one bloc. Believing the self-regulative role of economy for healing the economic instabilities and deviations such as unemployment, the regulative role of the State under the dominant classical liberal understanding of political economy has remained relatively limited. Since socioeconomic rights have been generally regarded as 'side-constraints' of working class struggle and its extremist political versions up until the end of the Cold War, Western capitalist States accordingly did not perceive them within the purview of State responsibility.[100] Whereas given the *apparent* sensitivity of the socialist ideology

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[97] "Statement to the World Conference on Human Rights on behalf of the ESCR Committee", Seventh Session, E/1993/22-E/C.12/1992/2, annex III, paras. 5-7, http://www2.ohchr.org/english/bodies/cescr/statements.htm (20 May 2011).

[98] http://www.ushistory.org/declaration/document/ (16 May 2011).

[99] http://www.constitution.org/fr/fr_drm.htm (16 May 2011).

[100] Alston and Quinn, pp. 157-160.

for securing economic and social rights, the stance of the Western governments in explicitly espousing this set of human rights through the Cold War era was not *relatively* positive.[101] Nonetheless, despite the prevalence of negative views upon the understanding of the West regarding economic and social rights, Donnelly's elucidation also makes sense:

> No Western country seriously debates whether to implement economic and social rights. Discussion instead focuses on the means to achieve this *unquestioned* end, how massive the commitment of resources should be, and which particular rights should be recognized and given priority.[102]

There is also an extreme argument of this point of view claiming that the UN formulation of socioeconomic rights has been specifically designed for those living in Western industrialised societies rather than for those living in other parts of the world.[103]

Nonetheless, as has been maintained by Donnelly that arguments putting economic and social rights outside the domain of true human rights are also 'philosophical, not merely political or polemical'.[104] One of the most serious criticisms against socioeconomic rights was developed by Maurice Cranston. As he argues:

> [t]he traditional political and civil rights are not difficult to institute. For the most part, they require governments, and other people generally, to leave a man alone... The problems posed by claims to economic and social rights, however, are of another order altogether. How can the

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[101] Henry J. Steiner and Philip Alston (Eds.), **International Human Rights in Context**, 2nd Edition, Oxford, 2000, pp. 249-254. Beetham, p. 43. Jerome J. Shestack, "The Jurisprudence of Human Rights", Theodor Meron (Ed.), in **Human Rights in International Law: Legal and Policy Issues**, Oxford: Clarendon Press, 1984, p. 73. Giandomenico Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance", **Journal of Public Policy**, 17, 2, Cambridge University Press (1997), pp. 139-167.

[102] *Ibid*, p. 65. [Emphasis added] Albeit Donnelly's claim of being an *unquestioned* one, it is a reality that the status of economic and social rights has been systematically upgraded with the institutionalisation of social democratic model which is essentially assessed as a derivative of liberal and socialist political systems of the 19th and 20th centuries. Thus it can be maintained that Donnelly's claim is still controversial. For an interesting argumentation that the US government had decisively rejected economic and social rights within the post-war global economy see Alex Kirkup and Tony Evans, "The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly", **Human Rights Quarterly**, 31, No. 4, (November 2009), pp. 221-238.

[103] Jones, p. 146.

[104] Donnelly, p. 28.

> governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for millions of people who inhabit those places and multiply so swiftly?[105]

Claiming, on the one hand, that civil and political rights are ‘universal, paramount, categorical moral rights’, he classifies socioeconomic rights as a group of rights that ‘belongs to a different logical category’.[106] By dividing Cranston’s refusal into three parts, Jones argues, firstly, that traditional civil rights such as rights to freedom of speech or freedom of association also “*require little more than restraint* from government and are therefore ‘practicable’ in all societies”.[107] Any right *either* socioeconomic *or* civil and political cannot be effectively secured by legislation alone unless it has been backed by enforcement. Secondly, regarding the universality test (a right for *all*) of socioeconomic rights, he claims that a classical socioeconomic right such as social security is universal in the sense of a classical civil right such as right to fair trial which “will be operative only for those who find themselves accused of a crime”.[108] Just like employees demanding social security from their respective States, individuals before the courts demand a right to fair trial principally from their domestic judiciary system. And thirdly, Cranston asserts the ‘paramount importance’ of civil rights with respect to socioeconomic rights. Having regard to the socioeconomic rights as *desirable objectives*, he puts that “the UN Declaration confused rights with ideals”. Whereas, by taking into consideration ‘the circumstances in which much of the world’s population lives’, Jones has the opinion that “access to those material essentials will often be much greater importance than civil rights such as freedom of expression or freedom of movement”.[109] In the same vein, Donnelly underlines as follows:

> … the psychological, physical, and moral effects of prolonged enforced unemployment may be as severe as those associated with denial of, say, freedom of speech. A right to education may be as

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[105] Maurice Cranston, “Are There Any Human Rights?”, **Daedalus**, 1983, 112, Fall 1983, p. 13.

[106] Maurice Cranston, **What Are Human Rights?**, New York: Basic Books, 1964, p. 54.

[107] Jones, p. 157. [Emphasis added] See also Donnelly (pp. 28-29) for a similar mode of reply against the refusal of socioeconomic rights by Cranston. For his critical analysis of ‘*apparent* impracticability in the present’ see Beetham (pp. 55-59).

[108] *Ibid*, p. 159.

[109] *Ibid*, p. 158; and also p. 163.

> essential to a life of dignity as freedom of speech or religion. (Economic and social) rights to food and health care may be as essential for protecting life as the (civil or political) right to life.[110]

In his reckoning about the very idea of socioeconomic rights, Jones presents three reasons:[111] Firstly, socioeconomic rights are absolutely essential for human survival. It is also a common argumentation that without basic well-being, enjoying civil and political rights is 'of little relevance or value for human beings'. Secondly, asserting that securing well-being of the members of the society is not primary objective of socioeconomic rights. Rather there is a mutual gain amongst the human beings: such as right to education can be justified as investment in human capital, right to health care can be assumed as securing an effective workforce, etc. And thirdly, albeit not a substantial one, and an extension of negative approach against socioeconomic rights in Western societies, fulfilling socioeconomic rights of the needy may help to eliminate the stigmatisation of recipients by the affluent.

Indeed, claiming that socioeconomic rights are not harmonious with the presumption of human rights idea aiming at procuring a life of dignity to each person is an excessive deduction. To put it differently, restricting human rights to merely negative aspects of human rights theory is not sufficient to provide a plausible ground for meeting necessary conditions of having a decent life of dignity. Taking into consideration of the vast number of socioeconomic problems even within the most developed countries of the world, meeting the basic necessities of the persons is in line with the very existence of human rights idea. Nonetheless, the conception of 'basic needs' can also be evaluated as a subjective concept. Accordingly, resolving 'the relative indeterminacy' of the concept together with discovering its 'limits' may help to meet the criticisms being raised.[112] Likewise, the ICESCR imposes obligation on each State Party:

> to take steps, individually and through international assistance and co-operation ... to the maximum of its available resources, with a view to achieving progressively the full realization of rights recognized in the present Covenant by all appropriate means.[113]

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[110] Donnelly, p. 28.

[111] Jones, pp. 147-148.

[112] *Ibid*, p. 153.

[113] Article 2(1).

From the clause, it can be interpreted that States Parties are obliged to take immediate and effective steps with all its available resources towards the realisation of *all* socioeconomic rights.[114] Regarding the divergences in economic resources, socioeconomic instabilities and disparities in various countries of the world, this clause gives a particular discretion to States for the realisation of socioeconomic rights. Nonetheless there exists a strict requirement expected from States for the fulfillment of, at the very least, 'minimum essential levels of these rights'.[115] As Freeman presents, there are suggestions in both theory and practice for the usage of indicators for measuring 'nutrition, infant mortality, frequency of disease, life expectancy, income, unemployment and food consumption'.[116] What is needed is some 'stable, non-arbitrary, normatively based criterion'.[117] Even there already exist some objective criteria such as a 'minimum threshold' approach or a 'human development index'. However, 'basic needs' or 'minimum requirements' do not just cover satisfaction of the physical necessities of life, but also require 'a level of provision for persons that is suitable for social agents, interacting with others in a specific society'.[118] With the effective use of such parameters, implementation or rather practicality of positive human rights seems likely to be relatively easier.

Despite the emphasis of the Convention, resource constraints of many States together with relatively limited impact of the conservative international institutions create impediments for effectively enjoyment of socioeconomic rights. Nonetheless, ideas of economic decision makers still being instituted under the impact of dichotomous analysis also create problems for instituting effective policies: "to guarantee civil and political rights is relatively cheap, whereas to guarantee economic

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[114] See the so-called Limburg Principles on the Implementation of the ICESCR, UN Doc. E/CN.4/1987/17, Appendix 1, http://www.acpp.org/RBAVer1_0/archives/Limburg%20Principles.pdf (10 April 2011).

[115] Freeman, p. 164. Beetham, pp. 44-50. See also Asbjorn Eide, "The Realisation of Social and Economic Rights and the Minimum Threshold Approach", **Human Rights Journal**, 10 (1989), pp. 35-51.In this vein, the Optional Protocol to the ICESCR, establishing an individual complaint mechanism, has entered into force on 5 May 2013 with the ratification of 10 Member States, Doc.A/63/435; C.N.869.2009.TREATIES-34 of 11 December 2009, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-3-a&chapter=4&lang=en (6 May 2013).

[116] *Ibid.*

[117] Griffin, pp. 182-184.

[118] Jones, p. 161.

and social rights is potentially enormously costly".[119] Despite all the efforts being performed, difficulties for the realization of socioeconomic rights, which Sen defines as the 'feasibility critique', is not just peculiar to this group of rights but also to civil and political rights.[120] Accordingly, "non-realization does not, in itself, make a claimed right a non-right".[121]

Nonetheless, disputation of the 'institutionalization critique' that "real rights must involve an exact correspondence with precisely formulated correlated duties" makes more sense for the viability of socioeconomic rights:[122]

> Unfortunately much writing and rhetoric on rights heedlessly proclaims universal rights to goods or services, and in particular 'welfare rights', as well as to other social, economic and cultural rights that are prominent in international Charters and Declarations, without showing what connects each presumed right-holder to some specific obligation-bearer(s), which leaves the content of these supposed rights wholly obscure... Some advocates of universal economic, social and cultural rights go no further than to emphasize that they *can* be institutionalized, which is true. But the point of difference is that they *must* be institutionalized: if they are not there is no right.[123]

In responding to criticism raised by O'Neill, Sen approves her approach in upholding the importance of institutions for the realisation of socio-economic rights.[124] However, these critics are not essentially substantial. Since there are sufficient moral grounds for the very existence of socio-economic rights, they are to be evaluated as procedural. Indeed, activities of domestic and international NGOs together create a sense of awareness for the importance of the ongoing problems. Thus, legitimate pressure groups try to exert their logistic and critical support for the re-institutionalisation of the governmental structures. As has been delineated above, endeavours for the development of objective criteria for the realization of socioeconomic rights continue. Nonetheless, Donnelly's emphasis is also noteworthy

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[119] *The Economist,* August 18-24, 2001, "Righting Wrongs", pp. 18-20.

[120] Sen, pp. 383-384.

[121] *Ibid*, p. 384.

[122] *Ibid*, p. 382.

[123] Onora O'Neill, **Towards Justice and Virtue**, New York: Cambridge University Press, 1996, pp. 131-132. [Emphases are original]

[124] Sen, p. 383.

that it points out the importance of political economy so as to effectively implement socioeconomic rights.[125] Affirmative political intervention by the governments then and in some certain cases will be a necessary condition in the form of duties correlative to rights in question.

One last point to be stressed about socio economic rights is that, unlike civil and political rights, they are not 'justiciable'.[126] Today many jurisdictions such as the United States, Canada, the United Kingdom (UK) and the ECtHR do not include socio-economic rights into the category of justiciable ones.[127] While duties correlated to civil and political rights are apparently identical with negative obligations, their restraint 'operates immediately and once for all'. However, positive duties are generally associated with socioeconomic rights and they are inherently 'continuing and require ongoing monitoring'.[128] Assuming that such a monitoring process is beyond the structural capability of a court, the issue is accepted as a matter of political choice. In his detailed analysis on prevalent patterns of judicial interpretations in Canada, New Zealand, and Israel, Hirschl also reaches similar conclusions. Regarding State regulation to human liberty and equality as a more direct threat than 'the potentially oppressive and exploitative social relations and institutions of the so-called "private" sector', national high courts in these countries, he maintains, give a generous interpretation in the context of negative rights claims. Yet their dedication is a much narrower one in the context of positive rights.[129] The objection focuses on the point that judiciary, which has inherently no expertise in economic policy, does not need to have power to shape the economic and social policies of the State in question. Having seen the judicial resolution inappropriate for solving the indeterminacy problem of positive duties, it largely remains to the political power to draw the line and perform affirmative action(s) if necessary.

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[125] Donnelly, p. 29.

[126] Freeman, p. 165. Marshall defines justiciability as 'the aptness of a question for judicial resolution'. (Geoffrey Marshall, "Justiciability" in **Oxford Essays in Jurisprudence**, A.G. Guest (Ed.), Oxford: OUP, 1961, p. 265)

[127] Fredman, p. 93. For the case of Canada see Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend", **FORUM CONSTITUTIONNEL**, 9:3 (1998), pp. 71-82.

[128] Fredman, p. 92.

[129] Hirschl, p. 1095.

Nonetheless, there are also alternative domestic systems favouring the justiciability of socioeconomic rights.[130] Specifically jurisprudence of the South African Constitutional Court and Indian Supreme Court has upheld claims for the violation of socioeconomic rights in a series of landmark judgements.[131] In line with the arguments delineated above, presenting the arguments of the South African Constitutional Court in the case of *Grootboom* can help for finalising the section:

> [H]undreds of thousands of people [are] living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants... [Although it] is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country... [T]hese are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.[132]

Even if Section 26 of the Constitution does not entitle right to housing to be procured by the State to every person, the Court adjudicated that it has the obligation to devise resources and implement a comprehensive and coordinated program progressively to realise the right of access to adequate housing with a special attention for the needs of the poor.[133] By adopting sufficient laws and policies for the fulfillment of its obligations in meeting short, medium, long-term needs and crisis as well, *reasonableness* was regarded as a means of policy allocation of available resources of the State and of supervision of the implementation of the programs.[134]

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[130] See Fredman (pp. 92-123) for a comprehensive analysis of the issue.

[131] Vizard, pp. 24-25. Sandra Liebenberg, "Adjudicating the Positive Duties Imposed by Economic, Social and Cultural Rights", **INTERIGHTS BULLETIN**, Volume 15, No 3 (2006), pp. 109-113. See also Fredman, pp. 100-102 and pp. 113-123.

[132] *Republic of South Africa and Others v Grootboom and Others,* 4 October 2000, Case No. CCT 11/00.2000 (11) BCLR 1169, paras. 93-94, http://www.law-lib.utoronto.ca/diana/TAC_case_study/Grootboom.pdf (20 April 2011).

[133] *Ibid*, paras. 47-69 and 99.

[134] *Ibid*, paras. 39-44. Budlender states that the impact of the *Grootboom* judgement remained limited even 3 years passed after the ruling. (Geoff Budlender, "Implementing Judgements on the Positive Obligations of States", **INTERIGHTS BULLETIN**, Volume 15, No 3 (1997), pp. 139-141) *Ibid*, footnote 6. For a more successful compliance, the author gives the case of *TAC* (*Minister of Health and Others v Treatment Action Campaign and Others* (No 2), 2002 (5) SA 721 (CC), http://www.saflii.org/za/cases/ZACC/2002/15.html (20 June 2011)) as an example through which a comprehensive treatment plan (with the contribution of civil society) has been developed within a year after judgement for people with HIV/AIDS.

As has been touched upon above, leaving all regulative functioning to the invisible hands of apparently self-regulating liberal economic system is not an effective method of policy for the fulfillment of human rights in an imperfect world. Accordingly, it can be summed up that inefficiencies regarding the fulfillment of socioeconomic human rights are not just a matter of scarcity of resources but a matter of political choice and legal awareness. As it will be presented in the next section of the dissertation, the concept of 'positive obligations' is likely to present a more structural framework for the development of a comprehensive judicial interpretation upon the fulfillment of human rights.

1.2 Structural Framework of Positive Obligations in Human Rights Theory

By conceptualising the interrelatedness and indivisibility of rights, Section 1.1 of the dissertation has advanced the theoretical base for positive human rights duties. Despite the fact that it did not explicitly analyse the very structure of positive duties, it tried to demonstrate the basic values laying behind the human rights idea with a particular endeavour for continuously presenting the fallacy of the alleged dichotomy and its derivatives in human rights theory. By demonstrating that it is artificial to attempt to classify human rights according to nature of their negativity or positivity, it is evinced that i) each one of the human rights has both negative and positive features; and ii) while a typical positive right can call for action on the part of the duty-bearer, be it a legal person or individual, a classical negative right can also impose a correlative duty which does call for action on the part of the duty-bearer. Having justified the clear interaction between two sets of rights, it has also been recognised that ascribing a particular right to the category of civil and political rights or to that of economic, social and cultural rights has at most an organising and classificatory value so as to secure academic debates and analyses.

In the preceding part, it has been already argued that the range of positive duties is not confined and do not overlap with socioeconomic rights. Accordingly it is debated that not only socioeconomic rights *do* give rise to negative duties of restraint but also civil and political rights *do* give rise to positive duties of affirmative action. Within this perspective, this part of the dissertation primarily seeks to examine very nature and structure of the positive duties. As the compulsory (or integral) component of human rights, the recognition of the positive duties is crucial for their enjoyment and implementation. As Beetham cites "[i]n the absence of a satisfactory theory of obligation, it is urged, human rights must remain merely 'manifesto' claims, not properly rights".[135] Who or what should bear the duties correlative to human rights? As one of the key players at domestic and international levels, how and to what extent do the positive obligations of States arise in human rights theory? What are the specific characteristics of these obligations? As human rights do have negative and positive elements, are positive duties correlative to human rights not only applicable to civil and political rights but also socioeconomic rights? And

[135] Beetham, p. 51.

by intentionally leaving their negative aspect aside, primary aim of this part of the dissertation is to analyse the nature of positive duties in detail.

1.2.1 Rights, Duties, and Obligations

Despite the UDHR's special clause stating that everyone "has duties to the community in which alone the free and full development of his personality possible",[136] human rights theory and practice essentially do neglect to emphasise *human duties*.[137] Likewise *individualistic* nature of human rights also emphasises rights rather than responsibilities. In this context, since individual's responsibility is not defined, individuals principally do not have responsibility recognised in international law.[138] Nonetheless, it can easily be maintained that the essence of rights theory is its connection with justified claims (*claimability*). Since a right can be described as a justified claim to stand in a certain relationship with some other person(s), obligation, accordingly, arises as a component part of the responsibility inherent in the very structure of the right in question. In other words, within the scope of this relationship, other person(s) has an obligation correlative to the right.[139] In the absence of an obligation or duty correlative to the right, there is no right in the strict sense of the term. Accordingly it can be envisaged that without specifying the content of correlative duty and its prospective respondent(s), elimination of the possible problems requisite for the fulfillment of the right in question cannot be possible at all. Hence, a unique form of indeterminacy arises as an obstacle curbing the viability of correlation between the rights and their correlative duties.

In his seminal analysis on rights, Wesley Hohfeld claims that a right may be one of four kinds: a claim, a liberty, a power, or an immunity.[140] Among those four kinds of

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[136] Article 29, para. 1.

[137] Freeman, p. 41 and p. 73.

[138] Tom Obokota, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law", **International Journal of Refugee Law**, 17 (2005), pp. 394-415. It is true, however, that in exceptional cases like crimes against humanity, international law does recognise the responsibility of individuals. (See for example Dirk Van Zyl Smit, "Punishment and Human Rights in International Criminal Justice", **Human Rights Law Review**, Volume 2, Number 1 (2002))

[139] Donnelly, pp. 7-8. Roger Pilon, "Ordering Rights Consistently: Or what we do and do not have rights to", **Conference on Modern Rights Theory**, San Diego, March 8-10, 1979, p. 1176.

[140] Wesley Newcomb Hohfeld, **Fundamental Legal Conceptions as Applied in Judicial Reasoning**, First Published, New Haven: Yale University Press, 1919.

rights, a claim-right is the one that represents a right 'in its strict sense'. Like the common usage of the term 'right' today, a claim-right constitutes a claim that one party (right-holder) has upon another (duty-bearer).[141] Individuals or rather right-holders have a *right* to insist on someone or something for the realisation of their rights. It is envisaged that each claim-right raised by the right-holder must have *at least* a correlative duty-bearer. One distinction of claim-rights is between negative and positive claim-rights that its analysis has already been delineated above. Just to remember the usage of the concept, positive claim-rights are demanded by the right-holders for a positive response or affirmative action from those who bear corresponding duties provided that obligation can be performed *without comparable cost* to those others. The same logic is also valid for negative claim-rights: The right-holder, for example, has a right not to be assaulted or not to have his property taken. Thus, since the right-holder has a right for demanding from someone to do (or not to do) something, the emerging correlative duty entails an action or inaction to be performed by the duty-bearer(s). The correlation does not only posit the imposition of duties upon others *vis-à-vis* the claim-right in question but also obliquely signifies the absence of a duty upon the right-holder.[142]

Apart from the Hohfeldian analysis of rights, there are many rights theories trying to distinguish varieties of rights.[143] Contemporary questioning of rights is essentially framed by interest theories (Raz) and choice theories (Hart).[144] Since analysing their approaches are beyond the scope of the dissertation, they will not be detailed here. However, it should be pointed out that two of the leading theories do stress the importance of rights' correlation with their correlative obligations: "[r]ights are relational in the sense that the obligations implied by rights are owed *to* someone".[145] The link between rights and duties is also assessed under the name of 'correlativity' thesis that claims for every right

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[141] Jones, pp. 12-22.

[142] Though it is also possible to assume that claim of the right by the right-holder upon the duty-bearer is also a *duty* incumbent upon right-holder for the viability of the relationship.

[143] See for a short but comprehensive presentation George W. Rainbolt, "Rights Theory", **Philosophy Compass**, 1, ET 003 (2006), pp. 1-11. Amongst those, Feinberg's alternative to the choice and interest theories is noteworthy although he also focuses on claims and duties (See Joel Feinberg**, Rights, Justice, and the Bounds of Liberty**, Princeton: Princeton University Press, 1980).

[144] Jones, pp. 12-44.

[145] Rainbolt, p. 4. [Emphasis is original]

there is a correlative duty, and for every duty there is correlative right. Although justifying the correlativity thesis within the broader meaning of Hohfeldian rights (in all four of the rights of right that Hohfeld identifies) is questionable, a broader interpretation of Hohfeld preserves the correlation between the right and the duty by means of a 'claim'.[146] Having taken the claim as the *core* of a right, Jones paraphrases the relation by stating that:

> If I have a property right in a car, that right is likely to consist of a complicated cluster of Hohfeldian rights. Typically these would include the claim-right that others should refrain from damaging my car or using it without my permission, my liberty-right as owner to use the car, the power to sell the car or to permit others to use it, and my immunity from any power of others to dispose of the car without my consent. In other words, a single assertion of right might, on inspection, turn out to be a cluster of different types of right.[147]

This part of the dissertation has primarily aimed at putting forward the correlation between rights and duties. And specification of personalities of those who are responsible for the fulfillment of human rights will be the topic of the next section. To conclude this section, it should be pointed out that balancing the necessities of rights demanded by their contents and correlative duties is also subject of a dynamic philosophical debate.[148] Furthermore, as has been previously discussed, indeterminacy problem of positive duties is a systemic one. And if it cannot be effectively resolved, there can "be much variation and possibly some ambiguity in the specification of duties".[149] Nonetheless, it is seen that even if persons are not themselves causing the violation, they do have a strong *reason* for helping another person. And under an *interdisciplinary* framework, there may be some other inferences for the very reason of emerging universal ethical demands.[150]

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[146] Orend, p. 23.

[147] Jones, p. 14.

[148] Adam Smith, **The Theory of Moral Sentiments**, Oxford: Clarendon Press, (republished) 1976. Immanuel Kant, **The Metaphysics of Morals**, Mary Gregor (Ed.), First Published, Cambridge: Cambridge University Press, 1996.

[149] Sen, p. 374.

[150] However, in line with the Kantian ethics, there is a clear difference between 'perfect obligations' and 'imperfect obligations'. While the former group of obligations are fully specified and there is no exception permitted, the second group of obligations give latitude for choice to those who have correlative duty for their imperfect obligations (See Sen, pp. 374-375 for a real-life case exemplifying the issue).

1.2.2 Shue's Tripartite Analysis

Orend states that "[u]p until the late 1970s, the duties correlative to claims of human right were largely seen as being *either* negative *or* positive".[151] Accordingly, in parallel with the alleged differentiation of rights, the difference between two groups of duties was also based upon the constrained analysis of whether or not the duty-bearer had to perform an action:

> A negative duty was one of strict factual inaction. It was a duty of omission, of forbearance, of non-interference, of *refraining from doing something*. A positive duty, by contrast, required factual action. It demanded performance, commission, assistance, *providing something* or otherwise doing something beneficial for the right holder.[152]

To paraphrase the understanding of traditional view regarding duties, the duties correlative to civil and political rights (or duties of restraint) were thought as a matter of forbearance. Hence their cost to the individuals and society in general seemed quite reasonable and affordable. Accordingly it is inferred that negative duties or duties of restraints are taken as perfect and primary, or rather "stringent duties of justice that correspond to human rights".[153] On the other side of the coin, costs of the positive duties correlative to socioeconomic rights are regarded as a matter of financial and material assistance, such as food, water, clothing, shelter. In this vein, Clapham posits that positive obligations "may mean actual expenditure and the deployment of resources to ensure that the right can be freely exercised".[154] And, as has been previously mentioned, this was a point of concern and recipient of sharp criticism by some rights theorists, such as Cranston and Nozick, who maintained that the immense costs and onerous burdens of positive duties were proving the illegitimacy of socio-economic rights as legitimate human rights.[155]

In this context, Henry Shue's unique formulation of basic rights and specifically their correlative duties has contributed not only for resolving the hegemony of the alleged dichotomous postulate in human rights theory but also towards the credibility of the

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[151] Orend, p. 139. [Emphases are original]

[152] *Ibid*. [Emphases are original]

[153] Elizabeth Ashford, "The Alleged Dichotomy Between Positive and Negative Rights and Duties", in Charles R. Beitz and Robert E. Goodin (Eds.), **Global Basic Rights** (pp. 92-112), Oxford University Press, 2009, p. 93.

[154] Andrew Clapham, **Human Rights in the Private Sphere**, Oxford: Clarendon Press, 1993, p. 345.

[155] Orend, p. 140.

indivisibility of human rights idea in (legal and administrative) practice.[156] As has already been delineated in Section 1.1.2, Shue has challenged the arguments of the standard view upholding the priority of security rights compared to welfare rights by claiming:

> 1) that security rights are more "positive" than they are often said to be,
> 2) that subsistence rights are more "negative" than they are often said to be,
> 3) that the distinctions between security rights and subsistence rights, though not entirely illusory, are too fine to support any weighty conclusions, especially the weighty conclusion that security rights are basic and subsistence rights are not.[157]

Since Shue's counter-arguments regarding the arguments cited above have already been expressed, it will not be repeated here. Yet his contribution to the systemic analysis of duties is specifically unique for the integrity of the dissertation. Thus, by putting stress upon his arguments favouring the interrelatedness of the two groups of rights, the dissertation will focus on his distinctive arguments about duties. According to Shue, rights are *basic* "only if enjoyment of them is essential to the enjoyment of all other rights".[158] Since "to have a right is to be in a position to make demand of others", there are correlative duties at the very centre of a basic right in his approach.[159] Without thoroughly analysing the nature of duties correlative to the right and the identity of their respondents (duty-bearers), effectively fulfillment of rights just remains as an aspiration. In other words, realisation of duties is a necessary precondition for the enjoyment of rights implying that "the enjoyment of basic rights is an *all-or-nothing affair*: one either enjoys all the basic rights or no rights at all".[160] Having said that, it can be claimed that a duty entailed by its

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[156] Thomas Pogge, "Shue on Rights and Duties", in Charles R. Beitz and Robert E. Goodin (Eds.), **Global Basic Rights** (pp. 113-122), Oxford University Press, 2009, p. 113. Although Shue prefers using the term 'basic rights' so as to narrow the scope of human rights and basic rights may somehow differ from human rights, both of them are essentially similar in nature concerning the institutionalisation of fundamental moral rights in some way (either politically or legally).

[157] Shue, p. 37.

[158] *Ibid*, p. 19. It is also noteworthy to point out that what Shue refers by basic rights is mostly the right to subsistence although he enumerates three *basic* rights (rights to liberty, security, and subsistence) in his book. (Shue, p. 54) He argues that until the right to subsistence has been securely guaranteed, enjoyment of other rights, including liberty rights, cannot be possible at all. His arguments on the priority of the right to subsistence over all other rights have also caused an ongoing theoretical debate questioning the possibility of enjoying other rights in the absence of the right to subsistence. (Ashford, pp. 94-95)

[159] Shue, p. 13.

[160] Pogge, p. 114. [Emphasis added]

correlative right is a moral obligation incumbent upon those who bear duties. Hence, the realisation of basic rights and their correlative duties necessitates '*social guarantees* against standard threads'.[161]

Although still paying attention to the importance of negativity and positivity tenets of traditional view, Shue does not find the existing two-fold structure appropriate for analysing fulfillment process of the rights:

> It is true that sometimes fulfilling a right does involve transferring commodities to the person with the right and sometimes merely involves not taking commodities away. Is there some grain of truth obscured by the dichotomy between negative and positive rights? Are there not distinctions here that it is useful to make?[162]

Accordingly he contends the classical idea that there is solely *one* single duty, either negative or positive, correlative to any single human right. But rather there are actually *multiple* duties combining both negative and positive elements of the conventional understanding. Thus, by rejecting one-to-one pairings between rights and duties, the *useful* distinction to be emphasised, he posits, is not between rights *but* amongst duties.[163] In his understanding, there are multiple kinds of duties and making distinctions in between them is requisite for the fulfillment of right in question. Under his tripartite analysis there are three types of duties, "all of which must be performed if the basic right to be fully honored but not all of which must necessarily performed by the same individuals or institutions".[164] Hence he suggests that every basic right is corresponded by their three-tiered correlative duties:[165]

I. Duties to *avoid* depriving.
II. Duties to *protect* from deprivation.
III. Duties to *aid* the deprived.

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[161] Judith Lichtenberg, "Are There Any Basic Rights?", in Charles R. Beitz and Robert E. Goodin (Eds.), **Global Basic Rights** (pp. 71-91), Oxford University Press, 2009, pp. 72-73. Shue, p. 34.

[162] *Ibid*, pp. 51-52.

[163] *Ibid*, p. 52.

[164] *Ibid*.

[165] *Ibid*. [Emphases are original]

As can be easily differentiated, under the paradigm of traditional view, the duties accompanying negative rights are exhausted just by the first category of duties. For example, your right not to be tortured is already met as long as other do not torture you. Again under the domain of conventional view, the duties corresponding to negative rights fall to everyone, and all people must do to fulfil their duties is solely to refrain from torturing you. Nonetheless, from the perspective of Shue's tripartite analysis, there are (not one but) three correlative duties for the fulfillment of the *negative* right not to be tortured:[166]

> I. Duties not to eliminate a person's security – duties to *avoid* depriving.
> II. Duties to protect people against deprivation of security by other people – duties to *protect* from deprivation.
> III. Duties to provide for the security of those unable to provide for their own – duties to *aid* the deprived.

According to Shue, without fulfilling three types of duties, fully guaranteeing any basic right is impossible: "[i]t is duties, not rights, that can be divided among avoidance and aid, and protection".[167] Furthermore, by criticising the attempted division of rights into forbearance and aid (and protection as well) of the conventional view, he maintains that such a division "can only breed confusion".[168] Having argued that each and every basic right 'entails of all three types' of duties, he generalises the usage of his tripartite analysis on duties correlative to subsistence rights as:[169]

> I. Duties not to eliminate a person's only available means of subsistence – duties to *avoid* depriving.
> II. Duties to protect people against deprivation of the only available means of subsistence by other people – duties to *protect* from deprivation.
> III. Duties to provide for the subsistence of those unable to provide for their own – duties to *aid* the deprived.

It is also noteworthy to state that Shue is also of the opinion that generality of the threefold analysis of duties correlative to the rights is also possible for *all* basic rights.[170]

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[166] *Ibid*, pp. 52-53. [Emphases are original]
[167] *Ibid*, p. 53. [Emphases are original]
[168] *Ibid*.
[169] *Ibid*.
[170] *Ibid*, pp. 54-55.

1.2.3 Who Bear Correlative Duties: Persons or Institutions?

As will be analysed in the next section more deeply, Henry Shue'e *unique* contribution is helpful in analysing the very structure of duties correlative to human rights. Nonetheless, his understanding upon the identity of those who bear the duties is in line with the one of conventional view of human rights discourse that basic rights "are everyone's minimum reasonable demands from the rest of humanity".[171] Nonetheless, even if burdening the responsibility of duties to be performed upon *everyone* in the world is principally an ideal approach and apparently seems in line with the principle of equality; such a generality may also dilute the issue in that, with the terms of Shue, a general duty to protect and aid can cause unlimited and unassignable burdens incumbent upon duty-bearers that may devalue the *practicality* of universal human rights idea. Thus, it can be envisaged that *concretisation* of everyone is important at least for the sake of moral and legal responsibilities.

It is relatively clear what is meant by *having* human rights: enjoying those things *both* that individuals vitally need and that can be provided at *reasonable* cost.[172] A right is most commonly a claim. And there cannot be a right without specifiable duty-bearers. In other words, when individuals cannot perform enjoyment of their rights by their own efforts, the helpers, the respondents of the duties, do have to perform their correlative duties without endangering 'their own rights to freedom and well-being'.[173] Accordingly, assuming the validity of premise that fulfillment of the rights in question has a substantial causal link with the realisation of their correlative duties, *specifying* those who bear the duties correlative to human rights is important for ensuring a theoretical baseline requisite for the practicality of human rights.

Construing that the word 'everyone' does not only cover individuals but also includes various kinds of legal entities such as States and (domestic, foreign, and international) institutions, associations and corporations may seem a plausible reading of the word. As can be envisaged, the debate is specifically between 'individualist' and 'institutionalist' readings of human rights. Since, in line with the arguments of the

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[171] *Ibid*, p. 19. [See also Section 1.2.1] Orend, p. 129. Gewirth, p. 62.

[172] *Ibid*.

[173] *Ibid*, p. 61.

conventional view, negative rights are perfect, their corresponding duties fall everyone in the world. As to the subsistence rights, which are imperfect in nature, and their correlative duties, two kinds of problems arise:[174] One, if the scope of positive duties does not extent to distant strangers, then there comes "the fear that so many unfilled rights of so many people threaten to overwhelm those who take on the corresponding duties".[175] Referencing to the Peter Singer's essay, this situation is named as *Singer-type problems of overdemandingness*.[176] And second, given the absolute failure of a government, the range of responsibility for the correlative duties to be fulfilled does also cover individuals, other governments, and NGOs. This is the other extreme with 'numberless people' performing 'innumerable duties' which is likely to cause overdemandingness again.[177]

Likewise, being aware of the possible identification of concerns on his 'individualist' approach, in a recent article Shue delimits the extent of responsibilities by stating as follows:

> One should not leap from universal rights to universal duties... On the side of duties there can be division of labour... For every person with a right, and for every duty corresponding to that right, there must be some agents who have been assigned that duty and who have the capacity to fulfil it. We have no reason to believe, however, that everyone has burdensome duties toward everyone else, however, that everyone has burdensome duties toward everyone else even if everyone else has meaningful rights.[178]

As has been sketched out, although there is a widely accepted emphasis in human rights theory addressing that individuals are the real respondents of duties correlative to human rights, an alternative institutional reading of *everyone* is also an emerging trend in human rights literature.[179] From this sphere of argument, Nickel claims that:

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[174] See Ashford (pp. 102-104) for a concise summary of Onora O'Neill's institutionalist approach for welfare rights which are *not claimable*.

[175] Henry Shue, "Mediating Duties", **Ethics**, Vol. 98, No. 4 (July, 1988), p. 695.

[176] Peter Single, "Famine, Affluence, and Morality", **Philosophy & Public Affairs**, 1 (1972), pp. 229-243.

[177] Henry Shue, *supra* note 33, p. 157.

[178] Henry Shue, "Mediating Duties", p. 689.

[179] Thomas Pogge, "How Should Human Rights be Conceived?", **Jahrbuch für Recht und Ethik,** 3 (1995), pp. 103-120. Onora O'Neill, **Bounds of Justice**, Cambridge: Cambridge University Press, 2000. Even in the 2nd edition of Basic Rights, Shue also concedes about 'institutional design' that it "must combine judgements about what it is fair to expect people to do, what it is efficient to ask people to do, and what it is possible to motivate people to do". (Shue, **Basic Rights**, p. 173)

> Human rights are political norms dealing mainly with how people should be treated by their governments and institutions. They are not ordinary moral norms applying mainly to interpersonal conduct (such as prohibitions of lying and violence).[180]

Having labelled conventional view's argument as 'interactional' and 'individualist', Thomas Pogge provides an 'institutional' reading of human rights.[181] Briand Orend soundly presents his approach as follows:[182] According to Pogge, Orend claims, the causal link between individuals and the fulfilment of human right claims is not strong. Most individuals have no real capacity for securing one's rights to physical security, to subsistence, liberty, etc. Claiming that *everyone*, including the villager on the other side of the world, bears duties correlative to your human rights is misleading and inaccurate. Without the existence of a causality with which other individuals can create a *substantive* impact or a material difference, deducing the accuracy of such a premise is totally controversial. Rather, Pogge favours that social institutions, with the resources they have and with the principles they have been founded on, constitute 'the basic structure' and can have material impact for the fulfillment of human rights in a given society. According to him, social institutions do exert profound influence over the social conditions of a given society and can also have an effective capacity for ensuring respect for and realisation of human rights:[183]

> [O]ver time the basic structure comes to establish the parameters around what kinds of freedoms and obligations we might enjoy, the political influence we might have, the level of wealth, health care and education we can reasonably expect, the rate of crime and illness we have to face, the opportunities for work and leisure available to us, our life expectancy, the languages we speak, and so on.[184]

Having said that, Pogge comes to the conclusion that correlative duties to be performed for ensuring human rights are *merely* the responsibility of institutional

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[180] James Nickel, *supra* note 17.

[181] Thomas Pogge, "How Should Human Rights be Conceived?", pp. 103-120. Thomas Pogge, "The International Significance of Human Rights", **Journal of Ethics**, 1 (2000), pp. 45-69. Lichtenberg, p. 77.

[182] Orend, pp. 132-133.

[183] Economic, political, legal, military, medical, educational and family associations are the most influential ones of the basic structure of a given society.

[184] Orend, p. 131.

structures, not that of individuals. In this context, another complementary argument raised by Pogge claims that human rights violations have 'official' grounds based upon institutional actions and omissions. Accordingly, either at domestic level or at international fora, they are not the ordinary criminals but rather *solely* governments and their officials get charged with human rights violations.[185]

While approving his contribution to human rights theory with a specific emphasis on institutional perspective, Brian Orend opposes Pogge's complementary argument and expresses his doubt whether 'official' grounding of human rights do suffice in explaining the whole matter.[186] If, under the standard view of human rights, 'any unjust taking of the objects of human rights claims' can be defined as a human rights violation, then individuals, alongside institutions, can also violate human rights.[187] And, Orend maintains that "if individuals can violate human rights, then they should bear duties that inform them that they should not do so".[188] Accordingly, since both individuals and institutions can violate human rights by causing unjustified harm, it is "reasonable to conclude that they must *both* bear duties of a kind correlative to human rights".[189]

Although, Pogge's main argument upholds the responsibility of institutions, two kinds of individuals, in his understanding, still bear responsibilities. First, officials who occupy institutional roles bear responsibilities: Police officers, judges, bureaucrats, elected politicians, etc. In parallel with the power of their position within the structure of institution in question, they "must do their fair share ensuring that the institution they help run does not violate human rights and, equally, plays its own role in the provision of the objects of human rights claims".[190] Accordingly, the responsibility of institutions is linked with the '*individuals-in-their-roles-within-institutions*', but not individuals in their private capacity.[191] Pogge's second group of individuals who bears duties is ordinary citizens or the general public in general. Since their choices, acts, and expressions also shape the very

[185] *Ibid*, pp. 132-133.

[186] *Ibid*, p. 133.

[187] *Ibid*.

[188] *Ibid*.

[189] *Ibid*, p. 134. [Emphasis added]

[190] *Ibid*.

[191] Lichtenberg, p. 77.

structure and policies of the social institutions, ordinary citizens also do bear *indirect* responsibilities.[192]

Lichtenberg also questions the possibility of granting the whole responsibility of human rights violations *merely* to governments or other political institutions.[193] In that case, individuals outside government or in their non-governmental capacities are to be beyond the reach of responsibility in their failure to prevent governmental human rights violations. In case of assuming the validity of such an inference, it can also provide additional encouragement for the delinquent governments in order to pursue their policies more diligently in an environment exempt from public criticism and protest.[194]

To summarise, since the causal link between *our* domestic institutions and *our* fellow citizens are more clear-cut, they bear 'the weightiest duties'. However, in an era of interconnection in which causal linkages between societies and individuals across the globe are continuously becoming stricter, moral demands and duties for the protection of human rights emanating from the relations between people are more clear-cut for every individual and every institution.[195] The limits of such duties are not just limited with the society in which we live but also do circle the globe. Either being an institution or an individual:

> [t]he more power and influence one has over the objects of another's vital needs, the greater the degree of responsibility one has in connection with that person's human rights.[196]

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[192] On the functions of indirect duties see Shue, "Mediating Duties", pp. 696-698. Interestingly enough, despite his strong emphasis on 'institutionalism', Pogge also comes to the conclusion that *both* individuals and institutions bear duties correlative to human rights: "since citizens are collectively responsible for their society's organization and its resulting human-rights record, human rights ultimately make demands upon (especially the more privileged) citizens". (Pogge, "How Should Human Rights Be Conceived?", pp. 103-120)

[193] Lichtenberg, pp. 77-78. See also Andrew Fagan, **Human Rights Confronting Myths and Misunderstandings**, Edward Elgar, 2009, p. 153.

[194] Lichtenberg, pp. 77-78.

[195] See Fredman (pp. 31-62) for the arguments levied by the author on how positive human rights duties should be an essential part of globalisation.

[196] Orend, p. 139. Given its emphasis on power and influence, such a conclusion can also be criticised. With the power you have you may criticise other governments, yet they may not have sufficient power to criticise you. Such an understanding is also likely to give way to criticisms against human rights alike those being raised against the realist theory of international relations. Construing power and influence as ability to help is also possible. Having such an understanding of a moderate line of argument, see Griffin (pp. 101-104).

1.2.4 Nature of Positive Duties

Having found argumentation of Henry Shue's tripartite typology convincing, many international institutions, including the UN, have adopted and used it extensively within the scope of their human rights assessment systems. Specifically the UN Committee on Economic, Social and Cultural Rights has utilised it in its General Comments on various articles of the Covenant.[197] Although many authors have reanalysed and developed it in time, Shue's classification still preserves its original form by and large:

Table 1

Approaches to typologies of State duties imposed by human rights treaties[198]

Proposal by	Duties				
Shue	Avoid depriving	Protect from deprivation	Aid deprived		-
Eide	Respect	Protect	Facilitate	Fulfil	-
Van Hoof	Respect	Protect	Ensure		Promote
Steiner and Alston	Respect	Protect/Prevent	Create institutional machinery	Provide goods and services	Promote
The Committee	Respect	Protect	Fulfil		-
			Facilitate	Provide	Promote

As has been seen, Shue's '*to aid the deprived*' has been divided into two subsections in the newly developed forms. And another obligation for the promotion of the

[197] The ESCR Committee, General Comment No. 12, "The Right to Adequate Food", UN ESCOR, 20th session, Agenda Item 7, [27], UN Doc. E/C.12/1999/5 (1999), 12 May 1999, http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9 (20August 2011), para. 15. The ESCR Committee, General Comment No. 13, "The Right to Education", E/C.12/1999/10, 08 December 1999, http://www2.ohchr.org/english/bodies/cescr/comments.htm (12 April 2011), paras. 46-47. The ESCR Committee, General Comment No. 15, "The right to water (arts. 11 and 12)", 20 January 2003, http://www2.ohchr.org/english/bodies/cescr/comments.htm (12 April 2010), paras. 20-29 and 34-37. See also Fons Coomans, "Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations", in A. Von Bogdandy and R. Wolfrum (Eds.), **Max Planck Yearbook of United Nations Law**, Volume 11, 2007, pp. 359-390.

[198] The table (originally entitled "Approaches to typologies of State duties imposed by human rights treaties") is taken from M. Magdalena Sepulveda, **The Nature of Obligations under the ICESCR**, Intersentia, 2003, p. 248. See also *ibid*, pp. 157-163. Eide, pp. 35-51. G.J.H. Van Hoof, "Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some", in Philip Alston and Katarina Tomaševski (Eds.), **The Right to Food**, Dordrecht: Martinus Nijhoff Press, 1984, pp. 106-108.

right concerned has also been added as a new layer to the system. In this respect, it can be conceded that duties in the form of affirmative action and policies to be performed by the governmental authorities are widely accepted as a general norm at international level. One way of doing this, as has been pointed out by the basic structure of Pogge, is issuing basic legislation and rendering institutions effective requisite for the fulfillment of human rights. Even after the establishment of a basic normative and institutional structure, a proactive State system, which is to be scrutinised by a democratic check and balance mechanism, functioning (or rather shifting) within *all* three levels of Shue's tripartite analysis is a necessity for the fulfillment of positive State obligations.

Nevertheless, with the systematisation of duties correlative to human rights, it is currently clear that fulfillment of human rights is not an easy process. Or at least it is not as easy as the proponents of *the duties of restraints paradigm* might suppose. Since duties are mixed in nature (that is having both negative and positive elements), specification and realisation of them necessitate consecutive number of policies to be implemented properly. Likewise, as has been previously touched upon, many socioeconomic rights might also give rise to negative duties for the State: "[t]he right to be housed includes a restraint on the State from unlawful evictions".[199] As such, it is seen that positive duties not only consist of socioeconomic rights but also civil and political rights. From another side of the view, when people lack an adequate standard of living, it is not easy to state whether the State in question has caused direct or indirect human rights violations. That is to say imposing duties upon governments is a sensitive and comprehensive issue. Indeed, interpretation over the scope and nature of the duties and deciding when and to what extent governments have failed to secure them can have enormous variations. And in most cases, this is the domain of which judiciary draws the boundaries. Nevertheless, as has been touched upon in Section 1.1.4, national judicial bodies are fairly conservative in not to broaden the scope of limits that might give way new responsibilities incumbent upon States for the realisation of duties. For example, in the case of *DeShaney v Winnebago County Department of Social Services*, the US Supreme Court found that the social service agency could not be liable for failing to remove a child from the custody of his father,

[199] Fredman, p. 68.

despite the clear evidence of the father's violence tendencies upon him.[200] The child had relied on the Due Process Clause of the Fourteenth Amendment, which states "*No State shall ... deprive any person of life, liberty, or property without due process of law*".[201] The Supreme Court rejected the argument on the grounds that the clause could not be interpreted as a one giving rise to a positive duty on the State to protect individuals against other individuals. In his statement giving the opinion of the Court, Chief Justice Rehnquist holds that:

> nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.[202]

As already pointed out, conventional view does see the domain of positive duties as a one appropriate for political decision if there is no already imposed positive duty by the legislative. Proving the existence of such an approach, Rehnquist submits that:

> [t]he people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[203]

Having said that, it is seen that indeterminacy problem of positive duties apparently seems as a deadlock for the judiciary of some jurisdictions. Nonetheless, it is not plausible

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[200] *DeShaney v Winnebago County Department of Social Services,* Decided on 22 February 1989, 489 U.S. 189 (1989) (US Supreme Court), http://supreme.justia.com/cases/federal/us/489/189/case.html (20 June 2011).

[201] Amendment XIV (1868), Section 1, http://www.senato.gov/civics/constitution_item/constitution.htm (8 May 2012).

[202] *DeShaney*, para. 195.

[203] Para. 203. For a similar kind of case from Canadian jurisprudence see *Case of Gosselin v Quebec* (Canadian Supreme Court, 2002 SCC 84, http://www.yorku.ca/khoosh/PPAS%202200/Cases/Gosselin-repro.pdf (8 May 2012)), paras. 338-358. See in particular para. 377 for the dissenting opinion of Judge Arbour criticising the majority for their decision finding no violation of positive duty of the State by assuming that the right to life, liberty and security does only give way duties of restraint, but not of positive ones.

to say that it is an absolute problem and irresolvable. As in the case of many other jurisdictions, there are not only political resolutions but also judicial decisions giving way to the State authorities to take active initiative for the fulfilment of duties correlative to human rights. As the dissertation will analyse more deeply in the next sections, this is also a realm where the ECtHR also draws boundaries by setting a delicate balance between one's rights and public interest. In this context, examining the layers of Shue's tripartite analysis can provide us a better understanding for interpreting and policing positive obligations of States having been developed under the jurisdiction of the ECtHR.

1.2.4.1 Duties to Respect

The obligation to respect is defined as "the most nearly "negative" or passive kind of duty that is possible".[204] It takes the form of a duty incumbent upon persons not to interfere with, hinder, or impede access to the enjoyment of rights. Principally if the right-holder has the object of the human rights in question, then all other persons and entities must indemnify from depriving the right-holder from that object. Likewise, human rights referring to freedom or liberty of persons principally involve the duty to respect. In a way, it can be construed as a way of self-restraint for individuals and the State as well. In other words, correlative duties to respect are generally associated with negative rights since they "merely require that one refrain from making an unnecessary gain for oneself by a means that is destructive for others".[205] It should also be emphasised that *a negative duty* include a meaning of *not performing act inflicting harm* on other(s). Thus it can be claimed that albeit the negative character of the duty to respect is at the forefront, it intrinsically does also consist of positive elements (obligation of *not* performing). Again obligation to respect also entails due regard to avoidance from performing activities not in line with the equality principle.

Claiming the validity of duties to respect for subsistence rights is also a plausible argument. It is clear that without recognising the very existence and importance of the subsistence right in question, its implementation by the third parties will not be possible. In this context, the existence of some individuals or institutions becomes a primary requisite

[204] Shue, p. 55.

[205] *Ibid*. Nonetheless, in some exceptional instances like forfeiture, the rights in question may be constrained under legally instituted structures in the name of public interest at the expense of individual one.

for the enforcement of the duty to avoid in that everyone in the society will probably not fulfil his duties to respect.[206]

Again Shue points out that relying on duties to protect rather than duties to avoid has obvious disadvantages such as excessive police power to protect can also cause deprivation of rights.[207] Nonetheless, at least *minimal* performance of duties to protect is also an obligation for securing duties to respect. In his general conclusions about duties to avoid and duties to protect, Shue states:

> first, that strictly speaking it is essential for the guarantee of any right only that either the one or the other be completely fulfilled, but, second, that for all practical purposes it is essential to insist upon the fulfilment of both, because complete reliance on either one alone is probably not feasible and, in the case of duties to protect, almost certainly not desirable.[208]

1.2.4.2 Duties to Protect

As has been touched upon above, solely having the object of the right is not sufficient for the enjoyment of human rights. Furthermore, with duties to respect, the social system essentially does recognise right-holder's special authority over the right in question with an associated determination not to inflict harm on it. Nonetheless, these two aspects are not sufficient for the fulfillment of the rights. They are to be supplemented by another additional layer securing the disposition of individuals upon human rights. As can be envisaged, there is an implicit reference here for hindering the harmful actions of potential violators. Since under a constant or potential threat, the meaning of having a right substantially changes and gives way the formation of an insecure society. For eliminating such a possibility, the duty to protect requires the State to protect individuals' human rights. In other words, "the State has a duty to restrain others in the same way as it restrains itself".[209] One of the primary aims of the duty to protect is to provide a constant and reliable assurance to individuals that their socially acknowledged and legally protected possessions are secure. As Orend puts "non-deprivation is not enough: reliable protection against future non-deprivation is also required".[210]

[206] *Ibid*.

[207] *Ibid*, pp. 60-61.

[208] *Ibid*, p. 61.

[209] Fredman, p. 73.

[210] Orend, p. 145.

The duty to protect encompasses taking measures to protect beneficiaries of the protected rights against political, economic and social interferences. It does not just rely on law enforcement or the performance of protective agencies in a given society but also entails designation of social institutions for the implementation of duties to protect.[211] Even though, as has been expressed in 1.2.3 [Who Bear Correlative Duties: Persons or Institutions?], the duty of securing duties ideally falls on individuals, State and its institutions are considered as having the primary responsibility to protect since aggregate capacity of State and other social institutions are enormously higher than those of private individuals. With their legitimate power and vast resources, social institutions, primarily State, burden the fulfillment of duties to protect. However, secondary responsibility falls on individuals by way of "social engagement, political participation, and reasonable sharing of the tax burden required to fund such institutions".[212]

Duty to protect is a *process* that not only covers the rights of the right-holder, but also entails securing the rights of the perpetrators.[213] In other words, restraining the rights of the perpetrators should also be held at an acceptable level. Fredman exemplifies a legal process formulated under the criteria set by the ECtHR:

> Dealing initially with the right to assembly, the first step is to identify the relevant principles. The right to assembly gives rise to a *duty to protect* lawful demonstrators (A) against counter-demonstrators (B). But the right to counter-demonstrate simultaneously invokes a duty of restraint on the State not to interfere unjustifiably with B. As well as these two competing principles, a third principle consists of other duties, constituting competing claims on State resources. Finally, the principle that the decision must be made by the competent and legitimate body means that there may need to be a measure of deference to the State or its senior police officers.[214]

Shue points out the need for a formulation setting a delicate balance between the duties to avoid and duties to protect.[215] If any one of them is 'construed too narrowly', relative importance and necessity of the other duty 'becomes unrealistically broad' for the fulfillment of the right. For example, if the State authorities fail to secure the duty to

[211] Shue, p. 102.

[212] Orend, pp. 145-146.

[213] Fredman, p. 73.

[214] *Ibid*, p. 74.

[215] Shue, pp. 61-62.

protect, then the structure will largely depend on self-restraint nature of the duty to respect. However, given the fact that many individuals and institutions are likely not to restrain themselves, governments consequently will have to fulfil their duties to protect. In this vein, the ECtHR, for example, is more active, compared to the practice of US Supreme Court in the case of *DeShaney*, in interpreting the articles of the Convention in a way that makes the usage of the duty to protect possible. In the case of *Z. v the United Kingdom*, there was a claim by the children that the State had failed to fulfil its duty to protect children against inhuman and degrading treatment inflicted by their parents. Stressing the importance of Article 3 of the ECHR[216] for a democratic society, the ECtHR found that there is a strong duty to protect, deriving from the obligation under Article 1 of the ECHR *to secure* to everyone within their jurisdiction the rights and freedoms defined in the Convention. The obligation of the State is to take measures "designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals".[217] Accordingly there was a breach of the duty to protect.

1.2.4.3 Duties to Fulfil

Shue emphasises that the urgency of the duties to aid is often at the highest level.[218] Since this kind of duty is to be provided for those who are already suffering 'the consequences of failures to fulfil both duties to avoid and to protect', a greater urgency arises. Yet urgency does not grant a hierarchical supremacy where duties to aid are more important than the other two.[219] Shue also comments on the complaints raised against the burden of meeting the correlative duties accompanying subsistence rights. And he again favours the idea that "to the extent that duties to avoid and to protect are fulfilled, duties to assist will be less burdensome".[220] In other words, effective realisation of duties to protect is also assessed as a precondition for easing the realisation of duties to fulfil.

[216] Convention for the Protection of Human Rights and Fundamental Freedoms, Open for signature by the members of the Council of Europe, in Rome, on 4 November 1950. Entry into force: 3 September 1953, http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm (18 June 2011).

[217] *Z. and Others v the United Kingdom*, Application No. 29392/95, Judgement of 10 May 2001, para. 73.

[218] Shue, p. 62.

[219] *Ibid*, pp. 62-63.

[220] *Ibid*, p. 63.

Duty to fulfil is more of a positive expectation on the part of the State to move its competence towards the actual realisation of the rights. Since the capacity and efficiency of the State and other institutions are better in meeting the challenges (as argued in Section 1.2.3), the first priority for meeting the duty in question again falls to the institutions. And meeting the cost of the duty to fulfil also presents a serious challenge in distributing the burden amongst all members of the society in an equitable and fair manner. Such a task can be managed primarily by the public and private institutions.[221] As to the form of aid, positive obligations of the State are generally linked to the necessity to make funding available. It is true that obligations for fulfilling the duties particularly in some certain fields such as health care, education or housing primarily need funding. Nonetheless duties to fulfil are not necessarily to be in the form of material or financial assistance; but rather they are *manifold* and might be provided in the form of training officials, educating people, creating social institutions, empowering accountability, rule of law and democracy.[222] Given that the content of duties to fulfil may consist of measures of a 'material nature' and also of a 'normative nature', it can be claimed that effective enjoyment of rights depends *at least* on a twofold structure. Another point to be emphasised here is that States also do have a relatively wide *margin of appreciation* to decide upon the specific forms of measures. Although their forms may change throughout national decision-making processes, very nature of the duties correlative to rights is fairly stable. For realising the broad aims of duties to fulfil in a stable margin, Fredman proposes four parameters:[223] i) effectiveness, ii) participation (involvement of those affected in the process), iii) accountability (public justification of the steps taken by the authorities), and iv) equality (policies favouring the needy). Even though there is an inherent correlation among each criterion, they are *not-all-nothing* standards. In other words, various level of fulfillment for each parameter can be possible in a given case.

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[221] Amartya Sen argues that the main cause behind famines in the world is corruption of domestic institutions. In this context, the providers of international human rights aid also do have a right for favouring institutional reforms within recipient countries. (Amartya Sen, **Poverty and Famines**, Oxford Clarendon Press, 1981) See also Orend, p. 146.

[222] Fredman, p. 77. Abramovich, *supra* note 49, p. 41.

[223] Fredman, pp. 77-80.

By giving *Airey v Ireland* as an example from the jurisprudence of the ECtHR, Fredman expresses the usage of her approach in a legal framework.[224] The applicant was a married woman with a limited income. While seeking for obtaining a decree of judicial separation from her husband who had been convicted of assaulting her, she could not pay the fees requisite for obtaining a decree of separation only avail from the High Court. Since the cost of legal representation before the High Court was excessive for her and there was no civil legal aid practice in Ireland, the applicant contended that denying her access to the Court was in breach of the Article 6(1) of the ECHR. Although the Irish Government argued that she could have applied in person to the Court, the ECtHR decided that her possible application before the Court in person did not provide an effective right of access to a court:

> Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and 'there is ... no room to distinguish between acts and omissions'. ... The obligation to secure an effective right of access to the courts falls into this category of duty.[225]

Indeed, the existence of all four parameters, albeit in different degrees, can be seen in the judgement: An explicit call for the institutionalisation of an effective system providing effective participation and substantial equality of the right-holder in question.

As may be envisaged, the very logic of the duty to assist is that if the right-holder *does not have* the objects of his human rights, then he "must be aided in this regard, and indeed provided the objects in question".[226] Since the aim of positive duties is to secure the ability for the enjoyment of the rights, their fulfilment requires 'the removal of all constraints, as well as the provision of resources or the facilitation of activities'.[227] Nonetheless, funding the duties to fulfil should be possible at a reasonable cost; otherwise the requirement *dissolves* for the individual duty-bearer. If the resources are not sufficient for an immediate fulfillment of the right by the related institution(s), then *time factor* becomes crucial for the realisation of duties correlative to the right in question. While

[224] *Airey v Ireland*, Application No. 6289/73, Judgement of 9 October 1979. Fredman, p. 78.

[225] *Airey v Ireland*, para. 25.

[226] Orend, p. 146.

[227] *Ibid*.

negative duties, since they basically depend on inaction, can be immediately performed, duties to fulfil essentially necessitate time for their realisation.[228]

Although being dependent on time does not diminish *prima facie* binding force of the right in question, it is certain that realisation of positive obligations needs further planning.[229] As has already been touched upon in Section 1.1.4, duties to take steps to the maximum of State's available resources are formulated in a form of *progressively* achieving the full realization of the rights recognized in the ICESCR.[230] Even if there are concerns about the definitions of 'maximum of its available resources' and of 'progressive realisation', by taking into consideration the specific nature of the duty in question, objective criteria, benchmarks, and principles can always be set for measuring the success or failure of the steps to be performed.[231] Again, the Committee asserts that the ICESCR requires States to move as "expeditiously and effectively as possible".[232]

All in all, despite the reality that many international human rights protection mechanisms have been using various criteria, it should be stressed that human rights theory does not specify the type of policies or measures but rather *does* lay down the standards to be scrutinised by oversight mechanisms (e.g. national and international administrative, judicial bodies, and NGOs). If they find the existence of a discrepancy between the

[228] Fredman, p. 80.

[229] *Ibid*, p. 77.

[230] Article 2(1) of the ICESCR. However, as in the example of the South African Constitution that gives 'every child the right to basic nutrition, shelter, basic health care services, and social services', even some positive duties might have an urgency that "[n]o other principles, nor demands on resources, have sufficient weight to displace it". (*Ibid*, p. 81) [South African Constitution, Section 28 (1) (c), http://www.servat.unibe.ch/icl/sf00000_.html (02 September 2011)]

[231] Fredman, pp. 81-84. Griffin, pp. 99-100. Abramovich, p. 41. See also The ESCR Committee, General Comment No. 3, "The Nature of States Parties' Obligations", 14 December 1990, para. 9, http://www2.ohchr.org/english/bodies/cescr/comments.htm (25 May 2011). *The minimum core obligation* is also used as another benchmark for measuring the efficacy of the positive duties. The ESCR Committee has conceptualised it as a one consisting of minimum essentials of the right in question. (*Ibid*, para. 10) Nonetheless, having seen the difficulty of defining a *minimum core* and the practical impossibility of immediate action with *all* available resources, the South African Constitutional Court has developed an alternative: *the principle of reasonableness*. Even if favouring some of the arguments raised for the justification of the principle of reasonableness is understandable, there are also some instances that an immediate action can be performed or that sufficient resource can easily be provided. For example, positive duty not to discriminate does require immediate positive action without requiring much resource. (Fredman, pp. 84-87) See also Eva Brems, "Human Rights: Minimum and Maximum Perspectives", **Human Rights Law Review**, 9:3, Oxford University Press (2009), pp. 349-372.

[232] The ESCR Committee, General Comment No. 3, "The Nature of States Parties' Obligations", para. 9.

standards set and the realities that persons faced while enjoying their rights, then ask the public authorities about what can be done for compensation and, if necessary, demand embodying of new policies and measures in order to curb violation of rights in the future.

1.3 Prisoners' Rights and Positive Obligations of States for Their Protection

Considering the strict positioning of the *individualist* nature of contemporary human rights theory, it is not reasonable to claim the existence of a different group of human rights belonging exclusively to prisoners.[233] Apart from the existence of such a theoretical rebuttal, as will be seen in the next sections, prisoners' rights are generally assessed as a special category of human rights. And prison law and policy at domestic and international levels are also integrated into human rights law and policy. In this vein, it is envisaged that even if they get prisoner status when they are incarcerated by a legal order, prisoners are still human beings and citizens as well.[234] Although rights of prisoners contradict with the dominant rationality of a society that the concept of prisoner-as-citizen does not adequately take into consideration the difference between 'criminal' and 'the honest man', recognition and promotion of rights in prison are in line with the rule of law and democracy.[235] Since human rights, by their very nature, indiscriminately cover all individuals, they also encompass those whose liberty is limited as a consequence of imprisonment. Accordingly prisoners do not cease to have rights by virtue of simply being in prison. Nonetheless, like the special vulnerability status of children and women in every society of the world, prisoners' human rights, as will be presented in this section, have a delicate potential of fragility. Accordingly, human rights of prisoners function as a bulwark against arbitrary interferences by the State and its agents and also reveal the domain where the State is obliged to act for their protection. As is the very core of the dissertation, deprivation of liberty may also impose additional obligations incumbent upon State authorities such as offering education, medical service, and psychiatric treatment as in the case of mentally ill prisoners.[236]

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[233] Donnelly, pp. 208-211. Griffin, pp. 256-276. Dominant individualist view of human rights theory does have a sceptical stance against groups rights in that the extension of the concept of human rights to limitless socio-cultural groups is likely to create a unique kind of *rights inflation*. Albeit the existence of such a strong refusal, limited number of *group rights* (such as rights of women, children, indigenous people, and minority rights) is still accepted as genuine human rights by some theorists.

[234] In fact this is the common and declared view of, at least, modern criminal justice systems. However authoritarian regimes may still not see prisoners as the subject of rights and an officially labelling policy may take place for them.

[235] Dirk Van Zyl Smit and Sonja Snacken, **Principles of European Prison Law and Policy Penology and Human Rights**, First Edition, Oxford University Press, 2009, pp. 67-69.

[236] United Nations Office on Drugs and Crime, **Handbook on Prisoners with special needs**, Vienna, 2009.

Looking closer, deprivation of liberty through incarceration is a sanction legally imposed upon those who have committed (or *presumably* have committed)[237] grave violations of criminal law. Yet, one of the inherent characteristics of imprisonment is its transient nature. Accordingly, when prisoners eventually return to their society as free citizens, the wider interests of the society in question depend upon whether they were treated in a just, humane and civil way in the prison.[238] This understanding is also formulated as the principle of 'imprisonment *as* punishment not *for* punishment'.[239] In this perspective, it is the sentence of deprivation of liberty which is the core punitive sanction of imprisonment. Accordingly, while restrictions on freedom of liberty are necessarily introduced on prisoners, they principally continue to retain all other human rights[240] to the greatest possible degree while serving their sentences: They have the right to be treated with dignity and a respect for their rights; they have the right to safety and security of their personality; and they have the right to be treated humanely and to be free from torture and degrading or inhuman treatment or punishment. For ensuring the incapacitation of the prisoners and also for security reasons within the prison, in addition to the right to liberty, the right to privacy, the freedoms of movement, expression, association and assembly are also limited to a certain extent by virtue of imprisonment. Principally, in short, even if being incarnated inherently causes a number of restrictions, prisoners *do* still continue to preserve the core of their basic rights.

However, specifically given their closed nature, prisoners' rights can frequently be neglected or abused in prisons.[241] Apart from systemic violations in some developing countries, even in the developed Western European countries governed by democracy and

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[237] The phrase 'presumably committed' is for remand prisoners since they are not yet sentenced ones by the decision of the competent court and make use of the *presumption of innocence*.

[238] Van Zyl Smit and Snacken, p. 68.

[239] Stephen Livingstone, "International Human Rights Law and Prisons", **INTERIGHTS BULLETIN**, Volume 11, No 4 (1997), p. 136. Irish Penal Reform Trust, Human Rights in Prison, **IPRT Position Paper 4**, August 2009, pp. 3-4.

[240] It is also possible to limit or hinder the enjoyment of some other human rights of prisoners if the competent court specifically decides on that. For example, apart from ordinary sentence of imprisonment, the court may also forbid the use of the right to vote if it deems necessary, by taking into account of the specific nature of the crime committed by the prisoner.

[241] Human Rights Watch, **Global Report on Prisoners**, June 1993, pp. xxi-xxxvii. Human Rights Watch, **World Report 2011**, http://www.hrw.org/world-report-2011 (12 May 2011).

the rule of law, prisoners may suffer a wide range of violations:[242] Prison conditions in many countries are not still sufficient for meeting the expected human rights standards.[243] Most of the prisons in the world are today overcrowded and congested, have decaying infrastructure, lack hygiene and adequate medical facilities.[244] Corporal punishment and torture are still widespread in many countries. Some of the serious threats to the prisoners' lives are communicable diseases such as tuberculosis, and HIV/AIDS.[245] Deprivation or reduction of diet, isolation practice for extended periods of time, and the use of leg irons,

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[242] Robert P. Weiss and Nigel South, **Comparing Prison Systems**, Gordon and Breach Publishers, 1998, pp. 12-14. Decca Aitkenhead, "Ian Huntley deserves nothing, but he's right to sue", **The Guardian**, 2 August 2010, http://www.guardian.co.uk/commentisfree/2010/aug/02/ian-huntley-right-to-sue (20 March 2011).

[243] Anne Owers, "The prison system is too big to fail, and too big to succeed", **The Guardian**, 14 July 2010, http://www.guardian.co.uk/commentisfree/2010/jul/13/prison-service-reoffending-mental-health (21 March 2011). Although the dissertation will set forth international standards on prisoners' rights in the next section, for an extensive study see Rod Morgan, "Developing Prison Standards Compared", **Punishment & Society**, Vol 2(3) (2000), pp. 325-342; and also Penal Reform International, **Making Standards Work, an International Handbook on Good Prison Practice**, The Hague: 1995.

[244] The ESCR Committee, Resolution 1997/36: "International cooperation for the improvement of prison conditions", 36th plenary meeting, 21 July 1997, http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm (9 May 2011). In this context, the case of *Napier v Scottish Ministers* (Decision of 10 February 2005, http://www.scotcourts.gov.uk/opinions/CSIH16.HTML (9 May 2011)) is a remarkable prisoners' rights case in Scottish legal history. A legal action by a remand prisoner, Napier, against the Scottish Prison Service and the Scottish Ministers in relation to the practice of 'slopping out' in Barlinnie Prison, resulted in a ruling that Scottish prison conditions fell below 'degrading treatment' standard of Article 3 of the ECHR. The ruling held that the Scottish Ministers directly accountable for withdrawing the funding that had been earmarked for the introduction of in-cell sanitation facilities in Barlinnie. A legal liability resulted in an award of £2,450 in damages. Subsequently, thousands of prisoners, both former and serving, commenced legal proceedings to claim damages under the Scotland Act in relation to the sanitary conditions of their imprisonment. By March 2009, 3,737 claims had been settled at a total cost of over £11.2 million (including legal fees) and, as of October 2009, approximately 2,165 cases were still pending. Noel Whitty, "Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector", **Discussion Paper No: 57**, LSE, January 2010, pp. 11-12; and BBC News Channel, "Prisoner wins 'slopping out' case", 26 April 2004, http://news.bbc.co.uk/1/hi/scotland/3659931.stm (29 March 2011). Anne Owers, "Prison Inspection and the Protection of Prisoners' Rights", **Pace Law Review**, Volume 30, Issue 5 (Fall 2010), pp. 1541-1542.

[245] Vivien Stern, "Problems in Prisons Worldwide, with a Particular Focus on Russia", *Annals of the New York Academy of Sciences*, doi: 10.1111/j.1749-6632.2001.tb11367.x, 953b: pp. 113-119, Article first published online: 10 February 2006, http://onlinelibrary.wiley.com/doi/10.1111/j.1749-6632.2001.tb11367.x/full (12 April 2011). Craig Haney, **Reforming punishment: Psychological limits to the pains of imprisonment**, Washington, DC: APA Books, 2006, p. 314.

shackles and chains are also other widespread forms of ill-treatment in prisons.[246] Even with short-term incarceration, the detrimental psychological effects of imprisonment are likely to cause an ‘unavoidable level of suffering’ on prisoners.[247] Prisoner-on-prisoner violence and sexual abuse of prisoners by fellow inmates and prison staff are also other points of concern likely to occur anytime in prisons.[248] Another ongoing systemic problem emanates from the failure of sufficiently ensuring the special rights of vulnerable groups such as women and juveniles.[249] Considering the insufficiency of physical and technological conditions and also professional inefficiencies of the prison staff, some other miscellaneous problems, such as suicide, illegal trafficking and drug use, can also arise in prisons.[250]

Whilst it can be an efficient way of limiting human rights violations, training of the staff, in many countries, does not suffice to eliminate already existing sub-cultures in the penitentiary systems.[251] It is a reality that the risk and discipline factors in prisons eventuate in power relations between prisoners and staff.[252] Despite the difficulty of controlling bureaucratic and oppressive elements inherent to any social organisation, internal and external protection mechanisms of the penitentiary systems primarily aim at

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[246] Dana L. Sichel, “Giving Birth in Shackles: A Constitutional and Human Rights Violation”, **Journal of Gender, Social Policy & the Law**, Vol. 16:2 (2008), pp. 223-255.

[247] Van Zyl Smit and Snacken, pp. 47-54.

[248] See (US) National Prison Rape Elimination Commission, “National Prison Rape Elimination Commission Report”, Issued in 2009, https://www.ncjrs.gov/pdffiles1/226680.pdf (18 March 2011); and also Aitkenhead, The Guardian, 2 August 2010.

[249] Jeffrey L. Metzner and Jamie Fellner, “Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics”, **The Journal of the American Academy of Psychiatry and the Law**, Volume 38, Number 1 (2010), pp. 104-108.

[250] United Nations Office on Drugs and Crime, **Drug Dependence Treatment: Interventions on Drug Users in Prison**, http://www.unodc.org/docs/treatment/111_PRISON.pdf (16 March 2011), p. 11. Anasseril E. Daniel, “Preventing Suicide in Prison: A Collaborative Responsibility of Administrative, Custodial, and Clinical Staff”, **The Journal of the American Academy of Psychiatry and the Law**, Volume 34, Number 2 (2006).

[251] Tomas Martin, “Taking the snake out of the basket: Indian prison warders’ opposition to human rights reform”, in Andrew M. Jefferson and Steffen Jensen (Eds.), **State Violence and Human Rights**, New York: Routledge-Cavendish, 2009, pp. 139-157. See also Lee H. Bowker, **Prisoner Subcultures**, Lexington Books, 1977. Van Zyl Smit and Snacken, pp. 43-47.

[252] Van Zyl Smit and Snacken state that despite its complexity such a power relation has a likelihood of turning into an authoritarian regime that “will usually be more detrimental to the prisoners than to staff”. (Van Zyl Smit and Snacken, pp. 70-71)

developing a legal position to be used for the prisoner as if he was a free citizen. However, administrating such a working environment absolutely necessitates professional prison staff being effectively scrutinised by the judiciary and the public.[253] Considering various dimensions of the duties to be performed by prison staff, which include, *inter alia,* execution of the judicial sentence, administration of the institution in terms of *good order*, and protection of the prisoners' rights, quality of the prison staff is one of the leading factors for the efficacy of the domestic penitentiary systems.[254]

1.3.1 The Basis of Prisoners' Rights

In his critical masterpiece entitled *Discipline and Punish*, Foucault argues that the origin of prison antedates its systemic use in the penal systems:[255]

> It had already been constituted outside the legal apparatus when, throughout the social body, procedures were being elaborated for distributing individuals, fixing them in space, classifying them, extracting from them the maximum in time and forces, training their bodies, coding their continuous behaviour, maintaining them in perfect visibility, forming around them an apparatus of observation, registration and recording, constituting on them a body of knowledge that is accumulated and centralized.

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[253] Edouard Delaplace and Matt Pollard, "Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty", **International Review of the Red Cross**, Volume 87, Number 857 (March 2005). The role of the judiciary on prisoner cases is also a relatively new one though. For example, the deliberate hesitance of the US federal district courts and courts of appeals till the mid 1960's to interfere with the US penal system is labelled as "hands-off doctrine". Considering that deciding upon cases raised by the prisoners before the court in question would impede the authority of prison officials in performing their duties and carrying out objectives of the penal system, the US judges practiced a hands-off doctrine by refusing to take jurisdiction on matters of conditions of confinement. (See Sheldon Krantz, **Corrections and Prisoners' Rights in a NutShell**, 3rd edition, West Publishing Company, 1976, pp. 123-125) For a more recent analysis of the decisions of African courts on the rights of inmates see Sufian Hemed Bukurura, "Protecting Prisoners' Rights in Southern Africa: An Emerging Pattern", **Penal Reform International**, September 2002, pp. 15-28.

[254] For a subtle analysis of the Chief Prison Inspector of Prisons for England and Wales see Anne Owers, "Prison Inspection and the Protection of Prisoners' Rights", **Pace Law Review**, Vol. 30, Issue 5 (Fall 2010), pp. 1535-1547, http://digitalcommons.pace.edu/plr/vol30/iss5/11 (20 May 2012). Andrew Coyle, "Revision of the European Prison Rules, a contextual report", in **European Prison Rules**, Council of Europe Publishing, 2006, especially pp. 112-114.

[255] Michel Foucault, **Discipline and Punish: the Birth of the Prison** (translated by Alan Sheridan), Penguin Books, 1977, p. 231.

In his analysis, imprisonment has evolved into a measure of social control aimed more at the mind rather than the body. By affecting the prisoners' consciousness, the main purpose of the penitentiary was punishing *better* and 'transforming prisoners from subjects to objects'.[256] In this vein in referencing German constitutional theorists' doctrine of the *besondere Gewaltsverhältnis* (particular authority relationship), Van Zyl Smit and Sonja Snacken classify prisons, schools and the military as *total institutions* "in which authority could be exercised without being governed by specific legal enactments".[257] It is clear that the definition has an oblique reference to 'a great deal of unfettered discretion' to be exerted by the staff of the total institutions. Given their closed nature, prisons are the prominent example of total institutions in which inmates have constrained physical contacts with the outside world. Despite the existence of a substantial transformation process taking place specifically at international level since the 1970's, prisons do still play their traditional role as the places of custody and punishment. Such a role is designated by a number of identifying principles that structures the characteristics of penal systems:

> hierarchy, routine, rituals of degradation and initiation, bureaucratic categorization and segregation of their populations through processes of 'role stripping' (loss of the variety of social roles played in the outside world and replacement by the role of 'criminal' and 'prisoner') and 'mortification' (loss of one's 'personal face' and privacy, loss of agency and capacity to control their destiny).[258]

Nonetheless, the most distinctive characteristic of prisons apart from other total institutions is their special emphasis upon risk, authority and order.[259] Within such an environment, risk emanating from the possible acts of inmates exposes need for a permanent risk analysis necessitating empowered staff. The staff members are responsible for procuring prison discipline and security based essentially upon an imbalanced (*asymmetrical*) power relation between themselves and inmates. It is clear that prison

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[256] Michael Welch, **Ironies of Imprisonment**, Sage Publications, 2005.

[257] Van Zyl Smit and Snacken, p. 67. They define total institutions as those "characterized by the fact that, contrary to what they do in 'normal life', inmates have to conduct the different aspects of their lives, such as sleep, work and leisure, in the same place and under the same authority, in the company of other people they have not chosen, and following a structured scheme of activities imposed by the authority through formal rules". (*Ibid*, p. 38)

[258] *Ibid*, p. 39.

[259] Whitty, pp. 1-20. Gilles Chantraine, "Prison and sociological perspective" (translated by Helen Arnold), **Champ pénal / Penal field, nouvelle revue internationale de criminology** [En ligne], Vol I | 2004, mis en ligne le 28 janvier 2006, http://champpenal.revues.org/238 (12 May 2011).

discipline or good order is in the interest of two parties. Nonetheless, such a mutual relation based upon risk and power management is inclined to cause abuse of power: "[p]risoners are more vulnerable to situations of powerlessness, lawlessness and dependency, resulting in frustrations and bitterness”.[260] Considering the fact that abuse of power is not just a reality of extraordinary times but also of ordinary daily psychosocial life, plausible suspicions arise regarding the fulfillment of rights in daily prison life.[261] Recognition of prisoners’ rights makes sense in such an environment “as an instrument to redress this imbalance in the dialectic of control and to counter the risk of domination and abuses”.[262]

It can be assumed, *on the one hand*, that extreme staff discretion has a risk of abuses by means of privileges recognized for some at the expense of others. It is clear that a system based upon rights not only limits extreme staff discretion but also eliminates uncertainty. If the rights and obligations of prisoners and staff are well defined in legally instituted terms, *on the other hand*, then:

> the role stripping and mortification of prisoners by the institution may be inhibited, and the pains of imprisonment experienced by the prisoners may be reduced if prisoners retain their fundamental human rights. These should recognise the unaltered status of the prisoner as a bearer of rights and should allow for higher degree of autonomy, sense of self and personal security. And finally, recognition of prisoners’ rights can enhance a sense of justice inside the prisons, by making decisions more transparent and raising the sense of the fairness of the system amongst prisoners.[263]

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[260] Van Zyl Smit and Snacken, p. 71.

[261] Indeed scientific experiments, especially performed by Milgram and Zimbardo, reveal that not only sadist persons but also average individuals are likely to be inclined to practice abuse of power, given the right circumstances and motivation. See Stanley Milgram, **Obedience to Authority, an Experimental View**, New York: Harper Torchbooks, 1975; and Craig Haney, Curtis Banks and Philip G. Zimbardo, “Interpersonal dynamics in simulated prison”, **International Journal of Criminology and Penology**, 1 (1973), pp. 69-97.

[262] Van Zyl Smit and Snacken, p. 41.

[263] *Ibid*. However, recognition of prisoners’ rights is also subject to criticism. Under the arguments raised against the Belgian prison law of 2005, it is stated that new regulations enacted are ‘subjugation of law to the security order’. Furthermore, even in its extreme interpretations, the discourse of rights in prison is “a source of new legitimacy for the institution”. (Gilles Chantraine and Dan Kaminski, “Rights in prison” (translated by Uri Ben-Gal), **Champ pénal / Penal field, nouvelle revue internationale de criminology** [En ligne], Séminaire Innovations Pénales, Version anglaise, mis en ligne le 11 décembre 2008, pp. 7-8, http://champpenal.revues.org/7033 (12 May 2011))

Considering in line with the scope of the dissertation, it can be maintained that interference by the prison authorities (*duties of restraint*) must be minimal and proportional with the aim pursued. Nonetheless, the scope and extent of positive obligations of States correlative to prisoners' rights are not still clearly defined to a great extent that the dissertation will try to analyse them under the jurisdiction of the ECtHR in the following sections. To conclude, it is a generally accepted view today that prisoners' rights should be articulated and implemented as administrative and legal norms so as to secure their enjoyment. This realm is certainly a one to be systematised by the prisoners, the victims, and society at large.

1.3.2 The Theory of Punishment and Prisoners' Rights

The theory of punishment is traditionally divided into two sub-categories: the *utilitarian* and the *retributivist* theories.[264] Although in various degrees, contemporary criminal justice systems have always combined either these two theories or their various forms. Whilst basing its stance on metaphysical (every offence violates a metaphysical, religious, or legal order) *or* empirical (the feelings of the victim(s) and society for revenge are to be channelled into the criminal justice system in order to avoid retaliation) grounds, the retributive theory assumes that the offender's wrongdoing is a sufficient reason for punishment, and the amount of punishment should be proportionate to the extent of wrongdoing.[265] As to the utilitarian theory, it aims at punishing offenders in order to promote the general welfare of the society and deterring offenders from future wrongdoing. Accordingly, incapacitation is necessary for the safety of society and deterrence helps to minimize the rate of crime and eases rehabilitation of the criminal. Under the utilitarian philosophy, crime and punishment are inconsistent with happiness; and they should be kept to a minimum.

Under the criticisms raised against those two general theories, alternative approaches have also been developed. *Classical penal theory* of the 18th and 19th centuries conceded that "rational human beings who freely choose to commit crimes".[266] Under the

[264] Van Zyl Smit and Snacken, pp. 73-76.

[265] *Ibid*, p. 73.

[266] *Ibid*, p. 74.

paradigm of classical penal theory, retribution and deterrence were accepted as the main determinants of punishment. By putting a cogent emphasis on the impact of socio-psychological factors for the formation of crime, *modern penal theory* claims that the society prepares the crime and human beings simply commit it. Within this framework, it tries to systematise reformation and rehabilitation of prisoners "where these [are] impossible, incapacitation".[267]

Foucault ironically posits that deprivation of liberty "has therefore the same value for all; unlike the fine, it is an 'egalitarian' punishment. The prison is the clearest, simplest, most equitable of penalties".[268] And since the beginning of the nineteenth century, penal imprisonment has covered both the deprivation of liberty and the *technical* transformation of individuals.[269] Although the existence of criticisms specifically raised on *empirical* inadequacies in Foucault's analysis and even today there has been a number of approaches within the critical criminology claiming that prisons are a matter of concern with issues of oppression and injustice and that they are to be abolished or at least a radical reduction in the prison population is to be secured, the number of the prisoners and their relative weight within the general world population are continuously growing.[270] According to the figures available in early May 2011, there were more than ten million inmates in the world prisons.[271] Considering the proliferation of maximum security units and establishments in

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[267] *Ibid*. Although *restorative justice*, with its special importance on reparation of the harm caused by the offender to the victim, is another and newest penal approach, its practice is highly limited. (*Ibid*, p. 75)

[268] Foucault, p. 232.

[269] *Ibid*, p. 233.

[270] Welch, pp. 19-33. Rob White and Fiona Haines, **Crime and Criminology**, OUP, Third Edition, 2004, p. 215. Chris Lewis, (2004) "Trends in crime, victimisation and punishment", in Anthony Bottoms *et al.* (Eds.), **Alternatives to Prison**, Willan Publishing, 2004, pp. 51-54. Van Zyl Smit and Snacken, pp. 59-63. Josine Junger-Tas, "The Respect of Human Rights of Prisoners in Europe", **European Journal on Criminal Policy and Research**, 12 (June, 2006), pp. 79-80. [There is a limited number of exceptional countries like Finland that there has been a steady reduction in prison rates. (See Lewis, p. 53)] See also David Garland (Ed.), **Mass Imprisonment: Social Causes and Consequences**, Sage Publications, 2001; and Michael Jacobson, **Downsizing Prisons**, New York University Press, 2005.

[271] Roy Walmsley (a), "World Prison Population List (ninth edition)", International Centre for Prison Studies, King's College London, http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (15 May 2012). At the beginning of the new millennium, the number of persons held in world prisons was 8.6 million. (Roy Walmsley (b), "Prison population size: problems and solutions", Paper presented at a Council of Europe seminar for judges and prosecutors in the Russian Federation, Moscow, 11 October 2000, http://www.kcl.ac.uk/depsta/law/research/icps/downloads/prison_population_size.pdf (15 May 2011).

many parts of the world, it can even be claimed that there is a counter trend of globalized 'hardening' of penal philosophy, implying an inherent toughening of penal regimes.[272]

Although being such a great component of modern societies, relative *indifference* of societies against prisons is noteworthy.[273] In such a general inertia, it is not difficult to maintain that general public opinion frequently deems prisons as places in which prisoners are *to be* punished but *not to be* treated. Since there is no clear-cut social enthusiasm for bridging the perceived gap between the criminal justice system and the community, prisons' very function amongst average citizens of the society is generally not being questioned.[274] Under the widespread impact of 'the myth of punitive public', political attempts at reforming the existing physical and administrative structures of the penitentiary systems are accordingly not systemic, but rather reflexive, merely redressing particular incidents or scandals such as riots or escapes.[275] Due to the ubiquitous budgetary constraints, political decision-makers generally see the problems in prisons as an issue that has collateral importance.[276] Accordingly such an attitude results in political inertia leading to inadequate allocation of resources which is then insufficient to cope efficiently with the ongoing problems of penitentiary systems.

However, there is also reliable evidence that a *slow* recognition of prisoners' human rights has also been taking place at domestic and international levels specifically since 1970's. In their article entitled '*Rights in prison*', Chantraine and Kaminski assess "the *emergence* of rights in prison and, above all, the opening of external channels of grievances and the re-enforcement of external agencies of control" as a *real novelty*, which is functioning as a tool "against the abuse of power of an administration now less

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[272] Yasemin Özdek, "Küreselleşme Sürecinde Ceza Politikalarındaki Dönüşümler", **Amme İdaresi Dergisi**, Cilt 33, Sayı 4, Aralık 2000, pp. 35-37.

[273] Van Zyl Smit and Snacken, pp. 67-68.

[274] See for example Marijke Malsch, "Lay elements in the criminal justice system of the Netherlands", in Joanna Shaplan (Ed.), **Justice, Community and Civil Society: A contested terrain**, Willan Publishing, 2008, pp. 107-124. And Shadd Maruna and Anna King, "Public opinion and community penalties" in Bottoms *et al.* (Eds.), **Alternatives to Prison**, Willan Publishing, 2004, pp. 83-112.

[275] *Ibid*, pp. 87-90. Again, for example, in her review (about the research on public opinion, mainly in the UK and the US) Rex comes to the conclusion that even victims are no more punitive than the general public opinion and that they show a considerable level of support for reparative and restorative disposals. (Sue Rex, **Reforming Community Penalties**, Cullompton: Willan Publishing, 2005, pp. 31-54)

[276] Anne Owers, *supra* note 243; Van Zyl Smit and Snacken, pp. 67-68.

sovereign".[277] Nonetheless, in their reasoning about the consequences of this emergence, they claim, it:

> did not so much, as hoped by the pragmatic abolitionists, initiate reforms that would, while improving the conditions of detention, force the institution to face its democratic shortfalls and therefore participate in its progressive dismantling, but rather remove from criticism one of its traditional targets and allow the institution to re-inforce the legitimacy of its apparatus.[278]

Although such an interpretation is relatively radical, it realistically touches upon not only the continuing existence of traditional problems in carceral systems but also the ongoing process taking place for the recognition of prisoners' rights in Europe since the 1970's. It is also an amenable reading of the Western panorama that the importance of revolts (like the ones in Attica, New York in 1971 and Hull, the UK in 1976, for example) and a number of militant actions have underpinned the concretisation of "positive effects on the living conditions in prison, without, nevertheless, having achieved their full potential".[279] However, the phenomenon for the recognition of prisoners' rights through the last couple of decades is not just peculiar to Europe.[280] Furthermore, adoption of several international and regional instruments ratified by States Parties has also created a momentum for securing the minimum requirements set by the ratified documents.[281] Legal obligations imposed upon all domestic public bodies have not only managed to create a

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[277] Chantraine and Kaminski, p. 9. [Emphasis added]

[278] *Ibid*.

[279] *Ibid*, p. 8. Attica Revisited, www.talkinghistory.ord/attica/ (10 December 2012). Hull prisoners revolt, 1976 – The Red Menace, http://libcom.org/history/hull-prisoners-revolt-1976-red-menace (10 December 2012).

[280] As Bukurura points out many States in Africa have also updated their constitutions by including detailed provisions for the protection of human rights of all people, including prisoners, and established mechanisms 'to monitor, investigate and report on conditions in prisons in general'. (Bukurura, p. 3)

[281] Whitty, p. 8; Bukurura, p. 3. One interesting argument on the acknowledgement of prisoners' rights has been recently raised by Rotman. Stating that international criminal law has reaffirmed the values underlying prisoners' rights and that it has also created a model for national sentencing and correctional policies, he argues that the creation of international criminal tribunals with jurisdiction over major human rights violations has created a framework respectful of prisoners' rights. (Edgardo Rotman, "The influence of international criminal law on the advancement of prisoners' rights", International Panel and Penitentiary Foundation, Paper presented at **Colloquium of the IPPF on Prison policy and prisoners' rights**, Stavern, Norway, 25-28 June 2008, pp. 131-137, http://fondationinternationalepenaleetpenitentiaire.org/Site/documents/Stavern/09_Stavern_Contribution%20Rotman.pdf (23 May 2011))

new rights-based awareness amongst public and media, but also have started to improve the sensitivity of judicial bodies for adopting a reformative and rehabilitative approach within the framework of their jurisdiction.[282]

Again, in the context of the United States, in line with the hands-off policy, Bowker states that:

> [t]he stability of the prison system before the mid-1960s was upheld by the ability of prison administrators to keep their charges from filing court cases and by unwillingness of the courts to consider prisoners' rights when an occasional case did slip through and come to their attention.[283]

However, with the change of factors causing such an *unwillingness*, the US courts, Bowker states, began to require that "prisoners lose no more human rights than those clearly specified by law or demonstrably necessary for human safety".[284] Another significant factor for the adoption of prisoners' rights was the discourses and campaigns of NGOs. In the United Kingdom, for example, involvement in court-based legal strategies by NGOs has replaced traditional non-legal forms of lobbying on prison conditions.[285] Again in the African context, different NGOs have also contributed towards the reformulation of government initiatives dedicated to ensuring prisoners' rights.[286]

1.3.3 Contemporary Tendency of Imprisonment and Its Criticism

In the context of criminology and penology, the historical development of imprisonment can be divided into two eras: the era of 'penal welfarism' and the era of 'alternatives to custody'. In the former era, in England, for example, the correctional system, in the first half of the twentieth century, was based predominantly on a religious and 'common sense practical' supervisory system.[287] For meeting the prisoners' treatment needs and assisting

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[282] Jeevan Ballav Panda, "Prisoner's Rights in India: Time for a humane approach?", in K. Jaishankar (Ed.), **International Perspectives on Crime and Punishment**, Cambridge Scholars Publishing, pp. 336-338.

[283] Bowker, p. 105.

[284] *Ibid.*

[285] Whitty, p. 8.

[286] Bukurura, p. 3.

[287] Bottoms *et al. (Eds.)*, **Alternatives to Prison**, pp. 2-11.

their reintegration into mainstream society, curricula of the rehabilitation program was formulated as a version of psychoanalytically-based ‘social casework’.[288]

Likewise, with the decline of the ‘rehabilitative ideal’,[289] the four aims of modern penal systems for the imposition of prison sentences have been recently recognized as: retribution, deterrence, incapacitation, and reintegration (or social rehabilitation).[290] In this vein, for avoiding the potential damage and expense of a custodial sentence, in the contemporary era of ‘alternatives to custody’, criminology and penology have started to improve the efficiency of correctional systems and develop alternative penalties since the late 1980’s and early 1990’s.[291] Firstly, rehabilitative and re-integrative programmes within the scope of probation services were instituted in order to prepare inmates for release. And secondly, efforts have been made for improving the efficiency of the programmes in aiding prisoners when they return to the community. The evaluation of ‘recidivism risk factors’ with an action plan to manage the correctional aspirations of the sentence has been practiced since the 1980’s.[292] Through reparative probation programmes, which are articulated for offenders who commit nonviolent offenses and who are considered at low risk for re-offense, the offender makes reparations to both the victim(s) and to the community as well.[293] Again restitution and mediation are other forms of restorative justice, enabling in-kind or actual return of what has been lost.[294] Electronic monitoring

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[288] *Ibid*, p. 2.

[289] *Ibid*, p. 3. Specifically emanating from the reasons i) proving the ineffectiveness of treatment; ii) resource constraints in meeting the continued rise in prison population; and iii) an ‘ideological’ crisis revolving around the term ‘rehabilitation’, with its scope for misuse and treatment. (Chantraine and Kaminski, p. 10)

[290] Van Zyl Smit and Snacken, p. 80.

[291] Malcolm M. Feeley and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications”, **Criminology**, Vol. 30, No. 4 (November 1992), pp. 449-474.

[292] Chantraine and Kaminski, p. 10.

[293] Gill McIvor, “Reparative and restorative approaches”, in Bottoms *et al.*, **Alternatives to Prison: Options for An Insecure Society**, Willan Publishing, 2004, pp. 162-194.

[294] Anthony Duff, “Probation, Punishment and Restorative Justice: Should Alturism be Engaged in Punishment”, **The Howard Journal of Criminal Justice**, 42(1) (2003), pp. 181-197. See also Council of Europe Committee of Ministers, Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies, https://wcd.coe.int/wcd/ViewDoc.jsp?id=420059&Site=CM (12 July 2011). And United Nations Office on Drugs and Crime, **Handbook on Restorative Justice Programmes**, New York, 2006.

and community service are also amongst recently developed alternative methods of punishment.[295]

However, there is also an ongoing tendency for criticism based upon sensible arguments: Having been based upon "hybridization of an actuarial (statistical) 'risk' management and cognitive-behavioral therapeutic practices, structured around the identification of the prisoners' 'needs' or 'criminogenic dynamic factors'", the recent system is defined as the core of a *neo-liberal correctionalist* model by Chantraine and Kaminski.[296] Despite it still retains the objectives of classical correctionalism, the recent system's emphases upon 'new subjective levers such as responsibilization and hypermotivation' of the prisoner are inherently new concepts. However, considering the relatively passive positioning of the prisoner in the face of an offer of services, Chantraine and Kaminski liken the prisoner to a *vassal* rather than a possessor of subjective rights against the institution: "[a]long with the advances of penal prudentialism, the institution allows increased prisoner access to specific rights".[297] In such an environment, recognition of rights is seen as a new form of neo-liberal strategy of instrumentalising *empowerment*.

1.3.4 Positive Obligations of States for the Protection of Prisoners' Rights in International Human Rights Law

Concern with the rights of prisoners at international level is relatively a new phenomenon. Up until the end of the Second World War, the issue, like the contemporary human rights discourse, was primarily under the absolute domain or rather domestic jurisdiction of States. Given the extreme atrocities specifically inflicted upon those prisoners in concentration camps throughout the Second World War, the Geneva Conventions of 1949 have been developed as a new international instrument relevant to the conduct of

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[295] Michael Jackson and Graham Steward, "A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety", On-line version of the report, September 2009, p. 119, http://www.justicebehindthewalls.net/resources/news/flawed_Compass.pdf (15 July 2011).

[296] Chantraine and Kaminski, p. 10. [Emphasis added]

[297] *Ibid*, p. 11.

international armed conflict and the protection of those caught up in it.[298] Rodley and Pollard claim that "[t]he refinement of rules of humanitarian law on the treatment of prisoners of war, for example, even now in some important respects goes beyond that of rules of human rights law relating to the treatment of prisoners in peacetime".[299] In line with the development of international human rights law at the very inception of the post-World War II period, specifically under the framework of the UN, an international standard-setting initiative has been activated since the adoption of the UDHR. Although it is not a binding document, it has heralded a new era in which States will no longer be allowed to hide, at least theoretically, behind the veil of sovereignty regarding the treatment of their citizens. By defining "the inherent dignity and of the equal and inalienable rights of all members of the human family", in its Preamble, as "the foundation of freedom, justice and peace in the world", it, *inter alia,* consists of implicit and explicit clauses on the rights of prisoners.[300] Nonetheless other international instruments enacted have subsequently crystallised the standards on prisoners.

Although there has not been any specific international convention, today there is a wide range of international and regional human rights documents that aims to ensure the rights of prisoners. These instruments can roughly be divided into two categories: the binding ('hard' law) standards and non-binding ('soft' law) standards. For the former group, the ICCPR,[301] the ICESCR,[302] and Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)[303] are the most important binding documents at international level. Some specific and even general provisions of those conventions are used as legal instruments regarding prisoners' rights. For example, Article 10 of the ICCPR has a specific clause on the issue of imprisonment. It contains two

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[298] http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp (18 July 2011). Nigel Rodley and Matt Pollard, **The Treatment of Prisoners under International Law**, 3rd Edition, Oxford University Press, 2009.

[299] *Ibid*, p. 3.

[300] "Everyone has the right to life, liberty and security of person". (Article 3) "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". (Article 5) "No one shall be subjected to arbitrary arrest, detention or exile". (Article 9)

[301] *Supra* note 6.

[302] *Supra* note 7.

[303] Adopted General Assembly resolution 39/46 on 10 December 1984, entered into force on 26 June 1987, http://www2.ohchr.org/english/law/cat.htm (1 June 2011).

specific provisions: i) accused persons are to be separated from the convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons, and ii) juveniles are to be separated from adults and brought as speedily as possible for adjudication. As can easily be differentiated, these are clearly positive obligations incumbent upon States Parties to the Convention. The Article also consists of two more general propositions: First, people deprived of their liberty 'shall be treated with humanity and with respect for the inherent dignity of the human person'. [*Obligation to respect*] And second, the essential aim of the prison system should be prisoners' 'reformation and social rehabilitation'. [*Obligation to fulfil*] Van Zyl Smit and Snacken emphasise the importance of Article 10(3) of the ICCPR as follows "it is the only provision in an international treaty that commit states ... to rehabilitative policies in the prison".[304] Article 9 of the ICCPR also guarantees, *inter alia,* the right to liberty and security of person, and that arrested or detained persons on criminal charge shall be arraigned promptly and tried within reasonable time or released without conditions. Again even if there is no direct reference to 'positive obligations' within the scope of the clause, the existence of a call for positive action is very clearly derivable from the wording of the text.

As apparently a classical negative right, Article 7 of the Convention is a fundamental prohibition on treatment that amounts to torture, and as well as inhuman and degrading treatment. However, in its General Comment No. 20,[305] the Human Rights Committee (HRC) has noted that Article 7 allows no limitation to the right and cannot be derogated by the States Parties. [*Obligation to respect*] It also furthered that, "it is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment".[306] [*Obligation to protect*] Prohibition imposed by Article 7 not only relates to the acts that cause physical pain but also to the ones that cause mental suffering to the victim. Corporal punishment and prolonged solitary confinement of the detained or imprisoned persons are also to be considered within the

[304] Van Zyl Smit and Snacken, p. 8.

[305] General Comment No. 20 Replaces general comment 7 concerning "Prohibition of torture and cruel treatment or punishment (Art. 7)", Adopted on 10 March 1992, http://www2.ohchr.org/english/bodies/hrc/comments.htm (12 June 2011).

[306] *Ibid*, para. 12.

scope of prohibited acts under Article 7. By stressing that systematic review of interrogation rules, instructions, methods and practices of the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment, the Committee also demands detailed information from States Parties regarding their safeguards for the special protection of particularly vulnerable persons.[307] [*Obligation to protect*] States Parties should also secure the right to an effective remedy, including compensation and full rehabilitation. [*Obligation to fulfil*]

By emphasizing that Article 10 paragraph 1 of the ICCPR imposes a positive obligation *to protect* on States Parties for persons deprived of their liberty, the HRC emphasizes that the detained persons may not be subjected to hardship or constraint other than the one resulting from the deprivation of liberty.[308] And respect for the dignity of such persons must be regarded under the same conditions as that of free persons. [*Obligation to respect*] The only restrictions that can be imposed on prisoners are those unavoidable in a closed environment.

By also covering detained and imprisoned persons, the CAT is also a kind of *lex specialis* for the prohibition of torture. The UN Convention on the Rights of Child (CRC)[309] prohibits cruel, inhuman and degrading treatment against children and provides that children should not be detained unless it is a measure of last resort and for the shortest period necessary. [*Obligation to respect*] With its Article 12, the ICESCR contains a provision concerning the right to health, which is an important positive right with regard to prisoners. In its General Comment No. 14,[310] the Committee on Economic, Social and Cultural Rights considers the right to health as a legal obligation for States not to deny or limit equal access to all persons including prisoners and detainees to preventive, curative

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[307] The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

[308] The HRC, General Comment No. 21, “Humane treatment of persons deprived of liberty”, 10 April 1992, http://www2.ohchr.org/english/bodies/hrc/comments.htm (26 August 2011).

[309] Adopted by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, http://www2.ohchr.org/english/law/pdf/crc.pdf (23 August 2011).

[310] The ESCR Committee, General Comment No. 14, “The Right to the Highest Attainable Standard of Health (art. 12)”, 11 August 2000, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4538838d0&page=search (24 August 2011).

and palliative health services. [*Obligations to protect and fulfil*] The International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families[311] also makes a specific reference to the conditions of arrest and detention of migrant workers and their families. As has been already mentioned, though their application is confined to persons detained in connection with situations of armed conflict, the 1949 Geneva Conventions set standards for the treatment of prisoners of war.[312]

As to the UN's soft law standards on prisoners' rights, these principally consist of the UN Standard Minimum Rules for the Treatment of Prisoners (SMR),[313] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BOP),[314] Basic Principles for the Treatment of Prisoners,[315] and Code of Conduct for Law Enforcement Officials.[316] There are also a number of auxiliary instruments; including the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[317] the 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[318] the 2000 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles),[319] the 1985 UN Standard Minimum Rules

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[311] Adopted by General Assembly resolution 45/158 of 18 December 1990, entered into force on 1 July 2003, http://www2.ohchr.org/english/law/pdf/cmw.pdf (18 August 2011).

[312] *Supra* note 298.

[313] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council (ECOSOC) by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, http://www2.ohchr.org/english/law/treatmentprisoners.htm (23 August 2011).

[314] Adopted by General Assembly resolution 43/173 of 9 December 1988, http://www.un.org/documents/ga/res/43/a43r173.htm (23 August 2011).

[315] Adopted by General Assembly resolution 45/111 of 14 December 1990, http://www2.ohchr.org/english/law/basicprinciples.htm (23 August 2011).

[316] Adopted by General Assembly resolution 34/169 of 17 December 1979, http://www2.ohchr.org/english/law/codeofconduct.htm (23 August 2011).

[317] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, http://www2.ohchr.org/english/law/firearms.htm (8 June 1011).

[318] Adopted by General Assembly resolution 37/194 of 18 December 1982, http://www2.ohchr.org/english/law/medicalethics.htm (7 June 2011).

[319] Annexed to General Assembly Resolution UNGA Res 55/89 (4 December 2000) and published together with the Istanbul Protocol as UN Doc HR/P/PT/8/8/Rev. 1 (2004), http://www2.ohchr.org/english/about/publications/docs/8istprot.pdf (8 June 2011).

for the Administration of Juvenile Justice,[320] and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.[321]

The SMR is the most comprehensive soft law instrument on the rights of prisoners at international level. Even though it was drawn up as early as 1955 by the UN Congress on the Prevention of Crime, it explicitly covers a wide range of State obligations regarding prisoners' rights,[322] including registration of prisoners, accommodation (including space, lighting, heat and ventilation), personal hygiene, medical care, education, discipline and punishment, clothing and bedding, exercise and sport, access to books, religion, retention of prisoners' property, removal of prisoners, treatment of specific categories of prisoners (sentenced prisoners, prisoners under arrest or awaiting trial, insane and mentally abnormal prisoners, civil prisoners, persons arrested or detained without charge), information to and complaints by prisoners, access to outside world and the powers and *duties* of prison staff. [*A combination of the tripartite positive obligations*] Since the SMR sets the 94 minimum rules below which national authorities should not fall,[323] its threshold principally cannot be regarded high for meeting the standards searched. For example, it provides that every prison shall have available at least one qualified medical officer who should have some knowledge of psychiatry, that the use of handcuffs, chains, irons, and strait-jackets as restraints are prohibited and that all prisoners should be entitled to a bath or shower at least once a week in temperate climates.

Rodley and Pollard point out that since the SMR has been formulated by the UN Congress and ECOSOC, and accordingly has no legal power, the General Assembly's pertinent resolutions are 'anything *more than* political or moral recommendations'.[324] In the preliminary observations of the rules, it is declared that prison conditions, considering legal, social and economic conditions of the world, may vary. Nonetheless States should

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[320] The 'Beijing Rules', adopted by General Assembly resolution 40/33 of 29 November 1985, http://www2.ohchr.org/english/law/pdf/beijingrules.pdf (15 June 2011).

[321] The 'Havana Rules', adopted by General Assembly resolution 45/113 of 14 December 1990, http://www2.ohchr.org/english/law/pdf/res45_113.pdf (15 June 2011).

[322] Covering both sentenced prisoners and unsentenced ones, and also special categories of detained persons such as juveniles, insane and mentally abnormal prisoners as well.

[323] An additional Rule 95 was added in 1977, ensuring that persons arrested or detained without charge are also to be benefitted from most of the same standards already cited in the SMR.

[324] Rodley and Pollard, p. 383. [Emphasis added]

try to adhere to the minimum conditions accepted. It is also pointed out that advancements beyond the minimum core are not precluded.[325] Likewise, Rule 1 of the SMR indicates that rules seek only to set out 'what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'. Given the great variety of legal, social, economic and geographical conditions of the world, Rule 2 declares that it is accepted that *not* all of the rules will be able to be applied 'in all places and at all times'. Although such a broad discretion exists for States emanating largely from its minimalistic nature, the SMR has managed to constitute an important basis for ensuring the right of prisoners worldwide, which has been used as a guideline by international courts and other bodies as a means by which prisoners' rights can be interpreted.[326] Regarding its emphasis in Rule 2 that the rules 'serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application', it is clear that there is an implicit call for States to implement their positive duties for the fulfillment of the minimum prison conditions as accepted by the UN.

It is also noteworthy that in the era of human rights after the Second World War which was intuitively aiming at ensuring negative aspects of human rights, when there were still more than ten years to go before the ICESCR was adopted and twenty five years before the first edition of Shue's *Basic Rights* was published, the SMR has already started to constitute a clear benchmark for the positive obligations incumbent upon States ensuring the rights of a specific group of persons. However, Livingstone states that it is in need of updating in a number of areas, for example:

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[325] SMR Preliminary Observations, paras. 2 and 3.

[326] "They are one of the oldest international instruments concerning the treatment of people in custody and have gained very wide recognition for their value and influence in the development of penal policy and practice. They contain a greater level of practical detail about the duty of care for prisoners than is generally to be found in the declarations, conventions and covenants." (Penal Reform International, "Making standards work", 2nd Edition, 2001, http://www.penalreform.org/files/man-2001-making-standards-work-en.pdf (05 May 2011), p. 7) Van Zyl Smit and Snacken, pp. 6-8. Rodley and Pollard, pp. 382-384. It is also pointed out that some rules of the SMR 'may also reflect legal obligations': When it restates some of the already existing rules of the international law such as prohibition of corporal punishment, cruel, inhuman, or degrading punishment, its impact is more than just a soft desire but rather a concrete denunciation of some clear-cut human rights violations. (*Ibid*, p. 383)

> there are no specific provisions on women prisoners, family visits are permitted 'at regular intervals' without a specific number per week or month and there is no requirement that prisoners receive an equivalent level of health care to people outside a prison.[327]

Although the need to review and update the SMR sometimes gives way to demands for a new 'Charter of Fundamental Rights of Prisoners', establishing a consensus on the subject amongst States has not been possible to date.[328] By pointing out that the reason lying behind such an inertia is political, economic and cultural diversity characterising the contemporary UN system, Van Zyl Smit and Snacken underline the then domination of Western countries for the agreement reached upon the SMR.[329] Nonetheless, when one takes into consideration the fact that the proposals for a new *Charter* was endorsed by Latin and South American, and African countries, approving the validity of their reasoning seems highly difficult.[330] Rather, within the scope of the dissertation it can be asserted that the very reason lying behind such an indifference is i) insufficiency of the number of States for realising their demands for the new Charter; ii) unlike the post-World War II period, lack of enthusiasm especially amongst Western countries for upgrading the existing level of human rights at international level specifically in an era of hardening global war against terrorism; and iii) with the contribution of the existing domestic and international mechanisms that have helped to constrain systemic human rights abuses, excluding a number of specific cases, systemic human rights abuses are not currently seen a general and urgent problem of the world; and iv) under the dominant paradigm of human rights theory and practice, there has not yet an explicit and common understanding on the obligations of States in their penitentiaries. Since definition process of positive obligations of States is still on the making, the dissertation will try to analyse the scope of the ongoing process with the juridical eyes of the ECtHR.

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[327] Livingstone, **INTERIGHTS Bulletin**, (1997) 11, p. 136. For a detailed critical analysis of the SMR regarding women prisoners see also Megan Bastick and Laurel Townhead, "Women in prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners", Geneva, Quaker United Nations Office, June 2008, http://www.quno.org/geneva/pdf/humanrights/women-in-prison/WiP-CommentarySMRs200806-English.pdf (01 May 2011).

[328] Van Zyl Smit and Snacken, pp. 6-8.

[329] *Ibid*, p. 7.

[330] *Ibid*.

The other relevant international soft law standards, many of them enumerated above, are similar to those in the SMR, and basically reinforce the provisions of the SMR. As has been presented above, some of them have been specifically formulated so as to secure the rights of specific categories of prisoners such as juveniles; some others for regulating the use of force by law enforcement officials; and some others for systemising the specific role of medical officials while they are dealing with torture. Although, the scope of the 1988 UN BOP, in addition to prisoners, also applies to those detained in police cells and immigration detention centres, it develops the standards expressed under the scope of the SMR.[331] For example, it provides for confidential inquiry in the case of any death in custody and establishes a right for a prisoner to make a complaint before a judge or other external body without the risk of disciplinary sanction for the complaint made.[332] Likewise, the 1990 Basic Principles have a more aspirational language and reiterate the abolition of solitary confinement as a punishment and enable prisoners' participation in cultural and educational activities 'aimed at the full development of the human personality'.[333]

Like the function of the ICCPR, regional human rights protection instruments also have direct and indirect provisions on the rights of prisoners. In this context, apart from the wider scopes of the American Convention on Human Rights[334] (ACHR, 1969), the African Charter on Human and Peoples' Rights[335] (AfChHPR, 1981), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[336] and the ECHR, there are also various regional soft law human rights instruments dedicated for securing prisoners' rights at regional levels such as the revised 2006 European Prison

[331] Rodley and Pollard, pp. 452-460.

[332] *Supra* note 313, Principle 34.

[333] Livingstone, **INTERIGHTS Bulletin**, p. 136.

[334] Adopted in San Jose, Costa Rica on 11/22/69, Entry into force: 07/18/78, http://www.oas.org/juridico/english/sigs/b-32.html (18 August 2011).

[335] Adopted on 27 June 1981, entered into force on 21 October 1986, http://www.hrcr.org/docs/Banjul/afrhr.html (20 August 2011).

[336] Opened for signature on 26 November 1987, entered into force on 1 February 1989, ETS No. 126, http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm (12 April 2013). Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) which entered into force on 1 March 2002.

Rules (EPR),[337] the 1996 Kampala Declaration on Prison Conditions in Africa,[338] the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.[339]

Before skipping to the analysis on the jurisprudence of the ECtHR on positive obligations of States regarding prisoners' rights, it is important to spell out the place of the EPR within the European context and also to emphasize its exact function contributing to the development of case-law of the European Court. Within the European framework, the role of the Council of Europe was decisive for the formation of a unique European criminal justice system.[340] The establishment of the European Committee on Crime Problems (CDPC),[341] a specialist body especially on penological matters by the European Council as early as in 1958, has created an environment gathering information and expertise from the policy makers, practitioners, and technical experts through conferences on the limits of imprisonment, alternative measures, and internal affairs of the European prison systems.[342] Although pointing out the similarity between the activities of the CDPC and 'the work of the international penological conferences of the late 19th and early 20th century', Van Zyl Smit and Snacken stress the importance of one crucial point as follows:

> [t]he work of the CDPC and its affiliated expert bodies was conducted within the framework of the Council of Europe with its overall, treaty-based commitment to human rights. It therefore anchored penological expertise in a specific human rights normative framework.[343]

In this context, a number of successive initiatives mainly in the form of non-binding resolutions on prison issues ranging from the electoral, civil and social rights of prisoners to the status, recruitment and training of prison staff was adopted by the

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[337] Council of Europe Committee of Ministers, Rec(2006)2, adopted on 11 January 2006, https://wcd.coe.int/wcd/ViewDoc.jsp?id=955747 (12 June 2011).

[338] Adopted at the International Seminar on Prison Conditions in Africa, 19-21 September 1996, http://www.penalreform.org/files/rep-1996-kampala-declaration-en.pdf (12 June 2011).

[339] Adopted by Inter American Commission on Human Rights on 13 March 2008, Resolution 1/08, http://www.oas.org/en/iachr/pdl/activities/principles.asp (23 August 2011).

[340] Van Zyl Smit and Snacken, p. 18.

[341] http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/default_en.asp (18 June 1011).

[342] Van Zyl Smit and Snacken, p. 18.

[343] *Ibid.*

Committee of Ministers in 1962.[344] However, the most comprehensive work was the 1973 European Standard Rules for the Treatment of Prisoners (ESMR).[345] Although it did not create any important departure from the principles already cited in the UN framework, the ESMR was evaluated as a successful European re-examination of the UN SMR. Although it was limited, a judicial interest for the application of the ESMR to the prisoner cases raised at domestic and European levels. As Van Zyl Smit and Snacken exemplify the then European Commission on Human Rights (EComHR) and the ECtHR had started to attribute to the provisions of the ESMR in their cases expounded.[346] Throughout the 'reorganisation and professionalization' of the Council of Europe on prison issues, a new set of rules, renamed as the European Prison Rules (EPR), was adopted by the Committee of Ministers in 1987.[347] That was the year in which the Committee for the Prevention of Torture (CPT) has been activated with a unique role of *European prison observatory* under Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[348]

The European Union (EU)'s growing enthusiasm, especially after finalisation of the Cold War in 1989, upon human rights in Europe has also created some special interest, *inter alia,* for imprisonment issues. Interestingly enough, there was explicit reference to the positive obligations of the Member States regarding prisoners' human rights by the European Parliament. According to it, Article 3 of the ECHR and case-law of the ECtHR:

> impose on the Member States not only negative obligations, by banning them from subjecting prisoners to inhuman and degrading treatment, but also *positive obligations*, by requiring them to

[344] *Ibid*, p. 20.

[345] Council of Europe, Committee of Ministers: Resolution 73 (5), "Standard Minimum Rules for the Treatment of Prisoners", 19 January 1973, https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=588982&SecMode=1&DocId=645672&Usage=2 (15 June 2011).

[346] Van Zyl Smit and Snacken, p. 20.

[347] Recommendation No. R(87)3 of the Committee of Ministers to Member States on the European Prison Rules, Adopted on 12 February 1987, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1977676&SecMode=1&DocId=692778&Usage=2 (15 June 2011).

[348] *Supra* note 336. See (http://www.cpt.coe.int/en/about.htm (12 April 2013)) for the CPT in brief.

> ensure that prison conditions are consistent with human dignity and that through, effective investigations are carried out if such rights are violated.[349]

Although there is apparently a strong desire by the European Parliament for formulating a binding Charter for its Member States, there is not yet any concrete development that can substantially make an impact over the prisoners' rights in the EU.[350]

Likewise desiderata in the Council of Europe framework were also active for the embodiment of a genuine protocol on prisoners' rights. The reason lying behind such a demand, according to Van Zyl Smit and Snacken, was the 'too timid' stance of the EComHR and ECtHR in providing 'a legal base for the protection of prisoners' rights'.[351] Even if a first draft of a protocol guaranteeing 'certain additional rights to persons deprived of their liberty' was also drawn up by the Committee of Experts for the Development of Human Rights in 1994,[352] the introduction of such a protocol was not found meaningful by the opinion of the Steering Committee for Human Rights on the ground that "it would run the risk of simply codifying existing case law and thus stultifying its development".[353] According to the Steering Committee:

> The Court had gone very far in the direction of requiring positively that persons deprived of their liberty be treated with humanity and respect for their dignity. The Steering Committee therefore recommended that energy should be focused instead on updating the European Prison Rules and that the judgments of the ECtHR and the findings of the CPT should be a key part of the process.[354]

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[349] European Parliament Recommendation to the Council on the Rights of Prisoners in the European Union (9.03.2004) 2003/2188 (INI) OJ C 102E vol 47 § E. [Emphasis added]

[350] Van Zyl Smit and Snacken, pp. 29-30.

[351] *Ibid*, p. 31.

[352] Reproduced in an Appendix II to Council of Europe Committee of Ministers Documents CM(2000)129 of 12 September 2000, http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/2001_Liberty_privation_en.pdf (12 August 2011).

[353] Council of Europe Steering Committee for Human Rights (CDDH) Interim Activity Report of its 52nd meeting from 6-9 November 2001 CDDH(2001)029, item 1, http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/52nd_en.pdf (12 September 2011). Van Zyl Smit and Snacken, p. 32.

[354] *Ibid*.

In this vein, the Parliamentary Assembly of the Council of Europe had also called, in 2004, its States Parties for drawing up a binding Charter and updating the 1987 EPR.[355] Even after the adoption of the new EPR in 2006, there was still insistence by the Parliamentary Assembly on the adoption of an additional binding Charter. Yet after having the opinion of the CDPC, the Committee of Ministers stated that:

> it would be difficult for the states to reach a consensus more than a very limited number of binding legal rules, which could impoverish and stigmatise existing standards and could, moreover, lead to weakening the importance and the impact of the European Prison Rules on the work of the prison administrations in the member states and at the European level in general.[356]

Thus, eliminating the option for a European-wide Prison Charter, at least for the time being, and after having consultations with many related parties (such as the ones of States Parties, of the CPT, and of the Conference of Directors of Prison Administration), the Committee of Ministers approved their Recommendation on European Rules in 2006, after some amendment on the draft proposed by the PC-CP[357] to the CDPC. The 2006 EPR are a set of principles primarily combining those new penological trends in the course of the last two decades in line with the case law of the ECtHR, and the works and standards put forward by the CPT as well.[358] Having regard to the growing number of prisoners in Europe, the Preamble of the EPR emphasises that deprivation of liberty should be used as a measure of last resort. Accordingly, Rule 1 declares that "[a]ll persons deprived of their liberty shall be treated with respect to their human rights". [*Obligation to respect*] In order to emphasise the exclusive position of prisoners in the society, Rule 2 states that "[p]ersons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody". [*Obligations to respect and protect*] Rule

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[355] Parliamentary Assembly of the Council of Europe Recommendation 1656 (2004), "Situation of European Prisons and Pre-trial Detention Centres", http://assembly.coe.int/Documents/AdoptedText/ta04/EREC1656.htm (17 July 2011).

[356] Reply of the Committee of Ministers to the Parliamentary Assembly regarding Parliamentary Assembly Recommendation 1747 (2006) on the European Prison Charter, adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies CM/AS (2006) Rec_1747 final, 29 September 2006, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1043113&Site=COE (12 September 2011).

[357] Having established in 1981 as a permanent standing Committee of the CDCP, PC-CP is an acronym for Council for Penological Cooperation consisting of five members selected for their personal expertise. See http://www.coe.int/t/dghl/standardsetting/prisons/PCCP_en.asp (12 June 2011).

[358] Van Zyl Smit and Snacken, pp. 35-37.

5 also sets another basic principle of European prison policy that specifies "[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community". [*Obligation to fulfil*] In short, by reiterating the already existing structure of the UN SMR, the EPR has created a more detailed set of 108 rules than the one of its predecessor. Yet, unlike the UN SMR, it has special provisions for women prisoners, detained children, infants, foreign nationals, and ethnic and linguistic minorities in order to secure their fragile positions within the European prison systems. The objective of the penal regime for sentenced prisoners is designed "to enable them to lead a responsible and crime-free life".[359] [*Obligation to fulfil*] There is also a direct reference to a programme of restorative justice if the prisoners give their consent to be involved in making reparation for their offences.[360] [*Obligation to fulfil*]

To sum up, this section has tried to sketch out the framework of international and European legal instruments instituted for ensuring the rights of prisoners' rights with a special concern upon positive obligations of States. Apart from presenting international legal panorama, it has also focused on the formation process of European prison law and policy as a preparation for providing a base that the ECtHR frequently refers to it in its case law.

[359] Rule 102.1.

[360] Rule 103.7.

CHAPTER TWO

THE CONCEPT OF POSITIVE OBLIGATIONS UNDER THE JURISDICTION OF THE ECtHR AND ITS PRACTICE BY THE COURT IN THE REALM OF PRISONERS' RIGHTS

Having primarily aimed at revealing the secondary status of positive obligations of States in human rights theory, the first chapter of the dissertation dissects various aspects of the concept with a special reference to the tripartite analysis of Henry Shue. It again embraces a complementary analysis upon prisoners' rights and positive obligations of States for their protection. It is also argued that transformation of the rehabilitative and re-integrative ideals of contemporary criminology and penology has provided a reliable theoretical basis so as to secure prisoners' rights. Nonetheless, it is put forward that effectively guaranteeing prisoners' rights in domestic penitentiary systems by means of a controversial concept in international human right law seems highly controversial. Although there are a number of specific clauses related to prisoners and imprisonment issues in international legal documents, negatory nature of States' positive obligations related to prisoners' rights seems highly prevalent. It is also noteworthy to underline that even if there have been specific endeavours for formulating legally binding documents at international level, they are still at their formative stages and soft-law nature of international law instruments related to imprisonment issues triggers concerns upon the efficiency of the international human rights protection systems.

Having regard to the theoretical bases provided in the first chapter of the dissertation, the second chapter of the dissertation aims at questioning the validity of its main argument by specifically focusing upon the case law of the ECtHR expounded on positive obligations of States for the protection of prisoners' rights. Accordingly, with the contribution of the arguments put forward in its first part, the second chapter specifically tries to analyse positive obligation case law of the Court related to prisoners' rights. Before doing that, it firstly tries to sketch out the status and limited usage of the concept of positive obligations in international (human rights) law, and subsequently touches upon the justiciability of the concept under the jurisdiction of the Inter-American and the African human rights systems. Then, it tries to maintain its questioning by putting forward the

interpretation methodology of the European Court with a particular emphasis on the usage of the concept by the Court.

2.1 The Concept of Positive Obligations in International Law

In line with and with the contribution of the developments in human rights theory, recent decades have witnessed a deep and rapid development within the realm of positive duties incumbent upon States. Apart from domestic experiences, which are essentially beyond the scope of the dissertation, international law and international human rights law as well have started to include the concept of positive obligations within their normative structure. In the *Barcelona Traction* case of 1970, for example, the International Court of Justice (IJC) set forth that the protection of certain fundamental rights is a concern of the international community as a whole:

> ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[361]

According to the Court, *erga omnes* obligations derive, *inter alia*, from 'the principles and rules concerning the basic rights of the human person'.[362] In this context, although it was started more than fifty years ago, the International Law Commission (ILC)[363] succeeded in adopting its 'Responsibility of States for Internationally Wrongful Acts' in 2001.[364] Though it is still too early to comment on whether the ILC Articles will

[361] *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain), Second Phase, ICJ Reports 3 (1970), p. 32, para. 33, http://www.icj-cij.org/docket/files/50/5387.pdf (20 May 2011). *Erga omnes* is a Latin phrase referring the violation of a norm of international law which "is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community". (Malanczuk, pp. 58-60)

[362] *Ibid*, para. 34.

[363] ILC was established by the UN General Assembly Resolution 174 (II) and it opened the first of its annual sessions on 12 April 1949. (See http://www.un.org/law/ilc/ (12 April 2013))

[364] Adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document

be accepted by States as a part of customary law, they have an inherent potential to provide a plausible base for commenting on internationally wrongful acts by States. Likewise, the ILC Article 1 states that "every internationally wrongful act of a State entails the international responsibility of that State". If an act or omission i) can be attributed to the State under international law, and ii) constitutes a breach of an international obligations of the State; then it can be assumed as an international wrongful act of the State and accordingly bears responsibility incumbent upon the State.[365] As can be differentiated, there are two elements here causing State responsibility, namely attribution and the breach of an international obligation. For the former, it can be assumed that either organs of the State or those persons (or entities) who acted under the direction or control of those organs are to be assessed within the scope of State responsibility.[366] Then it can be assumed that if there is no any specific causal linkage between the act or omission realised and the State organs, then the State is not responsible for the conduct of the persons or entities. In other words, wrongful acts of private persons are not principally within the scope of State responsibility.[367] However, if the State does not fulfil its positive obligations for preventing those acts or taking action to punish the individuals responsible, then it may be assumed liable for the consequences of the case in question:[368]

> Different rules of attribution … have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.[369]

A/56/49(Vol. I)/Corr.4, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (20 May 2012).

[365] *Ibid*, Article 2.

[366] *Ibid*, Articles 4-11.

[367] In legal theory, the legal responsibility of States for damaging acts perpetrated by private parties is also described as *horizontal* obligations of States.

[368] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Commentary on CHAPTER II - ATTRIBUTION OF CONDUCT TO A STATE, 2008, Commentary (4), http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (12 January 2012).

[369] *Ibid*, footnote 95 about *United States Diplomatic and Consular Staff in Tehran*, Judgement, I.C.J. Reports 1980, http://www.icj-cij.org/docket/files/64/6287.pdf (20 May 2011).

The ILC Article 12 defines the scope of State responsibility in international law by stating that “there is a breach of an obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. Again excess of authority and contravention of instructions are also regarded within the scope of State responsibility.[370] Continuing duty of the responsible State to perform the obligation breached is also secured under the ILC Article 30. Obligation of the State to cease the act if it is continuing and to offer appropriate assurances and guarantees of non-repetition is also arranged under Article 30. Any damage, whether material or moral, caused by the internationally wrongful act of a State is also to be compensated in order to make full reparation for the injury.[371]

Even if the ILC Articles have been recently adopted and the examples in the Commentary are mostly related to the issues *not of* international human rights law *but of* international humanitarian law, they set the basic norms about State responsibility in international law. In this context, there are also some referrals to them by domestic courts. For example, whilst assessing the admissibility of evidence obtained through torture or ill-treatment, the UK House of Lords in the *Case of A. and Others* made extensive reference set out in the ILC Articles and concluded as follows:

> [t]here is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.[372]

The impact of the ILC Articles has also deeply affected the UN human rights monitoring system especially by means of official reports of the UN organs.[373] By pointing

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[370] Article 7.

[371] Articles 31, and 34-39.

[372] *A. and Others v Secretary of State for the Home Department,* OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE, 8 December 2005, para. 34, http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (20 August 2011).

[373] Helen Duffy, “Towards Global Responsibility for Human Rights Protection: A Sketch of International Legal Developments”, **INTERIGHTS BULLETIN**, Volume 15, No 3 (2006), pp. 104-108. See the International Commission on Intervention and State Sovereignty (ICISS), “The Responsibility to Protect”, December 2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf (10 September 2011); High-level Panel on Threats, Challenges and Change, “A More Secure World: Our Shared Responsibility”, UN Doc. A/59/565, 2 December 2004, http://www.un.org/secureworld/report.pdf (10 September 2011); Report of the Secretary-General, “In Larger Freedom: Towards Developments, Security and Human Rights for All”, UN Doc. A/59/2005, 21 March 2005, http://un.org/largerfreedom/report-largerfreedom.pdf (10 September 2011); and 2005 World Summit Outcome, GA Res. 60/1, 16 September 2005, UN Doc. A/RES/60/1, Adopted by ‘acclamation’ [consensus] by the High-Level meeting of

out that "these documents tend to focus on an arguably more limited range of activity than covered by the ILC Articles", as Helen Duffy maintains "they are clear in endorsing, at the highest levels, the principle that third states have a duty to protect individuals where the state directly involved fails to do so".[374] Furthermore, it can also be stated that there are examples of new interpretations on State responsibilities combining various forms of duties in a broader understanding:

> The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility has three integral and essential components: not just the responsibility to react to an actual or apprehended human catastrophe, but the responsibility to prevent it, and the responsibility to rebuild after the event.[375]

After presenting the general principles of State responsibility in international law, seeking the obligations of States within the sources of international law may also help to understand their specific position in the international legal context. Principally, States will incur responsibility for not complying with their legal obligations to respect, protect and to fulfil the effective enjoyment of the human rights recognised either in a treaty binding on the State concerned or in any other source of international law. Likewise, Article 38(1) of the Statute of the International Court of Justice (ICJ) lists three principal sources of international law to be applied by the Court:[376] namely treaties, international customary law, and the general principles of law recognised by civilized nations. It also lists judicial decisions and the teachings of experts as subsidiary means for the determination of the rules of law. Although the Article is generally regarded as a complete statement of the sources of international law, there are some others who criticise the existing list and propose additional sources that can also be encountered to the Statute of the Court such as acts of international organisations, soft law, and equity.[377]

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the General Assembly, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement (21 March 2011).

[374] Duffy, p. 106.

[375] ICISS Report, *supra* note 373, p. 17, para. 2.32.

[376] Annexed to the Charter of the United Nations, of which it forms an integral part, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (2 August 2011).

[377] Ian Brownlie, **Principles of Public International Law**, 6th Edition, Oxford, 2003, p. 5. Malanczuk, pp. 52-62. [Malanczuk cites that equity is used as a synonym for 'justice'. (*Ibid*, p. 55)] For a subtle analysis of debates on international law see Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", **The American Journal of International Law**, Volume 95, No 4 (October 2001), pp. 757-791.

Although there is no sense of hierarchy amongst the *officially* listed sources of international law, whether there is a hierarchy of norms in international law is a controversial question. For example, Malanczuk states that "if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources".[378] Indeed, as will be presented in this section, international judicial mechanisms infer the obligations of States Parties essentially from treaty law whilst they are giving their decisions upon the alleged violation(s) of human rights. As treaties are formulated upon direct consent of the signatory parties, the creation of international (human rights) law by means of treaties is less controversial than the one of other sources. In other words, since they are explicitly supported, rights and obligations emanating from treaty law are assessed as binding on States Parties.[379]

Some conventions such as the ICCPR do have explicit clauses on positive obligations of States requisite for the protection of human rights. Article 2(1) of the ICCPR enjoins States Parties "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant". In its General Comment 6, the HRC also states that States Parties "should take measures not only to prevent and deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces".[380] Establishing 'effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons' is also a duty for the State.[381] With regard to the right to privacy, for example, the HRC has stated that this right "is required to be guaranteed against all interferences and attacks whether they emanate from State authorities or from natural or legal persons".[382] Accordingly it is seen that performing a proactive policy by providing a legislative framework in order to prohibit acts constituting arbitrary and unlawful interference with family, home or correspondence by natural or legal persons is also a positive obligation of the State Parties.[383]

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[378] *Ibid*, pp. 56-57. See also Michael Akehurst, "The Hierarchy of The Sources of International Law", **British Yearbook of International Law**, 1976, pp. 273-285.

[379] Brownlie, p. 83. The norm '*pacta sunt servanda*' is related here for States Parties.

[380] The HRC, General Comment No. 6, "The Right to Life (art. 6)", Adopted on 30 April 1982, para. 3, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument (8 June 2011).

[381] *Ibid*.

[382] The HRC, General Comment No. 16, "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17), Thirty-second session, 1988, para. 1, http://www2.ohchr.org/english/bodies/hrc/comments.htm (23 August 2011).

[383] *Ibid*.

In its General Comment 31, the HRC states that the legal obligation under Article 2(1) is "both positive and negative in nature".[384] It again sheds light that Article 2's positive obligations incumbent upon States Parties to ensure Covenant rights require the State to protect individuals not just from the arbitrary interference of the State and its agents but also of private persons and entities as well. In its commentary, the HRC states as follows:

> The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligation on States Parties to ensure Covenant rights will not only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise *due diligence to prevent, punish, investigate, or redress* the harm caused by such acts by private persons or entities.[385]

As an example on the stance of the Committee, the case of *Delgado Paéz v Colombia* can be given.[386] In that case the HRC held that the State Party was in breach of Article 9(1) by failing to ensure the applicant with effective protection from death threats and physical attacks by private parties. According to the Committee:

> It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.[387]

Nonetheless, unlike the ICCPR, many international treaties do not contain any explicit proviso for performing positive action envisaged as requisite for the fulfillment of

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[384] The HRC, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev. 1/Add. 13 (26 May 2004), para. 6, http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f (8 June 2011).

[385] *Ibid*, para. 8. [Emphases added]

[386] Communication No. 195/1985, Decision of 12 July 1990, http://www.bayefsky.com/pdf/106_colombia195.pdf (10 March 2012).

[387] *Ibid*, para. 5.5.

the rights in question.[388] As such, as it is expressed throughout the first part of the dissertation, it can be maintained that the notion of positive obligations has developed largely throughout practical and judicial inferences resulting from theoretical assumptions of human rights discourse. Likewise, by taking account the constrained position of the notion of positive obligations in international law, Borelli posits that *the notion* has been essentially derived from "its use in a substantially narrower sense to describe the progressively expansive interpretation of human rights obligations undertaken by human rights monitoring bodies".[389] In relation to the right to food, for example, the CESCR has stated that the State Parties have an obligation to ensure "that activities of the private business sector and civil society are in conformity with the right to food".[390] Again, in the context of the right to health, the CESCR has stated that the State is obliged to ensure that privatisation "does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities".[391]

Before sketching out the development phases of the notion at international level by the jurisprudence issued under the ECHR, the ACHR, and the AfChHPR, searching other sources of international law as a potential of human rights obligations is also noteworthy. As the second source of international law, customary international law also provides a basis for international law. International custom emerges from a general, uniform and consistent practice amongst States. The practice can consist of obligations ranging from "actions, omissions, statements of legal principle, national legislation and the practice of international organizations".[392] Even if there may be some cases for the emergence of an

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[388] Rather they often vaguely describe the notion of obligations as in the case of Article 2(1) of the ICESCR, for instance, requiring that a State Party "undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of rights recognized in the present Covenant". For *derived* State obligations stated in other leading UN documents (ICERD (The International Convention on the Elimination of All Forms of Racial Discrimination), CEDAW (The International Convention on the Elimination of All Forms of Discrimination Against Women)) and their practice by the related committees see Ineta Ziemele, "Human Rights Violations by Private Parties and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies", **European University Institute (EUI) Working Paper**, Academy of European Law, PRIV-WAR project, AEL 2009/8, pp. 6-8.

[389] Silvia Borelli, "Positive Obligations of States and the Protection of Human Rights", **INTERIGHTS BULLETIN**, Volume 15, No 3 (2006), p. 103.

[390] *Supra* note 310, para. 27.

[391] The ESCR Committee, General Comment No. 14, "The Right to the Highest Attainable Standard of Health (art. 12)", UN Doc. E/C.12/2000/4, 11 August 2000, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4538838d0&page=search (24 August 2011).

[392] Martin Dixon, **Textbook on International Law**, 4th Edition, London: Blackstone Press, 2000, p. 29. Malanczuk, p. 39.

'instant' customary law, the general practice must be perceived as a legal obligation in so far as States must believe themselves bound by law. This perception or rather psychological belief that State practice is rendered obligatory rather than being merely convenient or habitual is called as *opinio juris*.[393] Thus consisting of objective and subjective elements at the same time, State practice does not only base upon empirical evidence that it is extensive, constant and virtually uniform but also it must demonstrate a belief that practice is required by law.[394]

However, when the leading role of general practice to the formation of customary law is taken into account, it is not easy to maintain, in the face of widespread violations of human rights throughout the world, that there are positive obligations of States in custom regarding their duties for the protection of human rights within their jurisdiction. On the other side of the coin, as has been widely debated in the first part of the dissertation (see Sections 1.1.2, 1.1.3, and 1.1.4), universality of human rights idea is a dominant understanding amongst human rights theoreticians. At the very least, there are those who maintain certain core 'negative' rights can be found in statements and statutes around the world protecting human beings against slavery, torture, genocide, prolonged arbitrary imprisonment, and systemic racial discrimination.[395] Again, human rights and State obligations enlisted in the UDHR and other leading conventions, and the understanding of international institutions such as the ones expressed in the UN General Assembly resolutions, domestic and international court decisions, and official statements and practice censuring human rights violations and upholding their fulfilment can also be evaluated as empirical evidences that customary international law looks for taking as a ground for its very structure. However, even if there is apparently a widely accepted determination upon the protection and fulfilment of human rights by States, there is also a factual difference between words (subjective element) and *de facto* State practice (objective element).[396] In

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[393] *Ibid*, pp. 39-48. *North Sea Continental Shelf cases, Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*, Judgement of 20 February 1969, p. 44, para. 77, http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5 (20 May 2011).

[394] Brownlie, p. 10. It should also be pointed at this point that there is a real 'uncertainty' regarding the definition and scope of the objective and subjective elements of customary law. For a recent critical analysis see Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", **EJIL**, Vol. 15, No. 3 (2004), pp. 523-553.

[395] Given their absolute nature, these protections in international law are known as *jus cogens*, Latin phrase meaning 'compelling law' or peremptory norms of general international law.

[396] "No-one imposes exact limits on the amount of state practice needed to create law". (Kammerhofer, p. 530) See also *ibid*, pp. 525-535.

other words, there is not enough evidence revealing (or rather proving) the existence of a 'general State practice' regarding the positive obligations of States requisite for the protection of human rights. Therefore, customary international law does not take positive obligations of States as a ground largely because of the lack of consistent and common State practice.

As to the third and last primary source of international law, 'general principles of law recognized by civilized nations' is a one taken into account where international treaties and customary law might provide an insufficient basis for the ICJ to take a decision. Principally it can be inferred that a general principle of law is a legal instrument that it can be found in all major legal systems throughout the world. Given the difficulty of proving a principle is common to most or all legal systems, the matter about the very content of the general principles is not also exempt from complexity.[397] In this context, some general rules such as the principles of good faith, estoppels,[398] proportionality, and a number of procedural rules, such as the right to a fair hearing, and liability for fault can be encountered amongst those. Although there is a wide discretion here for an international judge or arbitrator, Malanczuk points out that the 'creative role' of the judge is not 'at all peculiar to the international legal system'.[399] Like the one in customary international law, acceptance and recognition of the general principles at international level are also prerequisite. Nonetheless, in the latter case there is no insistence upon general State practise and it basically requires that the norm is to be widely recognised by the States Parties. Likewise, in its *Corfu Channel Case* the ICJ pointed out "obligations ... based ... on certain general and well-recognised principles".[400] Although it is possible to assume the existence of positive obligations of States regarding their duties for the fulfillment of the right to a fair hearing, claiming an extensive use of general principles to enforce a widespread use of human rights obligations in international law seems highly controversial.

Before going further on the subject, it is also important to point out the very role of subsidiary sources of international law regarding positive obligations of States. Given the

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[397] Malanczuk, pp. 48-51.

[398] *Ibid*, pp. 154-155.

[399] Malanczuk, p. 49.

[400] "[N]amely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States", ICJ Reports 1949, Judgement of 9 April 1949, p. 22, http://www.icj-cij.org/docket/files/1/1645.pdf (24 May 2011).

wealth of international (and domestic) case-law within the realm of human rights protection, judicial decisions and the teachings of experts can be regarded as a dynamic area in which positive obligations of States are continuously analysed and restructured.[401] As has been extensively presented throughout the first part of the dissertation, the notion of positive obligations has already been widely debated and analysed by many scholars such as, *inter alia,* Henry Shue. And, as has been also mentioned about, his tripartite approach is not only used by international monitoring mechanisms but also by international jurisprudence extensively. As to the judicial decisions, by interpreting already existing norms of international law, international human rights protection mechanisms, namely the ECtHR, the Inter-American Court of Human Rights (I-ACtHR), and the African Commission on Human and Peoples' Rights have by and large contributed to the development of a comprehensive jurisprudence on the concept of positive obligations of States.

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[401] See also Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", **The Modern Law Review Limited**, 70(4) MLR (2007), pp. 598-625.

2.2 Positive Obligations of States in the Inter-American and the African Human Rights Systems

Since the jurisprudence developed by the ECtHR on positive obligations of States will be analysed in a more expanded nature in the following section, briefly tracing the contribution of other leading international judicial tribunals to the evolution of the concept may also help to enlighten the issue. Firstly, the American Convention on Human Rights[402] in its Article 1 provides that:

> [t]he States Parties to this Convention undertake *to respect* the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[403]

As can be differentiated, the American Convention does hypothetically not only include negative obligations but also positive ones. In this vein, the I-ACtHR, since its very first and landmark *Velásquez Rodríquez* case,[404] has recognised that States have overarching positive duties to ensure against violations of human rights. In the Court's view, the duty to ensure requires States Parties to take affirmative measures of a judicial, legislative, and administrative nature. Accordingly, it seeks:

> to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[405]

According to the Inter-American Court:

> 173. ... What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible...
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> 174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its

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[402] *Supra* note 334.

[403] Emphases added.

[404] *Velásquez Rodríquez v Honduras,* I-ACtHR, Judgement of 29 July 1988, Series C, No. 4, http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (12 June 2011).

[405] *Ibid*, para. 166.

jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obliged to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures...

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

As can be seen, the Court enlightens the line for holding the State responsible for violations occurring in the private sphere (*horizontal* obligations of States) only if it can be proved that it failed to exercise '*due diligence to prevent and respond'* to the violations. Though the I-ACtHR did not hold Honduras responsible for the acts of the private individuals *per se*, considering the facts of the case that the Honduran Government had a failure of carrying out effective investigations for the disappearances of more than 100 persons between 1981 and 1984, it ruled that a human rights violation which is not directly imputable to a State can lead to international responsibility of the State "not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention".[406]

In the case of *Yanomami v Brazil,*[407] the Inter-American Commission similarly held that the State Party had failed to take "timely and effective measures to protect the rights of the Yanomamis" whose territory had been penetrated by corporations and other non-state actors on a large scale to their detriment.[408] Since Brazil failed to prevent settlers from moving in large numbers to the Brazilian Amazon reserve and thereby bringing disease, violence, and destruction to the Yanomami, it had breached the rights to health and life of

[406] *Ibid*, para. 172. [Emphasis added]

[407] *Yanomami v Brazil*, Res. No. 12/85, Case 7615, 5 March 1985, http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm (5 January 2012). In the same vein, for a case revealing the failure of the State Party in effectively delimiting and demarcating the territory to which indigenous people had a property right see *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, I-ACtHR, IHRR (2001), 31 August 2011, § 153, http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html (5 January 2012).

[408] *Yanomami v Brazil*, para. 11.

indigenous people. As can be easily differentiated, specifically with the contribution of emphasis in para. 175 of the case of *Velásquez Rodríquez*, it is not possible to make a detailed list of all measures requisite for the prevention of possible violations. Rather it is a question to be answered on a case-by-case basis under the circumstances at stake.

In the case of *Children's Rehabilitation v Paraguay ('Panchito López'),*[409] the I-ACtHR did not only require the State Party to adopt its domestic legislation by elaborating it in collaboration with civil society within six months but also institute "a State policy of short, medium and long-term related to children in conflict with the law that is fully consistent with Paraguay's international commitments".[410]

The duty to prevent also includes adopting "the legislation of appropriate penalties for non-compliance with minimum standards of conduct and redress for those harmed by such-compliance".[411] As in the case of *Tarcisio Medina Charry v Columbia*,[412] the Commission found the State Party was in breach of its duty to prevent violations of the Convention rights by failing to establish forced disappearance as a crime in its domestic law:

> The State, by not criminalizing the forced disappearance of persons, has squandered an opportunity to make a statement condemning and discouraging such heinous activity. The State has also failed to provide tailored criminal sanctions which would ... provide an effective deterrent against the commission of such a crime. As a result, the State has not established a legal regime which adequately works to prevent forced disappearances.[413]

As has been stated by Melish and Aliverti, *appropriate sanctions,* in the eye of the Commission, *"*serve to prevent abuse by acting as a deterrent".[414] The authors also point out as follows:

> [s]taff training in prisons, detention facilities, police and military institutions, hospitals, and educational establishments with respect to human rights norms and standards has also been repeatedly emphasised by the Inter-American human rights organs as part of the state duty to prevent. So too has

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[409] *Children's Rehabilitation v Paraguay* (*'Juvenile Reeducation Institute'* or *'Panchito López'*), 02 September 2004, Series C, No. 112, http://www.corteidh.or.cr/docs/casos/articulos/seriec_112_ing.pdf (12 November 2011).

[410] *Ibid*, para. 316.

[411] Tara J. Melish and Ana Aliverti, "Positive Obligations in the Inter-American Human Rights System", **INTERIGHTS BULLETIN**, Volume 15, No. 3 (2006), p. 121.

[412] *Tarcisio Medina Charry v Columbia,* Report No. 3/98, Case 11.221, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.98, Doc. 7 rev. 7 April 1998 (1998), para. 108, http://www1.umn.edu/humanrts/cases/1997/colombia3-98.html (20 April 2012).

[413] *Ibid.*

[414] Melish and Aliverti, p. 121.

> the need to monitor constantly the human rights situation, particularly in problem areas. This includes taking measures such as the preparation of impact studies and engaging in consultations with affected populations, issues that have been dealt with most extensively by the Commission.[415]

Responding appropriately in diligent ways to human rights abuses is also a matter of concern for the Inter-American human rights system. Starting from the *Velásquez Rodríquez v Honduras* case, proper investigation, prosecution and punishment of those responsible for the acts as well as ensuring adequate compensation for the victim have been the leading parameters of responding appropriately against human rights abuses.[416] Any and every violation of rights that results in harm burdens an obligation for the State Party to make adequate reparation. And adequate reparation, according to the I-ACtHR, consists "in full restitution (*restitution in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm".[417]

It is seen that the Inter-American system, since its very inception, has been particularly dealt with the positive aspects of classical negative rights such as state-sponsored extrajudicial executions, disappearances, arbitrary detention, and torture. Nonetheless, positive duties emanating from economic, social and cultural rights have also been recognised as a fruitful matter for the recent case-law of the Court. Within such an understanding, States Parties are obligated "to take reasonable, appropriate and necessary measures to *provide* goods and services to persons, where they cannot access them on their own, in order to ensure their life, health and personal integrity".[418]

As has been delineated above, persons, who are deprived of their liberty, are also deprived of their ability to access outside assistance from their family, friends, doctors, etc. Accordingly State and its agents assume the role of direct and immediate guarantor of the rights to life, health and humane treatment for persons in custody. As in the case of *Panchito López*, the Court has upheld 'minimum conditions compatible with dignity' as

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[415] *Ibid*. For example see *Maya Indigenous Community of the Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.122, Doc. 5 rev. 1 at 727 (2004), http://www1.umn.edu/humanrts/cases/40-04.html (12 April 2012).

[416] Case of *Velásquez Rodríquez v Honduras*, § 177. See also case of *Godínez-Cruz v Honduras*, Judgement of 20 January 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989), § 188, http://www1.umn.edu/humanrts/iachr/C/5-ing.html (12 April 2012); and of *Paniagua Morales et al. v Guatemala*, 8 March 1998, Judgement of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), § 91, http://www1.umn.edu/humanrts/iachr/C/37-ing.html (12 April 2012).

[417] Case of *Velásquez Rodríquez v Honduras*, § 26. [Emphasis added]

[418] Melish and Aliverti, p. 122. [Emphasis is original]

the 'ineluctible obligation' for the States Parties.[419] The Court has also spelt out that ensuring his or her 'life project', *inter alia,* entails healthcare and educational assistance.[420] While finding a failure of the State in offering adequate education and providing adequate healthcare to the children detainees, it held the State responsible for violating their right to life. And throughout a more recent series of cases, the I-ACtHR has affirmed the State Parties' obligations requisite for ensuring the health and life of detainees.[421] Considering over the existing conditions of American penitentiaries in terms of sanitation, overcrowding, and poor nutrition, the Court has not just labelled them lacking 'the minimum conditions compatible with human dignity' but also ordered provisional measures such as urgently providing 'proper medical treatment' to a detainee with heart disease 'with a view to protecting his physical, psychological, and moral integrity',[422] and to ensure that such treatment be received 'from a doctor of [the beneficiary's] choosing'.[423]

In summation, paraphrasing the preceding elements of the case-law of the I-ACtHR reveals, first of all, that there is a general obligation of States Parties under the American Convention to prevent human rights by public and private parties. If the State Party does not perform due diligence in preventing human rights violations, responsibility is to be attributed to the respondent State. Secondly, if a State *does* also tolerate violations of human rights by third parties, it will also incur responsibility. Thirdly, if the State Party does not adequately investigate, prosecute, punish and provide compensation to the victims, it is also in breach of its positive obligation to respond appropriately. Fourthly, human rights violations are to be outlawed at the domestic level. And finally, the Court has demarcated certain lines bordering positive obligations of the State Parties entailed in the Convention.

Since African regional human rights protection system is relatively a new one, the existence of some borrowing of the terminology and methodology of positive obligations from other regional systems is self-evident. On the other side of the coin, given a general

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[419] Case of *Panchito López v Paraguay*, § 161.

[420] *Ibid*, § 173.

[421] *Mendoza Prison Case* (Argentina), Order of the Court of 1 July 2011, http://www.worldcourts.com/iacthr/eng/decisions/2011.01.07_Mendoza_Prisons_v_Argentina.pdf (12 April 2012); *Febem Prison Case (Brazil),* Order of the Court of 3 July 2007, http://www.corteidh.or.cr/docs/medidas/febem_se_04_ing.pdf (20 May 2012); *Monagas Prison Case (Venezuela),* Order of the Court of 9 February 2006, http://www.corteidh.or.cr/docs/medidas/lapica_se_02_ing.pdf (12 April 2012).

[422] *Cesti Hurtado Case*, Order of the Court of 11 September 1997, http://www1.umn.edu/humanrts/iachr/E/2-ing-28.html (12 April 2012).

[423] *Ibid,* Order of the Court of 21 January 1998.

context of poverty and scarcity in the African context, clearly demarcating the extent of the positive obligations incumbent upon an African State is a difficult task. Nonetheless, Article 1 of the AfChHPR provides a reliable basis for paraphrasing positive obligations of States in the African system. Likewise in the case of *Legal Resource Foundation v Zambia*,[424] the African Commission on Human and Peoples' Rights declared that "... the positive obligations incumbent on State Parties to the Charter in terms of Article 1 not only to "recognise" the rights under the Charter but to go on to "undertake to adopt legislative or other measures to give effect to them"".[425] Founded upon Article 1 of the Convention, the African Commission, in the case of *SERAC v Nigeria*,[426] defined positive obligations as prerequisite for ensuring the enjoyment of rights.[427] According to the Commission:

> [i]t is more of a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights. This also corresponds to a large degree with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).[428]

Like its American counterpart, the African Commission has upheld institutionalisation of procedural structures for the enjoyment of rights and freedoms in the Charter. As in the case of *Dawda Jawara v The Gambia*, the Commission held that "the rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated".[429] The responsibility of States Parties for the acts and violations committed by private parties has also become a topic for the Commission. In the SERAC case, involving the exploitation of the Ogoni community by foreign investors, for example, the Commission posits that:

> [...] Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties... This duty calls for positive action on part of governments in fulfilling their obligation

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[424] *Legal Resource Foundation v Zambia,* Comm. No. 211/98, 1 May 2001, http://www1.umn.edu/humanrts/africa/comcases/211-98.html (15 May 2011).

[425] *Ibid*, para. 62.

[426] Social *and Economic Rights Action Center for Economic and Social Rights (SERAC) v Nigeria*, Comm. No. 155/96, October 2001, http://www1.umn.edu/humanrts/africa/comcases/155-96.html (15 May 2011).

[427] *Ibid,* paras. 46-47 and also para. 57.

[428] *Ibid*, para. 47.

[429] *Dawda Jawara v The Gambia*, Comm. Nos. 147/95 and 149/96, 11 May 2000, http://www1.umn.edu/humanrts/africa/comcases/147-95.html (15 May 2011), para. 74.

under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríquez v Honduras.*[430]

In addition to the assumption that economic and social rights have all been justiciable, the African Commission even includes actions of private individuals within the scope of its jurisdiction. Nonetheless, as has been pointed out by Olinga, terminology for *positive state action* incumbent upon African governments has been specified in a *cautious* form.[431] While stating about the obligations of State Party, the Commission, according to the author, prefers using negative terminology of rights (with the exception of the right to food) or rather obligations not to act.[432] Because of "the risk that it will remain abstract if it imposes upon the states obligations that are disproportionate to their means and that ultimately have little chance of being met",[433] the scope of positive obligations of States emanating from the enjoyment of many rights and freedoms (such as the right to housing, the right to health, environmental rights, etc.) formulated in a limited and cautious mode. Likewise, the African Commission spells out that:

> it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty, rendering them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.[434]

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[430] *SERAC v Nigeria*, para. 57. See *supra* note 404 for *Velásquez Rodríquez v Honduras.*

[431] Alain Didier Olinga, "The African Charter on Human and Peoples' Rights and Positive Obligations", **INTERIGHTS BULLETIN**, Volume 15, No 3 (2006), p. 119.

[432] *Ibid.*

[433] *Ibid.*

[434] *Purohit and Moore v The Gambia*, Comm. No. 241/01, Decision of May 2003, para. 84, http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf (15 May 2011).

2.3 Positive Obligations of States under the Case Law of the ECtHR

The dissertation hitherto has primarily aimed at i) analysing the theoretical aspects of positive human rights obligations of States, and ii) presenting evolution and practical usage of positive obligations of States in international human rights law with a special reference to prisoners' rights. As has already been revealed, given the crystallisation of an ever-enlarging jurisprudence by international human rights mechanisms, it has recently been a common acceptance in international human rights law that States cannot avoid their legal responsibility simply by omitting to act or not interfering. On the contrary, they do have certain positive duties to be realised for securing human rights of those subject to the State's jurisdiction. European regional human rights protection system is not exempt from this distinctive orientation. As already common in other international human rights instruments, Article 1 of the ECHR imposes inherent responsibilities to the States Parties in order to secure everyone's rights and freedoms defined in the Convention.

Despite the existence of such an apparently clear-cut reference to positive obligations of States Parties at the very inception of the Convention, the ECtHR, unlike the uniform one developed for verifying its negatory discourse, has declined to offer a unique method of interpretation to explain its systematisation of affirmative duties in the Convention. Whereas as has been pointed out by Cordula Dröge:

> [a] clear three step test exist for the assessment of negative obligations, i.e.: (1) whether the claim falls under the scope of the right, (2) whether there has been an interference with the right, and (3) whether the interference is justified, i.e. provided by law and necessary in a democratic society.[435]

Indeed, in judicial analysis process of cases claiming violation of negative human rights obligations by States Parties, the three step test approach has been well established since the inception of the Court in 1959. Having been applied in a uniform and predictable manner, a transparent *proportionality test* of the negative interferences seeks to ensure that limitations imposed on human rights are 'prescribed by law, intended to achieve a legitimate objective and necessary in a democratic society'.[436] Nonetheless, *lack of* such uniformity throughout judicial interpretation process of alleged non-compliance with

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[435] Cordula Dröge, "Positive Verpflichtungen der States in der Europäischen Menschenrechtskonvention", Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 159 (2003), p. 389, www.mpil.de/shared/data/pdf/beitr159.pdf (15 May 2012). See also D.J. Harris *et al.*, **Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights**, Second Edition, Oxford University Press, 2009, pp. 341-360.

[436] Ellie Palmer, "Protecting Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights", **Erasmus Law Review**, Volume 02, Issue 04 (2009), p. 406.

positive human rights obligations of States Parties has been criticised: For example, in its concurring opinion in the case of *Stjerna v Finland*,[437] Judge Wildhaber, referencing to para. 38 of the judgement, points out the existence of an 'established but still somewhat incoherent jurisprudence'. Paragraph 38 of the judgement reads:

> The refusal of the Finnish authorities to allow the applicant to adopt a specific new surname cannot, in the view of the Court, necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an *obligation* on him to change surname. However, as the Court has held on a number of occasions, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the right protected, there may in addition be *positive obligations* inherent in an effective "respect" for private life.
>
> The boundaries between the State's *positive and negative obligations* under Article 8 (art. 8) 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 (see, for instance, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49). [Emphases added]

In the next paragraph of his concurring opinion, Judge Wilhbarer exemplifies the obscurity of dividing line between negative and positive obligations by the Court.[438] In cases, claimants' demands before the Court can be viewed as either negative or positive interference: for example, in the case of *Stjerna*, "the refusal by the Finnish authorities to allow the applicant freely to acquire the surname of his ancestors may be perceived as either a negative or a positive interference".[439] Accordingly, enlisting a large group of judgements on Article 8 of the Convention,[440] Wildhaber demands that the Court *reserves* the term "interference" for facts capable of infringing the State's *negative obligations*. However, as has already been acknowledged in para. 38 of *Stjerna* case, there could be positive obligations inherent in an effective respect for private and family life. In such cases, by not applying its well established test, the Court prefers applying "the fair balance

[437] *Supra* note 4.

[438] *Ibid*, para. 2.

[439] *Ibid*.

[440] *Ibid*, footnote 4. Article 8 (art. 8) of the Convention, which reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

test that has to be struck between the general interest of the community and the interests of the individual".[441]

Indeed, as the dissertation shall search its verification throughout its following sections, while a sophisticated and clear-cut jurisprudential method by the Court has been practised in complaints founded upon allegations of negative intrusion, this is not the case for complaints demanding violations of positive obligations by the States. As Judge Wildhaber points out in his concurring opinion in the case of *Stjerna*, traditional three step methodological approach articulated originally for determining upon allegations of negative obligations can also be applied in deciding upon allegations raised over positive obligations of States.

As a solution of *incoherency* in question Wildhaber proposes “to construe the notion of "*interference*" so as to cover facts capable of breaching an obligation incumbent on the State under Article 8 para. 1 (art. 8-1), whether negative or positive”.[442] He puts it that:

> [w]henever a so-called positive obligation arises the Court should examine, as in the event of a so-called negative obligation, whether there has been an interference with the right to respect for private and family life under paragraph 1 of Article 8 (art. 8-1), and whether such interference was "in accordance with the law", pursued legitimate aims and was "necessary in a democratic society" within the meaning of paragraph 2 (art. 8-2).[443]

However, it should be underlined that the term ‘interference’ inherently refers to the act of interfering or the process of being interfered with.[444] In legal terminology, it is generally associated with an unwarranted interference with personal liberty (see Section 1.1.2). Again it also brings into mind breaches of negative obligations where ‘State action denied’ in human rights discourse. Considering theoretical arguments presented upon the very logic and structure of positive obligations of States throughout the study, applicability of such a proposal to cases claiming violation of positive obligations before the ECtHR can essentially be seen as a matter of incoherency. Within such a framework, application of

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[441] *Ibid*, para. 1 and footnote 5. See also Janneke Gerards, “Judicial Deliberations in the European Court of Human Rights”, in N. Huls, M. Adams, J. Bomhoff (Eds.), **The Legitimacy of Highest Courts’ Rulings**, The Hague: T.M.C. Asser Institute, 2008.

[442] Emphasis added.

[443] *Ibid*, para. 3.

[444] http://oxforddictionaries.com/definition/english/interference (21 July 2012).

such a genuinely negative term also for positive obligations/duties, as suggested by Judge Wildhaber, is not to be seen as an ideal methodological (and also juridical) approach.

First of all, since positive obligations refer to broad category of obligations where 'State action demanded', identifying them with a negatory term like interference has a potential to create an incoherency throughout the judicial interpretation process of the case in question before the ECtHR. Unlike negative obligations, they demand proactive policy for the protection of rights incumbent upon States. Thus, in place of questioning the verification of possible *interference with positive obligation* in the case in question, judicial interpretation approach should try to examine preferably the existence of a violation of positive human rights obligation by the State authorities. In other words, the European Court should define the extent, scope and type of the positive obligation(s) to be performed by the State's organs and agents. It is clear that by trying to paraphrase the scope of such an obligation by means of an intrinsically negative term (or rather tool), drawing the boundaries of positive obligations seems highly problematic. Secondly, asking whether such interference was in accordance with the law is also essentially problematic in that, unlike negative obligations, positive obligations "cannot fulfil the requirement of "provided by law" as they may indeed be obligations to enact legislative measures".[445] Likewise, Judge Wildhaber's another analysis on the issue is also striking. He puts that the Court:

> has added rather vaguely that in the sphere of positive obligations "the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance". But the Court has in effect applied only the first paragraph (art. 8-1) in such instances.

Indeed, the second paragraph of Article 8 of the Convention enumerates intrinsically possible inferences by a public authority with the exercise of the right. In spite of the fact that many positive undertakings of States might already been enacted at domestic level, various types of positive obligations are still on the making or do not exist at all at domestic level. While the requirement of 'provided by law' can be more understandable for allegations of clearly defined negative obligations (as in the second paragraph of Article 8), human rights theory and discourse do not exclusively specify the type of policies or measures but rather, as has been pointed out in Section 1.2.4.3 [Duties to Fulfil], *do* lay down the general standards and principles to be scrutinised. Thus, the

[445] Dröge, p. 390. Daniel Rietiker, "From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent *Haas v. Switzerland* Judgment", **Harvard Human Rights Journal**, Vol. 25 (2012), pp. 95-97.

ECtHR has been faced with the questions of drawing the lines of positive obligations incumbent on States in a case-by-case basis. Accordingly, in case of a discrepancy found between the standards set and the realities that persons faced while enjoying their rights, domestic authorities are rendered responsible for compensation and, if necessary, demanded embodying of new policies and measures to curb violation of rights in the future.

2.3.1 Interpretation of the Concept and Its Limitation by the Court

Cordula Dröge claims that the principles of effectiveness and dynamic interpretation are the "main methods of interpretation invoked to justify the acceptance of positive obligations in the Convention".[446] Again Harris *et al*. point out that the Court attributes special emphasis in defining its interpretation method as an 'effective, dynamic, or evolutionary' one in the light of the changing social and moral assumptions.[447] By not taking into consideration the prevalent human rights patterns of the 1950's, the Court might select applying the existing standards currently accepted in European society.[448] If it does not maintain a dynamic and evolutive approach, it "would indeed risk rendering it a bar to reform or improvement".[449] In many cases, the European Court has interpreted the Convention that the rights enshrined are not merely 'theoretical and illusory' but 'practical and effective'.[450] Nonetheless, as in the disputed right to divorce in the case of *Johnston and Others v Ireland*, interpretation of the Convention cannot be broadened to a scope covering a unique right that "it was not intended to include when the Convention was drafted".[451] Again the authors exemplify as follows:

> the Court's finding of *positive obligations* for states throughout the Convention and, more particularly, its application of Article 3 to cases of removal of individuals from a state's territory and

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[446] *Ibid*, pp. 386-387. Clare Ovey & Robin C.A. White, **Jacobs & White The European Convention on Human Rights**, Oxford University Press, 4th Edition, 2006, pp. 47-48. See also Radu Meres, "Defining the Limits of Corporate Responsibilities against the Concept of Legal Positive obligations", **The George Washington International Law Review**, Vol. 40 (2009), pp. 1199-1200.

[447] Harris *et al.*, pp. 7-8.

[448] In the case of *Tyrer v the United Kingdom* (Application No. 5856/72, Judgement of 25 April 1978), the Court ruled inconsistency of judicial corporal punishment with the present-day standards of the European society. (Para. 31)

[449] *Christine Goodwin v the United Kingdom*, Application No. 28957/95, [GC] Judgement of 11 July 2002, para. 74.

[450] *Ibid.*

[451] *Johnston and Others v Ireland,* Application No. 9697/82, [Plenary] Judgement of 18 December 1986.

> of Article 8 to environmental matters can either be seen as the discovery of obligations that were always implicit in the guarantees concerned or as the addition of new obligations for states.[452]

The notion of 'effectiveness' has been formulated as a foundation for the subsequent development of many different positive obligations under the Convention.[453] Nonetheless, despite its emphasis upon the fact that 'a purely negative conception would not be compatible with the object and purpose of the Article 11 (art. 11)', in the case of *Plattform "Ärzte für das Leben" v Austria*, the Court, in line with the dominant negatory paradigm in human rights theory, directly refused to formulate such a general doctrine or theory of positive obligations incumbent upon the States Parties.[454] Again in a more recent case, Judge Martens defined positive obligations basically as the ones "requiring member states to ... take action".[455] By emphasising merely duties upon States to undertake affirmative acts and policies, such a simplistic definition can be seen as a one encompassing the very essence of the term. However, such an understanding has also caused a lack of uniformity and predictability in the formulation of the very meaning of the Court's case-law.[456] Claiming that such an *incautious* expansion would extend the scope of positive obligations in the areas of social and economic policy, Merrills purports that the restrictive interpretation of the Convention by the Court is a *conscious* one:

> Every government is aware that by subscribing to the Convention, it places itself in a position in which domestic laws and practices have to be modified to avoid impinging on the various liberties the Convention was brought into being to protect. What a government may not bargain for is to find itself put to considerable trouble and expense, as a result of an obligation to advance particular social or economic policies which it may not wholly support. While this is not a conclusive objection to the Court's employing the principle of effectiveness to develop the law and identify positive obligations in the Convention, it unquestionably argues for caution in so doing.[457]

According to Dröge, "the other interpretative principles of the Convention serve to limit the extent of positive obligations resulting from effective and dynamic

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[452] Harris *et al.*, pp. 7-8. [Emphasis added]

[453] Alastair Mowbray, **The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights**, Hart Publishing, 2004, pp. 151-155.

[454] Application No. 10126/82, Judgement of 21 June 1988, para. 31.

[455] Dissenting Opinion of Judge Martens in the case of *Gul v Switzerland* (Application No. 23218/14, Judgement of 19 February 1996). See also Jean-François Akandji Kombe, **Positive obligations under the European Convention on Human Rights**, Council of Europe, Human rights handbooks, No. 7, 1st Printing, January 2007, p. 7.

[456] Dröge, p. 379.

[457] J.G. Merrills, **The Development of International Law by the European Court of Human Rights**, Manchester: MUP, 1993, p. 106.

interpretation":[458] Having seen them as 'equally important as they render the scope of positive obligations', the author enlists them as the principles of historic interpretation, the systematic interpretation of the Convention norms, and the wording of the specific provision.[459]

Likewise, in line with Article 31 of the Vienna Convention on the Law of Treaties,[460] the ECHR "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Wording or rather 'ordinary' meaning of the terms in the Convention is taken as a primary base for the interpretation.[461] When there is no clear wording in the text, the Court prefers applying 'object and purpose' of the Convention as a guidance. In many cases, it recognizes 'the rule of law', 'pluralism', tolerance', and 'broadmindedness' as the cornerstones of a democratic society.[462]

As a supporting parameter for the claims that the ECHR is to be translated as a constitutional guarantee for the protection of human rights in Europe, it is not seen as an ordinary international instrument creating 'reciprocal engagements between contracting states' but rather as a one imposing 'objective obligations' upon them.[463] Nonetheless, the scope and width of these obligations are generally (but *not always*) left to the Contracting States, choosing the appropriate means and methods of ensuring compliance with the Convention within their own jurisdictions. Harris *et al.* claim that the sensitivity of the State Parties in cases involving, *inter alia*, complex resource allocation issues, the European Court has deployed 'the margin of appreciation doctrine'.[464] In other words, a certain discretionary power is left to the States to decide between 'the needs and resources of the community and of individuals'.[465] Hence in cases where the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, the Court has generally respected the legislature's

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[458] Dröge, p. 387.

[459] *Ibid.*

[460] 23 May 1969, 1155 UNTS 331, Articles 31-33, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (20 May 2012).

[461] Harris *et al.*, p. 5. Ovey & White, pp. 42-44. Again Cordula Dröge sees the wording as the most important limit to evolutive interpretation. (Dröge, p. 387)

[462] Harris *et al.,* p. 6.

[463] *Ibid.*

[464] *Ibid*, pp. 11-15. Palmer, pp. 405-406.

[465] See, for example, *Johnston and Others v the United Kingdom*, 27 November 1986, para. 55. See *Stjerna v Finland*, para. 39.

policy choice unless it is 'manifestly without reasonable foundation'. In the case of *Hatton and Others v the United Kingdom*, the Court:

> reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. The United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").[466]

This is also the case, as has also been stated by Judge Wildhaber in *Stjerna*, the Court points out that "Contracting States enjoy a wide margin of appreciation in the implementation of their positive obligations".[467] When the Court '[b]eing obliged to intervene in the "preserve" of domestic authorities where positive obligations are concerned', Akandji-Kombe claims that:

> it will therefore proceed with a degree of circumspection that is rarely found in the framework of a review of negative obligations, and will seek in particular not to "impose an impossible or disproportionate burden on the authorities". As a result, states enjoy a margin of appreciation here which, although varying from one case to another, is necessarily wider.[468]

The comparative interpretative approach is another interpretation method 'expressed in European jurisprudence as the so called common European Standard'.[469] Dröge puts it in the way as follows:

> The Strasbourg organs are, in most cases, reluctant to go further in their interpretation of Convention rights than corresponds to an already existing common European standard. This does not mean that there is an exact equivalent of an obligation recognised by the Court in all member States. Indeed, the systems are too diverse for positive obligations to exist as a common European normative theory. Nonetheless, the positive obligations recognised until now by the Commission and the Court limit themselves to reflecting a standard of legal or social guarantees common to most of the member States.

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[466] *Hatton and Others v the United Kingdom*, Application No. 36022/97, [GC] Judgement of 8 July 2003, para. 97.

[467] *Stjerna v Finland*, Concurring Opinion of Judge Wildhaber, para. 1.

[468] Akandji Kombe, p. 18.

[469] Dröge, p. 387. Harris *et al.*, pp. 8-10. Ovey & White, pp. 48-50.

When there is no European consensus upon the issue, the Court's tendency is to look for "a lowest common denominator approach or to accommodate variations in state practice through the margin of appreciation doctrine when deciding upon the meaning of a Convention guarantee".[470] In addition to the genuinely European human rights instruments such the European Social Charter, the revised EPR, and the Charter of Fundamental Rights of the European Union,[471] the Court also uses other international human rights instruments such as the ICCPR, the ACHR as a point of reference when interpreting a Convention norm in the sense of positive obligations.[472] (See also Section 1.3.4)

Obligation of 'due diligence' is another limit applied by the Court upon the States Parties. Within this framework, States are expected to take reasonable and suitable measures and perform related actions in order to prevent and redress harm.[473] Alike the one used by the South African Constitutional Court in the case of *Grootboom* (see Section 1.1.4), *reasonableness* of the decision making process has also been applied for drawing the borders of positive obligations incumbent upon the States Parties:[474]

> 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 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.

And last but not least, the principle of proportionality (also known as the 'fair balance' methodology) is the remaining limitation method of positive obligations practised by the ECtHR.[475] In its analysis in the case of *Soering v the United Kingdom*,[476] the Court claimed:

> inherent in the whole of the Convention is a 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.[477]

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[470] Harris *et al.*, p. 9.

[471] Adopted on 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ 364/01), http://www.euparl.eu./chater/default_en.htm (12 April 2012).

[472] Dröge, pp. 387-388.

[473] Mares, p. 1203.

[474] [Emphasis added] See for example *Osman v the United Kingdom*, Application No. 23452/94, Judgement of 28 October 1998, para. 116. And also Ziemele, pp. 13-15.

[475] Harris *et al.*, pp. 10-11. Palmer, p. 406.

[476] Application No. 14038/88, [Plenary] Judgement of 7 July 1989.

[477] *Ibid*, para. 89. [Emphasis added]

Dröge specifies its primary function by stating that it "has to rely on the basic principle that positive obligations have the purpose of establishing or restoring the real liberty and autonomy of the individual".[478] According to the author, "the higher the restraint placed on the individual's freedom of choice, the more precise the requirement that is put on the state".[479] The proportionality test is used in some cases in determining whether the positive obligation in question has been sufficiently satisfied. In combining the principle of proportionality's various functions throughout interpretation process of negative and positive obligations, Harris *et al.* claim that:

> [a] limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate, even allowing for a margin of appreciation, where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.[480]

To conclude this sub-section, it could be claimed that the positive obligations case law by the Court primarily aims at ensuring (maintaining or restoring) the autonomy of the individual against unjust inferences by other persons or the State authorities. As Akandji-Kombe cites that they "tend in essence to ensure the tangible material and judicial conditions for genuine exercise of the rights protected by the Convention".[481] Since most of the cases upon positive obligations do have an inherent tendency to broaden the extent and the scope of the burdens that States have to satisfy, their judicial definition and ruling are of major importance. Again considering the increasing number of cases raised upon the violation of a positive obligation before the Court, reassessment of the competing balance between rights and their correlative duties incumbent upon public authorities is also important for judicial credibility and transparency. As Philip Leach demands, "it is clear that constant recalibrations of such issues will be required, not least because of the Court's interpretation, and re-interpretation, of the Convention as a *living instrument*".[482]

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[478] Dröge, p. 388.

[479] *Ibid.*

[480] Harris *et al.*, p. 11.

[481] Akandji-Kombe, p. 10.

[482] Philip Leach, "Positive Obligations from Strasbourg – Where do the Boundaries Lie?", **INTERIGHTS BULLETIN**, Volume 15, No 3 (2006), p. 123. [Emphasis is original]

2.3.2 Its Origins and Evolution by the Court

As has already been touched upon, many international and regional human rights instruments generally use *some specific verbs* in order to signify positive obligations incumbent upon States Parties. In addition to the genuine terms of Henry Shue, 'to secure', 'to provide', 'to ensure', 'to recognise', and 'to entail' are also amongst the leading ones arising in essence from treaty-based international structures. The European Convention of Human Rights is not destitute of this overriding tendency either. As has been touched upon in the preceding section, under its title 'Obligation *to respect* human rights', Article 1 of the ECHR reads as follows:

> The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.[483]

In spite of the fact that 'securing' connotes a positive understanding, it should not be underestimated that interpretation of the term does also encompass negative obligations of States.[484] Furthermore, the interpretative richness between the two types of obligations at the very inception of the Convention system was not in favour of the former. Even in *Belgian Linguistic Case,* the third case brought before the ECtHR, the Belgian Government pleaded that:

> [T]he Convention and the Protocol are inspired on the whole by the classic conception of freedoms, in contrast to rights, differing in this respect from the Universal Declaration of Human Rights and from the European Social Charter. The individual freedoms place purely negative duties on the governmental authorities. ... The commitments undertaken by the States by virtue of the Convention and the Protocol possess therefore an essential negative character.[485]

In its reply to the respondent Government, the EComHR argued that the rights recognised in the Convention were not all 'negative'. Having said that, it was necessary, according to the Commission, to 'examine each question' and 'each provision in its own right without being led astray' by a legal theory of 'some antiquity' – namely the classic *negatory* doctrine of individual freedoms.[486] In its ruling, delivered in 1968, the Court expressed its readiness for deriving certain 'positive obligations' from the Convention text

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[483] Emphasis added. For a concise comparison of the Convention with the US Constitution see also Palmer, p. 405.

[484] Ovey & White, pp. 20-21.

[485] *Belgian Linguistic Case* (No. 2), Application Nos. 1474/62, 1677/62, 169/62, 1769/63, 1994/63, 2126/64, [Plenary] Judgement of 23 July 1968, p. 17.

[486] *Ibid*.

(in addition to those few that are expressly found within it)[487] even if there was no direct reference to such a concept in the ruling itself. Accordingly such an ambiguous wording of the Article 1 of the Convention has given way for crystallisation of a comprehensive case-law essentially having been developed for scaling the breadth and depth of States Parties' (either negative or positive) duties *vis-à-vis* human rights and fundamental freedoms recognised by the Convention. However, if one wants to trace the developments about positive obligations in a chronological order, there was nothing much more than a few limited numbers of cases till the mid-1980's. These preliminary cases only started to reveal that the traditional understanding of human rights by the Contracting States and of the European Court itself needed an expressive revision.

The preliminary ones in this context were the cases of *Marckx v Belgium*[488] and *Airey v Ireland*[489] of 1979 and the case of *X. and Y. v the Netherlands*[490] of 1985. While analysing the case in the context of the right to 'respect for family life' in Article 8, the Court spelt out in *Marckx v Belgium* that "it does not merely compel the state to abstain from such interference: in addition to this primary negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life".[491] Since Belgian family law disadvantaged a mother and her illegitimate child to obtain official recognition of their maternal affiliation, the Court thought that natural ties between the mother (the applicant) and her daughter constituted family life within the meaning of Article 8. And it ruled that no distinction should be drawn between 'legitimate' and 'illegitimate' families. As such, a positive obligation, necessitating securing of effective respect for family life, had been breached by the State Party.

Likewise, in the case of *Airey v Ireland* the Court also applied the same approach so as to point out the existence of a positive obligation in cases where the domestic legal system failed to provide an effectively accessible legal procedure for obtaining judicial separation in Ireland. Since obtaining a decree of judicial separation was only available from the High Court through a complicated process and the cost of legal representation would have been excessive having regard to the income of the applicant, a bare majority of the Strasbourg Court, four votes to three, found a violation of Article 8, considering the

[487] Harris *et al., supra* note 435, p. 19.

[488] Application No. 6833/74, [Plenary] Judgement of 13 June 1979.

[489] *Supra* note 224.

[490] Application No. 8978/80, Judgement of 26 March 1985.

[491] *Supra* note 488, para. 31.

practical *ineffectiveness* of Convention rights in order to obtain an order of judicial separation. Providing civil legal aid by the State authorities to bring Mrs Johanna Airey's case effectively before the domestic court was seen as an *obligation* requisite for making the application '*practical and effective*' as distinct from being '*theoretical and illusionary*'.[492] While deciding on the case and accordingly obliging the State to protect inherent interest of the applicant, the Court also took into consideration Airey's dire economic conditions sharpened with physical abuse by her husband.

In *X. and Y. v the Netherlands*, the Court again stressed the deficiency of the domestic legal system. Due to the existence of a procedural gap in Dutch law, a sixteen-year-old mentally handicapped girl (Y) was not able to bring the charge against the man who exerted sexual assault on her. Disfavouring the Government's argument that there had been possibility in order to apply for available civil remedies by the claimant, the ECtHR emphasised the importance of criminal remedies to be applied exclusively for the case and declared its dissatisfaction for the absence of an effective criminal remedy in such a case where 'fundamental values and essential aspects of private life are at stake'.[493] Another argument of the Government that criminalisation of a private action would endanger the respect for private life (negative obligation) was also rejected by the Court in that non-consensual acts of private individuals upon others (as the existence of duress in the case) are accepted as a realm of *positive obligation* for the State Parties that they should interfere with.

As has been emphasised those three cases were just preliminary rulings, heralding the development of a case-law on positive obligations incumbent upon States Parties by the Court. Furthermore, commentaries by the practitioners had also started to analyse the ongoing change in the judicial system:

> The growing complexity of the social fabric is obliging the State to take *positive action* to protect rights and freedoms which, in the traditional view, only required protection against interference by public authorities. Modern human rights legislation increasingly relies on the concept of a "State conferring benefits". Human Rights have become an area in which the State finds itself confronted with a subtle, shifting synthesis between prohibited interference and compulsory intervention.[494]

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[492] Para. 24.

[493] *Supra* note 490, para. 27.

[494] Judge Dimitries Evrigenis, "Recent Case Law of the European Court of Human Rights under Article 8 and 10 of the ECHR", **Human Rights Law Journal**, 3: 121 (1982), p. 136. [Emphasis added]

There are also instances of positive obligations of States originating from private relations between individuals.[495] However, such kind of cases before the Court does not merely depend on an unjust conduct of the private individual inflicted upon other(s) but of the responsibility of the State giving way to the realisation of violation in question. Accordingly the State becomes responsible for violations committed between individuals due to, for example, 'a failure in the legal order, amounting sometimes to an absence of legal intervention pure and simple, sometimes to inadequate intervention, and sometimes to a lack of measures designed to change a legal situation contrary to the Convention'.[496] Apart from a more clear-cut responsibility of the States Parties viewed in cases emanating from the transfer of traditional State powers to private companies and others by means of privatization,[497] the scope of the Convention's interpretation by the Court has remained highly intact touching 'only indirectly through such positive obligations as it imposes upon a state'.[498]

Today, in conjunction with Article 1 of the Convention, the Court has continuously managed to create a new category of case law based essentially upon positive undertakings of the States Parties.[499] As Akandji-Kombe puts it that "here we are faced with an essentially judge-made opus or structure".[500] Nonetheless, despite the existence of such a basis for a promising jurisprudence on positive obligations, the European Court has consciously avoided theorising the concept but rather favoured the incremental evolution of its complementary (or rather declaratory) principles.[501] Accordingly, unlike the cases alleged upon the violations of negative obligations, in complaints framed under positive obligations, both parties (the claimant and the State Party) may lose the benefits of the complex balancing exercise (traditionally dissecting the issue just after a preliminary

[495] Some authors misleadingly paraphrase the issue under the genuinely German concept of *drittwirkung*. However, it refers to legal right of an individual 'who may rely upon a national bill of rights to bring a claim against a private person who has violated his rights under that instrument' (also known as 'horizontal application of the law'). (Harris *et al*., pp. 20-21) Ovey & White, pp. 51-52. *Ibid*, p. 243.

[496] Akandji-Kombe, pp. 14-16.

[497] In the case of *Costello-Roberts v the United Kingdom* (Application No. 13134/78, Judgement of 25 March 1993) corporal punishment in a private school was seen as a violation of the Convention since 'the state cannot absolve itself from responsibility' to secure a Convention right 'by delegating its obligations to private bodies or individuals'. (Para. 27)

[498] Harris *et al*., pp. 20-21.

[499] Akandji-Kombe, pp. 8-9. Mowbray, *supra* note 453.

[500] *Ibid*, p. 6.

[501] Alastair Mowbray, "The Creativity of the European Court of Human Rights", **Human Rights Law Review**, 5:1 (2005), OUP, p. 61. And also see Cordula Dröge, pp. 379-392.

inquiry) which has marked the evolution of the ECHR as a sophisticated mechanism of differential rights adjudication. Again, understanding and implementing the decisions of 'dynamic' jurisprudence through which subsidiary but legally binding positive obligations incumbent upon the States Parties by the Court may "be difficult to square with their understanding of the negative obligations that they had undertaken at the time of ratification" the Convention.[502] Given the common fallacy that positive obligations impose inappropriate financial burdens and accordingly that States may have reluctance in appropriately implementing the rulings of the Court, attempting to formulate 'a coherent principled approach' giving way for examination of positive obligations for the effective protection of Convention rights in the States Parties has not been expressly put into practice till now.[503] Although the ECtHR proposed to apply the *same methodological approach* whether the case was presented in terms of a breach of either negative or positive obligation,[504] it has made an ontological interrogation of the issue in the case of *Pretty v the United Kingdom* that:

> ... while States may be *absolutely forbidden to inflict the proscribed treatment* on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be *more judgemental, more prone to variation from State to State, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction*.[505]

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[502] Palmer, p. 402.

[503] *Ibid,* p. 404.

[504] *Ibid*, p. 407. See cases of *Powell and Rayner v the United Kingdom,* Application No. 9310/81, Judgement of 21 February 1990; and *Rees v the United Kingdom*, Application No. 9532/81, [Plenary] Judgement of 17 October 1986.

[505] Application No. 2346/02, Judgement of 29 April 2002, para. 15. [Emphases added]

2.4 Positive Obligations of States for the Protection of Prisoners' Rights under the Case-Law of the ECtHR

2.4.1 Positive Obligations to Respect

2.4.1.1 Respect for Private and Family Life (Article 8)

Provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In parallel with the general wording of Articles 8 to 11, Article 8 too has a two paragraph form. In the first paragraph, the scope of the right is expressed with a special emphasis to the notion of 'respect'. And in its second paragraph, the legitimate interferences are set forth requisite for the enjoyment of the right within a structure of negative obligations. It is understood from the wording of the first paragraph that the enjoyment of the right in question does not only necessitate abstaining from arbitrary or disproportional interferences but also demands performing positive actions and proactive policies necessary for protecting the essential features of family and private life. Thus the positive obligation in question can either necessitate performances in order to secure respect for the right or demand effective actions for protecting the right of the individual from interferences by others. Accordingly, a national regulation or (in)activity which fails to meet the requirements of the expected standards of the Convention may violate the first paragraph of Article 8 without the need for a further examination of the second paragraph.[506]

Likewise in the case of *Dolenec v Croatia*[507] the Court reiterates as follows:

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[506] Ovey & White, p. 243.

[507] Application No. 25282/06, Judgement of 26 November 2009.

> while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private (see *Van Kück v. Germany*, no. 35968/97, § 70, ECHR 2003-VII). However, the 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 determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, *Keegan v. Ireland*, 26 May 1994, Series A no. 290, § 49; *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 52, *Reports of Judgments and Decisions* 1998-V and *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002-I).[508]

In *Dolenec*, the applicant was a detainee alleging, *inter alia,* the violation of Article 8 of the Convention. He complained about the general conditions of his detention in various prisons, his placing in cells with smokers, attacks performed by prison personnel and other inmates and inactivity of the prison authorities in this respect, and the failure of prison authorities to secure him adequate medical care for his psychiatric condition. Whilst considering upon allegations by the applicant, the Court points out that "it is the master of the characterisation to be given in law to the facts of the case; it does not consider itself bound by the characterisation given by an applicant or a government".[509] Furthermore, it stresses as follows:

> its case-law does not exclude that treatment which does not reach the severity of Article 3 may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, § 36). In the present case the Court will consider the applicant's complaints concerning the general conditions of his detention and the alleged attacks on him under Article 3 of the Convention, while the remaining complaints, concerning the alleged lack of adequate psychiatric treatment, will be examined under Article 8 of the Convention.[510]

While noting that the case relates to the responsibility of the State authorities in securing necessary measures for adequate psychiatric supervision of the applicant, the Court agreed with the submission of the Government that none of the medical reports indicated the necessity for the placement of the applicant to a specific treatment institution other than a regular penal institution.[511] Again, it is seen that "the applicant was prescribed

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[508] *Ibid*, para. 166.

[509] *Ibid*, para. 127.

[510] *Ibid*, para. 128.

[511] *Ibid*, paras. 170-172.

and given pharmacotherapy for his mental condition during his stay in prisons”.[512] Alleging that he had not been informed about group sessions available for inmates suffering from post-traumatic stress disorder (PTSD) during his placement in Lepoglava State Prison, Dolenec also claimed that he was initially included in group therapy in Pula Prison, and then excluded from the therapy. The Government replied that the termination of Dolenec’s therapy had been based upon ‘his frequent conflicts with other inmates and his disruptive behaviour at the sessions’. Within such a framework, the Court stressed that there had not been any recommendation for the group therapy of the applicant by the psychiatrists through his examinations. It again noted that the applicant had been regularly examined by psychiatrists through his stays in various Croatian prisons and hospitalised six times owing to the worsening of his mental condition. The Court also noted that he had also received pharmacotherapy as has been prescribed by the psychiatrists. Within such a general framework, the Court, by four votes to three, held that the respondent State was not in violation of his positive obligation under the provisions of Article 8 of the Convention.

However, a joint dissenting opinion of three judges underlines vividly some missing parts of the ruling. At the very inception of their dissent, the three judges point out the existence of great need of psychiatric treatment for the applicant, suffering from ‘a number of serious mental ailments’. As a detained and particularly vulnerable person, they assessed the treatment and measures by the State authorities executed for the supervision of the applicant were not sufficient. According to the dissidents:

> The applicant was impulsive and emotionally unstable, easily lost control of his behaviour, with evident low tolerance towards frustration, a high tendency to react aggressively, a significantly reduced capacity to maintain self-control and a high likelihood of reoffending. Psychiatric supervision was clearly needed. The facts of the case also show that the applicant was prone to conflicts with other inmates and the prison personnel, that he was aggressive and that he often went on hunger strikes. On several occasions he also inflicted injuries on himself and attempted to commit suicide. These circumstances, together with the clear recommendations that the applicant receive psychiatric treatment, show that the applicant was indeed in need of such treatment. In view of the applicant's diagnosis and mental problems, such a programme appears to have been all the more necessary.[513]

Although there has been a continuous treatment for the applicant, they declared that there was not an individual programme in line with the relevant provisions of domestic law specifically designed for the ongoing mental problems of the applicant. Again the

[512] *Ibid*, para. 172.

[513] Joint Dissenting Opinion, para. 5.

respondent Government's failure in providing information 'on the exact duration or frequency of any of the alleged therapeutic treatment of the applicant' was a point of concern for them. The three judges expressed that:

> [i]t could reasonably have been expected of the prison authorities to keep a record of the psychiatric and other therapeutic sessions attended by the applicant and to carry out regular assessment of his participation and condition. It is unclear what treatment, if any, was provided to the applicant in such groups, and on what basis, or what personnel was involved in the conduct of these groups.[514]

They furthered their arguments by submitting that:

> [i]n the course of the applicant's continual placement in penal institutions since 1 April 2005, his examinations by a psychiatrist, though frequent, have always been connected with incidents or hunger strikes concerning him rather than being planned as part of a well-designed therapeutic process with specific aims. In this connection we would stress that providing adequate professional treatment for convicts suffering from psychiatric conditions, and in particular PTSD, is not only beneficial to the individual convict but also to the well-being of society as a whole. In short, the attitude of the authorities has been purely *reactive* and not, as it should have been, *proactive*.[515]

Having also considered the applicant's transfers to nearly ten various detention facilities within four years; they concluded their dissenting opinion by maintaining that:

> the relevant prison authorities have not secured the applicant adequate supervision for his mental problems. They have therefore failed in their *positive obligations* under Article 8 of the Convention, namely to secure to the applicant the "respect" for his private life to which he is entitled under the Convention.[516]

However in the case of *Uslu v Turkey*,[517] the Court did not make a selection in between negative and positive obligations of the respondent State. The applicant was a detainee being held at Inebolu Prison. After an examination by the prison doctor, he was transferred to the State Hospital due to his neurological complaints. His demand for having copies of report issued by the prison doctor was firstly rejected by the prison authorities then approved by the Judge of Execution. Basing his objection on a Ministry of Justice circular prohibiting distribution of copies of official prison documents to detainees and prisoners on grounds of security and public order, the Public Prosecutor objected the

[514] *Ibid*, para. 9.

[515] *Ibid*, para. 11. [Emphases added]

[516] *Ibid*, para. 14. [Emphasis added]

[517] Application No. 23815/04 (No. 2), Judgement of 20 January 2009.

delivery of the 'originals or copies of any official prison documents to detainees or convicted persons' before the Assize Court. After the approval of the Assize Court, the documents in question were demanded back from Uslu by the prison authorities.

Having considered that personal information belonging to a patient's private life falls within the ambit of Article 8 of the Convention, the Court points out as follows:

> the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in ensuring effective "respect" for private or family life. However, the boundaries between the State's positive and negative obligations under this provision 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; in both contexts the State enjoys a certain margin of appreciation.[518]

Indemnifying from considering specifically over the nature of the allegation, the Court also states that it:

> does 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 it is of the view that the core issue in the present case is whether a fair balance was struck between the competing public and private interests involved.[519]

Within such a framework, the Court did not find any specific reason identifiable to create a potential risk upon security or public order considerations. Accordingly, it held that a fair balance was not struck between the competing general and individual interests and unanimously found the violation of Article 8.

The case of *István Gábor Kovács v Hungary*[520] was about the limitations upon visitors of a detainee, being held at Szeged Prison. Kovács was detained on remand on allegations of relatively mild charge of excise tax fraud. The applicant, *inter alia,* submitted that he could receive visitors only one hour every month (with an exception for his brother having three extra visits, each of them lasting two hours). Touching his family members had also been also restricted under the provision of Rule 25 of Szeged Prison's Regulations. The Government stated that the applicant could have benefitted from extra visits of which he never requested beforehand. Nonetheless the Court pointed out that the

[518] *Ibid*, para. 23.

[519] *Ibid*, para. 24.

[520] Application No. 15707/10, Judgement of 17 January 2012.

respondent Government did not provide any related information about its domestic regulations granting a 'reasonable prospect of success to a detainee requesting longer or extra visits'.[521]

Whilst calibrating its position on the issue, the Court emphasised the responsibility of the respondent State by stating as follows:

> it is an essential part of a detainee's right to respect for family life that the authorities *enable* him or, if need be, *assist* him in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision.[522]

Within such a framework implicitly suggesting positive obligations of States, the Court preferred interpreting the case with its well-established negative obligation formulation.[523] Firstly, it found that there was an interference with the applicant's right. Then it looked for the justifiability of the restrictions on the issue. Identifying the existence of domestic law on the Execution of Sentences and Measures and of Szeged Prison's House Regulations, the limitation on the frequency and duration of family visits had a legal basis and pursued 'the legitimate aims of protecting public safety and preventing disorder and crime' as well. Nonetheless, it specified its concerns about the necessity of limitations in a democratic society by stating as follows:

> the frequency of family visits to one per month in a general manner, without affording sufficient flexibility for determining whether such limitations were appropriate or indeed necessary in each individual case. As regards the applicant's personal situation, the Court is unable to discern the necessity for such stringent limitations on the frequency and duration of family visits, in view of the fact that the applicant was detained on remand – rather than convicted – on the relatively mild charge of excise tax fraud. In these circumstances, and having regard to the duration of the impugned period (it lasted from January 2008 until June 2010), the Court concludes that the limitation went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent

[521] *Ibid*, para. 32.

[522] *Ibid*, para. 35. [Emphases added]

[523] See also *Ciorap v Moldova*, Application No. 12066/02, Judgement of 19 June 2007, paras. 105-119; *Gülmez v Turkey*, Application No. 16330/02, Judgement of 20 May 2008. Impugned preventions of family visits by the authorities, nearly one year in both cases, were accepted as the reason for finding the violation of Article 8.

> limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government.[524]

Accordingly, the Court, six votes to one, declared the failure of the authorities in establishing a fair balance of proportionality in between the means employed and the aim that they sought to achieve. However, returning to the fundamental dichotomy once more, Judge Jočienė expressed her concern over the decision of the majority as regards Article 8. According to the dissident, the State's positive obligation cannot be without limits. And in the instant case, the applicant, according to Judge Jočienė, had not "even shown any wish to receive an extra visit while detained on remand. According to her dissenting opinion, broadening the scope of positive obligations to an extent imposing an "obligation on the prison authorities to request every detainee separately about his/her wish to receive or not an extra visit or longer ones" is excessive. Thus, Judge Jočienė concluded that "it should remain the right of every detainee to ask for it".

In *Klamecki v Poland*[525] the domestic authorities had also set limitations on the applicant's contact with his wife "after she had been charged with a related offence and on the grounds that there was a risk that they might induce each other to give false testimonies or obstruct the proper course of the trial".[526] In its assessment, the Court held that limitations on family visits could be imposed under legitimate and reasonable aims such as the prevention of disorder and crime. Nonetheless, "with the passage of time and given the severity of those consequences, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention," the authorities were under an obligation of carefully reviewing whether keeping the applicant in a complete isolation from his wife was necessary.[527] Accordingly, there was a breach of Article 8 in regard to the applicant's right to respect for his family life.

Correspondence of prisoners is also assessed as a realm falling within the scope of Article 8 by the Court. Yet the use of the negative obligation case law terminology by the Court is highly common on the issue.[528] Conversely finding direct reference to positive

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[524] *István Gábor Kovács v Hungary,* para. 38.

[525] Application No. 31583/96, (No. 2) Judgement of 3 April 2003.

[526] *Ibid*, para. 147.

[527] *Ibid*, para. 150.

[528] Amongst many see *Golder v the United Kingdom*, Application No. 4451/70, Judgement of 21 February 1975*; Silver and Others v the United Kingdom*, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement of 25 March 1983; *A.B. v the Netherlands*, Application No. 37328/97, Judgement of 29 January 2002; *Davydov and Others v Ukraine*, Application Nos. 17674/02 and 39081/02, Judgement of 1 July 2010; *Kepeneklioglu v*

obligations of States does not seem possible at all. In the case of *A.B. v the Netherlands*, the Court analysed various forms of prisoner correspondence: The applicant was detained on remand, being charged with embezzlement and forgery. As regards the allegation of interference with the correspondence of the applicant, the Court stated that there was no justified reason appropriate for limiting the confidentiality. Accordingly, it unanimously found the breach of Article 8 in this regard. Secondly, interference with the applicant's correspondence with his lawyer was also a point of concern for the Court. Although the Court stated that it might be necessary to screen the correspondence of the applicant with his legal representatives within the framework of the 'ordinary and reasonable requirements of imprisonment', a blanket ban on prisoners' correspondence with former fellow inmates (applicant's initial representative was also a former inmate) could not be justified under Article 8 paragraph 2 of the Convention. Thirdly, since sending up to three letters per week was available for the prisoners in the Netherlands Antilles, the Court was content with the provisions of the domestic authorities. Domestic authorities' practice covering the costs of postage and writing materials was also a point touched upon by the Court in its reasoning. Accordingly, the Court unanimously did not find any justification for the breach of Article 8 in this regard. And lastly, it examined the electronic communication facilities of the domestic system and did not interpret Article 8 of the Convention as a one guaranteeing prisoners the right to make telephone calls, "in particular where the facilities for contact by way of correspondence are available and adequate".[529] By paraphrasing the issue under the light of the case of *A.B. v the Netherlands*, Mowbray points out that States are not under a positive obligation to make electronic forms of communication available to prisoners.[530]

The case of *Ploski v Poland*[531] also touches upon a sensitive issue. The applicant was detained on remand at the material time, charged with larceny. On the basis of the telegram received informing him about the death of his mother, Ploski demanded leave for attending the funeral of his mother. Even though the existence of the statement of a prison officer supporting his request, the Penitentiary Judge rejected the applicant's demand, basically because of the accused involved a significant danger to the society and also of the

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Turkey, Application No. 73520/01, Judgement of 23 January 2007; *Ekinci and Akalin v Turkey*, Application No. 77097/01, Judgement of 30 January 2007; and also *Ciorap v Moldova*, *supra* note 523.

[529] *A.B. v the Netherlands,* para. 92.

[530] Mowbray, p. 186.

[531] Application No. 26761/95, Judgement of 12 November 2002.

lack of compassionate circumstances as referred to in Article 59 § 1 of the Code of the Enforcement of Sentences. The applicant's father also died next month. Accompanied by again a supporting statement of a prison officer, he asked for permission to have a leave for attending the funeral. The District Court refused the application, grounding its reasoning that the applicant was a habitual offender. Prisoner's demand for attending to the funeral of his father was not also approved by the Penitentiary Judge. Asserting that the practice of the domestic authorities was an 'inherent and unavoidable consequence ... of the detention on remand', the Government submitted that the interference was in accordance with the law and was necessary in a democratic society 'in the interest of public safety and for the prevention of disorder or crime'.[532]

Given the fact that the applicant lost both of his parents in a space of one-month, and also the existence of an affirmative written statement by prison officials for the demanded leaves, the Court expressed its concern whether the respondent State had successfully managed to demonstrate the existence of pressing social need for the leaves in question.[533] If there was a reasonable suspicion emanating from the nature of alleged crimes by the applicant, the possibility of escorted leaves could have been tried by the authorities. Though there was not any sign of consideration for that option. According to the Court, the reasoning upon which the Penitentiary Judge had based his decisions was 'not supported by the facts'. Emphasising the margin of appreciation left to the Contracting States, the Court is of the opinion that "Article 8 of the Convention does not guarantee a detained person an unconditional right to leave to attend a funeral of a relative".[534] Nonetheless, by taking into consideration of the circumstances in the instant case, the Court ruled that the refusals of leave by the domestic authorities were not necessary in a democratic society and proportionate to the legitimate aims pursued. In its concluding remarks related to Article 8, it expressed more direct statements, vividly implying positive obligations of the Contracting States. According to the Court:

> the charges brought against the applicant did not concern violent crime and that he was released as early as February 1996 … Therefore, the applicant could not be considered as a prisoner without any prospect of being released from a prison. It is aware of the problems of a financial and logistical nature caused by escorted leaves and the instances of shortage of police and prison officers. However, taking into account the seriousness of what is at stake, namely refusing an individual the right to

[532] *Ibid*, para. 29.

[533] *Ibid*, para. 35.

[534] *Ibid*, para. 38.

> attend the funerals of his parents, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leaves – could have been found.[535]

Again there have also been more recent cases affording the stance of the Court in analysing positive obligations of States falling within the ambit Article 8. For example, in the case of *E.S. and Others v Slovakia,*[536] the Court ruled that the State authorities did not effectively provide adequate protection to the applicant against the violence committed by A., her ex-husband. Despite the existence of some precautions by the authorities such as the intervention of the police, the Court did not satisfy itself with not practical and effective measures. It stated that:

> it was the domestic authorities' inactivity and failure to ensure that A. was duly detained for psychiatric treatment which enabled him to continue to threaten the applicant and her lawyer. Moreover, it was only after the applicant and her lawyer had filed fresh criminal complaints against A. that the police had taken it upon themselves to intervene. In this connection, it recalls that the domestic authorities were under a duty to take reasonable preventive measures where they "knew or ought to have known at the time of the existence of a real and immediate risk".[537]

In the same vein, *A. v Croatia*[538] is not a case examining the detention conditions of a prisoner but rather a one putting stress upon the deficiencies of the domestic penitentiary system in general. The applicant was a female seeking to divorce from her husband B., mainly because of violent behaviours of the latter within the family. There was also a medical report previously issued by two psychiatrists revealing B.'s suffering from several mental disorders. Although there had been a number of judicial orders for restraining B.'s aggressiveness, such as additional psychiatric examinations, sentencing him three years' imprisonment, his compulsory psychiatric treatment, etc., they were not effectively implemented by the authorities. For example, imprisonment of B. could not be realised because the capacity of the prison was full. On the other side of the coin, there had been a *continuity* of criminal and minor offences by B., essentially focusing on his former wife A., the applicant. In its analysis as regards the allegation of Article 8, the Court purported its awareness that it was 'for the national authorities to organise their legal systems so as to

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[535] *Ibid*, para. 37.

[536] *E.S. and Others v Slovakia,* Application No. 8227/04, Judgement of 15 September 2009; *Hajduová v Slovakia,* Application No. 2660/03, Judgement of 30 November 2010.

[537] *Ibid*, para. 50.

[538] Application No. 55164/08, Judgement of 14 October 2010.

comply with their positive obligations under the Convention'.[539] However, considering the intensity of violent acts by the same person against the same victim, it ruled that the specific circumstances of the case were necessitating "a better overview of the situation and an opportunity of addressing the need to protect the applicant from various forms of violence in the most appropriate and timely manner".[540] The domestic system was so slow in meeting the requirements of authorities that:

> many of these measures, such as periods of detention, fines, psycho-social treatment and even a prison term, have not been enforced ... and the recommendations for continuing psychiatric treatment, made quite early on, were complied with as late as 19 October 2009 and then in the context of criminal proceedings unrelated to the violence against the applicant. In addition, it is not certain that B has as yet undergone any psychiatric treatment ... The Court stresses that the main purpose of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be achieved without the sanctions imposed being enforced.[541]

By exerting an explicit terminology of positive obligations of States, the Court furthered its analysis that:

> [t]he national authorities failed *to implement* measures ordered by the national courts, aimed on the one hand at addressing B's psychiatric condition, which appear to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by B. They thus left the applicant for a prolonged period in a position in which they failed *to satisfy* their *positive obligations to ensure* her right to respect for her private life.[542]

As one of the sensitive issues of prisoners' rights, body and strip-searches of inmates also fall within the scope of Article 8 of the Convention.[543] In this context, allegations demanding the violation of Convention during body searches of visitors have already been interpreted by the Court.[544] In those cases, the Court continuously preferred to use its negative obligations terminology. Nonetheless, even if there is no direct referral to positive obligations of States in those cases, inferring their existence can be possible. For

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[539] *Ibid*, para. 76.

[540] *Ibid*.

[541] *Ibid*, para. 78.

[542] *Ibid*, para. 79. [Emphases added]

[543] To name only a few *McFeeley v the United Kingdom*, Application No. 8317/78, [EComHR] Decision of 15 May 1980; *Iwańczuk v Poland*, Application No. 25196/94, Judgement of 15 November 2001; *Valašinas v Lithuania*, Application No. 44558/98, Judgement of 24 July 2001; *Lorsé and Others v the Netherlands*, Application No. 52750/99, Judgement of 4 February 2003; *Frerot v France,* Application No. 70204/01, 12 June 2007.

[544] *Wainwright v the United Kingdom,* Application No. 12350/04, Judgement of 26 September 2006.

example, in the case of *Wainwright v the United Kingdom,* it held that strip-searches of the visitors could be regarded as necessary in a democratic society within the meaning of Article 8. The applicant was a mother who had intended to visit his son being arrested on suspicion of murder and detained on remand in prison. However, following a report by a senior prison officer raising suspicions that the applicant's son was involved in the supply and use of drugs within the prison, the Prison Governor had ordered for the automatic strip-search of his visitors. Without having any identifiable idea about the search procedure beforehand, the applicant and the half-brother of the detainee expressed their intentions for the visit in question before the prison officials. And then their searches were carried out by the officials. In analysing the allegations before it, the Court, by taking into consideration the possibility of an endemic drugs problem in the prison, considered that the searching of visitors could be seen as a legitimate preventive measure. Nonetheless, technical problems and inappropriate attitudes of the prison officers throughout the execution of searches were a point of concern for the Court. It stated that:

> the prison officers did not provide the applicants with a copy of the form which set out the applicable procedure to be followed before the search was carried out, and which would have put them on notice of what to expect and permitted informed consent; they also overlooked the rule that the person to be searched should be no more than half-naked at any time and required the second applicant to strip totally and the first applicant to be in a practically equivalent state at one instant. It also appears that the first applicant was visible through a window in breach of paragraph 1.2.7 of the applicable procedure ... The Government have not contradicted her assertion in that respect, saying that she should have asked for the blinds to be drawn. It is however for the authorities, not the visitor, to ensure the proper procedure is followed.[545]

Within such a framework, it expressed its disapproval for the searches that:

> were [not] proportionate to that legitimate aim in the manner in which they were carried out. Where procedures are laid down for the proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary. They did not do so in this case.[546]

Whilst examining the State's positive obligations under Article 8 of the Convention, *A. v Norway*[547] is a unique case before the ECtHR providing analysis of the

[545] *Ibid*, para. 45.

[546] *Ibid*, para. 48.

[547] Application No. 28070/06, Judgement of 9 April 2009.

right of a former prisoner against defamation. The applicant had been convicted of 'murder, attempted murder and eight instances of assault'. After his eleven years of imprisonment, he had been placed under supervision at liberty (*fri sikring*) in May 1999. In May 2000, two girls of eight and ten years of age were raped and stabbed to death in the area where the applicant had also been living and working under supervision. The incident was extensively issued by the domestic media. Throughout investigation of the police, the applicant was also interrogated by the police. As one of the leading suspects, news about the applicant extensively took coverage in the media till the arrest of actual perpetrators in October 2000. Within this space of time, there were many detailed information about the applicant in the media such as "the name of his work place, a photograph of him, taken from the side, while entering a bus on his way to work and another photo, taken from behind, depicting him walking home at a location close to his home".[548] The applicant unsuccessfully alleged the invasion of his privacy by the national media before the domestic courts. When the applicant brought his case before the ECtHR, the respondent State submitted that the Norwegian Supreme Court had struck a fair balance between freedom of expression under Article 10 of the Convention and the right to protection of reputation under Article 8. According to the Government, heavy media coverage of the applicant was a result of the legitimate need for information of the general public.

By citing about its previous case law and Principle 8 in the Appendix to Recommendation Rec(2003)13 of the Committee of Ministers to Member States on the provision of information through media in relation to criminal proceedings[549] as well, the Court pointed out the role of the State's positive obligations for the protection of privacy of persons targeted in ongoing criminal proceedings.[550] While applying the related principles under Article 8, it clearly stated that the case in question was about "whether the respondent State had failed to fulfil its *positive obligation* under this provision to protect

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[548] *Ibid*, para. 48.

[549] Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies, https://wcd.coe.int/ViewDoc.jsp?id=51365 (20 May 2012). Principle 8, reads as follows: "The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle".

[550] *A. v Norway*, para. 65.

the applicant's honour and reputation as part of the right to respect for private life".[551] Looking closer to the media coverage about the applicant, the Court assessed, an ordinary reader could easily perceive him as the possible suspect of the crimes in question. It furthered its interpretation by stating that:

> [i]t is obvious that the crimes in question because of their particular nature and gravity were a matter of utmost concern to the national public generally and to the local public especially, as observed by the national courts ... Not only did the press have the task of imparting such information but the public also had a right to receive it. However, the Court does not consider that the serious public interest in the subject matter could constitute such a special ground as to justify the defamatory allegation against the applicant with the consequent harm done to him.[552]

Hence the Court did not find the proportionality test of the domestic courts reasonable. According to its unanimous view, the applicant's honour and reputation had been defamed by the intense and extensive media coverage.

The case of *Dickson v the United Kingdom*[553] is another case where the Grand Chamber (GC) has had the possibility of questioning the contours between negative and positive obligations of States on a European-wide controversial subject. The first one of the two applicants was serving his life sentence for murder in prison 'with a tariff of 15 years'. The second applicant was the wife of the former, and she had also been a former prisoner. She had already three children from an earlier relationship. While they were imprisoned, they met in 1999 by means of correspondence through a prison pen pal network. After the release of the second applicant, they got married in 2001. Though there was no possibility for the earliest release of the first applicant until 2009 by which time the second applicant would be 51. After marriage, they demanded for the use of facilities for artificial insemination since the second applicant would not be capable of childbirth at that age. Refusing their application, the Secretary of State replied his concerns, *inter alia,* that their relationship had not been tested in the outside world yet; that "any child which might be conceived would be without the presence of a father for an important part of his or her childhood years" and that "there would be legitimate public concern that the punitive and deterrent elements of your sentence of imprisonment were being circumvented if you were allowed to father a child by artificial insemination while in prison".[554] The applicants'

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[551] *Ibid*, para. 67. [Emphasis added]

[552] *Ibid*, para. 71.

[553] Application No. 44362/04, [GC] Judgement of 7 December 2007.

[554] *Ibid*, para. 13.

submissions before the domestic judicial authorities were also rejected definitively in 2004. Then they applied before the ECtHR by alleging that their refusal of permission constituted a violation of their right to private and family life under Article 8 of the Convention and also of their right to found a family under Article 12.

The Chamber judgement had pointed out that the restriction in question was not a blanket ban. But rather, it argued, the domestic authorities would consider upon the circumstances of each application for artificial insemination facilities "on the basis of domestic criteria considered to be neither arbitrary nor unreasonable and which related to the underlying legitimate aims of the Policy".[555] It also assessed the State's refusal to take steps to allow something *not* a failure to fulfil a positive obligation to secure the applicants' rights. By taking into consideration the careful and detailed arguments of the domestic authorities for their refusals (together with the wide margin of appreciation afforded to the national authorities), the Chamber judgement, four votes to three, did not find their refusal either unreasonable or disproportionate.

Then the case was referred to the Grand Chamber of the ECtHR. The applicants objected the arguments of the Secretary of State by stating that:

> It was unfair to state that their relationship had not been tested: the strength of any relationship (prisoner or other) was uncertain, there was no link between imprisonment and dissolution of relationships and, indeed, the first applicant's imprisonment had not weakened their relationship. In any event, this latter argument was circuitous as it could automatically negate any request for artificial insemination facilities from such long-term prisoners. It was equally unjust and circular to argue that the first applicant would be initially absent: long-term absence was a necessary starting point to apply for the requested facilities (artificial insemination being the only means of conception) but at the same time it meant artificial insemination could not be granted (given the consequent separation from any child conceived). It did not make sense that their marriage was accepted as rehabilitative and to be supported by the system but that the right to procreate was not.[556]

The Government reiterated its submission on the grounds of the Chamber judgement and claimed that the Policy of the national authorities was not disproportionate to the aims of 'the maintenance of public confidence in the penal system and the interests of any child conceived and, thus, those of society as a whole'.[557] Rejecting the existence of a blanket and unconvincing policy on the issue, it also maintained the consistency of the

[555] *Ibid*, paras. 13 and 42.

[556] *Ibid*, para. 55.

[557] *Ibid*, para. 58.

Policy with the Convention standards and provided statistical information about the domestic practice enabling individual assessment.[558]

While the Chamber considered that the submission of the applicant was to be analysed within the scope of positive obligations, the Grand Chamber:

> does 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 it is of the view that the core issue in the present case ... is precisely whether a fair balance was struck between the competing public and private interests involved.[559]

Then it dwelt on negating the arguments of the Government expressed before the Court for the justification of the Policy:[560]

> 74. Before the Grand Chamber they first relied on the suggestion that losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment.
>
> Whilst the inability to beget a child might be a consequence of imprisonment, it is not an inevitable one, it not being suggested that the grant of artificial insemination facilities would involve any security issues or impose any significant administrative or financial demands on the State.
>
> 75. Secondly, before the Grand Chamber the Government appeared to maintain, although did not emphasise, another justification for the Policy namely, that public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners guilty of certain serious offences to conceive children.
>
> The Court, as the Chamber, reiterates that there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion ... However, the Court could accept, as did the Chamber, that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. The Government also appeared to maintain that the restriction, of itself, contributed to the overall punitive objective of imprisonment. However, and while accepting that punishment remains one of the aims of imprisonment, the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence.
>
> 76. Thirdly, the Government argued that the absence of a parent for a long period would have a negative impact on any child conceived and, consequently, on society as a whole.
>
> The Court is prepared to accept as legitimate, for the purposes of the second paragraph of Article 8, that the authorities, when developing and applying the Policy, should concern themselves, as a matter of principle, with the welfare of any child: conception of a child was the very object of the exercise. Moreover, the State has a positive obligations to ensure the effective protection of children

[558] 28 applications for artificial insemination facilities had been made since 1996, 12 were not pursued, 1 was withdrawn as the relationship broke down, 1 applicant was released on parole and 2 were pending. Of the remaining 12 applications, 3 were granted and 9 were refused. (*Ibid*, para. 60)

[559] *Ibid*, para. 71.

[560] *Ibid*, paras. 73-76.

> (*L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, § 36; *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, § 115-116; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released.

In its latest analysis, the Grand Chamber sought to question whether there was a balance between the conflicting interests of the parties.[561] It pointed out that the Policy was not a part of primary legislation and was not adopted by the Parliament. Again there was no evidence that the Policy had been formed under after consideration of its impact upon Convention rights. Thus it did not have the capacity of weighing various competing interests on the issue. Despite not having assessed the Policy as a blanket ban, the Court assessed the domestic threshold so high against the applicants from the outset. Accordingly, it found, by twelve votes to five, a breach of Article 8.

Joint dissenting opinion of five judges criticised majority's decision burdening obligation upon the respondent State Party. They expressed their concern for the implicit definition of the Court describing artificial insemination facilities as a right in prisons while the Court's existing case law has not yet defined conjugal visits as a right for prisoners.[562] Without specifying their reasoning clearly, they stated that the ruling was contradictory and limiting the wide margin of appreciation of the States in this field. Such a broad definition, according to the dissentients, has also a potential for creating new questions for other sorts of couples such as 'a man in prison and the woman outside, a woman in prison and the man outside, a homosexual couple with one of the partners in prison and the other outside'. In summation, the five dissentient judges expressed their common view that the Policy was not an arbitrary one neglecting the welfare of the child which would be born.

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[561] *Ibid*, paras. 83-85.

[562] In the case of *Aliev v Ukraine* (Application No. 41220/98, Judgement of 29 April 2003) the Court, without expressing any clearly identified reason, disapproved submission of the prisoner for intimate contact with his wife. It considered that intimate visits 'for the present time be regarded as justified for the prevention of disorder and crime' within the meaning of Article 8 § 2. (*Ibid*, para. 188)

2.4.1.2 Freedom of Thought, Conscience and Religion (Article 9)

Provides that:

(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.

Despite the existence of a preliminary case law especially before the EComHR, there has not been any clear obligation burdened upon States regarding the provisions of Article 9.[563] Similar to the hands-off policy of the US courts, it is commented that the Commission had a suspicion that "prisoners were trying to obtain an unfair advantage by claiming that their Article 9 rights were being infringed and their claims should therefore be scrutinized strictly".[564] As Ovey and White point out it "was somewhat unsympathetic to complaints of interference with religious freedom by prisoners".[565] For example, while the applicant was complaining about the absence of the services of a Church of England priest in a German prison and demanding his transfer to another prison in the same country, the Commission found the existence of a German Protestant pastor in the prison sufficient for complying with Article 9.[566] The Commission also based its decision on the fact that the applicant was not successful in proving the German pastor was not meeting his religious needs. In another case, it did not find the imposition of an obligation on the State Party so as to provide books for the prisoner claiming their necessity for the exercise of his religion.[567] But it rather preferred to consider the complaint under Article 10 of the Convention and Article 2 of the First Protocol. Again in the same case, it also upheld the

[563] Van Zyl Smit and Snacken, p. 209.
[564] *Ibid*, pp. 209-210.
[565] Ovey & White, pp. 311-313.
[566] *X. v Federal Republic of Germany*, Application No. 2413/65, [EComHR] Decision of 16 December 1966. See also Van Zyl Smit and Snacken, pp. 207-211.
[567] *X. v Austria*, Application No. 1753/63, [EComHR] Decision of 15 February 1965.

decision of the prison authorities rejecting prisoner's having a prayer chain and growing a beard, grounding its decision upon prison order and discipline.[568] In another one, the Commission found the failure of the Buddhist applicant prisoner in proving the necessity of communication was an essential element in the exercise of his religion and hence found the application manifestly ill-founded.[569]

In the case of *Jakóbski v Poland*[570] the applicant was a Polish prisoner serving an eight-year prison sentence imposed by the Poznan Regional Court following his conviction for rape. As a Buddhist prisoner adhering strictly to the Mahayana Buddhist dietary rules, which is based upon refraining from eating meat, he requested to be served meat-free meals on account of his religious dietary requirements. Yet, being served a 'no pork' (PK diet) diet that included very little meat throughout a three months period based upon recommendation of the prison dermatologist, continuation of granting the PK diet was not approved on medical grounds and prisoner's demand for that was rejected by the Polish prison authorities despite his objection and threat to go on a hunger strike. His asking for initiation of criminal proceedings based upon allegations for the refusal of his meat-free diet demands by Goleniów Prison authorities was not also approved by the Goleniów District Prosecutor.

In a letter sent to the prison authorities by the Buddhist Mission in Poland, it is submitted that Mahayana Buddhists had a serious moral problem when they were forced to eat meat: "[a]ccording to the rules, a Mahayana Buddhist should avoid eating meat to cultivate compassion for all living beings".[571]

The claimant's applications to various domestic judicial and administrative mechanisms were also rejected on similar grounds. For example, the Szczecin Prisons Inspector decided that:

> [a] convict has a right to change religion while serving a prison sentence and to profit from freedom of religion if he/she feels like that. However, this does not mean that the prison authorities are obliged to provide an individual with special food in order to meet the specific requirements of his faith. The question of food related to religion or cultural background should not lead convicts to manipulate the prison authorities in order to secure personal advantages.[572]

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[568] *Ibid.*

[569] *X. v the United Kingdom*, Application No. 5442/72, [EComHR] Decision of 20 December 1974.

[570] Application No. 18429/06, Judgement of 7 December 2010.

[571] *Ibid*, para. 10.

[572] *Ibid*, para. 17.

Jakóbski alleged before the ECtHR that the State was *obliged to respect* and support the individual's freedom to practice his religion. According to him, the practice of prison authorities had infringed his right to manifest his religion through observance of the rules of the Buddhist religion.

Relying on resources found in the Great Polish Encyclopaedia and Wikipedia, the Polish Government contended that Buddhism in general and the strict Mahayana school in particular did not prohibit eating meat and required vegetarianism, encouraging only the latter for those adhering the Mahayana school.[573] The Government also furthered that accepting the existence of "an obligation on the State authorities to provide each detainee with special food in accordance with his or her beliefs would be too rigorous and would entail too many difficulties of a technical and financial nature".[574] They also claimed that the diet that the applicant had been granted 'roughly corresponded to his religious requirements'.[575] According to them, considering the presence of nearly 1,200 detainees in Goleniów Prison, an obligation upon the prison authorities for the preparation of special meals for only one person would likely to be accepted as an excessive one.

Referring to its previous case law in para. 45 of the judgement, the Court noted that "observing dietary rules can be considered a direct expression of beliefs in practice in the sense of Article 9".[576] Without specifically deciding on whether such decisions are taken as a result of a religious duty, the Court notes that "the applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable".[577] Thus the allegation raised upon the refusal of the prison authorities to provide him with a vegetarian diet regarded as falling within the ambit of Article 9 of the Convention.

Despite applicant's submission that "the refusal to provide him with meat-free meals amounted to an interference with his rights guaranteed by Article 9 of the Convention", the Court, by taking into account the circumstances of the applicant's case and in particular the nature of his complaint, declared that the issue was more appropriate to be examined from the standpoint of the respondent State's *positive obligations:*

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[573] *Ibid*, paras. 39-40.

[574] *Ibid*, para. 41.

[575] *Ibid*, para. 14.

[576] *Ibid*, para. 51.

[577] *Ibid.*

> In this respect the Court reiterates that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 9 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly 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 in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 9, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance.[578]

In line with the arguments of the Government, the Court also stresses the importance of financial cost for making special arrangements for one prisoner and its indirect implication on the quality of treatment of other inmates. Accordingly, it considers that the success of the State is to be evaluated "whether the State can be said to have struck a fair balance between the interests of the institution, other prisoners and the particular interests of the applicant".[579] Considering the fact that the claimant's demand simply based upon having a vegetarian diet, excluding the meat products, and not demanding a special preparation, prescription or service requiring any special products, the Court declared its dissatisfaction that serving a vegetarian diet to the applicant would not have entailed "any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners".[580] It also pointed out the revised EPR, recommending that prisoners should be provided with food that takes into account their religion. Despite having regard to the margin of appreciation left to the respondent State, the Court unanimously has found that the authorities failed to strike a fair balance between the interests of the prison authorities and those of the applicant. Consequently there was a breach of Article 9 of the Convention.

In *Kuznetsov v Ukraine* and *Poltoratskiy v Ukraine*, which were inherently similar cases regarding the allegations, *inter alia,* based upon the violation of Article 9, the ECtHR also found violation. Both of the applicants of the two cases were prisoners sentenced to capital punishment because of the murder of four persons. They claimed that their denial of visit from a priest was a violation of Article 9. By taking into account the oral evidence and documents available, the Court accepted the findings of the Commission that the applicants were not able to participate in the weekly religious services available to other prisoners and

[578] *Ibid*, para. 47.

[579] *Ibid*, para. 50.

[580] *Ibid*, para. 52.

that they were not visited by a priest until 26 December 1998. Although allegations raised could easily be seen within the scope of positive obligations of States (providing regular visits by a priest), the Court preferred to classify them as an interference within the meaning of negative obligations and considered that this situation amounted to an interference with the exercise of the applicant's ‘freedom to manifest his religion or belief’. Even though such an interference could be considered reasonable if it had been ‘prescribed by law’, serving one or more of the legitimate aims in paragraph 2 and was ‘necessary in a democratic society’ to achieve those aims. Nonetheless, the relevant Ukrainian legislation was an ‘Instruction’ issued by the Ministry of Justice, the Prosecutor General and the Supreme Court. It was genuinely articulated for organising detention conditions of persons sentenced to death and operated in secret. Regular visits to inmates by chaplains were not possible since the Instruction did not allow such visits.

Within such a context, the Court found the violation of Article 9 para. 2 of the Convention since the interference with the applicant's right to manifest his religion or belief was not ‘in accordance with the law’.

2.4.1.3 Freedom of Expression (Article 10)

Provides that

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health and morals, for the protection of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Having seen it primarily as the right ‘to freedom to receive information’, the Court evaluates Article 10 as a realm of negative obligations, basically aiming at prohibition of

State interference with a person from receiving information.[581] Nonetheless, apart from some exceptional cases such as one necessitating dissemination of official information concerning industrial pollution[582] or one requiring governmental bodies ‘to take proactive security measures to safeguard journalists and media organisations from unlawful violence’,[583] the scope of the case law of the Court on positive obligations of States Parties remained highly limited.[584] Within such a context, Mowbray states that:

> [t]he Court has been reluctant to recognise the existence, under this Article [10], of a positive obligation upon states to provide information to persons. Applicants have sought to persuade the Court to find such an obligation in different contexts, but so far most judges have not been willing to uphold those claims.[585]

Although it can be hypothetically considered that inherent structural problems of the European penitentiary systems may cause to raise a claim that allegations on human rights violations taking place in the European prisons do tend to focus on some specific articles of the Convention. Looking closer, on the contrary, provides that applications on the alleged violations upon the incidents taking place in the European correctional systems have not focused on some specific articles of the Convention but rather demanded the violation of the Convention rights in general. Nonetheless, intrinsic interpretation methodology of the Court has given way for widespread analysis of some certain rights such as Articles 2, 3, 5, and 8 of the Convention. As in many cases before the Court, the applicant prisoners in the case of *Silver and Others v the United Kingdom*[586] demanded the violation of Article 10. However, while alleging the violation of their right to correspondence, the claimants also submitted that the control of their mail by the prison authorities constituted a breach of their right to freedom of expression under the article. Nonetheless, concurring with the argumentation of the EComHR, the Court concluded that the right to free expression in the context of correspondence was guaranteed by Article 8 of the Convention and did not look for a further examination of the matter under the light of Article 10.

[581] *Handyside v the United Kingdom*, Application No. 5493/72, [Plenary] Judgement of 7 December 1976.

[582] *Guerra v Italy*, Application No. 14967/89, Judgement of 19 February 1998.

[583] *Özgür Gündem v Turkey*, Application No. 23144/93, Judgement of 16 March 2000.

[584] Mowbray, pp. 191-195.

[585] *Ibid*, p. 192.

[586] *Supra* note 528.

Again, for example, in *Ždanoka v Latvia*[587] the Court ruled that special circumstances of the case were necessitating taking Article 3 of Protocol No. 1 as the *lex specialis.*[588] Accordingly, it could not find any argument requiring a separate examination of the applicant's complaints about her inability to stand for election from the point of view of Article 10.

In cases where the Court found a violation of Article 10, it took the issue from the standpoint of negative obligations: For example, in the case of *Herczegfalvy v Austria*,[589] the applicant was demanding to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations, *inter alia,* under Article 10 of the Convention. While he was a prisoner, the psychiatrists diagnosed him with *paranoia querulans*, which was equivalent to a mental illness and meant that he was not responsible for his acts. Regarding this, Mr Herczegfalvy was sent to the Vienna psychiatric hospital and received medical treatment and psycho-therapy till his release on 28 November 1984. During his stay there, he claimed that he had been deprived of reading matter, radio and television for long periods during his detention on grounds of disciplinary purposes only and maintained before the ECtHR that the restrictions on his access to information had breached Article 10. Despite the Government's arguments that the measures were based on section 51 (1) of the Hospitals Law and "had been justified for therapeutic reasons, and had lasted for a short time only on each occasion", the Court, arguing that section 51 (1) of that law could not be regarded as true "law" within the meaning of paragraph 2 of Article 8, and *inter alia,* found the violation of Article 10.[590] Despite the fact that such an interference with the right in question could also be assessed as a deficiency of the State authorities within scope of positive obligation to fulfil the necessary conditions of imprisonment by enacting laws, the Court did not give credit to such an argumentation throughout its judicial analysis of the case in question.

Again in the case of *Yankov v Bulgaria,*[591] the Court preferred to take the allegation into consideration from the standpoint of negative obligations of States. The applicant, who was a detainee at the time, claimed that there was an unjustified interference with his right to freedom of expression because of the confiscation of his manuscript. Alleging that the

[587] Application No. 58278/00, Judgement of 16 March 2006.

[588] Protocol to the Convention for the Protection of Human Rights an Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20.III.1952, http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm (12 December 2012).

[589] Application No. 10533/83, Judgement of 24 September 1992.

[590] *Ibid*, paras. 39 and 91.

[591] Application No. 39084/97, Judgement of 11 December 2003.

manuscript was denigrating the judicial and penitentiary systems and the Government as well, the prison authorities refused its transmission to the applicant's lawyer. While stating that the manuscript was concerning the criminal proceedings against him, the applicant also demanded that he had been 'entitled to transmit uncensored correspondence to his lawyer'.[592] The Government claimed that the material of the manuscript was unrelated to the criminal proceedings against the applicant and accordingly demanded its transmission to the lawyer without prior permission of the authorities was a violation of the relevant prison rules. In any event, according to the Government, the content of the manuscript was containing offensive and defamatory statements, and accordingly "the measures against the applicant had been justified under Article 10 § 2 of the Convention to protect the reputation of others and to maintain the authority of the judiciary".[593] While the applicant was free to publish his manuscript as a book after his release from the prison, the government argued, he was not entitled to transmit or publish his views at a time when he was under detention.

Having observed that the punishment of Yankov by the prison administration with a seven days' confinement due to his 'offensive and defamatory statements against police officers, investigators, judges, prosecutors and state institutions', the Court decided on the existence of an interference with his right to freedom of expression and then furthered its analysis by looking for whether it was prescribed by law and necessary in a democratic society in pursuance of a legitimate aim.[594] While doing this, it pointed out that:

> In a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. Limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive, abusive or defamatory attacks when on duty.[595]

[592] *Ibid*, para. 124.

[593] *Ibid*, para. 125.

[594] *Ibid*, paras. 126-145.

[595] *Ibid*, para. 129, (iv).

Despite having seen some remarks of the applicant insulting,[596] the Court assesses the manuscript in a 'language and style characteristic of personal memoirs or a similar literary form'. Its narrative form is seen by the Court as a one that the applicant was describing moments of his life as a detainee and explaining his opinion about the criminal proceedings against him by 'taking a critical stand as regards allegedly unlawful acts by State officials'.[597] The Court also expresses its confusion by stating that:

> the applicant was punished for having written down his own thoughts in a private manuscript which, apparently, he had not shown to anyone at the time it was seized. He had neither "uttered" nor "disseminated" any offensive or defamatory statements. In particular, there was no allegation that the applicant had circulated the text among the other detainees.[598]

Regarding the necessity of public confidence that civil servants should enjoy 'in conditions free of undue perturbation', the Court did not accept the existence of such a threat arising from the expressions in the manuscript. Consequently it was unanimous in holding that the interference with the applicant's freedom of expression was not necessary in a democratic society within the meaning of Article 10 § 2 of the Convention.

Despite the Court did not use the terminology of positive obligations in the case of *Yankov v Bulgaria*, it can be extracted from the ruling that the European judicial and penitentiary systems have an obligation to respect 'criticisms expressed by prisoners'.[599]

2.4.1.4 Freedom from Discrimination (Article 14)

Provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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[596] Such as 'well-fed idlers' and 'simple villagers' (about the prison warders), 'a provincial parvenu' (about a police officer whose name was also stated) and 'powerful unscrupulous people' (apparently about prosecutors and investigators generally).

[597] *Ibid*, para. 137.

[598] *Ibid*, para. 139.

[599] Van Zyl Smit and Snacken, p. 249.

Since its very early case law,[600] the Court deliberately declared that Article 14 does not have an independent one but is to be read in conjunction with other articles set forth in the Convention. Harris *et al*. basically define it as a 'parasitic' provision since it 'only complements' those other substantive provisions.[601] For example, in the case of *I. v the United Kingdom*[602] the Grand Chamber accepts the importance of Article 14 in meeting the applicant's complaints. However it also assesses that examinations performed under other substantive provisions of the Convention render another examination unnecessary. As the Court puts it that:

> the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.[603]

Even though it can be hypothetically extracted from the wording of the Article that States may have positive obligations to take steps for the prevention of discrimination falling within the scope of Article 14, Harris *et al*. claim that "[t]here is no express positive obligation under Article 14 so any obligation this kind must be implied".[604] Indeed, there has been a specific realm of positive obligations that the Convention organs have already emphasized the obligations of the States Parties to take necessary action for the protection of persons against public and private acts of discrimination and also to investigate allegations of racially-motivated crimes.[605] Within this vein, the Court reiterates its general standpoint in the case of *Jakóbski v Poland* that:

> Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and its Protocols, since it protects individuals placed in similar

[600] *Belgian Linguistic Case* (No. 2), *supra* note 485. And also see *Haas v the Netherlands*, Application No. 36983/97, Judgement of 13 January 2004, para. 41.

[601] Harris *et al*., pp. 577-578.

[602] *I. v the United Kingdom*, Application No. 25680/94, [GC] Judgement of 11 July 2002.

[603] *Ibid*, para. 88.

[604] Harris *et al*., p. 610.

[605] *Ibid*, pp. 610-611. Mowbray, pp. 202-204. For example see *Thlimmenos v Greece* (Application No. 34369/97, Judgement of 6 April 2000) that the Court ruled that refusing to wear military uniform on religious or philosophical grounds throughout his period of military service and having a criminal conviction on that respect should not have been taken as a ground for the claimant's exclusion from the accountancy profession.

> situations from any discrimination in the enjoyment of the rights set forth in those other provisions. Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 89, ECHR 1999-III, [...].[606]

In the case of *Kafkaris v Cyprus*,[607] the applicant was serving his life sentence on three counts of premeditated murder under the conviction of Limassol Assize Court on 10 March 1989. Yet there was a legal confusion, as had already been noted by the sentencing court of Kafkaris, on the execution of the life sentence whether it entailed imprisonment of the convicted person for the rest of his life or just a period for a period of twenty years as provided by the Prison (General) Regulations of 1981 and the Prison (General) (Amending) Regulations of 1987. If the latter approach was applicable then another issue would arise upon whether the sentences should be imposed consecutively or concurrently. There was an also executive and administrative confusion as follows:

> When the applicant was admitted to prison to serve his sentence, he was given written notice by the prison authorities that the date set for his release was 16 July 2002. In particular, he was given a F5 Form titled "Personal File of Convict", "I.D. no. 7176." On the form, under the heading "Sentence", it was marked "Life" and then "Twenty Years"; under the heading "Period" it was marked "From 17 July 1987 to 16 July 2007" and under the heading "Expiry" it was noted "Ordinary Remission" 16 July 2002. The applicant's release was conditional upon his good conduct and industry during detention. Following the commission of a disciplinary offence on 6 November 1989, his release was postponed to 2 November 2002.[608]

As a response to a letter of the applicant for pardon or the suspension of the remainder of his sentence by the President of the Republic, the Attorney-General refused the demand by reasoning that suspension or commutation of his sentence was not justified under the related Article of the Constitution.[609] Applicant's appeal before the Supreme Court was also dismissed. Under such a framework, the applicant pointed out the existence of a discriminatory treatment *vis-à-vis* life prisoners and other prisoners as well while:

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[606] *X. v the United Kingdom*, *supra* note 569, para. 58.

[607] *Kafkaris v Cyprus*, Application No. 21906/04, [GC] Judgement of 12 February 2008.

[608] *Ibid*, para. 16.

[609] Though the President is not bound by the advice or recommendation of the Attorney General. (*Ibid*, para. 38)

> most other life prisoners had been released having served their twenty-year sentence. In this connection he noted that while these prisoners had been released by way of commutation of their sentences by the President of the Republic under Article 53 (4) of the Constitution, for reasons unknown to him, he had been subjected to discriminatory treatment and kept in prison. Furthermore, he noted that in addition to the nine life prisoners released in 1993, another four life prisoners had been released between 1997 and 2005 on the basis of Article 53 (4).[610]

The respondent Government opposed the allegations of the applicant, arguing that the other prisoners had been released "on the basis that it had been announced to them that their sentences would be twenty years' imprisonment".[611] However, the Government stated that the nature of the judgement sentencing Kafkaris was different from the others by referencing to the decision of the Assize Court demanding the 'proper interpretation of a life sentence and the question of whether the Regulations had been unconstitutional'.[612]

Having pointed out the existence of the discretionary powers of the President of the Republic and arguing the nature of the serious offence committed as well, the Grand Chamber, by sixteen votes to one, held that there was no violation of Article 14. It emphasized the fact that other life prisoners were essentially released on a case-to-case basis by the President in the exercise of his discretionary Constitutional powers. Hence, regarding that fact and by not finding the violation of Article 14 of the Convention, the Court did not burden an obligation on the State Party justifying the alleged violation of the applicant's right to be treated equally.[613]

Another important case regarding the applicability of Article 14 upon prisoners' rights is *Stummer v Austria*.[614] The applicant prisoner had spent twenty-eight years of his life in prison, working for lengthy periods in the prison kitchen or the prison bakery. He then demanded the countenance of his working for twenty-eight years in prison as insurance months for the purpose of having his pension rights. After the refusal of his demand in the domestic system, Stummer complained before the Court on grounds of discrimination since he was not affiliated to the old-age pension system on account of his status as a prisoner.

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[610] *Ibid*, para. 154.

[611] *Ibid*, para. 156.

[612] *Ibid*.

[613] In his partly dissenting [and highly critical] opinion, Judge Borrego Borrego assesses the Grand Chamber's ruling as a one from ivory tower and far from reality as well. Basing its striking analysis on the applicant's refusal to confess naming the person who hired him, he submits that there was an intentional discriminatory treatment against the applicant "because he [was] unable or unwilling to identify the powerful citizen behind this horrific murder".

[614] Application No. 37452/02, [GC] Judgement of 7 July 2011.

Having assessed being a prisoner as an aspect of personal status within the ambit of Article 14, the Grand Chamber maintains that:

> prison work differs from the work performed by ordinary employees in many aspects. It serves the primary aim of rehabilitation and resocialisation. Working hours, remuneration and the use of part of that remuneration as a maintenance contribution reflect the particular prison context. Moreover, in the Austrian system prisoners' obligation to work is matched by the prison authorities' obligation to provide them with appropriate work. Indeed, that situation is far removed from a regular employer-employee relationship. It could be argued that consequently, the applicant as a working prisoner was not in a relevantly similar situation to ordinary employees.[615]

Regarding also the fact that health and accident care of the working prisoners has already been provided by the Austrian authorities, the Court assesses that "a prisoner who has already reached pensionable age is in a different situation from a pensioner who is not imprisoned, as a prisoner's livelihood is provided for by the prison authorities".[616] Then the Court in its analysis looks for the existence of a legitimate aim within the ambit of the difference in treatment between working prisoners and ordinary employees. And having taken into consideration of the cautious wording used in the 2006 EPR, it has also given credit to implications of the Government in preserving 'the overall consistency within the social security system'.[617] It has again assessed the existing tendency in European societies 'moving towards the affiliation of prisoners to their social security systems in general and to their old-age pension systems in particular' and points out to the fact that 'at the material time there was no common ground regarding the affiliation of working prisoners to domestic social security systems'.[618] Furthermore, the Court has also taken into consideration of the fact that:

> the applicant, although not entitled to an old-age pension, was not left without social cover. Following his release from prison he received unemployment benefits and subsequently emergency relief payments, to which he was entitled on account of having been covered by the Unemployment Insurance Act as a working prisoner. According to his own submissions, the applicant currently still receives emergency relief payments complemented by social assistance in the form of a housing allowance. His monthly income currently amounts to approximately EUR 720 and thus almost

[615] *Ibid*, para. 95.

[616] *Ibid*.

[617] *Ibid*, para. 97. Rule 26.17 of the 2006 EPR reads as follows: "[a]s far as possible, prisoners who work shall be included in national social security systems."

[618] *Ibid*, paras. 105-107.

> reaches the level of a minimum pension, which is currently fixed at approximately EUR 780 for a single person.[619]

Accordingly, the Court does consider that the respondent State, by not having affiliated working prisoners to the old-age pension system to date, has not exceeded the margin of appreciation afforded to it and does not find, by ten votes to seven, the violation of Article 14 of the Convention.

Nonetheless a strong joint dissenting opinion of seven judges does claim that the applicant was "discriminated against in that he was not affiliated to the old-age pension system on account of his status as a prisoner". The minority opinion takes the issue from various perspectives and criticizes the stance of the majority by claiming that:

> the judgment begins with an emphatic reminder of the Court's well-established case-law to the effect that "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction"... Nevertheless, in applying this approach to the present case, the majority head off in a different direction.[620]

By pointing out the evolving trend in the Council of Europe's Member States, the minority view stresses the existence of a gradually reducing margin of appreciation of States within the realm of the affiliation of working prisoners to national social security systems. Again it also criticizes the stance of the Austrian domestic courts for their *automatic* exclusion of working prisoners from the compulsory old-age pension system. Withholding of Austrian authorities some 75% of a working prisoner's enumeration as a maintenance contribution is also seen as an excessive policy, in a sense condemning prisoners by making them unable to pay sufficient contributions to the old-age pension system. Noting the sociological existence of a growing older prison population, the minority opinion holds the view that discussion before the Grand Chamber (and the Austrian legislature as well) has not analysed the issue of working prisoners into the national social systems sufficiently. Furthermore, it differs the status of emergency relief payments from that of an old-age pension granted on the basis of the number of years worked and the contributions paid. Accordingly the Court points out that "[t]he former

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[619] *Ibid*, para. 108.

[620] Dissenting Opinion, para. 4.

constitute assistance, whereas the latter is a right. *The difference is significant in terms of respect for human dignity".*[621]

It is a reality that the judicial terminology used by the Court in the case of *Stummer v Austria* does not directly consist of the classical terms of the negative obligations case law such as 'interference'. Again it does not expressly mention about the positive obligations of States Parties on the issue. Yet the stance of the minority in *Stummer* could be assessed as a one pointing out the possibility of prospective obligations to be undertaken by the States Parties in the future. Again it seems having a potential to create a judicial discussion topic analysing whether insufficient regulations of States on the social rights of prisoners are to be seen as a distinct realm of penal and social policies.

2.4.1.5 Right to Marry (Article 12)

Provides that:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Having seen marriage as a result of private relation between two parties, Article 12 is basically seen as a right that States Parties do not have any obligation to fulfil it. Unlike rights enshrined in Articles 8-11, the wording of Article 12 does not include limitations to be practiced in a democratic society. However, in certain circumstances, there can be problems for the enjoyment of the right and State Parties may burden obligations in order to eliminate impediments on the way. In two cases involving prisoners in the UK, the EComHR has given way for the introduction of legislation to allow prisoners to be married in prison.[622] While the British Marriage Act of 1949 was not consisting of any specific regulation preventing prisoners from marrying, it did require marriages to be celebrated only at certain places.[623] Since prison authorities would not allow the applicant for temporary release to be married outside the prison, prisoner's right to marry was

[621] Emphasis is original.

[622] *Hamer v the United Kingdom*, Application No. 7114/75, [EComHR] Decision of 13 December 1979; and *Draper v the United Kingdom*, Application No. 8186/74, [EComHR] Decision of 10 July 1980.

[623] *Ibid*, paras. 16-18.

practically delayed. Likewise in *Draper v the United Kingdom*, the prisoner was serving his life service and there was no foreseeable date for his release. Accordingly, his right to marry was blocked unintentionally. Having seen the existing situation in the UK as an interference with the substance of the right to marry, the Commission found the violation of Article 12 in each case and pointed out the obligation of the State for re-regulating its legislation on licence. Considering 'the imposition by the State of any substantial period of delay on the exercise of the right' as an 'injury to its substance', the EComHR stated as follows:

> [n]o particular difficulties are involved in allowing the marriage of prisoners. In addition there is no evidence before the Commission to suggest that, as a general proposition, it is in any way harmful to the public interest to allow the marriage of prisoners. Marriage may, on the contrary, be a stabilizing and rehabilitative influence.[624]

In the cases of *I. v the United Kingdom*[625] and of *Christine Goodwin v the United Kingdom*,[626] the Grand Chamber overviewed existing positions of transsexual persons within the meaning of the Convention. Albeit the claimants were not inmates, it used, *inter alia,* transsexual prisoners' status in order to get a conclusion for the submissions of the applicants in question. In each of the cases, which were essentially based upon the same allegations, the claimants complained that although they currently enjoyed a full physical relationship with a man, they and their partners could not marry because of the law treated them as men. Complaining about the difficulties in their social lives,[627] they claimed that the restriction in the UK law on a post-operative transsexual's marrying a male was a violation of Article 12 of the Convention and they should be treated as being of their post-operative sex for the purposes of the right to marry.

Referring to the Court's previous case law, the UK Government maintained that "neither Article 12 nor Article 8 of the Convention required a State to permit a transsexual to marry a person of his or her original sex".[628] They also stated that any change in this

[624] *Ibid*, para. 72.

[625] *I. v the United Kingdom*, *supra* note 602.

[626] *Christine Goodwin v the United Kingdom*, *supra* note 449.

[627] For example, I. alleged that the domestic prison rules would permit her to be sent to a male prison. They would also permit her strip search in the presence of a male person. Her attempt for an employment in a prison was also hindered by the existence of a 'common practice of requiring an individual to show her birth certificate in the most mundane contexts'. (*I. v the United Kingdom*, paras. 44-45)

[628] *Christine Goodwin v the United Kingdom*, para. 96.

important and sensitive area was to be accepted within the margin of appreciation and be left to the discretion of the domestic authorities.

In its preliminary considerations, the Grand Chamber mentioned that the issue in the instant case could be analysed whether the respondent State had failed to comply with a *positive obligation to ensure* the right of the applicant and *to respect* for her private life, in particular through the lack of legal recognition given to her gender re-assignment.[629] Reminding its previous case law on the issue, it stated that:

> there was no positive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties. ... It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area.[630]

Some points of the Report of the Working Group on Transsexual People (Home Office April 2000) was also expressed in the ruling that: i) Post-operative transsexuals in the UK *where possible* are allocated to an establishment for prisoners of their new gender; ii) Post-operative male to female transsexuals will be treated as women for the purposes of searches and searched only by women; and iii) A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status.[631]

In its ruling on the alleged violation of Article 12, the Grand Chamber assesses that although there is a certain margin of appreciation to the Contracting States on the issue, the domestic limitations introduced must not restrict or impair the very essence of the right in question. Considering the major social changes in the institution of marriage and dramatic changes brought about by developments in medicine and science in the field of transsexuality since the adoption of the Convention,[632] the Grand Chamber holds that the

[629] *Ibid,* paras. 71-75.

[630] *Ibid*, para. 53.

[631] *Ibid*, paras. 32-34.

[632] The Court also noted that, unlike the wording of Article 12 of the Convention, Article 9 of the recently adopted Charter of Fundamental Rights of the European Union (*supra* note 471), which regulates the right to marry and found a family, do not have any reference to sexes in its wording.

very essence of the applicant's right to marry has been infringed in that she has been deprived of the right to marry with the man that she is already in relationship. Leaving the space entirely to the Contracting States will, in the eyes of the Court, will be extending the margin of appreciation so far that can hinder the effective enjoyment of the right to marry.[633] Despite its emphasis that the issue is to be evaluated within the scope of positive obligations,[634] the Grand Chamber does not follow its preliminary evaluation and finds the violation of Article 12 essentially in line with the terminology of negative obligations and interferences of State authorities.

2.4.1.6 General Conclusions

In Section 2.4.1, it is provided that the basis for positive obligations enforced by the Court under Articles 8, 9, 10, 12 and 14 is the duty upon States to 'respect' the rights enshrined in the Convention. In order to effectively safeguard the enjoyment of those rights, the Court generally uses its fair balance test as a criterion searching whether a specific positive obligation existed. Throughout this process, it is observed that it also devotes particular attention to the margin of appreciation granted to States Parties on a case by case basis.

The Court has recognised the existence of positive obligations to respect under Article 8 in a wide range of cases submitted by prisoners, ranging from the stringent limitations on the frequency of family visits of prisoners to controlling correspondence of prisoners. In this vein, delimiting the frequency of family visits to one per month is an excessive measure if there is not sufficient flexibility in the domestic system for determining upon the appropriateness of the ongoing limitation in each individual case (*István Gábor Kovács v Hungary)*. Eliminating unnecessary interference with the right to correspondence of prisoners with their legal representatives is a positive obligation falling within the ambit of Article 8 (*A.B. v The Netherlands*). Furthermore, securing distribution of copies of official prison documents to detainees is another obligation if there is no justified reason capable of delimiting the authorities (*Uslu v Turkey*). Again giving permission to prisoners to enjoy the right of attendance to the funeral of their parents is also an obligation within the meaning of Article 8 if there is not any justified security concern (*Ploski v Poland)*. Domestic authorities' inactivity and failure to ensure duly psychiatric treatment of detainees imply violation of the right in question by not taking

[633] *I. v the United Kingdom*, para. 83.

[634] *Ibid,* Preliminary considerations, paras. 51-55.

reasonable preventive measures securing the applicants from the possibility of being exposed to violence and threats (*E.S. and Others v Slovakia)*. By expressly using positive obligations terminology in *A. v Croatia*, the Court holds that incapacity of the domestic system in incarcerating the assailant is a failure of the national authorities to organise their legal systems in complying with their positive obligations under the Convention. In addition to the routine body and strip searches of inmates, strip searches of visitors are also to be performed in an appropriate way of conduct with which the domestic authorities duly designate and conduct (*Wainwright v the United Kingdom*). Falling within the scope of the right to respect for private life, failure of States Parties in protecting former prisoners' honour and reputation against defamation also means a failure in fulfilling positive obligations for the protection of privacy of persons targeted in ongoing extraneous criminal proceedings (*A. v Norway).* Although indemnifying from making an express reference to the nature of the obligation in question, the Grand Chamber in *Dickson v the United Kingdom* prefers to apply a fair balance test between the conflicting interests of the parties and adjudicates that that the respondent Government has failed to guarantee the nature and quality of the related domestic legislation. By declaring that the existing domestic legislation did not meet the expected capacity of weighing various competing interests on the issue, the Court implies the necessity of fulfilling a positive obligation of States Parties by means of articulating their domestic legislation on the use of artificial insemination facilities for prisoners.

In other articles of the Convention gathered under the title 'Positive Obligations to Respect', the number of cases expounded by the Court is highly limited. While the applicant in *Jakóbski v Poland* was complaining about the existence of an interference with his rights guaranteed under Article 9 of the Convention, the Court held that the claim of the prisoner was more appropriate to be examined from the standpoint of the respondent State's positive obligations. Considering the arguments of the parties, the Court comes to the conclusion that serving a vegetarian diet to the prisoner will not have a potential to create any disruption or extra cost to the prison administration. In line with the argumentation of the applicant, the Court is on the opinion that States are under an obligation to respect prisoners' freedom to practice their religion.

Adjudicating that deprivation of a detainee from reading matter, radio and television for long periods during his stay in a psychiatric hospital *was* an unjustified interference with freedom of expression under the meaning of Article 10, the Court did not provide any evidence in *Herczegfalvy v Austria* that there was a failure of domestic

authorities in meeting their positive obligations despite the existence of 'very vaguely worded provisions not specifying the scope or conditions of exercise of the discretionary power' in the related domestic legislation. Again in *Yankov v Bulgaria,* it can be implicitly extracted from the ruling of the Court that the European judicial and penitentiary systems have a positive obligation to respect 'criticisms expressed by prisoners'.

As for the prisoner cases related to freedom from discrimination under Article 14, there is no explicit reference to positive obligations of States by the Court. Furthermore, in two prisoner cases (*Kafkaris v Cyprus* and *Stummer v Austria)* the Court specifically scrutinised the existence of an alleged violation of Article 14, but did not find its violation.

As regards the right to marry under Article 12 of the Convention, there is again limited number of cases implying positive obligations of States. For example in *Draper v the United Kingdom*, the EComHR pointed out the actual and potential existence of positive State obligations for reregulating the domestic legislation leading to a substantial period of delay on the exercise of the right in question. To conclude, it could easily be maintained that the Court was highly cautious when developing and applying positive obligations terminology within this exclusive realm of rights and positive obligations to respect.

2.4.2 Positive Obligations to Protect

2.4.2.1 Right to Life (Article 2)

Provides that:

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) 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:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Together with Article 3, right to life is one of the two fundamental rights enshrined in the Convention. The two fundamental rights' nature is recognised by the fact that they cannot be derogated from anytime including the time of war or other public emergency.[635] In addition to the negative obligation not to take life, Article 2 burdens positive obligations upon States Parties to protect the right to life. Under the practicality and effectiveness paradigm, its interpretation by the Court formulates positive obligations enforcing them "to take appropriate steps to safeguard the lives of those within their jurisdiction".[636] As Ovey and White note:

> the State's obligation to safeguard life consists of three main aspects: the duty to refrain, by its agents, from unlawful killing; the duty to investigate suspicious deaths; and, in certain circumstances, a positive obligation to take steps to prevent the avoidable loss of life.[637]

It is clear that while the first limb of their assessment connotes negative obligations of States, the second and third limbs directly fall within the ambit of positive obligations.

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[635] See Harris *et al*., pp. 617-645. Paragraph 2 of Article 15 of the Convention reads that "No derogation from Article 2 ... or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision". This clause is also valid even in the event of a public emergency threatening the life of the nation.

[636] *L.C.B. v the United Kingdom*, Application No. 23413/94, Judgement of 9 June 1998, para. 36. For an overview of the analysis of Court's case law under Article 2 see Ovey & White, pp. 56-72; and Mowbray, pp. 7-41.

[637] Ovey & White, p. 56. Harris *et al*., pp. 37-67.

A unanimous Chamber judgement in *Paul and Audrey Edwards v the United Kingdom*[638] touched upon various aspects the issue. The applicants were the parents of Christopher Edwards. Prior to his death, he had a mental history of tentative schizophrenia and was having medication till his leave from his parents in 1994. In that year, when he was 30, he had been remanded in custody due to his inappropriate behaviours against women in the street. Then under the jurisdiction by the magistrates, he was transferred to Chelmsford Prison and placed in a cell. Given his excessive attitudes especially against women, there were some attempts by the police, and other social and health care officials for diagnosing his aggressiveness. Throughout the process, his mother had also tried to inform the authorities about the mental situation of her son. Meanwhile, another detainee, Richard Linford, was also arrested due to assaulting his friend and her neighbour. Although there were some tentative diagnoses by the police officers that he had been mentally ill, in the last analysis, he was transferred to Chelmsford Prison too. And, after a certain period of screening by a member of health care service in the prison, he was also transferred to the cell of Christopher Edwards. A few hours later, after their unity in the same cell, Linford killed the applicant's son in a violent attack. Then he was transferred to Rampton Special Hospital and pleaded guilty to the manslaughter of Christopher Edwards by reason of diminished responsibility. Richard Linford was, at the material time, still at hospital, diagnosed with paranoid schizophrenia.

A domestic inquiry commission was established for investigating the incident. The report of the inquiry revealed a number of shortcomings of the British justice system including 'poor record-keeping, inadequate communication and limited inter-agency cooperation, and a number of missed opportunities to prevent the death of Christopher Edwards'.[639]

The applicants demanded the violation of the positive obligations imposed on the domestic authorities to protect the life of their son before the ECtHR. By referring to the findings of the inquiry's report, they maintained that:

> although the police, the Crown Prosecution Service and the magistrates were all aware that [Richard Linford] was dangerous and prone to violence, no formal warning was passed on to the prison, nor was any information made available about his past criminal or medical records. In addition, the positive obligation imposed by Article 2 rests on all public authorities, not only the prison authorities. The test should not be construed narrowly to focus on the particular agency or officer dealing with the

[638] Application No. 46477/99, Judgement of 14 March 2002.

[639] *Ibid*, paras. 32-33.

victim at the time of the incident, but should take into account systemic failure involving a number of different authorities.[640]

The Government defended that there was 'no real or immediate risk about which the prison authorities knew or ought to have known'.[641] According to the medical evidence, Christopher Edwards was eligible for detention. This was the point also expressed in the inquiry's report. The Government also demanded that there was not any failure concerning the dissemination of information to the prison authorities. This was also the case for Linford, there were not any psychiatric sign or suspected mental illness after the arrest that could hinder his admission to the prison.

In its analysis of the various aspects of the case, the Court emphasises that the emergence of a positive obligation depends on cognitive awareness and operational consistency of authorities. With its own terminology:

> For a positive obligation to arise, 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 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.[642]

It also reiterates its general stance in the context of prisoners that "persons in custody are in a vulnerable position and that the authorities are under a duty to protect them".[643] In applying its principles to the instant case, the Court thought that with the information available the authorities ought to have known that Richard Linford was a 'real and serious risk' to others when placed in his cell. As to the measures which the authorities might reasonably have been expected to take to avoid that risk, there was:

> a series of shortcomings in the transmission of information, from the failure of the registrar to consult Richard Linford's notes in order to obtain the full picture, the failure of the police to fill in a CID2 form (exceptional risk) and the failure of the police, prosecution or Magistrates' Court to take steps to inform the prison authorities in any other way of Richard Linford's suspected dangerousness and instability.[644]

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[640] *Ibid*, para. 48.

[641] Also known as Osman criteria since the Court embodied it first in the case of *Osman v the United Kingdom* (*supra* note 474).

[642] *Paul and Audrey Edwards v the United Kingdom,* para. 55.

[643] *Ibid*, para. 56.

[644] *Ibid*, para. 61.

Cumulative failure of the domestic agencies involved in sharing information about Linford, and also insufficient screening process in prison were revealing the existence of a systemic problem in the domestic system. Hence, the Chamber judgement unanimously found a breach of Article 2.

As regards procedural limb of the right in question, the Court paid special attention to the deficiencies of the inquiry process. Since it did not manage to encompass information from the leading witnesses and gave way for the exclusion of the applicants from the proceedings, the Court was of the opinion that the procedural obligation of Article 2 has not also been met by the national authorities. Accordingly, it also unanimously declared a separate violation of the Article as regards its procedural limb.

In the case of *Česnulevičius v Lithuania,*[645] the Court has recently reinterpreted its standing position on the issue by means of the alleged violation of State's positive obligation due to the killing of a prisoner by unknown persons in prison. While the applicant's son, A. Česnulevičius, was serving his prison sentence in Pravieniškės High-Security Prison, he was found beaten on August 2000. When asked by the guards, he refused to give a written statement explaining the very reason of the incident in question. He also refused to be checked by a doctor although he had injuries on his face. Then as a measure, he was transferred to a solitary confinement cell by the guards that night. When the prison governor asked him to explain the incident next day, he stated that he had no enemies, and some unknown prisoners might have beaten him by accident. A. also refused the Governor's offer for staying in solitary confinement cell or in the medical unit. At that midnight, he was again beaten by those who whore cloth masks. Next day, at about 5 p.m., he was once more attacked and beaten by some unknown perpetrators. Then he was brought to the medical service by two inmates. He did not again make any explanation about the assault. As has been noted by the nurse, there was a deep stab wound on one of his knees, bleeding heavily. Since the nurse did not succeed in stopping the bleeding, A. was taken to the Prisons Department's Hospital and operated there. The following day, he was transferred to the emergency department of Vilnius University Hospital. A. died there half an hour after his arrival.

In its assessment, the Court emphasised that refusal of A. in explaining the incident and identifying the perpetrators was not important. Although performed subsequently within three days, three attacks upon the same person by some unknown persons were

[645] Application No. 13462/06, Judgement of 10 January 2012.

evidence of the clear risk and danger that prison authorities must have informed about. Although it was apparently a high security facility, the prison in question was an open one where inmates move freely. When the guards put him in isolation after the first attack, this was done for one night only. Statement by the Prison Governor that A. had already refused to stay in either isolation cell or in the medical unit of the facility was not seen as a reliable explanation by the Court since the document was written after A.'s death.

Since the death in question was the result of a traumatic shock emanating from the injuries, the Court also put forward the deficiencies in the medical unit of the prison. Firstly, A's treatment at the Prisons Department's Hospital was executed by an individual who did not possess a medical licence. Again, while intervention of the prison staff to violence in prison necessitates prompt action for terminating abuse and providing necessary mental and health services, acknowledging the existence of such coordination amongst security staff, medical practitioners, and prison management in the present case is not possible. Accordingly, it emphasised that:

> notwithstanding the existence of a serious risk to A.Č.'s well-being, Pravieniškės Prison's administration did not maintain a safe environment for him, having failed to detect, prevent or monitor, and respond promptly, diligently and effectively to the violence that he had been subjected to by other inmates. The Court therefore concludes that the authorities did not respond adequately to the danger A.Č. was in and thus did not fulfil their positive obligation to ensure that his right to life was upheld.[646]

As to the allegation on the violation of the procedural aspect of Article 2, the Court points out that continuous suspension and reopening of the investigation together with procedural inefficiencies such as failure in getting the testimony of witnesses reveal the problematic nature of the inquiry process.[647] Lack of alternative technical methods to be carried out by the domestic authorities such as questioning of the witnesses without a risk to disclose their identities or forensic examination of the metal bar and masks found by the guards after the first attack are amongst the leading deficiencies of the inquiry. Additionally lack of any information upon criminal, administrative or disciplinary proceedings against the prison wardens or officers before the Court is also a matter of concern. Hence the Court concluded that the investigation being executed upon the death of the applicant's son was not effective.

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[646] *Ibid*, para. 89.

[647] *Ibid*, paras. 94-102.

Since *Keenan v the United Kingdom*,[648] suicide attempts of the prisoners have also been one of the leading topics that the Court has frequently interpreted. Having considered the conduct of the prison authorities reasonable, the Court in *Keenan* did not find the breach of Article 2. In its final evaluation, the placement of Keenan in hospital care, scrutiny process when he performed suicidal tendencies, daily medical supervision by the prison doctors, their consultation to external psychiatrists about Keenan's mental condition were sufficient evidences in the eye of the Court that the authorities had succeed in securing their positive obligation incumbent upon them under Article 2.

Whereas in *Renolde v France,*[649] the Court concluded that the national authorities failed in complying with their positive obligation to protect Joselite Renolde's right to life under Article 2 of the Convention. The applicant was the sister of Joselito Renolde. He was arrested by a decision of investigating judge for the armed assault of his former partner and their thirteen years old daughter, and for criminal damage and theft as well. After his imprisonment on 19 July 2000, a medical and psychological report, drawn up under the order of the investigating judge, diagnosed that Renolde was having a number of neurotic and cognitive problems. Two days after his transfer to Bois-d'Arcy Prison, he attempted to commit suicide by cutting his arm with a razor. After the intervention, the warder on duty called the Rapid Crisis Intervention Team (*Équipe Rapide Intervention de Crise* – "ERIC")

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[648] Application No. 27229/95, Judgement of 3 April 2001. Rietiker, *supra* note 445, pp. 100-101. See also *Uçar v Turkey* (Application No. 52392/99, Judgement of 11 April 2006) that the applicant alleged that his son was killed by agents of the State or the inmates of the ward no. 1 of Diyarbakır E-type prison. Since the two medical reports drawn up before the death of the applicant's son did not refer to any psychological disturbance and there was not any conclusive evidence justifying the raised allegations, the Court rejected the claim that the authorities had failed to fulfil their positive obligation to protect the life under Article 2 of the Convention. In case of *Tepe v Turkey* (Application No. 27244/95, Judgement of 9 May 2003), the Court rejected the alleged violation of the substantial limb of Article 2 by deciding that the material in the case file does not prove beyond all reasonable doubt that the missing person was abducted and killed by any State agent or person acting on behalf of the State authorities. Nonetheless, even if it has not been established that the applicant's son was seen in detention in Diyarbakır Prison, it found the violation of the substantial limb of the Article 2 by considering that State authorities failed their positive obligations to adequately and effectively investigate the circumstances surrounding the death. (See also *Tekdağ v Turkey,* Application No. 27699/95, Judgement of 15 January 2004)

[649] Application No. 5608/05, Judgement of 16 October 2008. For a more recent case from France see *Ketreb v France*, Application No. 38447/09, Judgement of 19 July 2012. Despite the existence of two suicide attempts by hanging, neither the prison authorities nor the medical staff performed any special measure in *Ketreb.* Even if Kamel Ketreb had no chronic mental disorder or acute psychotic symptoms, diagnosing him as a "borderline" by the experts should have been sufficient reason for taking measures "such as appropriate surveillance or regular searches, which might have found the belt he used to commit suicide". Accordingly, the Court ruled in that the authorities had failed in their positive obligation to protect Ketreb's right to life under Article 2 of the Convention.

from the psychiatric unit at Charcot Hospital after Renolde had claimed to be hearing voices. Then under the prescription of the ERIC team, an antipsychotic treatment was initiated through which the infirmary staff supplied medicine to Renolde twice a week. He was placed in a cell on his own under special supervision in the form of more frequent patrols. The treatment was realised by the Regional Medical and Psychological Service (*Service Medico-Psychologique Regional* – "the SMPR") that they also visited him ten times in the next eighteen days. After having a warning from a trainee warder due to his throwing a piece of bread out of the window, Renolde verbally threatened the warder and then threw at a chair, causing her certified unfit for work for five days. After interviewing with him, the disciplinary board gave Renolde a disciplinary penalty of 45 days in a punishment cell. While he was serving his penalty, his lawyer demanded psychiatric examination of her client so as to ascertain whether his mental situation was compatible for detention in a punishment cell. In a letter sent by Renolde to her sister on 6 July 2000, he also wrote about the idea of ending his life. On 20 July 2000, the warder on patrol found him hanging from the bars of his cell with a bed sheet. Despite effort to revive him, he was registered death at 5 p.m.

Having acknowledged that the State's obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, the Court, at the very beginning of its analysis, appreciates "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".[650] Then it dwells on adapting available evidences of the present case into its general formulation. Firstly, it declares that the authorities were already informed about the risk arising from Renolde's acute psychotic episodes. Then it starts to assess whether the authorities did *all* that could reasonably be expected of them to avoid that risk. In its observation, the Court expresses that there was not any differentiable negligence or lack of supervision throughout the process in question. Despite that, recalling 'the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk', measures assigned for Renolde's treatment by the authorities were not seen compatible with the expected standards by the Court.[651] Firstly, there was not specific control of his medication taking. As has been understood from the expert report, it was not convincing whether the medication had taken regularly. The report also pointed out that:

[650] *Ibid*, para. 82.

[651] *Ibid*, paras. 98-99.

> supervision of Joselito Renolde's daily taking of medication would have been helpful and that, in view of his lack of awareness of his disorders, it would "perhaps" have been preferable to have supplied him with the medication every day and to have supervised his taking it.[652]

Possible working difficulties in a prison environment, as has been expressed by the Government, are not sufficient to persuade the Court and it did not approve the justification of a claim that a prisoner suffering from psychotic disorders was not necessarily to be supervised while taking his medication.[653] Secondly, given his mental and psychotic conditions, Renolde's placement in a disciplinary cell for the execution of a forty-five days punishment, just three days after his suicide attempt, is also assessed as severe. Such kind of punishments not only isolates prisoners from visits and all other activities but also has a potential 'likely to aggravate any existing risk of suicide'.[654] Accordingly, the Chamber finds out that there has been a violation of Article 2 of the Convention.

In cases of *Trubnikov v Russia*[655] and *Shumkova v Russia,*[656] there were previous suicide attempts by the prisoners that the Russian prison authorities already informed about. Albeit the prisoners were having medication and under treatment, the Russian Government expressed the difficulty of foreseeing future suicide attempts of them. In Trubnikov's case, it was testified by the psychiatrist that his attempt had merely been a 'demonstrative' one. It was also demanded that he had essentially aimed at manipulating the prison authorities in order to avoid from his placement in a punishment cell. Since he was under the influence of alcohol, the officer on duty had provisionally placed him in the punishment cell. Since the placement was realised at the weekend there was no medical staff at the material time. Yet, as a general measure, Trubnikov's shoe laces and trouser

[652] *Ibid*, para. 101.

[653] *Ibid*, paras. 101-104.

[654] *Ibid*, para. 107.

[655] Application No. 49790/99, Judgement of 5 July 2005. See also *Çoşelav v Turkey* (Application No. 1413/07, Judgement of 9 October 2012) in which case the applicants' 17 years old son committed suicide on 17 December 2004 while he was detained together with adult prisoners in Erzurum Prison. Despite 'his two suicide attempts, his repeated requests for help, and the incidents of self-harm', the Court defined the prison authorities' response as 'indifference' since there was no supervision in his cell on his own before hanging himself at 1.30 p.m., just a few hours after he hit his head against the walls of his cell at 10.00 a.m. Having found the failure of the authorities in complying with their positive obligations under Article 2 of the Convention, the Court unanimously adjudicated that "the national authorities were not only responsible for the deterioration of Bilal Çoselav's problems by detaining him with adult prisoners, but also manifestly failed to provide any medical or other specialist care to alleviate those problems". (Para. 69)

[656] Application No. 9296/06, Judgement of 14 February 2012.

belt had been taken away before his placement. Although the cell was under supervision, he was found dead, 'hanged by the sleeve of his jacket with another sleeve attached to water pipe' about an hour later after his placement.

In its assessment, the Court justifies the approach of the Government that there had not been any clear sign necessitating Trubnikov's compulsory psychiatric treatment. In contrast to the mental state of Keenan, his psychiatric disorders did not 'reach the threshold of a mental illness'. As regards the assessment about whether the authorities ought to have known of the risk for suicide attempt, the Court does not see any identifiable evidence implying the possible risk. Conversely, the medical records of Trubnikov were reflecting a certain improvement. Again, there was not any clear omission attributable to the domestic authorities 'in providing medical assistance or in monitoring Viktor Trubnikov's mental or emotional condition throughout his imprisonment'.[657] Although the Court pays attention on his access to alcohol, it also indemnifies from attributing the responsibility of this defect to the prison authorities. Regarding the abovementioned assessments, the Court does not claim that the Russian authorities failed to prevent a "real and immediate risk of suicide or that they otherwise acted in a way incompatible with their positive obligations to guarantee the right to life".[658]

Like the apparently improving mental or emotional conditions of Trubnikov, in the case of Shumkov, too, "there had been no symptoms of aggravation of his condition, such as delirium, hallucinations or inability to control his actions or realise their meaning".[659] According to the psychiatric examinations, his previous instances of self-mutilation were "of a clearly demonstrative nature, as he had not wished to die but simply to attract attention".[660] Yet, at around 2.10 a.m. on 4 August 2001, prison warders found him that he had slashed his veins by blade. After refusing the warders' offer for medical assistance, Shumkov demanded to be seen by a doctor. Yet after the arrival of the doctor about 20-25 minutes later, his efforts for Shumkov's revival were not sufficient to save his life. Since there was no demand "upon whether the arrangement whereby a doctor is on standby duty outside the correctional facility during night hours is as such adequate", the Court did not see it as a matter of concern to decide upon.[661] The essential concern for the Court was the

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[657] *Trubnikov v Russia,* para. 76.

[658] *Ibid*, para. 78. Rietiker, *supra* note 445, pp. 101-102.

[659] *Shumkova v Russia*, para. 78.

[660] *Ibid*, para. 81.

[661] *Ibid*, para. 97.

critical importance of urgent medical assistance that Shumkov had refused to accept from the warders. According to the Court, the warders:

> were bound to realise this since, given Dr G.'s description of arteries and veins having been slashed and the whole cell being covered in blood upon his arrival, the bleeding from Mr Shumkov's wounds when the warders opened the cell must have been heavy enough to alert them to the gravity of the situation. However, it is common ground that no medical aid was provided until Dr G.'s arrival.[662]

It furthered its emphasis that:

> [i]n the first place, it was known to the prison officers that Mr Shumkov suffered from a psychiatric disorder characterised by demonstrative reactions. Therefore, hardly any weight should be reasonably attached to his refusal of first aid in the circumstances. Moreover, it has not been alleged that Mr Shumkov tried physically to prevent the officers from dressing his wounds and, given his injuries, he would hardly have been capable of resisting them, which makes their compliance with his refusal even harder to explain.[663]

Accordingly, declaring the training of the prison officers for such emergency situations as a reasonable expectation, the Court stated that the authorities' conduct to display due vigilance in the present case was an insufficient one and not in comply with the positive obligation to protect life under Article 2.

In both cases, there were missing procedural aspects that the ECtHR expressed its concern. In essence, the way of conduct of the prosecuting authorities were not compatible with the procedural obligation to carry out an effective investigation under the provision of Article 2. Among those concerns, several cycles of suspensions and resumptions of the domestic investigations in question were the leading ones.

Even though the Convention does not directly consist of a right to health, the Court has started to develop it within the scope of its own case law.[664] Since they are the States incarcerating prisoners in an establishment with predesigned conditions and regulations under which a prisoner cannot provide his own health as a free person, it is the responsibility of authorities to provide sufficient medical assistance and remedies for those

[662] *Ibid*, para. 98.

[663] *Ibid*, para. 100.

[664] See *L.C.B. v the United Kingdom*, *supra* note 636; *Guerra v Italy*, *supra* note 582; *Öneryildiz v Turkey*, Application No. 48939/99, [GC] Judgement of 30 November 2004.

imprisoned.[665] Failure to provide adequate medical assistance to the prisoners who are in need of health care can be examined either within the scope of Article 2 or Article 3 of the Convention. If the threshold of the inadequacy leads to the death of the prisoner, then the Court assesses the allegation within the scope of Article 2.

In the case of *Shchebetov v Russia*,[666] the applicant alleged, *inter alia,* that he had been infected HIV through a blood test in the prison hospital, contracted tuberculosis in custody and that he had been denied adequate medical assistance. The Government opposed the arguments of the applicant arguing that his allegations about having contracted HIV through a blood test in the prison hospital were not true. The Government also stated that as a 'latent drug addict' he could have infected the virus through "a dirty syringe while injecting a drug or any other medicine or could have been infected "while maintaining relations" with an HIV-positive inmate, Mr A."[667] Although there are various explanations from both of the parties about the very reason of infection, the Court does not see the failure of the Government in proving the justification of the raised allegations with any real evidences as a sufficient basis for deciding upon a violation of Article 2.

As to the allegation regarding the violation of procedural limb of Article 2, the Court noted that the domestic authorities had already implemented a preliminary inquiry ended with no further criminal prosecution. Nonetheless, the Court focuses on the quality of the investigation "whether it was conducted diligently, whether the authorities were determined to establish the facts of the case and, accordingly, whether the investigation was "effective"".[668] By chronologically examining the legal initiatives executed by the domestic authorities, it notes the promptness of the authorities for initiating the inquiry, setting up additional investigations, including medical reports of those related, hospital registration logs, questioning of the medical personnel, etc. Approximately a duration of three years for the finalisation of the investigation is not beyond the expected threshold according to the Court that it has not found the violation of the procedural aspect of Article 2.

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[665] Van Zyl Smit and Snacken, pp. 147-175. Ingrid Nifosi-Sutton, "The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective", **Harvard Human Rights Journal**, Vol. 23 (2010), pp. 51-73.

[666] Application No. 21731/02, Judgement of 10 April 2012.

[667] *Ibid*, para. 40.

[668] *Ibid*, para. 53.

Whereas founding some deficiencies of the system in the case of *Tarariyeva v Russia*,[669] the Court found out the violation of Article 2. The applicant was the mother of Tarariyev, who was 25 when he was detained in 1996 on suspicion of having caused grievous bodily injury that resulted in the victim's death. After his conviction of six years, he was sent to a correctional facility for serving the sentence. In January 2001, he was diagnosed with a certain kind of cardiac syndrome and an acute ulcer condition. Although there were various diagnoses in his medical history, he was received in and out-patient treatment under certain medication prescribed by doctors. He also had two surgeries. Nonetheless, approximately one and a half years after the first diagnosis, he died in September 2002.

In its analysis, the Court noted a number of systemic inefficiencies through the Tarariyev's treatment process as follows:

> For more than two years preceding his death Mr Tarariyev had been in detention and the custodial authorities had been fully aware of his health problems. There was no consistency in his medical records, most of which were either mislaid or incomplete. At the Khadyzhensk colony he was not properly examined and did not receive any medical treatment. Although he was promptly transferred to a state hospital, the surgery performed was defective. The doctors at Apsheronsk Hospital authorised his discharge to the prison hospital in full knowledge of the post-operative complications requiring immediate further surgery. They also withheld crucial details of Mr Tarariyev's surgery and developing complications. The prison hospital staff treated him as an ordinary post-operative patient rather than an emergency case with the consequence that surgery was performed too late. Furthermore, the prison hospital was not adequately equipped for dealing with massive blood loss.[670]

Accordingly, it holds that there has been a violation of Article 2 of the Convention on account of the Russian authorities' failure in protecting Tarariyev's right to life.

On the procedural aspect of the right in question, the slowness and restricted nature of the investigation was a concern for the Court. It additionally maintained that "[t]he prosecution had poorly prepared the evidentiary basis for the trial which ended in the acquittal of the suspect".[671] Since the failure of the criminal proceedings was also finalised the prospective for applying civil-law remedy, the Court found a violation of Article 2 of the Convention on account of the Russian authorities' failure "to discharge their positive

[669] Application No. 4353/03, Judgement of 14 December 2006.

[670] *Ibid*, para. 88.

[671] *Ibid*, para. 102.

obligation to determine, in an adequate and comprehensive manner, the cause of death of Mr Tarariyev and to bring those responsible to account".[672]

In the case of *Makharadze and Sikharulidze v Georgia*,[673] the Court analysed various aspects of the right to health of the prisoners under Article 2 of the Convention. The first applicant, thirty nine years old at the material time, was arrested in March 2006 for his alleged connection with the criminal world and possession of drugs. After his placement to the Ksani no. 7 Prison, he appealed against the detention order of the Tbilisi City Court, claiming, *inter alia,* poor conditions in the prison and his critical state of health. Informing the prison authorities that he should have been provided with appropriate conditions of detention and medical care in prison, the Appeal Court dismissed the appeal. In July 2006, Makharadze was sentenced to seven years imprisonment. Within this space of time, he had been diagnosed with an open form of multidrug-resistant tuberculosis, in the phase of infiltration and decomposition. Additionally, examination results showed that he had been infected with viral hepatitis C and suffered from a number of serious cardiac and neurosensory disorders. Then, till his death in January 2009, there had been a medical process without any identifiable solution on behalf of the prisoner.

Although the result of the diagnoses and declaration of the medical experts were evidencing the necessity of planning a drug regimen for the effective treatment of the applicant's multi-drug resistant form of tuberculosis, the authorities, as has been assessed by the Court, did not act in a timely manner in order to prevent the lethal outcome. Additionally, given the incapacity of the authorities in providing the applicant with particular tuberculosis drugs, the applicant's family had finally obtained them. Again the respondent Government did not succeed in ensuring that the administration of those drugs had been monitored by the specially trained clinicians. The Court assessed with concern that:

> all those omissions were due to the fact that, despite the threatening magnitude of the problem of the transmission of multi-drug resistant forms of tuberculosis and the associated high rate of mortality in Georgian prisons, which has prevailed in the country for many years, the relevant State authorities did not begin implementation of the standard general health-care measures – outlined by the WHO as far back as 1997 – until March 2008 ... This mismanagement by the State in the medical sphere, which directly resulted in or contributed to the death of the first applicant, cannot be justified, under Article 2 of the Convention, by a lack of resources.[674]

[672] *Ibid*, para. 103.

[673] Application No. 35254/07, Judgement of 22 November 2011.

[674] *Ibid*, para. 90.

Accordingly, the Court proposed that even if it does not burden any clear obligation on the State for an early or conditional release of the prisoner, allowing the applicant's 'placement in one of the two civil hospitals specialised in treatment of tuberculosis' could be a practical solution for the issue. Coexistence of such a cumulative indecisiveness was not approved by the Court and it unanimously found the breach of Article 2 of the Convention.

Criminal acts of private persons outside the prisons can also have implications upon the domestic penal and criminal policies. In the case of *Branko Tomašić and Others v Croatia,*[675] the applicants were the relatives of the victims, alleging the respondent State's failure to comply with its positive obligation in order to prevent the deaths of their child (M.T.) and her baby (V.T.) under Article 2 of the Convention, and also to conduct a thorough investigation for the inquiry of the killings in question. After a relationship, M.M. and M.T. had started to live together with the family of M.T. And then they had a baby, V.T., in March 2005. Afterwards, M.M. had started to quarrel with the members of the household, verbally threatened M.T., and left from the house in July 2005. Due to the continuous threats by M.M., M.T. started a criminal complaint, alleging that he had been threatening to kill her and their daughter with a bomb unless she agreed to come back to him. A psychiatric opinion during the process pointed out that M.M. was suffering from a profound personality disorder and had a potential to repeat the same or similar criminal offences in the future. The Court found M.M. guilty of threatening M.T. on several occasions and sentenced him to five months' imprisonment and a security measure of compulsory psychiatric treatment during his imprisonment and afterwards as well. As regards his appeal, the domestic appellate court upheld the ruling but reduced the security measure to the duration of M.M.'s prison sentence. After serving his sentence in Varaždin Prison, M.M. was released on 3 July 2006. And then he shot M.T., their daughter V.T., and himself.

Although there was no civil action by the applicants for getting compensation against the responsibility of State officials due to their failure in preventing the killings, the European Court put that the central question here was not the lawfulness of the acts of the relevant authorities but rather the alleged deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals. Rejecting the arguments of the Government for the lack of any civil action by the applicant in the domestic system,

[675] Application No. 46598/06, Judgement of 15 January 2009.

the Court emphasized the consequence of the *ex officio* inquiry by an investigating judge of the Varaždin County Court that, excluding a number of searches, did not initiate any criminal or other proceedings against any of the persons involved in the case.

In its assessments about the merits of the case, the Court pointed out that the domestic authorities were aware of the threats and their seriousness. Accordingly, responsibility of the authorities for taking all reasonable steps for the protection of the lives of M.T. and V.T. fell well within the scope positive obligations for States. Although the evidence available reveals that the authorities were already informed about the nature of the threats against the victims, there was not any precautionary measure or action by the relevant authorities before the realisation of the tragic event. Furthermore, as apparently being the most preventive measure, the compulsory psychiatric treatment of M.M. in prison had already lasted two months before his release from prison. Accordingly, the impact of the psychiatric report and the first instance court's decision regarding the necessity of M.M.'s treatment upon the prison authorities remained highly limited.[676] The nature and quality of the treatment were also a matter of concern by the Court. Likewise, as has been examined by the Court:

> the Government have failed to show that the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered. The documents submitted show that the treatment of M.M. in prison consisted of conversational sessions with the prison staff, none of whom was a psychiatrist. Furthermore, the Government have failed to show that an individual programme for the execution of M.M.'s prison term was designed by the Varaždin prison governor as required under section 69 of the Enforcement of Prison Sentences Act. Such individual programme in respect of M.M. takes on additional importance in view of the fact that his prison term was combined with a measure as significant as compulsory psychiatric treatment ordered by the domestic courts in relation to the serious death threats he had made in order to help him develop the capacity to cope with difficult situations in life in a more constructive manner.[677]

In sum, the ECtHR came to the conclusion that the domestic authorities had not performed necessary measures in order to diminish the likelihood of the realisation of tragic event. Regarding that fact, the Court found the violation of the substantive limb of Article 2.

As regards the alleged violation of procedural limb of the Article, the Court stresses the importance of the effective implementation of official investigations and claims that

[676] *Ibid*, para. 57.

[677] *Ibid*, para. 56.

“[t]he essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life”.[678] It adds that:

> [a]ny deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention (see, for example, *mutatis mutandis*, *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII, § 63).

In its examining the necessity of ‘a further positive obligation to investigate the criminal responsibility of any of the State officials involved’, the Court comments that the solution may vary under the specific circumstances of the case in question. As has already been stated by the Court on a number of occasions that:

> an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. The Court has already held that in the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII and *Tarariyeva v. Russia*, no. 4353/03, § 75, ECHR 2006-... (extracts)). The same should apply in respect of the possible responsibility of State officials for the deaths occurring as a result of their negligence.[679]

Nonetheless, by taking into account the nature of the complaints, not alleging ‘any individual responsibility of a State official on whatever grounds’ and its own finding of the breach of the substantive limb of Article as well, the Court unanimously did not find examining this part of the complaint necessary.

In a case about prisoner release schemes in Italy, the Grand Chamber has not only examined positive obligation of States upon prisoner rights but also questioned the issue horizontally. In *Mastromatteo v Italy,*[680] the applicant’s son had been shot dead on 8 November 1989 in a bank robbery as the robberies were trying to escape from the bank.

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[678] *Ibid*, para. 62.

[679] *Ibid*, para. 64.

[680] Application No. 37703/97, [GC] Judgement of 24 October 2002.

Three of the four criminals were serving prison sentences at the material time. Their crimes were primarily violent ones such as attempt for murder, complicity in attempted murder, and robbery. Three of them had also been granted either prison leave or subjected to semi-conditional regime by the judicial decisions of the related domestic courts. The applicant submitted the violation of the State's positive obligation to protect the life of his son since the authorities had given prison leave to very dangerous habitual offenders. While providing permission to prisoners for their leaves, the judges, the applicant alleged, had not thoroughly assessed their possible dangerousness to society. Without taking into account the fact that their previous crimes had been committed in cooperation with each other, coincidence of their leave days by the judicial decisions had also given way for the realisation of the criminal acts in question. Furthermore, no supervision of the prisoners during the leaves or the application of semi-custodial regime had taken place by the authorities. Even if all those measures had been formulated for facilitating the reintegration of prisoners, the applicant claimed, they were not serving to the declared aims of modern penal policy but rather revealing the existence of gross negligence by the authorities. According to the applicant:

> the facts of the present case clearly illustrated the lack of co-ordination and information between the prison services, the rashness and negligence of the police authorities, the inadequacy of the supervision carried out by the judges responsible for the execution of sentences and their errors of assessment.[681]

Admitting 'a punishment also pursued a rehabilitative aim', the respondent Government primarily argued that although Article 2 of the Convention obliges States to adopt necessary measures to protect life, it does not require that the State is under an obligation to prevent any possible violence. Under the relevant domestic legislation, the judges responsible for the execution of sentences have the judicial power so as to examine the availability of prisoner for the leave. As to the supervisory measures attached to the prison leave, they are essentially "intended to place only a minimal restriction on the freedom of the prisoner who had temporarily been released".[682] And, according to the observation of the Government, setting a causal link between the death of the victim and alleged shortcomings of the domestic system and the authorities would not be an objective assessment.

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[681] *Ibid*, para. 59.

[682] *Ibid*, para. 65.

In its analysis, the Court emphasises the difference of the present case from its case law. In its reasoning, it states as follows:

> it is not a question here of determining whether the responsibility of the authorities is engaged for failing to provide personal protection to A. Mastromatteo; 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.[683]

It also maintains that:

> [o]ne of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment. From that perspective it acknowledges the merit of measures – such as temporary release – permitting the social reintegration of prisoners even where they have been convicted of violent crimes.[684]

Looking from a closer perspective, the Italian system embraces some certain criteria for the eligibility of a prisoner for leave under the related provisions of the Prison Act that:

> prison leave may be granted to a prisoner only if he has been of good behaviour while in prison and if his release would not present a danger to society. In this connection the mere absence of disciplinary punishments is not sufficient to justify the grant of measures facilitating reintegration, the prisoner being required to show a genuine willingness to participate in the reintegration and rehabilitation programme. The assessment of a prisoner's dangerousness to society is left to the judge responsible for the execution of sentence, who is obliged to consult the prison authorities. Such an assessment must be based not only on information furnished by the prison authorities but also on information available from the police when the judge considers this to be necessary.
>
> In addition, Act no. 356, which makes special provision for the case of crimes committed by members of a criminal association, excludes the possibility of prison leave or other measure alternative to imprisonment in the case of particularly serious offences, at least in cases where the offender has not co-operated with the judicial authorities. Moreover, if a prisoner has been convicted of aggravated armed robbery, prison leave may not be granted if there is evidence of a link between the prisoner and organised crime. The judge responsible for the execution of sentences is required to request information from the police and in any case to take his or her decision within thirty days of such request.[685]

Statistics provided by the Government also satisfy the Court since they show that the percentage of crimes committed by prisoners while they were using their prison leave

[683] *Ibid*, para. 69.

[684] *Ibid*, para. 72.

[685] *Ibid*.

and had been subjected to semi-custodial regime is very low. The Court also underlines that the risk to life in the present case does not head for one or more identified individuals but for members of the public in general. Within such a context, it assesses that the risk emanating from the adoption and implementation of the judicial decisions to grant prison leave and to conduct semi-custodial treatment for the three prisoners in question is also low. Since there was nothing to alert the authorities, judicial decisions' inefficiency in differentiating the real and immediate threat to life was to be found to be in conformity with Article 2 of the Convention. Accordingly, the Court comes to the conclusion that there has not been any identifiable negligence attributable to the authorities sufficient to hold them liable for any breach of the duty of care required by the substantive limb of the Article.

Although the ruling of the Grand Chamber in *Mastromatteo* seeks to question negative possible impacts of the enjoyment of prisoners' rights through their reintegration process to society, it does not assign an additional burden incumbent upon the authorities.[686] The unanimous ruling of the Court expresses its satisfaction with the existing domestic practice. The support of the statistical evidence upon violent crimes being committed by prisoners granted early release or home leave is also self-evident. Accordingly, the Court concludes that there is not a compelling causal link between the alleged failures of the State and the death of the victim in the present case.

As regards the procedural limb of Article 2 in the case of *Mastromatteo*, the Court notes the completion of the domestic investigation under which two criminals were convicted of murder and given long sentences. They were also ordered to pay compensation for the damages to the applicant. Although applicant's seeking for compensation, raised under the domestic legal framework genuinely designed for providing assistance to victims of mafia-type or terrorist crimes, was not approved by the authorities, the Court notes that initiating two more applications for the alleged negligence of the authorities could also be possible under the Italian law.[687] Thus, the Grand Chamber, sixteen votes to one, does not find the violation of the procedural requirements under Article 2 of the Convention.

Nonetheless, in his partly dissenting opinion Judge Bonello expresses its criticism essentially upon the discretion generously used by the Italian judges in the present case on behalf of the 'socially dangerous' criminal and his accomplice. According to the

[686] Mowbray, pp. 21-22.

[687] *Mastromatteo v Italy*, para. 95. Van Zyl Smit and Snacken, pp. 321-324.

dissentient, authorisation of the release of reoffenders by judicial decisions is to be assessed as an excessive use of the discretion, implying the liability of the State. He emphasises his belief that it is:

> an indisputable axiom of law that in case of fault or negligence from which harm results, it is the lapser who pays. It seems however that the Court's case-law can be made to justify other, more nonconformist, solutions. In the present murder, the one who paid for the failings of the State was not their author, but their victim. Perhaps because it was not a case of fault or negligence, but one of fault *and* negligence. It is with overwhelming rational bewilderment and considerable legal perplexity that I have found myself identifying with this.[688]

[688] Partly Dissenting Opinion, para. 21. [Emphasis is original]

2.4.2.2 Prohibition of Torture (Article 3)

Provides that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Viewed from the positive obligations perspective, States Parties are obliged to take action to protect the individuals from serious maltreatment. Like Article 2, it is one of the fundamental rights of the Convention that no derogation is possible even in time of war or public emergency. In the case of *Chahal v the United Kingdom*, the Court emphasised as follows:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture, or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[689]

Expressing some common points from the structure of the Court's ever enlarging case law is also possible. First of all, 'attaining a minimum level of severity' is required for falling within the scope of violation.[690] In other words, the Court might not accept all forms of conducts falling under Article 3.[691] However, there have been various forms of ill treatment that can be regarded over the threshold established judicially in time.[692] The ECtHR can also question and redefine its own well-established definitions for torture, inhuman and degrading treatment.[693] It is also noteworthy that the assessment of the minimum level of severity is relative. As the Court continuously emphasises that it depends on 'all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.

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[689] Application No. 22414/93, Judgement of 15 November 1996.

[690] *Van der Graaf v the Netherlands*, Application No. 8704/03, Inadmissibility Decision of 1 June 2004.

[691] *Ireland v the United Kingdom*, Application No. 5310/71, Judgement of 18 January 1978.

[692] Rodley and Pollard, *supra* note 298, pp. 82-144.

[693] *Selmouni v France*, Application No. 25803/94, Judgement of 28 July 1999.

As to the case law of the ECtHR related to prisoners' rights and their correlation with States' positive obligations, they do specifically focus on allegations on medical care, living conditions and ill-treatment.[694] In the case of *Premininy v Russia*,[695] the Court reiterates its general formulation as regards the obligation of States falling within the scope of Article 3:

> Admittedly, it goes without saying that the obligation on States under Article 1 of the Convention cannot be interpreted as requiring a State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or, if it has been, that criminal proceedings should necessarily lead to a particular punishment. However, it has been the Court's constant approach that Article 3 imposes on States a duty to protect the physical well-being of persons who find themselves in a vulnerable position by virtue of being within the control of the authorities, such as, for instance, detainees or conscripted servicemen (see *Chember v. Russia*, no. 7188/03, § 50, 3 July 2008; *Sarban v. Moldova*, no. 3456/05, § 77, 4 October 2005; *Jalloh v. Germany* [GC], no. 54810/00, § 69, ECHR 2006-IX; and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX).[696]

In the case of *István Gábor Kovács v Hungary*,[697] the applicant complained about, *inter alia,* the over-crowdedness of prison cells and submitted that it amounted to inhuman and degrading treatment under the wording of Article 3 of the Convention. Being detained as from January 2008, he had spent three and a half years in Szeged Prison after being convicted of trafficking in goods subject to excise tax. While the applicant was claiming that he had been kept in cells with a personal space of around 2.5 square metres, the Government provided its own calculations that the average personal space in the respective cells of the applicant varied within a range of 4.00 square metres and 5.60 square metres, without deducting the space taken up by the furnishings. Even in the extreme cases, the Government maintained, the applicant at no time had had less personal space than 3.60 square metres of ground surface.

Referring to the assessment of the CPT in *the 2009 Report to the Hungarian Government on the visit to Hungary*, the Court underlines the fact that the practice in Hungary fell below the 4.00 square metres' living space per inmate minimum standard, furnishing included, in multi-occupancy cells. Considering also the fact that the applicant had to spend almost all of his time inside the cell, the Court decides that the overcrowded

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[694] See *J.L. v Latvia*, Application No. 23893/06, Judgement of 17 April 2012. *Bazjaks v Latvia*, Application No. 71572/01, Judgement of 19 October 2010.

[695] Application No. 44973/04, Judgement of 10 February 2011.

[696] *Ibid*, para. 73.

[697] *Supra* note 520.

conditions of detention amounted to inhuman and degrading treatment was a breach of Article 3 of the Convention. Having assessed the seriousness of overcrowding problem in the Hungarian penitentiary system, the Court also demanded a rapid reaction from the national authorities by taking the necessary administrative and practical measures 'in order to secure appropriate conditions of detention for detainees'.[698]

In the case of *Stepuleac v Moldova*,[699] the Court emphasised the importance of keeping detainees under the responsibility of Ministry of Justice. The applicant was arrested, with a suspicion of being the perpetrator of unlawfully detaining and blackmailing a person and his potential risk for exerting pressure on the victim and witnesses as well, on 29 November 2005 and kept in the General Directorate for Fighting Organised Crime ("the GDFOC") remand centre till his transfer to the Ministry of Justice Detention Centre prison on 9 March 2006. The GDFOC remand centre was a subdivision under the control of the Ministry of Internal Affairs. Since the detention centre under the jurisdiction of the Ministry of Justice was overcrowded, the transfer of the applicant did not materialise promptly. The applicant submitted before the ECtHR that he, *inter alia,* had been kept under solitary confinement and deprived of sufficient medical assistance. He alleged that the cell's area of the remand centre was just 4.00 square metres. He had had to bring his own bed linen and food from outside which was allowed once a week. There was neither cold storage system for foods nor toilet in the cell. The latter was located in a separate part of the facility that he was allowed to visit once a day for ten minutes in the morning. There was also no possibility for running water in the cell. According to the records of the Government, just two demands of the applicant for ambulance out of five had been met. Additionally, he complained about visits of his cell by unidentified persons to intimidate him.

In its assessment upon the alleged violation of Article 3, the Court noted "the clear insufficiency of food given to the applicant, which in itself raises an issue under Article 3 of the Convention".[700] Although contradicting submissions raised by the parties, the Court is of the opinion that the cell in question did not consist of daylight. Since the Government did not contradict the applicant's claims regarding the use of the toilet and running water facilities, the Court points out the similarity between the allegations of the applicant and the description made by the CPT in 2001 upon general conditions of the detention centres

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[698] *Ibid*, para. 7.

[699] Application No. 8207/06, Judgement of 6 November 2007.

[700] *Ibid*, para. 55.

in Moldova.[701] Lack of medical personnel at the detention centre was also another concern for the Court. Despite the existence of a preliminary medical diagnosis of bronchitis, there had not been any examination by a specialist doctor or test confirming the medical condition of the applicant. Medical service of the detention centre was being provided by calling an ambulance in more serious cases. The Court concluded that "the applicant was in a vicious circle where he could not get assistance until he "really needed" it, while at the same time he could not prove such a medical need in the absence of qualified medical opinion to confirm his fears".[702] Even though it did not make any clear comment upon the argument of the respondent Government that the reason lying behind the applicant's solitary confinement was that "he used to be a policeman and risked ill-treatment from other detainees", the Court implied the declared reasoning in question was not justified.[703] About the applicant's allegation of intimidation in his cell by unidentified persons, the Court stressed the silence of the domestic prosecution authorities in the face of two applications by the applicant. Since there was not sufficient evidence for deciding over the merits of the alleged intimidation, the Court preferred taking the matter into account within the scope of positive obligations and ruled that the respondent State did not fulfil its positive obligation of properly investigating allegations of ill-treatment under Article 3 of the ECtHR. The Court also expressed its concern for the failure of the State Party, as of 2006, in complying with the suggestion of the 2001 CPT report for transferring the responsibility for all detention centres from the Ministry of Internal Affairs to the Ministry of Justice.

In *Renolde v France*, the applicant, in addition to her claims under Article 2, submitted that Joselito Renolde's placement for forty-five days in a punishment cell, despite his mental conditions, had amounted to treatment in breach of Article 3 of the Convention. Stressing the vulnerability and inability to complain coherently of mentally ill persons in prisons, the Court reiterates the recorded history of the prisoner, emanating primarily from acute psychotic disorders i.e. his suicide attempt, his attacking to a warder, etc. Regarding the necessity of punishing assaults on warders in prison, it expresses its concern with the given maximum penalty of forty-five days detention in a punishment cell, prohibiting of all visits and all contacts with others.[704] And it accordingly decides that such

[701] *Ibid*, para. 39.

[702] *Ibid*, para. 59.

[703] *Ibid*, para. 62.

[704] *Ibid*, paras. 120-125.

a penalty is not compatible with the required treatment standards in respect of a mentally ill person under Article 3 of the Convention.

In the case of *Artyomov v Russia*,[705] the applicant alleged the violation of Article 3 in that he had been subjected to inhuman treatment and that the domestic authorities had not carried out an effective investigation of those events. While the applicant was serving a prison sentence, a group of special-purpose unit officers carried out an operation in the correctional colony in October 2001. The operation included searches of all premises in the colony and body searches of detainees. Throughout the operation, many inmates including the applicant sustained multiple injuries. The applicant provided detailed information about the incident, 'indicating the time, location and duration of the beatings, and showing methods used by the special-purpose unit officers'.[706] Since the prisoners had not demonstrated any resistance, he stated that there was no need for the use of force. He also alleged that his numerous requests to be checked by a prison doctor had not been approved. When he was controlled two weeks after the operation, Artyomov alleged that the prison doctor had refused to record all injuries that he had. The applicant also complained about the failure of the criminal investigations that he had already requested from the State authorities. Even five years after the operation in question, the investigation was still pending in 2006.

The Government opposed the submissions of the applicant. Stating that no force or special measures had been used in the operation, they provided a handwritten report by the head of the special-purpose unit. The Government submitted that there had already been a doctor throughout the operation for which he had not recorded any complaints.

At the very beginning of its analysis, the Court declared that it would "examine this complaint from the standpoint of the State's negative and positive obligations flowing from Article 3".[707] Since conducting a prompt and effective medical examination under such circumstances is an obligation, the Court did not see the medical examination executed by the prison doctor two weeks after the operation as sufficient. Even though there is no evidence of ill treatment inflicted upon the applicant, the Court claims that:

> the absence of such evidence cannot immediately lead to the conclusion that the allegations of ill-treatment are false or cannot be proven. Were it otherwise, the authorities would be able to avoid responsibility for ill-treatment by not conducting medical examinations and not recording the use of

[705] Application No. 14146/02, Judgement of 27 May 2010.

[706] *Ibid*, para. 148.

[707] *Ibid*, para. 140.

> physical force or special means (see, *mutatis mutandis, Dedovskiy and Others v. Russia*, no. 7178/03, § 77, 15 May 2008).[708]

Regarding that fact, the Court paid attention to evidence in the case file. It was a registry of the prison doctor ordering the applicant's confinement to bed for three days. It also expressed its awareness upon the statement of a representative of the correctional colony and also confirmation of another inmate in domestic hearings that physical force had been used on the applicant. Accordingly, the Court concluded that it was 'beyond reasonable doubt' that the "use of force was intentional, retaliatory in nature and aimed at debasing the applicant and forcing him into submission".[709]

There were also two other allegations on the excessive use of force inflicted upon him by the applicant. Regarding the first allegation, the Court did not consider the use excessive force by the warder L. Since it was beyond doubt that the applicant had not obeyed the order by the warder, it had had to use physical force against the applicant. Nonetheless, there was no evidence or testimony of witnesses justifying the allegation of the applicant. Hence it did not establish it beyond reasonable doubt that the force used had such an impact on the applicant's physical or mental well-being. As to the latter incident, it was about the use of force by some officers from the special-purpose unit. They intervened in the collective hunger strike and self-mutilation acts of inmates taking place in the prison. Whilst the Government admitted this time the use of a rubber truncheon against the applicant, the ECtHR, by referring its existing case law, reiterated that recourse to physical force might be used "only if indispensible and must not be excessive".[710] Having found another violation of the substantial limb of Article 3 in the instant case, the Court:

> does not discern any necessity which might have prompted the use of rubber truncheons against the applicant. On the contrary, the actions by the officers were grossly disproportionate to the applicant's imputed transgressions and manifestly inconsistent with the goals they sought to achieve. Thus, it follows from the Government's submissions ... that a group of officers entered cell no. 3, where the applicant was detained, intending to search it. The applicant refused to leave the cell, insulted the officers and pulled their clothes. The Court accepts that in these circumstances the officers may have needed to resort to physical force in order to take the applicant out of the cell. However, the Court is not convinced that hitting a detainee with a truncheon was conducive to the desired result, namely

[708] *Ibid*, para. 153.

[709] *Ibid*, para. 156.

[710] *Ibid*, para. 169.

facilitating the search. In the Court's eyes, in that situation a truncheon blow was merely a form of reprisal or corporal punishment.[711]

As regards the procedural aspect of the Article, the Court states as follows:

where an individual raises an arguable claim that he has been seriously ill-treated in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. An obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible.[712]

By enumerating various inefficiencies of the domestic investigation process of the *Artyomov* case, the Court essentially criticises i) not questioning of the officers and warders involved in or witnessed the case; ii) the prosecutor's relying mainly on the reports written by the officers and warders involved in the incidents; and iii) lack of judicial attempt for bringing those responsible for the ill-treatment to account.[713] Hence, it does not find the domestic investigation through, expedient or effective and declares a violation of Article 3 of the Convention under its procedural limb.

In the case of *Mandić and Jović v Slovenia*,[714] the applicants were detained for about seven months in the remand section of Ljubljana prison, pending their trial. They essentially complained about the size of their cell, in which six prisoners were held together, and also about their out-of-cell time, two hours daily. They also maintained that they had had to share toilet and furniture with other inmates. Due to the excessive crowdedness in the prison, they had not had the possibilities of recreation yard as guaranteed under the domestic regulations. The applicants also complained about high temperatures in their cell due to the lack of ventilation system in the facility.

In its analysis, the Court expressed its observation that there was an overcrowding problem in the prison in question during the applicants' detention period. The situation was already reported by the Slovenian Human Rights Ombudsman in 2009 and also by the CPT

[711] *Ibid*, para. 170.

[712] *Ibid*, para. 174.

[713] *Ibid*, paras. 177-183.

[714] Application Nos. 5774/10 and 5985/10, Judgement of 20 October 2011.

in 2006.[715] Therefore the Court assessed that "the applicants were at least for a significant part of their detention held in a cell in which the personal space available to them was 2.7 square metres, which was further reduced by the furniture in the cell".[716] It also expressed its concern about just two hours for daily outdoor exercise and an additional two hours per week in the outdoor yard. Although there were TV, radio and books in the cell, the Court did not assess them sufficient, making up 'the lack of possibility to exercise or spent time outside of the overcrowded cell'. Despite the findings of the Human Rights Ombudsman, the Court noted that there existed no improvement regarding the methods of ventilation of prison cells. As to the alleged inadequacy of sanitary conditions, it noted that:

> the applicants were able to use the sanitary annex, containing a basin and toilet, in private. The sanitary annex was attached to the cell and was constantly at the disposal of the prisoners accommodated in the cell. They were also allowed to shower once a day in a shower room which contained partitions between the shower heads. It further observes that the sanitary annex contained a functioning ventilation system. While it can accept that the sanitary conditions might have been affected by the fact that the facilities were overcrowded, the Court does not find on the basis of the material before it that the cleanliness of the relevant areas of the prison was inadequate *vis-à-vis* the Convention standards.[717]

In sum, even if it did not identify the existence of a specific intention 'to humiliate or debase', the Court considered that "the distress and hardship endured by the applicants exceeded the unavoidable level of suffering inherent in detention and went beyond the threshold of severity under Article 3".[718]

In a series of cases, the Court also assessed excessive use of force by the State officials within the ambit of Article 3.[719] In the case of *Mironov v Russia*,[720] the applicant was complained that he had been beaten in remand prison IZ-50/9 (Moscow Region) on 23 June 2002. The government refused the claim arguing that the applicant had not complained to the prison administration about the injuries he had allegedly sustained on 23 June 2002. When he had been examined two days later by a doctor, he again did not mention about the alleged ill-treatment. Claiming that no injuries had been found after the

[715] *Ibid*, paras. 41-48.

[716] *Ibid,* para. 78.

[717] *Ibid*, para. 79.

[718] *Ibid*, para. 80.

[719] As the most comprehensively analysed case, see *Davydov and Others v Ukraine*, *supra* note 528.

[720] Application No. 22625/02, Judgement of 8 November 2007.

examination in question, the Government concluded that the applicant's allegations were unfounded.

In its evaluation, the Court expressed that it was not a matter of controversy between the parties that on 23 June 2002 a joint initiative by the prison officers and three special forces unit (*Fakel)* officers had been carried out in the prison. While they were checking the detainees' presence in the cells:

> fifteen detainees had sustained injuries, including one detainee whose arm had been broken, and fourteen detainees who had received blows, "which were not subject to medical assessment". However, criminal proceedings against the *Fakel* officers were discontinued on the ground that "[i]n the course of the preliminary investigation it did not appear possible to establish who was responsible for which injuries".[721]

Although the applicant was not enlisted among the injured detainees, the Court claimed that the authorities were under "an obligation to conduct a medical examination of the applicant as well as of other detainees held in the premises concerned for injuries".[722] Given the vast number of injured inmates, it considered the possible injuries of other detainees after the operation was a 'realistic possibility'. It was also undisputed that the applicant had also complained before the Moscow Region Prosecutor's Office. However, the Prosecutor refused to institute criminal proceedings on the allegations mainly due to 'non-existence of medical assistance application by Mironov'. The Russian Government did not also provide the medical certificate that it previously declared its prospective submission to the Court. The Government's reasoning on whether there had been an inspection or not was also self-contradictory. The ECtHR emphasised the inherent obligation of the State authorities' to conduct a medical examination of inmates where there were allegations of ill-treatment. Within such a context, the Court ruled that:

> although the applicant's allegations of having been beaten by the *Fakel* officers on 23 June 2002 has remained unsubstantiated by any medical evidence, in the circumstances of the case the authorities' failure to conduct a medical examination to ascertain whether the applicant had sustained any injuries as a result of the operations conducted in remand prison IZ-50/9 on 23 June 2002 amounted to a breach of the State's positive obligation to ensure that individuals are not subjected to treatment contrary to Article 3 of the Convention.[723]

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[721] *Ibid*, para. 56.

[722] *Ibid*, para. 57.

[723] *Ibid*, para. 64.

Likewise, the Court emphasised the importance of training of law enforcement officials within the scope of positive obligations terminology by claiming that:

> Article 3 of the Convention establishes, like Article 2 of the Convention, a positive obligation on the State to train its law enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no-one is subjected to torture or treatment that runs contrary to that provision (see, *mutatis mutandis*, *Abdullah Yilmaz v. Turkey*, no. 21899/02, § 57, 17 June 2008). This also presupposes that the training activities of law enforcement officials, including officials of the penitentiary institutions, are not only in line with that absolute prohibition, but also aim at prevention of any possible treatment or conduct of a State official, which might run contrary to the absolute prohibition of torture, inhuman or degrading treatment or punishment.[724]

In *Premininy v Russia,*[725] the applicants complained that the first applicant had been systematically humiliated and beaten up by his three cellmates in Yekaterinburg no. 1 temporary detention facility. Additionally, they claimed that long wooden sticks used by the assailants in the most serious attack of 10 June 2022 were provided by the warders. In its analysis about the merits of the case, the Court preferred to question “two separate but interconnected questions: the credibility of his version of events and the gravity of the ill-treatment to which he was allegedly subjected, and the State's accountability for that treatment”.[726] For the first limb of its questioning, the Government objected the applicant’s description of the event by claiming that his injuries had resulted from a one-off fight between the applicant and his cellmate K. In addition to the prison doctor’s opinion on the event in question, the Court also took into account the forensic psychiatric examination of the first applicant revealing a strong link between the deterioration of his mental health and his psychologically traumatic experience. Hence it comes to the conclusion that “the first applicant was a victim of systematic ill-treatment at the hands of his cellmates which lasted for at least a week”.[727]

As to the second limb of the questioning, the European Court sought the State’s responsibility upon supervision and control system in detention facility. By referring to the absolute character of the right under Article 3, the Court pronounces that it “has developed a test for cases concerning a State's positive obligation under that Convention provision”.[728] The core of the test, according to the Court, relates “to the question whether

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[724] *Davydov and Others v Ukraine, supra* note 528, para. 268.

[725] *Supra* note 695.

[726] *Ibid*, para. 75.

[727] *Ibid*, para. 80.

[728] *Ibid*, para. 84.

the authorities fulfilled their positive obligation under Article 3 will depend on all the circumstances of the case under examination”.[729] As to the case in question, the Court emphasises as follows:

> it is the State's utmost responsibility to prevent and address violence among inmates in prisons in accordance with its obligation to respect, protect and fulfil the right of individuals not to be subjected to torture or to inhuman or degrading treatment or punishment.[730]

Looking closer to the facts the case, the Court notes that the administration of the detention facility was already aware of the acts of violence against the first applicant. Again, it points out that the first applicant’s psychological state, his relatively young age and his having no previous experience of the criminal justice system should have been taken into account by the authorities. Within such a framework, the Court takes the view that even if the administration of the detention facility was not immediately aware of the first attack inflicted on the first applicant, “within a few days they should have been alerted to the fact that [he] had been subjected to ill-treatment and that there was cause to introduce specific security and surveillance measures to prevent him being the subject of continual verbal and physical aggression”.[731]

As regards the promptness of the action by the authorities, the Court points out the necessity of ‘the coordination of security staff, forensic, medical, and mental health practitioners and facility management’.[732] Nonetheless, it expresses its concern for not seing the existence of any material and satisfactory evidence aiming at guaranteeing the security of the first applicant against the existence of a serious risk. It is understood from the material provided by the parties that ‘the detention facility lacked a clear policy on the classification and housing of detainees, key to promoting internal prison security and preventing prison violence’.[733] Lack of a clear policy of monitoring for inmates ‘prone to being violent or those who were at risk of being subjected to violence’ is also a point of concern for the Court.[734] Furthermore, the absence of a disciplinary policy by the authorities was another leading issue revealing “that prison violence was not taken as seriously as other crimes and that the facility administration allowed detainees to act with

[729] *Ibid*.

[730] *Ibid*, para. 85.

[731] *Ibid*, para. 87.

[732] *Ibid*.

[733] *Ibid*.

[734] *Ibid*, para. 88.

impunity to the detriment of the rights of other inmates, including the right guaranteed by Article 3 of the Convention".[735] To sum up, the Court came to the conclusion that:

> the facility administration did not maintain a safe environment for the first applicant, having failed to detect, prevent or monitor, and respond promptly, diligently and effectively to the systematic inhuman and degrading treatment to which he had been subjected by his cellmates. The Court therefore concludes that the authorities did not fulfil their positive obligation to adequately secure the physical and psychological integrity and well-being of the first applicant.[736]

As regards obligation to carry out an effective investigation in *Premininy v Russia*, the Court enlists the inadequacy of authorities: Firstly, the initial one-day investigation by the facility's administration and its consecutive decision not to take any action on the cause of the most serious incident of ill-treatment were a point of concern upon the independency of the investigation. Secondly, decision of the administration was quashed by the Sverdlovsk Regional Prosecutor's Office after more than two years. Although an additional investigation was also initiated, it was a substantial delay so as to bring the assailants to justice. Again, the Court is not content with the performance of the Russian prosecuting authorities in acting of their own motion so as to investigate the 'decisions of the management of detention facilities, particularly those which concern instances of alleged ill-treatment of detainees'.[737] It is also not satisfied that the investigation was conducted in a diligent nature ensuring "that all the facts were established, that culpable conduct was exposed and that those responsible were held accountable".[738] Thus it concluded that "the investigation was not prompt, expeditious or sufficiently thorough".[739]

Accordingly, the Court unanimously hold that there has been a violation of Article 3 of the Convention on account of the authorities' failure to fulfil their positive obligation to adequately secure the physical and psychological integrity and well-being of the first applicant in detention facility no. 1 in Yekaterinburg.

Inadequacy of medical assistance or treatment in prisons has embodied a relatively vast number of cases revealing positive obligations of States within the scope of Article 3. In the case of *Romokhov v Russia*,[740] for example, the applicant complained about the

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[735] *Ibid*.

[736] *Ibid*, para. 90.

[737] *Ibid*, para. 95.

[738] *Ibid*, para. 96.

[739] *Ibid*, para. 97.

[740] Application No. 4532/04, Judgement of 16 December 2010.

refusal and delay of medical treatment for his eye problems while in detention. Given the rapid deterioration of his eyesight, the applicant had repeatedly requested to be examined by a specialist. Yet his first official examination by an ophthalmologist was realised in December 2004, four months after the first request. Then he was diagnosed with total retinal detachment in both eyes. Afterwards, due to his granted disability status, Romokhov was released in May 2005. Since the applicant had already got compensation from the domestic courts, the Russian Government demanded that he had ceased to be a "victim" of the alleged breach of Article 3. Nonetheless, even if acknowledging that the domestic courts are genuinely responsible ones in assessing the adequacy of the award, the European Court found the domestic compensation awarded to the applicant did not sufficient. Hence he might "still claim to be a "victim" of a breach of Article 3 of the Convention on account of the delays and defects in his medical treatment while in detention".[741] And it unanimously came to the conclusion that there was a violation of Article 3 of the Convention on account of the delays and defects in the applicant's medical treatment while in detention, which led to the applicant losing his eyesight.

In *Goginashvili v Georgia*,[742] the Court assesses the adequacy of the prison authorities in maintaining the stability of the applicant's health in prison by emphasising that:

> it must be guided by the due diligence test, since the State's obligation to cure a seriously ill detainee is one of means, not of result. Notably, the mere fact of a deterioration of the applicant's state of health, albeit capable of raising, at an initial stage, certain doubts concerning the adequacy of the treatment in prison, could not suffice, as such, for a finding of a violation of the State's positive obligations under Article 3 of the Convention, if, on the other hand, it can be established that the relevant domestic authorities have in timely fashion resorted to all reasonably possible medical measures in a conscientious effort to hinder development of the disease in question.[743]

In the instant case, it found that the prison authority had shown a sufficient degree of due diligence, providing requisite assistance for the renal disorders of the applicant. Accordingly, there has been no violation of Article 3 of the Convention.

Whereas in the case of *Rotaru v Moldova*,[744] a unanimous ruling of the Chamber found the conditions of detention and insufficiency of medical assistance were amounting

[741] *Ibid*, para. 112.

[742] Application No. 47729/08, Judgement of 4 October 2011.

[743] *Ibid*, para. 71.

[744] Application No. 51216/06, Judgement of 15 February 2011.

to inhuman treatment falling within the meaning of Article 3. The applicant was arrested in February 2003 for his alleged crimes of theft and robbery. He was a detainee till his conviction by Rîşcani District Court in June 2005. The applicant complained of inhuman and degrading conditions of the prisons in which he was detained. He, *inter alia,* demanded that the conditions had led to his contracting tuberculosis and other illnesses. The Government submitted before the Court that the detention conditions of the applicant had been in conformity with Article 3 requirements. After his demand for cell change in November 2004, he had been moved to another cell in better conditions of detention. He was offered medical assistance on a number of occasions. And he had been fully treated for tuberculosis before his release, especially after DOTS ("Directly Observed Therapy") treatment in the Pruncul Prison Hospital. The Government maintained that the applicant's refusals for having X-ray examinations in early 2005 had hindered the establishment of diagnosis at an earlier stage. Accordingly, a failure of the authorities in fulfilling their positive obligations to prevent and treat illnesses could not be claimed before the Court.

In its examination, the Court presents the materials evidencing the ongoing problems in the instant case. Firstly, it evaluates the transfer of the applicant to another cell with better conditions of detention as an implicit acknowledgement by the Government that "the conditions of the applicant's detention prior to November 2004 had been substandard".[745] Again the Court pays special attention to the insufficient and poor food service in the system due to a lack of funding, such items as meat, fish or dairy products were provided 'within the limits of available funds'.[746] By taking the applicant's particular situation necessitating a special diet including basic ingredients such as dairy products, meat and fish, the Court expresses its concerns for the adequacy of treatment for the treatment of tuberculosis. By referencing to the 2007 report of the CPT, it does emphasise the ongoing overcrowding problems in the Moldovan prison systems and its possible side-effects upon detainees' health. Considering the fact that the applicant's detention period lasted more than seven years (except for several months in the prison hospital), the Court considers that the conditions of the applicant's detention were inhuman and accordingly finds the infringement of Article 3.

In the case of *Ciorap v Moldova*,[747] the Court assessed the sensitive issue of force-feeding within the realm of Article 3. The applicant went on a hunger strike due the

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[745] *Ibid*, para. 33.

[746] *Ibid*, para. 34.

[747] *Supra* note 523. See also *Nevmerzhitsky v Ukraine*, Application No. 54825/00, Judgement of 5 April 2005.

general conditions of the prison and subsequent violation of his rights. Since there was no clear-cut response from the authorities, he cut his wrists and set fire to himself in August 2001. After his treatment, he was force-fed a couple of times by means of a stomach tube.[748] The respondent Government argued that the force-feeding in question was based upon medical grounds. It was ordered and carried out by the qualified personnel under the legitimate authorisation by law. Since the applicant had gone on strike for twenty four days, there was a real risk threatening his life. The applicant's suicidal behaviour and his being diagnosed with "mosaic schizophrenia" were also supporting factors of a force feeding operation, consisting of the use of handcuffs and other equipment. In its assessment the Court notes that although there was sufficient evidence of a medical necessity to force-feed the applicant, there was not any medical identified reason by the authorities to start the force-feeding procedure.[749] It rather particularises that "the applicant's health was each time assessed as "relatively satisfactory" or even "satisfactory" by the duty doctor ..., which is hardly compatible with a life-threatening condition requiring force-feeding".[750] Under such conditions, the Court assesses that the force-feeding in question was not realised for guaranteeing the applicant's best interests but rather as a one aiming at 'discouraging him from continuing his protest'. Then the Court has dwelt on the manner of the force-feeding by the authorities. First of all, it points out that the practice of force-feeding would likely to cause of severe pain upon the applicant. Additionally while there was a less intrusive alternative option to force-feeding, none of the domestic authorities did not even consider about feeding the applicant by means of intra-venous drips. Such a practice in the eye of the Court was unnecessarily painful and humiliating. Accordingly there was a violation of Article 3 of the Convention.

In another case associated with medical condition of the applicant, the ECtHR found the practice of the State officials was diminishing his human dignity and amounting

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[748] "He described the process as follows: he was always handcuffed, even though he never physically resisted force-feeding but simply refused to take food as a form of protest. The prison staff forced him to open his mouth by pulling his hair, gripping his neck and stepping on his feet until he could no longer bear the pain and opened his mouth. His mouth was then fixed in an open position by means of a metal mouth-widener. His tongue was pulled out of his mouth with a pair of metal tongs which he claims left it numb and bleeding each time. A hard tube was inserted as far as his stomach through which liquidised food passed into his stomach provoking, on some occasions, sharp pain. When the metal holder was removed from his mouth, he bled, he could not feel his tongue and was unable to speak." (*Ibid*, para. 19)

[749] *Ibid*, para. 81.

[750] *Ibid*.

to inhuman treatment.[751] The applicant was detained in February 2009, on suspicion of being the leader of a criminal organisation and manslaughter. He was placed in temporary detention facility no. 5 in Krasnodar, a four-storey building constructed in 1938. While the administrative offices and technical facilities of the facility were located on the ground floor, the cells were located at the fourth floor. The facility did not have a lift. Given his illnesses, he was bound to a wheel-chair. Since the authorities refused his request to be admitted to a prison hospital, "[e]very day he had been forced to endure the walk from the fourth to the ground floor of the building to receive lengthy haemodialysis, to undergo testing or other medical procedures, to take part in court hearings or to meet his lawyers".[752] Despite the warders' assistance during those walks, he submitted that such an obligation was inhuman and degrading. The Government demanded that there had been a medically equipped special room on the ground floor of the facility with doctors from the Regional Nephrological Centre. Given the lack of medical equipment to perform haemodialysis in any prison hospital in Krasnodar Region, they claimed that transfer of the applicant to a prison hospital was not possible. The reason lying behind the deterioration of the applicant's state of health, according to the Government, was emanating from his occasional refusals to take medicines, including insulin and immunosuppressants.

In its assessment, the Court noted that especially after renal transplantation and initiation of haemodialysis, use of the stairs by the disabled and extremely overweight applicant became a daily occurrence for almost fifteen months. He had to descend and ascend four flights of stairs at least four times a week 'on his way to and from the lengthy, complicated and tiring vital medical procedure of haemodialysis'.[753] Additionally, he had to endure similar trips, *inter alia,* for the visits of his lawyer and his attendances to a court hearing. The Court also underlines the fact that the applicant did not have an opportunity to walk in the recreation yard of the facility, noting the existence of two exceptional cases. Although there was no evidence proving the existence of a positive intention to humiliate the applicant, the Court assessed that:

> the detention authorities were indifferent to his accessibility needs. The prison management made no improvements which could have mitigated his access to the medical, recreational or administrative facilities over time, although the frequency with which the applicant needed to use the stairs indicated that the authorities should have taken action to address his needs. Additionally, given the number of

[751] *Arutyunyan v Russia*, Application No. 48977/09, Judgement of 10 January 2012.

[752] *Ibid*, para. 60.

[753] *Ibid*, para. 77.

> grievances the applicant appears to have lodged regarding the conditions of his detention, the Court finds it undisputable that the authorities were aware of the applicant's unusual distress. While reiterating its constant jurisprudence, according to which a State has a sufficient margin of discretion in defining the manner in which it fulfils its obligation to protect the physical well-being of persons deprived of their liberty, *inter alia,* by choosing an appropriate facility, taking into account "the practical demands of imprisonment", as long as the standard of chosen care is "compatible with the human dignity" of a detainee (see *Aleksanyan v. Russia*, no. 46468/06, § 140, 22 December 2008, and most recently, *Vasyukov v. Russia*, no. 2974/05, § 79, 5 April 2011), the Court finds it inexplicable that the Russian authorities persistently dismissed the applicant's pleas for a transfer to another detention facility or a prison hospital, given, and it was not disputed by the Government, that detention facility no. 5 was initially unprepared to accommodate an inmate of the applicant's needs, lacking the medical licence, equipment and personnel to provide him with the required medical care, including haemodialysis.[754]

In addition to the inactivity of the authorities for finding a place of detention appropriate for the applicant in another region of Russia, the Court also noted their failure "to handle the applicant in a safe and appropriate manner consistent with his disability, denying him effective access to the medical facilities, outdoor exercise and fresh air".[755] Accordingly, there was a violation of Article 3 of the Convention.

In cases of *Keenan v the United Kingdom*[756] and *Sławomir Musiał v Poland*[757] the Court assessed the scope of States' obligations upon allegations relating to prison suicides. In the former case, the Court pointed out the lack of effective monitoring of the mentally ill prisoner. Despite the fact that the authorities were already aware of Keenan's suicide risk, imposition of a serious disciplinary punishment – seven days' segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days before his expected date of release – to a mentally ill prisoner was not seen appropriate form of conduct by the Court. Having regarded such an administrative approach as an inhuman and degrading treatment and punishment, it unanimously found an infringement of Article 3 of the Convention.

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[754] *Ibid*, para. 80.

[755] *Ibid*, para. 81.

[756] *Supra* note 648. Rietiker, *supra* note 445, pp. 99-101.

[757] Application No. 28300/06, Judgement of 20 January 2009.

2.4.2.3 Right to Liberty and Security (Article 5)

Provides that:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph (1) (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 5 of the Convention primarily aims at protecting the physical liberty and security of person. As Harris *et al* express:

> [t]he Court's jurisprudence contains several statements affirming the paramount importance of the right to liberty in a democratic society, its relationship with the principle of legal certainty and the rule of law, and generally explaining that the overall purpose of Article 5 is to ensure that no one should be disposed of his liberty in an 'arbitrary fashion'.[758]

Nonetheless, since lawful detention is to be considered in comply with the wording of Article 5, additional restrictions on the liberty of an inmate will not usually give rise to any issue under this article in question. In its decision on the admissibility of *Bollan v the United Kingdom,*[759] the Court:

> does not exclude that measures adopted within a prison may disclose interferences with the right to liberty in exceptional circumstances. Generally however, disciplinary steps, imposed formally or informally, which have effects on conditions of detention within a prison, cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and therefore fall outside the scope of Article 5 § 1 of the Convention (see Application no. 7754/77, dec. 9.5.77, D.R. 11, p. 216). In appropriate cases, issues may arise however under Articles 3 and 8 of the Convention.[760]

In such a context, the Court assessed the nature of the allegation by the relatives of a woman detainee who committed suicide while confined in her cell during a period while other prisoners were enjoying their free association. Having contemplated that the confinement of Angela Bollan in her cell from 11.10 a.m. to 12.50 p.m. disclosed a variation in the routine conditions of her detention, the Court thought that the circumstances of the case did not involve a deprivation of liberty and unanimously declared the application in question inadmissible.

In the case of *Yankov v Bulgaria*,[761] the applicant, *inter alia,* alleged that his detention had not been unjustified and unreasonably lengthy and that he had not been brought promptly before a judge or other officer authorised by law to exercise judicial power. He furthered his claim by submitting that the authorities had not established the existence of any danger of his absconding or committing an offence. According to him, there was no clear reasoning for his pre-trial detention since he already had a family, an established professional life and a permanent residence. Whereas the Government demanded that the case had been a very complex one. Accordingly, they claimed that the domestic authorities had taken all necessary measures so as to conduct the case effectively.

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[758] Harris *et al.*, p. 122.

[759] Application No. 42117/98, Inadmissibility Decision of 4 May 2000.

[760] *Ibid.*

[761] *Supra* note 591.

Referring to its previous case law about Bulgarian legal system before 1 January 2000, the Court reiterated that the old domestic system did not provide "officers authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention. Since the decision upon Yankov's arrest confirmed by an investigator and a prosecutor with no power to make a binding decision to detain the applicant, it declared the violation within the meaning of Article 5 § 3 of the Convention. Secondly, about the alleged lengthy nature of pre-trial detention, the Court noted that the domestic authorities failed to 'address concrete relevant facts' but rather preferred to rely 'solely on a statutory presumption based on the gravity of the charges'.[762] Therefore, the ECtHR declared the failure in justifying the applicant's remand in custody for a period of two years and almost four months was also a violation of Article 5 § 3 of the Convention. Again the Court notes that although Article 5 § 4 of the Convention does not impose a general obligation on States Parties, it maintains that "the judge examining appeals against detention must take into account concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty".[763] Hence it finds violation of Article 5 § 4 of the Convention. Responding to the last allegation by the applicant under Article 5, the Court sought to clarify the claim whether the domestic system had not had a provision so as to compensate the illegal detention in question. Since seeking compensation for a person remanded in custody would only be possible only if the detention order was set aside 'for lack of lawful grounds', the Court, within the paradigm of lawfulness, held that "Bulgarian law did not afford the applicant an enforceable right to compensation, as required by Article 5 § 5 of the Convention".[764]

In *Arutyunyan v Russia*,[765] the Court assessed the alleged unlawfulness of applicant's detention from 24 to 28 January 2010. The applicant demanded that the District Court's decision of 21 January 2010 was not a formal order lawfully extending his detention but merely a one issued for responding to the demand of the applicant's lawyer for his release. Refusing to construe the decision of 21 January 2010 as a formal order authorising the applicant's detention until 28 January 2010, the Court noted that the domestic authorities were under an obligation to authorise the detention in question 'in

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[762] *Ibid*, para. 172.

[763] *Ibid*, para. 175.

[764] *Ibid*, para. 197.

[765] *Supra* note 751.

accordance with a procedure prescribed by law' by issuing a formal detention order under Article 5 § 1 of the Convention. Within such a context, the Court declared that:

> [f]inding otherwise would place on the applicant, rather than the authorities, the burden to ensure a lawful basis for his continued detention (see, among other authorities, *Melnikova v. Russia*, no. 24552/02, § 62, 21 June 2007; *Shukhardin v. Russia*, no. 65734/01, § 81, 28 June 2007; and *Matyush v. Russia*, no. 14850/03, § 63, 9 December 2008). The Court is not convinced that the decision of 21 January 2010 could be construed as a formal order authorising the applicant's detention until 28 January 2010.[766]
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> However, even proceeding on the assumption that the Government's argument to that effect is valid, the Court cannot overlook the fact that the decision of 21 January 2010 did not give any reasons for the necessity to continue keeping the applicant in custody. It also failed to set a time-limit for the continued detention or for a periodic review of the preventive measure.[767]

In the case of *Ivanţoc and Others v Moldova and Russia,*[768] the Court thought about the continued detention of the first two applicants despite its previous jurisdiction upon the issue. The first two applicants were tried and sentenced to 15 years in 1993 by the "Supreme Court of the Moldavian Republic of Transdniestria (MRT)" for various crimes and offences such as murder, deliberate destruction of another's property and the unauthorised use and theft of ammunition or explosive substances. In *Ilaşcu, Ivanţoc, Leşco and Petrov-Popa v Moldova and Russia,*[769] the Court already ruled that there had not been a conviction by a 'court' and that "the sentence of imprisonment passed by "the Supreme Court of MRT" in the circumstances of that case could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law"".[770] Despite the existence of such a clear-cut ruling revealing that applicants' deprivation of liberty was not in comply with the conditions laid down in paragraph 1 (a) of Article 5 of the Convention, the first two applicants were detained until their release in June 2007 in the Moldavian Republic of Transdniestria. Having considered upon the continued detention of the first two applicants in prisons, the Court concluded that there was a continuing violation of Article 5 § 1 of the Convention.

[766] *Ibid*, para. 91.

[767] *Ibid*, para. 92.

[768] Application No. 23687/05, Judgement of 15 November 2011.

[769] Application No. 48787/99, [GC] Judgement of 8 July 2004.

[770] *Ivanţoc and Others v Moldova and Russia*, para. 132.

In *Premininy*,[771] the applicant, *inter alia*, complained about the slowness of domestic courts in reviewing his application for release. By reiterating the function of Article 5 § 4 "in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention", the Court emphasises the need for "a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful".[772] In the instant case, examination of the request for release took almost ten months without any reason emanating from the applicant or his lawyer. By referencing to its existing case law, the Court expresses that such a space of time cannot be considered compatible with the 'speediness' requirement of Article 5 § 4.

In *Lanz v Austria*,[773] the applicant complained that the authorities had decided on the continuation of his detention on remand without giving him the possibility to reply to the submissions of the Senior Public Prosecutor. He alleged that lengthy and carefully reasoned submissions of the Senior Public Prosecutor demanded ordering detention on grounds of a risk of absconding. The Government objected that the applicant, assisted by his counsel, had already had the opportunity to defend himself through oral hearings before the Review Chamber on his request for release from detention on remand. They maintained that the Senior Public Prosecutor had neither taken place nor actually made submissions through the deliberations of the Court of Appeal. The Government also furthered that proceedings under Article 5 § 4 do not offer the same procedural guarantees as proceedings under Article 6 of the Convention, especially when submissions of the Senior Public Prosecutor before the Court of Appeal did not contain any new aspects as in the instant case.

Emphasising the importance of always ensuring equality of arms between the parties, the Court recalls that the proceedings related to deprivation of liberty must be adversarial by stating as follows:

> in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon

[771] *Supra* note 695.

[772] *Ibid*, para. 119.

[773] Application No. 24430/94, Judgement of 31 January 2002.

> (see, mutatis mutandis, Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, p. 27, § 67 and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13.2.2001).[774]

Even if it does not expressly use the terminology of positive obligations, the Court claims that "a State which sets up a second level of jurisdiction for the examination of applications for release from detention must in principle accord to the detainee the same guarantees on appeal as at first instance".[775] Such an implicit procedural obligation, according to the Court, is to be supplemented by the 'truly adversarial' guarantees ensuring the equality of arms between the parties. According to the Court, it is beyond questioning "whether or not a submission by the prosecution deserves a reaction is a matter for the defence to assess".[776] Thus, there is no reason to have a different form of guarantees under Article 5 § 4 other than those under Article 6 of the Convention. Accordingly a unanimous court ruling declares a breach of Article 5 § 4.

In the case of *Stepuleac v Moldova*,[777] the Court assessed, *inter alia*, the reasonableness of the suspicion on which an arrest must be based under Article 5 § 1 (c) of the Convention. In its assessment, the Court pointed out that there were missing parts on the reasoning for ordering the detention in question such as:

> the prosecutor's decision to include the applicant's name in the list of suspects without a statement by the victim or any other evidence pointing to him (see *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 674, 13 November 2003), as well as the prosecutor's failure to make a genuine inquiry into the basic facts, in order to verify whether the complaint was well-founded.[778]

Within the context of the information provided, the Court unanimously did not accept the alleged reasoning for the detention of the applicant as a sufficient one capable of satisfying "an objective observer that the person concerned may have committed the offence".[779]

As a response to the applicant's second arrest, the Court noted that there was "no urgency for an arrest in order to stop an ongoing criminal activity and the 24 investigators assigned to the case could have used any extra time to verify whether the complaints were

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[774] *Ibid*, para. 41.
[775] *Ibid*, para. 42.
[776] *Ibid*, para. 44.
[777] *Supra* note 699.
[778] *Ibid*, para. 73.
[779] *Ibid*.

prima facie well-founded".[780] Since the alleged crime committed by the applicant essentially based upon the circumstances ending in September 2005, the Court argued that he already had plenty of time if he would have wanted to pressure the victim or witnesses or destroy evidence till his arrest ordered in December 2005. Instead of verifying the reasoning objectively, order of arrest by the Centru District Court, just one day after the initiation of the investigation, was a concern for the Court.[781] All in all, the Court is not persuaded with the evidences provided by the Government that there was sufficient ground supporting a reasonable suspicion that the applicant had committed a crime.[782] Hence, the Court has also found the violation of Article 5 § 1 in respect of the applicant's second arrest.

In the case of *V. v the United Kingdom*,[783] the applicant was a child convicted of murder and abduction of a two-year-old boy in February 1992. Ten-year-old boys V. and T. were arrested and detained pending trial. After the conduction of trial, they were found quilt of crimes and sentenced to detention during Her Majesty's pleasure. While the judge recommended "a period of eight years to be served by the boys to satisfy the requirements of retribution and deterrence",[784] the Secretary of State, who was to fix the tariff period, informed the applicant that he should have served a period of fifteen years in respect of retribution and deterrence.[785] Subsequently, after the submission of the applicant before the Divisional Court that the tariff set by the Secretary of State "was disproportionately long and fixed without due regard to the needs of rehabilitation", a majority in the House of Lords found that:

> it was unlawful for the Secretary of State to adopt a policy, in the context of applying the tariff system, which even in exceptional circumstances treated as irrelevant the progress and development

[780] *Ibid*, para. 76.

[781] The reasons given by the court were that: "the crime of which [the applicant] is accused is a serious one for which the law provides a penalty of more than two years; during the initial stage of proceedings the accused could obstruct the investigation, could put pressure on witnesses and the victim and could destroy evidence". (*Ibid*, para. 16)

[782] *Ibid*, paras. 75-80.

[783] Application No. 24888/94, [GC] Judgement of 16 December 1999.

[784] *Ibid*, para. 20.

[785] *Ibid*, para. 23. Section 53(1) of the Children and Young Persons Act 1933 (as amended) provides that: "A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life nor shall sentence of death be pronounced on or recorded against any such person but in lieu thereof the court shall ... sentence him to be detained during Her Majesty's pleasure, and if so sentenced he shall be liable to be detained in such a place and under such conditions as the Secretary of State may direct." (*Ibid*, para. 36)

> of a child who was detained during Her Majesty's pleasure. A majority of the House of Lords also held that in fixing a tariff the Secretary of State was exercising a power equivalent to a judge's sentencing power and that, like a sentencing judge, he was required to remain detached from the pressure of public opinion. Since the Secretary of State had misdirected himself in giving weight to the public protests about the level of the applicant's tariff and had acted in a procedurally unfair way, his decision had been rendered unlawful.[786]

As a result of this judgement, the Secretary of State informed the Parliament in November 1997 that "he would keep the tariff initially set under review in the light of the offender's progress and development".[787] The applicant complained about the lack of any judicial decision in questioning the lawfulness of his detention. The Government contested that there was no obligation under the scope of Article 5 § 4 for a periodical review "because the tariff period primarily depended on the circumstances of the offence and the consequential requirements of retribution and deterrence, factors which were not subject to change over time".[788]

In its reasoning the Grand Chamber unanimously held as follows:

> given that the sentence of detention during Her Majesty's pleasure is indeterminate and that the tariff was initially set by the Home Secretary rather than the sentencing judge, it cannot be said that the supervision required by Article 5 § 4 was incorporated in the trial court's sentence.

In addition to that, the Court also noted the lack of a new tariff after the decision of the House of Lords in June 1997. Such a failure, according to the Court, means that "the applicant's entitlement to access to a tribunal for periodic review of the continuing lawfulness of his detention remains inchoate".[789] To conclude, the Court finds an infringement of Article 5 § 4 of the Convention.

In a group of applications, the Court has recently analysed the preventive detention practice in Germany.[790] All of them had identically common features, arising essentially from retrospective preventive detention orders by the competent domestic courts. While

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[786] *Ibid*, para. 26.

[787] *Ibid*, paras. 27 and 44.

[788] *Ibid*, para. 117.

[789] *Ibid*, para. 121.

[790] *M. v Germany*, Application No. 19359/04, Judgement of 17 December 2009; *B. v Germany*, Application No. 61272/09, Judgement of 19 April 2012; *Jendrowiak v Germany*, Application No. 30060/04, Judgement of 14 April 2011; *Kronfeldner v Germany*, Application No. 21906/09, Judgement of 19 January 2012; *O.H. v Germany*, Application No. 4646/08, Judgement of 24 November 2011; *S. v Germany*, Application No. 3300/10, Judgement of 28 June 2012; *Schwabe and M.G. v Germany*, Application Nos. 8080/08 and 8577/08, Judgement of 1 December 2011.

the sentencing court finds a person guilty of an offence, it may, in addition to the prison sentence, order for the preventive detention of offender at the time of conviction "if the offender has been shown to be a danger to the public".[791] The Retrospective Preventive Detention Act of July 2004 also aimed at "preventing the release of persons whose particular dangerousness came to light only during the execution of a prison sentence imposed on them".[792]

In the case of *B. v Germany*, for example, the applicant was detained in Straubing Prison at the material time. He was convicted of sexual assault and rape of a hitchhiker with the aid of weapons and sentenced him to nine years' imprisonment in February 2000 by the Coburg Regional Court. He had also been a number of previous convictions of sexual offences, 'namely of two counts of attempted rape in 1978, of rape in 1983 and of sexual assault and another rape in 1989'. After having consultation of a psychiatric and a psychological expert, the Coburg Regional Court decided that the applicant had not suffered from a pathological disorder and he had had criminal responsibility at the time of offence. However, the Regional Court did not make any decision in its ruling whether the applicant should be placed in preventive detention after serving his nine years sentence.

Starting from November 2005, B. participated with motivation into the social-therapeutic activities for about merely eight months in Straubing Prison. After having served his full sentence, he was placed in preventative detention department of the same prison under the detention order issued on 2 July 2008. Subsequently, the Coburg Regional Court ordered the applicant's preventive detention retrospectively (*nachträgliche Sicherungsverwahrung*) under Article 66b § 2 of the Criminal Code on 8 October 2008. The Regional Court also took into account the reports of the two psychiatric experts,

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[791] *B. v Germany*, para. 31.

[792] *Ibid*, para. 33. Having been entitled 'Retrospective order for placement in preventive detention', Article 66b inserted to the Criminal Code provides as follows:

1. If prior to the end of enforcement of a term of imprisonment imposed on conviction for a felony ... evidence comes to light which indicates that the convicted person presents a significant danger to the general public, the court may order preventive detention retrospectively if ...

2. If evidence of facts of the kind listed in paragraph 1 comes to light after a prison sentence of a term of not less than five years has been imposed for one or more felonies against life or limb, personal liberty, sexual self-determination or ..., the court may order preventive detention retrospectively if a comprehensive assessment of the convicted person, his offence or offences and, in addition, his development during the execution of his sentence revealed that it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims. (*Ibid*, para. 34) Though Article 66b §§ 1 and 2 of the Criminal Code were abolished for offences committed after the entry into force of that Act under the Reform of Preventive Detention Act, which entered into force on 1 January 2011. (*Ibid*, para. 35)

analysing that the applicant had a propensity to recommit serious sexual offences. In addition to the preventive detention ordered, the Court also underlined that "an individual therapy for sexual offenders outside prison which the applicant had declared to be ready to undergo, was not sufficient to protect the public from him".[793]

Although the Regensburg Regional Court decided the termination of the applicant's preventive detention, the Nuremberg Court of Appeal quashed that decision on 29 December 2011 and ordered the continued execution of the applicant's preventive detention. In its reasoning, it claimed that "the applicant did not only suffer from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act, but that it was also highly likely that he would commit the most serious crimes of violence or sexual offences if released".[794]

In fact, all those various decisions of the domestic authorities were formulated under the ruling of the Federal Constitutional Court concerning the retrospective preventive detentions of a number of applicants under Article 66b § 2 of the Criminal Code. By reversing its previous position, the German Constitutional Court in its ruling dated 4 May 2011 stated that:

> all provisions on the retrospective prolongation of preventive detention and on the retrospective ordering of such detention were incompatible with the Basic Law as they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.[795]

In its reasoning, the Constitutional Court, *inter alia*, relied upon the interpretation of the ECtHR in the case of *M. v Germany*[796] and decided that:

> all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the latest. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively under Article 66b § 2 of the Criminal Code, the courts dealing with the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act ... As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of "persons of unsound mind" in Article 5 § 1 sub-paragraph (e) of the

793 *Ibid*, para. 15.

794 *Ibid*, para. 27.

795 *Ibid*, para. 44.

796 *Supra* note 790.

> Convention made in this Court's case-law (see §§ 138 and 143-156 of the Federal Constitutional Court's judgment). If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011.[797]

The applicant alleged that his continued detention after he had fully served his prison sentence was a violation of Article 5 § 1 of the Convention. Although he did not commit another crime in prison, the decision of the Coburg Regional Court of October 2008 was not a 'conviction' for the purposes of Article 5 § 1 (a). According to the applicant, "[t]hat court did not find him guilty of a new offence, but imposed another penalty, namely preventive detention, for the offence of which he had already been found guilty and for which he had been sentenced to a long term of imprisonment in 2000".[798] Since he had been never diagnosed suffering from a 'true mental disorder', the applicant also maintained that describing him as a person 'of unsound mind' within the meaning of sub-paragraph (e) of Article 5 § 1 was baseless.

The Government argued that protecting potential victims from the applicant was a positive obligation of the States, particularly under Articles 2 and 3 of the Convention. Since the preventive detention was ordered 'after conviction' by a competent court, it had been justified under sub-paragraph (a) of Article 5 § 1. Again there existed a causal connection between the conviction and the preventive detention, since:

> the fresh proceedings in which the applicant's preventive detention had been ordered retrospectively in 2008/2009 had to be qualified as akin to a reopening of the proceedings in relation to the assessment of the dangerousness of the perpetrator. New facts had been necessary which had only then disclosed the applicant's dangerousness. Therefore, the judgment of the Coburg Regional Court of October 2008 ordering the applicant's preventive detention retrospectively had to be qualified as a "conviction", for the purposes of Article 5 § 1 (a).[799]

The Government also argued that the applicant had to be qualified, under the assessments of two experts, as being of 'unsound mind' and an 'alcoholic' within the meaning of sub-paragraph (e) of Article 5 § 1.[800]

In its assessment, the ECtHR held that it is only the judgement of the "Coburg Regional Court of 14 February 2000, convicting the applicant of rape with the aid of

[797] *B. v Germany*, para. 46.

[798] *Ibid*, para. 58.

[799] *Ibid*, para. 62.

[800] *Ibid*, para. 63.

weapons, which can be characterised as a "conviction" for the purposes of the Convention".[801] Accordingly, it declared that:

> [t]he judgment of the Coburg Regional Court of 8 October 2008 ordering the applicant's preventive detention retrospectively in relation to that same offence did not involve a finding of guilt in respect of a (new) offence and cannot, therefore, be qualified as a "conviction" within the meaning of sub-paragraph (a) of Article 5 § 1.[802]

Considering the fact that Article 66b § 2 had been inserted in the Criminal Code in July 2004, establishing a causality between the applicant's conviction in 2000 and his – retrospective – preventive detention since July 2008 was not justified under sub-paragraph (a) of Article 5 § 1. Referencing to its case law, the Court reiterated that "the detention of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution".[803] Since the applicant was detained in a separate wing of the Straubing Prison for persons in preventive detention, it also expresses its concern for the availability of an appropriate environment for the applicant. Even if the applicant deliberately refused to take part in social therapeutic group therapies in prison, the Court emphasises that "the applicant's conduct or attitude does not exempt the domestic authorities from providing persons detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition".[804] Thus, the Court did not also accept the continuation of the applicant's detention as a legitimate exception covered under sub-paragraph (e) of Article 5 § 1. To conclude its analysis over the case, the Court states as follows:

> Articles 2 and 3 of the Convention do not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1. Consequently, the State authorities cannot, in the present case, rely on their *positive obligations* under the Convention in order to justify the applicant's deprivation of liberty which ... did not fall within any of the permissible grounds for deprivation of liberty exhaustively listed under sub-paragraphs (a) to (f) of Article 5 § 1.[805]

Accordingly, it finds a violation of Article 5 § 1 of the Convention.

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[801] *Ibid*, para. 73.

[802] *Ibid*.

[803] *Ibid*, para. 81.

[804] *Ibid*, para. 82.

[805] *Ibid*, para. 88. [Emphasis added]

2.4.2.4 Protection from Slavery and Forced Labour (Article 4)

Provides that:

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Under the clear-cut wording of Article 15,[806] Article 4 (1) contains an absolute guarantee and cannot be derogated from in time of war or public emergency. While it is intended to abolish slavery and servitude, Article 4 § 1 aims at protecting the right of individuals who are at liberty. Nonetheless, Article 4 § 2 has a number of exemptions expressly permitted under Article 4 § 3. Although sub-paragraph (a) of Article 5 § 3 permits any work required from the prisoners during detention or during conditional release from such detention, Convention organs have dealt with submissions brought under the alleged violation of Article 4. In the case of *Van Droogenbroeck v Belgium*,[807] the applicant had been sentenced to two years' imprisonment because of his conviction of theft by the Bruges criminal court in 1970. The domestic court also ordered that the applicant should be 'placed at Government's disposal' for an additional period of ten years after the completion of his prison sentence. Having rejected the submission by the applicant, the Plenary Court unanimously held that there was no infringement of Article 5 § 1, upholding the inherent authority of the Minister of Justice for the execution of sentences and other measures.[808] Nonetheless, given the applicant was not able to challenge the lawfulness of his additional detention after a certain space of time elapsed since the inception of

[806] See *supra* note 635.

[807] Application No. 7906/77, [Plenary] Judgement of 24 June 1982.

[808] *Ibid*, para. 41.

detention in question, the Court unanimously pointed out the necessity of court review to be demanded by the applicant at reasonable intervals by finding a violation of Article 5 § 4.[809] Alleging that he had been held in servitude and forced to work in order to save 12,000 BF, the applicant also submitted the violation of his rights under Article 4. However, a unanimous Court ruling held that the applicant was not demanded an extra work apart from the one aiming at his reintegration into society. Such a practice, in view of the Court, "did not go beyond what is 'ordinary' in this context since it was calculated to assist him in reintegrating himself into society and had as its legal basis provisions which find an equivalent in certain other member States of the Council of Europe".[810] Thus, the practice of Belgian authorities did not fall under the expected threshold of Article 4 of the Convention.

Although an early attempt by German prisoners alleged before the EComHR that they were subjected to forced and compulsory prison work without receiving adequate payment and without being covered by the social security system, the Commission declared their complaints inadmissible as being manifestly ill-founded.[811] By pointing out its consistent case-law on the issue, it stated its admissibility decision that Article 4 did not contain any provision concerning the remuneration of prisoners for their work or their coverage under social security systems.

In a recent case of *Stummer v Austria*,[812] the Grand Chamber reiterated the continuation of its existing policy upon the issue. The applicant had spent about twenty-eight years of his life in prison, mostly by working for lengthy periods in the prison kitchen or the prison bakery. As from 1 January 1994, he was affiliated into the unemployment insurance scheme in respect of periods worked in the prison. However, his demand for being affiliated to the old-age pension system was rejected under the General Social Security Act. The Pension Office dismissed the applicant's claim in February 1999, claiming that he had accumulated only 117 insurance months out of 240, the required minimum for an early retirement pension. He submitted before the domestic authorities that the number of months that he had been working in prison should be counted as insurance months and added for the assessment of his pension rights. Rejecting the

[809] *Ibid*, para. 48.

[810] *Ibid*, para. 59.

[811] *Twenty-one Detained Persons v Federal Republic of Germany*, Application Nos. 3134/67, 3172/67 and 3173-3206/67, [EComHR] Decision of 6 April 1968.

[812] *Supra* note 614.

reasoning of the decision of the Labour and Social Court, he maintained that there was no distinction between a work based on an employment contract and a prison work performed on the basis of a legal obligation. Likewise, since prisoners who worked in prison had been affiliated to the unemployment insurance scheme since 1993, there was no justified reason not to include them into the old-age pension system. Rejecting the submissions of the applicant, the Vienna Court of Appeal ruled that affiliation of the unemployment was not conclusive for the question of their affiliation to the old-age pension system. Such a question of social policy, according to the Court of Appeal, was a specific realm for the legislature "to decide whether or not to change the provisions relating to the social insurance of prisoners".[813]

The applicant served his last prison term on 29 January 2004, and subsequently (upon the expiry of his unemployment benefits on 29 October 2004) started to receive emergency relief payments amounting to some 720 euros (EUR) per month.

Stummer complained before the ECtHR, *inter alia*, that since prisoners in Austria were obliged to work under section 44(1) of the Execution of Sentences Act, his prison work amounted to forced or compulsory labour within the meaning of Article 4 § 2 of the Convention. He furthered that if any prisoner who is fit to work does refuse to work assigned to him, it constitutes a punishable offence under sections 107(1) and 109 of the Act in question.[814]

In its assessment, the Grand Chamber points out the difference between the parties upon the nature of prison work. While the Government evaluates it as "work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention",[815] the applicant asserts that prison work without affiliation to the old-age pension system does not fall within the scope of exemption under Article 4 § 3 (a) but rather is to be seen as "forced or compulsory labour", violating Article 4 § 2 of the Convention.[816] His allegation also 'appears to be arguing' that prison work without affiliation to old-age is not in line with the contemporary European standards and the Court's existing doctrine "must be interpreted in the light of present-day conditions".[817] In

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[813] *Ibid*, para. 14.

[814] "The penalties set out in section 109 range from a reprimand, or a reduction or withdrawal of certain rights (for instance, the right to use "house money", to watch television, to send and receive correspondence or telephone calls), to a fine or house arrest (solitary confinement)". (*Ibid*, para. 45)

[815] *Ibid*, para. 126.

[816] *Ibid*.

[817] *Ibid*, para. 129.

answering such a request, the Court firstly sketches out the 1987 and 2006 European Prison Rules, noting that Rule 26.17 provides that "as far as possible, prisoners who work shall be included in national social security systems". Then it points out that:

> [a]ccording to the information available to the Court, while an absolute majority of Contracting States affiliate prisoners in some way to the national social security system or provide them with some specific insurance scheme, only a small majority affiliate working prisoners to the old-age pension system. Austrian law reflects the development of European law in that all prisoners are provided with health and accident care and working prisoners are affiliated to the unemployment insurance scheme but not to the old-age pension system.[818]

Despite its acknowledgement that the existence of an evolving European trend upon the issue of the affiliation of working prisoners to the old-age pension system, the Court does not suffice it proving the existence of a consensus and disapproves translating Rule 26.17 of the 2006 Rules as an *obligation* upon the Contracting States. Thus, it rules that "the obligatory work performed by the applicant as a prisoner without being affiliated to the old-age pension system has to be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a)".[819] Accordingly, it holds by a clear majority, sixteen votes to one, that there has been no violation of Article 4 of the Convention.

2.4.2.5 General Conclusions

In Section 2.4.2, the dissertation aims at sketching out the basis for 'positive obligations to protect' expounded by the Court under Articles 2, 3, 5, and 4. It is the duty incumbent upon States to 'protect' the rights enshrined in the Convention. Unlike the ambiguous wording and implicit referral under 'positive obligations to respect', the Court is more generous in explicitly referring to positive obligations of States as a means of protecting the Convention rights.

Penitentiary systems incapable of truly identifying the vulnerable position of detained persons do not suffice the expected standards of the Court (*Paul and Audrey Edwards v the United Kingdom*). If it is 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, then positive obligations of the authorities to protect arise. The authorities' slowness in

[818] *Ibid*, para. 131.

[819] *Ibid*, para. 132.

responding promptly to the danger to life is also a failure of the authorities in fulfilling their positive obligation (*Česnulevičius v Lithuania)*. Not taking preventive operational measures to protect the life of a prisoner is defined by the Court as another form of failure in fulfilling positive obligations of States (*Renolde v France) (Çoşelav v Turkey)*. Lack of training of the prison officers causing their failure to display due vigilance into suicide attempt of prisoners is not found compatible with the presumed positive obligation to protect life under Article 2 (*Shumkova v Russia).* Slowness of domestic authorities responsible for the treatment of prisoners (*Tarariyeva v Russia)* and their cumulative indecisiveness for finding a practical solution for the prisoners' treatment (*Makharadze and Sikharulidze v Georgia)* are not seen in comply with the State Parties' positive obligation to determine in an adequate and comprehensive manner. Failure of domestic authorities in applying individual programme and compulsory psychiatric treatment to prisoners can again be a form of failure of States Parties to protect the life of individuals within the meaning of Article 2 (*Branko Tomašić and Others v Croatia)*. However, the Court does not broaden the scope of causal link between granting prison leave to prisoners by the authorities and their killing of an individual when they are in their prison leave to a degree reminiscent of the responsibility of States Parties if the statistical evidence supports that the domestic prison leave system has already been in line with the rehabilitation ideals of criminal justice (*Mastromatteo v Italy)*.

As regards prohibition of torture under Article 3 of the Convention, the Court states that taking necessary administrative and practical measures for securing appropriate conditions of detention for detainees falls within the ambit of Article (*István Gábor Kovács v Hungary)*. When there has been silence of the domestic authorities in duly responding to the applicant's allegation of intimidation in his cell by unidentified persons, the Court adjudicates to examine the case within the perspective of positive obligations and finds out that the authorities do not fulfil their positive obligation of properly investigating allegations of ill-treatment (*Stepuleac v Moldova).* Medical examination of inmates after the applicant's allegations of having been beaten and training of law enforcement officials for the prevention of any possible ill-treatment are also articulated within the scope of positive obligations terminology by the Court (*Mironov v Russia)*. Procuring an effective coordination of security staff, forensic, medical, and mental health practitioners and facility management are intrinsically amongst positive obligations that the authorities could not succeed in formulating so as to alleviate the violence amongst prisoners in *Premininy v Russia.* Providing prompt and timely medical treatment for inmates without causing delays

and defects in treatment while in detention (*Romokhov v Russia),* insufficient detention and treatment conditions for ill prisoners (*Rotaru v Moldova) (Arutyunyan v Russia),* lack of effective monitoring of mentally ill prisoners (*Keenan v the United Kingdom)* are also amongst the issues which disclose that States must improve their existing standards to a degree arising from the obligations that they have already undertaken.

As to the cases raised under Article 5 of the Convention, they in particular focus on allegations of unlawfulness of detention (*Arutyunyan v Russia) (Yankov v Bulgaria) (Ivanţoc and Others v Moldova and Russia)*. Additionally the slowness of the domestic judicial system for detainees (*Premininy v Russia),* establishing guarantees to detainees for securing equality of arms (*Lanz v Austria*), lack of reasonable suspicion for detaining individuals (*Stepuleac v Moldova*), lack of regular supervision of detention orders by the domestic courts (*V. v the United Kingdom),* and prohibition of retrospective detention orders by the Courts (*B. v Germany)* are amongst the leading issues that the ECtHR has pointed out the necessity of reorganising procedural aspects of domestic systems without making any explicit reference to positive obligations of States Parties.

Having justified the compulsory labour for prisoners, the Court holds that Contracting States are not under a positive obligation of affiliating the working prisoners to the old-age pension systems under Article 4 of the Convention (*Stummer v Austria*).

2.4.3 Positive Obligations to Fulfil

2.4.3.1 Right to Free Elections (Protocol No. 1 - Article 3)

Provides that:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The right to free elections is protected under Article 3 of the First Protocol.[820] It presupposes the existence of a freely elected legislature as a basis of a democratic society.[821] The article is a basis for the enjoyment of an effective democratic society. Although the unique phrasing of the article apparently underlines the existence of a pure obligation to be undertaken by the Contracting Parties, case law of the Convention organs, as will be discussed below, has established that it also 'guarantees individual rights, including the right to vote and to stand for election'.[822]

Although the number of complaints alleging the violation of Article 3 Protocol No. 1 has been increasing in recent years, the first judgement on this Article by the Court was not delivered until 1987.[823] In that case, the Court pointed out that this was an area where the Contracting States were required to take *positive measures* as opposed to merely refraining from interference.[824] Although this general tendency is similar within realm of prisoners' rights, the Convention organs, as from the 1967, held that depriving convicted prisoners of the right to vote did not violate the Convention.[825] Indeed, as the Court points out in *Hirst*, the case law has traditionally justified 'various restrictions on certain convicted persons':[826]

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[820] *Supra* note 588.

[821] Ovey and White, p. 388.

[822] *Hirst v the United Kingdom* (No. 2), Application No. 74025/01, Judgement of 6 October 2005, paras. 56-57.

[823] *Mathieu-Mohin and Clerfayt v Belgium,* Application No. 9267/81, Judgment of 2 March 1987.

[824] *Ibid*, para. 57. Rory O'Connell, "Realising political equality: the European Court of Human Rights and positive obligations in a democracy", **Northern Ireland Legal Quarterly**, 61(3), 2010, p. 271.

[825] *X. v Federal Republic of Germany*, Application No. 2728/66, [EComHR] Decision of 6 October 1967.

[826] *Hirst v the United Kingdom* (No. 2), para. 64.

> In some early cases, the Commission considered that it was open to the legislature to remove political rights from persons convicted of "uncitizenlike conduct" (gross abuse in their exercise of public life during the Second World War) and from a person sentenced to eight months' imprisonment for refusing to report for military service, where reference was made to the notion of dishonour that certain convictions carried with them for a specific period and which might be taken into account by the legislature in respect of the exercise of political rights (no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 245). In *Patrick Holland v. Ireland* (no. 24827/94, Commission decision of 14 April 1998, DR 93, p. 15), where, since there was no provision permitting a serving prisoner to vote in prison, the applicant, who was sentenced to seven years for possessing explosives, was *de facto* deprived of the vote, the Commission found that the suspension of the right to vote did not thwart the free expression of the opinion of the people in the choice of the legislature and could not be considered arbitrary in the circumstances of the case.[827]

Again in the case of *M.D.U. v Italy*, the Court rejected the complaint of a former Member of Parliament sentenced to three years' imprisonment together with an additional judge-imposed ban on voting for a two-year period imposed in connection with a conviction for tax fraud served 'the proper functioning and preservation of the democratic regime'.[828]

However, the Court was also resolute in finding an infringement of Article 3 in case of disenfranchisement of a former detainee in *Labita v Italy*.[829] The applicant had been arrested in April 1992, being suspected of a member of a mafia-type organisation in Alcamo and of running a financial company on behalf of his brother-in-law, suspected of the leader of the main mafia gang in the area. After a judgement of 12 November 1994, the Trapani District Court acquitted the applicant given the insufficiency of evidence obtained during the investigation. Subsequently he was released from the prison. The public prosecutor's appeal against the acquittal was also dismissed by the Palermo Court of Appeal in December 1994. The applicant submitted before the Court, *inter alia*, that his disenfranchisement despite his acquittal was a violation of Article 3 of Protocol No. 1. Arguing that the temporary disenfranchisement of the applicant was a justified intention so as to prevent Mafia's influence over elected bodies, the Government claimed the restriction was proportionate within the meaning of the Article.[830]

Acknowledging the existence of a wide margin of appreciation of the Contracting States in this sphere, the Court emphasises that "it is for the Court to determine in the last

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[827] *Ibid*, para. 65.

[828] *M.D.U. v Italy*, Application No. 58540/00, Judgement of 28 January 2003.

[829] Application No. 26772/95, [GC] Judgement of 6 October 2000.

[830] *Ibid*, para. 199.

resort whether the requirements of Protocol No. 1 have been complied with".[831] By taking into consideration the rulings of the domestic courts on the ground that the applicant "had not committed the offence", the Grand Chamber unanimously found that there was no concrete evidence corroborating the 'suspicion' that the applicant had belonged to the Mafia at the time of the removal of his name from the electoral register.[832] There has accordingly been a violation of Article 3 of Protocol No. 1.

Within such a context, the Grand Chamber's ruling in *Hirst* has provided a new perspective on blanket ban imposed upon convicted prisoners in Europe. The applicant had been sentenced to a term of discretionary life imprisonment in 1980, being convicted of manslaughter on ground of diminished responsibility. Although he had already served the essential part of his sentence relating retribution and deterrence in June 1994, the Parole Board, considering his risk and dangerousness to the society, lasted his detention till his release from prison in May 2004. When the applicant maintained before the domestic authorities that his disenfranchisement from voting in parliamentary or local elections was not compatible with the ECHR, judicial authorities rejected the claim under section 3 of the Representation of the People Act 1983.[833]

Although the Court expressed that issues claimed under Article 3 Protocol No. 1 might have fallen within the ambit of positive obligations of States, it again prefers using its well-established test in questioning the existence of the alleged violation of the right in question. It firstly looks for whether the existing domestic policy has had a legitimate aim. The Court notes that even if "the primary emphasis at the domestic level may perhaps have been the idea of punishment, it may nevertheless be considered as implied in the references to the forfeiting of rights that the measure is meant to give an incentive to citizen-like conduct".[834] Although it takes into consideration the assertion by the domestic authorities that "voting is a privilege not a right" and expresses its doubts upon the efficacy of achieving the identified aims of the Government,[835] the Court refrains from declaring the illegitimacy of expressed aims through a blanket ban on voting rights of prisoners. As to the second criterion of the test in question, it lists a number deficits or rather

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[831] *Ibid*, para. 201.

[832] *Ibid*, para. 203.

[833] The said provision provides "(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election".

[834] *Ibid*, para. 74.

[835] Namely, "the aim of preventing crime by sanctioning the conduct of convicted prisoners and also the aim of enhancing civic responsibility and respect for the rule of law". (*Ibid*)

disproportionalities within the very fabric of the domestic policy. Firstly, it notes that the number of convicted prisoners in the UK, deprived automatically of their right to vote and stand for election, namely some 48.000, is not a negligible figure. Again the Court points out that even if there is no rational link 'between the facts of any individual case and the removal of the right to vote', the courts in England and Wales impose sentences without making any reference to disenfranchisement in their decisions.[836] Furthermore, the Grand Chamber does not assess the initiatives performed by the legislature in time as sufficient, not considering them in line with the 'current standards of human rights and modern day penal policy'. Having acknowledging the wide margin of appreciation, the Court emphasises that:

> [t]he [domestic] provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.[837]

Accordingly, it concludes by a majority, twelve votes to five, that the restriction affecting all convicted prisoners in custody goes beyond a State's margin of appreciation and there has been a violation of Article 3 of Protocol No. 1.

The majority's decision revealed that imprisonment after conviction did not automatically elicit the "forfeiture of rights beyond the right to liberty" and that "voting was a right and not a privilege".[838]

Having expressed in particular 'the sensitive political character of the issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1', five dissentients did not accept the imposition of an *obligation* on national legal systems necessitating "either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent".[839]

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[836] *Ibid*, para. 77.

[837] *Ibid*, para. 82.

[838] Van Zyl Smit and Snacken, p. 255.

[839] Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para. 9. [Emphasis added]

2.4.3.2 No Punishment without Law (Article 7)

Provides that:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7 of the Convention enshrines the principle of legality in the context of criminal law, *nullum crimen, nulla poena sine lege.* As an essential element of the rule of law, the Article "should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment".[840] Its importance is also recognised by the fact that it cannot be derogated from in time of war or other public emergency under Article 15 of the Convention. In *M. v Germany*, the Court states that:

> [w]hile it prohibits in particular the retrospective application of the criminal law to an accused's disadvantage (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A) or extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005, and *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV).[841]

As to the cases related to prisoners' rights under Article 7, retrospective application of the relevant legislation by the Contracting States has been a point of concern for the Convention organs: for example, application of the confiscation order in *Welch*[842] and extension of the maximum period of imprisonment from four months in default to two years in *Jamil*[843] were breaches under the meaning of the Article. There is also a recent

[840] *M. v Germany*, *supra* note 790, para. 117.

[841] *Ibid*, para. 118.

[842] *Welch v the United Kingdom*, Application No. 17440/90, Judgement of 9 February 1995.

[843] *Jamil v France*, Application No. 11/94, Judgement of 25 May 1995.

series of parallel cases by the prisoners from Germany alleging that application of preventive detention retrospectively as an additional sentence was, in addition to the allegations under Article 5 (see Section), a violation of Article 7 of the Convention.[844]

In the case of *Jendrowiak*, for example, the applicant was detained in Bruchsal Prison, being convicted multiple counts of sexual offences since 1972. Lastly, the Heilbronn Regional Court had sentenced him to three years' imprisonment and had ordered his placement in preventive detention pursuant to Article 66 § 1 of the Criminal Code. After serving his sentence, he was placed in preventive detention as from 24 October 1992 till 23 October 2002 under the jurisdiction of Karlsruhe Regional Court. Then the domestic court, after having heard the applicant and his counsel in person, decided the continuation of the applicant's preventive detention before his prospective release on 15 October 2002. The report of a psychiatric had also impact on the embodiment of the court's decision that "the applicant, owing to his criminal tendencies, might commit serious sexual offences if released resulting in considerable psychological or physical harm to the victims".[845] Jendrowiak's allegations before the Karlsruhe Regional Court was also been dismissed in November 2002.

Within the framework of domestic legal practice, the maximum duration of prevention period could not exceed ten years under Article 67d § 1 of the Criminal Code. After ten years at most, the detainee must have been released. As from 31 January 1998, a new version of the Criminal Code entered into force, abolishing the former maximum duration of preventive detention. With this new regulation, sentencing courts and courts responsible for the execution of judgements shall declare the termination of preventive detention "(only) if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims".[846] Jendrowiak submitted before the ECtHR that the retrospective

[844] *M. v Germany*, *supra* note 790; *G. v Germany*, Application No. 65210/09, Judgement of 7 June 2012; *Jendrowiak v Germany*, *supra* note 790; *O.H. v Germany*, *supra* note 790; *Schummer v Germany*, Application Nos. 27360/04 and 42225/07, Judgement of 13 January 2011. See also *Kafkaris v Cyprus* (*supra* note 607) as a parallel but *distinct* case that the relevant Cypriot law 'as a whole' was not formulated with "sufficient precision as to enable the applicant to discern, even with appropriate advice, the scope of the penalty of life imprisonment and the manner of its execution". (*Ibid*, para. 150)

[845] *Ibid*, para. 10.

[846] *Ibid*, para. 25. As already expressed above (see *supra* notes 790 and 792), the German Federal Constitutional Court has reversed its previous position on preventive detention with its leading judgment of 4 May 2011. It held that "the provisions of the German Criminal Code on preventive detention at issue did not satisfy the constitutional requirement of

detention of his preventive detention to an unlimited period of time under the said domestic legislation was a violation of his right not to have a heavier penalty other than the one applicable at the time of his offence under Article 7 of the Convention.

Referring to his previous case law, the ECtHR, in its assessment, came to the conclusion that "the applicant's preventive detention – as that of the applicant in the case of *M. v. Germany* – was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence".[847] Having seen the instant case as a follow up one, the Court notes that:

> preventive detention under the German Criminal Code, having notably regard to the facts that it is ordered by the criminal courts following a conviction for a criminal offence and that it entails a deprivation of liberty which, following the change in the law in 1998, no longer has any maximum duration, is to be qualified as a "penalty" for the purposes of the second sentence of Article 7 § 1 of the Convention.[848]

The Court also pays attention to the claim of the Government that State authorities are under a positive obligation to take preventive operational measures to protect the individuals from the criminal acts of another individual. Nonetheless, it reiterates that:

> [t]he Convention thus does *not oblige* State authorities to protect individuals from criminal acts of the applicant by such measures which are in breach of his right under Article 7 § 1 not to have imposed upon him a heavier penalty than the one applicable at the time he committed his criminal offence.[849]

Accordingly, it unanimously concludes that there is a violation of Article 7 § 1 of the Convention.

establishing a difference between preventive detention and detention for serving a term of imprisonment". (*G. v Germany*, *supra* note 844, para. 73)

[847] *Ibid*, para. 46.

[848] *Ibid*, para. 47.

[849] *Ibid*, para. 48. [Emphasis added]

2.4.3.3 Right to an Effective Remedy (Article 13)

Provides that:

> Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13 requires States Parties to provide effective remedies for the individuals before national authorities for the fulfilment of their Convention rights. Since the absence of an effective domestic remedy before the national authorities gives way to its submission under the related articles of the ECHR, the Court assesses such a deadlock at domestic level as a matter of violation within the meaning of Article 13.[850] As it states in *Dankevich v Ukraine*[851]:

> this provision guarantees remedies at the national level to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their *Convention obligations* under this provision. The scope of the *obligation* under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII, § 97).[852]

Likewise in *Silver and Others v the United Kingdom*, the Court has expressed the principles of Article 13 arising from the interpretation of its own jurisprudence by stating as follows:

> (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see ... Klass and others judgment, Series A no. 28, p. 29, § 64);

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[850] Harris *et al.*, p. 557.

[851] Application No. 40679/98, Judgement of 29 April 2003.

[852] *Ibid*, para. 168. [Emphases added]

> (b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (ibid., p. 30, § 67);
> (c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (see, mutatis mutandis, ... X v. the United Kingdom judgment, Series A no. 46, p. 26, § 60, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 32, § 56);
> (d) neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 18, § 50).
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> It follows from the last-mentioned principle that the application of Article 13 (art. 13) in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its *obligation* under Article 1 (art. 1) directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I (see ... Ireland v. the United Kingdom judgment, Series A no. 25, p. 91, § 239).[853]

After enumerating the remedies available to the applicants (namely an application to the Board of Visitors, an application to the Parliamentary Commissioner for Administration, a petition to the Home Secretary, and the institution of proceedings before the English courts), the Court in *Silver and Others* searched whether they were really effective within the meaning of Article 13.[854] As regards the first two remedies, it does not assess them as effective since they do not have power to enforce their own conclusions. Again, the Home Secretary is the one who is the author of the directives requiring the control of the prisoners' correspondence. As to the English courts, the Court claims that they:

> are endowed with a certain supervisory jurisdiction over the exercise of the powers conferred on the Home Secretary and the prison authorities by the Prison Act and the Rules ... However, their jurisdiction is limited to determining whether or not those powers have been exercised arbitrarily, in bad faith, for an improper motive or in an ultra vires manner.[855]

Noting that the applicants did not maintain the alleged violation of their rights to correspondence under English law, the Court expresses that their very concern focused on incapability of the English courts in interpreting the Convention norms. Since the Convention was not being incorporated into domestic law at the material time, the Court

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[853] *Supra* note 528, para. 113.
[854] *Ibid,* paras. 114-117.
[855] *Ibid*, para. 117.

establishes that the domestic judicial system was not compatible with the expected Convention standards in securing effective remedies as required by Article 13.

In interpreting the decision of the Court, Mowbray states "non-judicial bodies that only possess advisory powers are very unlikely to be classified as an effective remedy by the Court even when they are accorded great respect in the national administrative system".[856] Nonetheless, the Court also acknowledges that a combination of distinct methods such as the possibility of submission of a petition to the Home Secretary alleging the misapplication of prison officials and also the supervisory powers of the domestic courts could also be assessed as an effective form of remedy as required by Article 13.[857]

Nonetheless in the case of *Paul and Audrey Edwards v the United Kingdom*,[858] the Court does not find the aggregate of domestic remedies sufficient in successfully redressing the failure of authorities "to protect their son's right to life and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby".[859] Since the domestic inquiry was not effectively conducted by the authorities such as securing the attendances of witnesses and the applicants in the proceedings held, the apparent existence of such a combination of remedies did not satisfy the Court to adjudicate that the Government had successfully responded to its obligations under Article 13.[860]

In a series of cases about the structural overcrowding problem in Russian prisons, the Court pointed out that the reason lying behind the unsatisfactory conditions of detention was lack of financial resources.[861] It was true that the applicant, in *Artyomov,* for example, had already lodged a tort action before the domestic courts. Yet his application was dismissed. The appeal court also rejected the submission. Within such a framework, the Court assessed that remedies available under the Russian Civil Code do not have a prospect of success and that "finding that a tort action as the one brought by the applicant

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[856] Mowbray, p. 207.

[857] *Silver and Others*, para. 119.

[858] *Supra* note 638.

[859] *Ibid*, para. 101.

[860] *Ibid*, paras. 100-101.

[861] *Artyomov v Russia*, *supra* note 705, para. 112. See also *Benediktov v Russia*, Application No. 106/02, Judgement of 10 May 2007; *Moiseyev v Russia*, Application No. 62936/00, Judgement of 9 December 2004; *Kalashnikov v Russia*, Application No. 47095/99, Judgement of 18 September 2001; and *Mamedova v Russia*, Application No. 7064/05, Judgement of 1 June 2006.

under Article 1069 of the Russian Civil Code could not be considered an adequate and effective remedy".[862]

In the case of *Onoufriou v Cyprus*,[863] the applicant complained, *inter alia*, about accessing effective domestic remedies when he was detained in Nicosia Central Prison. Contrary to the statements of the Government, he submitted that recourse to the Prisons Board[864] and to the Supreme Court under Article 146 of the Constitution could not be considered effective remedies. By referencing to a decision of the domestic Supreme Court (refusing the decision of the prison director restricting Onoufriou's visitation rights as an 'administrative act') and also to the Government's lack of reference to any previous decision by the Supreme Court successfully addressing any similar issue of the same nature under an Article 146 recourse, the ECtHR holds that "the possibility of lodging a recourse under Article 146 of the Constitution did not constitute an effective remedy which the applicant was required to exhaust in the present case".[865] As regards the efficacy of lodging a complaint before the Prisons Board, it cites that:

> [a]lthough a remedy, in order to be considered "effective", is not required to lead to a favourable outcome for the applicant, it is necessary that the authorities take the *positive measures* required in the circumstances to ensure that the applicant's complaints are properly dealt with and that the remedy is effective in practice.[866]

Despite the recommendations by the CPT, the Court also expresses its concern for the lack of a domestic appeal possibility to an outside authority when solitary confinement

[862] *Ibid*, para. 135.

[863] Application No. 24407/04, Judgement of 7 January 2010.

[864] The Government noted that "the Prisons Board was expressly included by law among the authorities to which a prisoner could address, in writing and immediately, any complaint concerning an illegal act against him or a violation of his rights in any way. The Government highlighted that the Prisons Board was an independent body appointed by the Council of Ministers. It was, at the relevant time, composed of twelve members drawn from both the public and private sectors, including representatives of non-governmental organisations and the Cyprus Bar Association. Its chairman was the Director-General of the Ministry of Justice. The Prisons Board had the power to hear and investigate complaints submitted to it by prisoners, including complaints as to their treatment, and to investigate prisoners' living conditions. For this purpose, its members were afforded the right of free entry at all times to all areas of the prison, of free communication with prisoners outside the presence of prison officers, of inspection of prison records and of the conduct of any investigation in the prison which they considered necessary. Under the Prison Regulations, letters could be addressed to the Prisons Board without any monitoring of their content by the prison authorities. If the Prisons Board found any shortcomings concerning the treatment of prisoners, it could communicate the matter to the relevant Minister and the prison director". (*Ibid*, para. 48)

[865] *Ibid*, paras. 54 and 123.

[866] *Ibid*, para. 123. [Emphasis added]

is ordered. All in all, it finds that there has been a violation of Article 13 of the Convention.

Having found the responsibility of the State authorities 'for the inhuman and degrading treatment and injuries inflicted on the applicants in the course of the training exercises on 30 May 2001 and 29 January 2002', the Court expresses in *Davydov and Others v Ukraine*[867] that the effect of Article 13 is:

> to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.[868]

It additionally pays special attention to a number of technical deficiencies in the domestic system when the domestic investigating authority initiated the inquiry process under the jurisdiction of the Code of Criminal Procedure. For example:

> the preliminary review undertaken by an investigating authority could not carry out investigative actions relevant for effective and thorough investigation under Article 13 of the Convention, which would have included assessment of reliable medical evidence and interrogation of witnesses.[869]

Under such a context, the Court assesses that:

> investigations were not capable of leading to factual findings relevant to possible identification and punishment of those responsible and, where appropriate, to possible payment of compensation for victims of ill-treatment. Consequently, any other remedy available to the applicant, including a claim for damages, had limited chances of success and could be considered as theoretical and illusory, and not capable of affording redress to the applicant as the alleged perpetrators were never identified ... and no relevant findings of fact were ever made by the investigative authorities. The Court also finds that similar considerations apply to complaints about lack of medical treatment and assistance or any claim for damages in that respect, as in the absence of medical findings that the applicants were injured and thus requiring medical treatment or assistance, any claim would have no reasonable prospect of success.[870]

Consequently, the Court unanimously holds that conducting an effective and thorough investigation redressing the ill-treatment of the applicants during the two training exercises was not possible and declares the violation of Article 13 of the Convention.

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[867] Application Nos. 17674/02 and 39081/02, Judgement of 1 July 2010.

[868] *Ibid*, paras. 308 and 309.

[869] *Ibid*, para. 310.

[870] *Ibid*, para. 312.

By pointing out its previous case law revealing the existence of a structural problem in the detention conditions, the Court does not pay attention to the submission of the Government that there were remedies available which had not been exhausted by the applicants. Hence it also expresses that the State has failed its obligation under Article 13 in securing the enjoyment of effective and accessible remedies redressing the poor conditions of detention.

In *Bazjaks v Latvia*[871] the applicant complained, *inter alia*, about the absence of any domestic remedy available in redressing the conditions of his detention in Daugavpils prison. Similar to its approach in *Davydov and Others*, the Court establishes three available domestic remedies to the applicant in the instant case, namely applications to i) a court of general jurisdiction to claim compensation on the basis of Article 92 of the Constitution, ii) a prosecutor to exercise his powers under the Law on Prosecutor's Office, and iii) a court to initiate a private prosecution for minor bodily injuries.[872] As regards the first possibility of domestic remedy, the Court points out that there was no evidence provided by the Government proving the effectiveness and availability of applying to a domestic court of general jurisdiction to claim compensation for any damage incurred. Since, in the view of the Court, providing such information is under the responsibility of the respondent Government, it does not satisfy itself with a mere declaration claiming the remedy's theoretical and practical effectiveness by the authorities.[873] Secondly, similar to the reasoning in the first one, any material or domestic practice was not provided by the Government showing that the prosecution authorities had exercised their legal powers so as to examine the problems of a complaint of the similar kind. Although there seems apparently extensive powers under the Law on the Prosecutor's Office exclusively mandated the prosecuting authorities so as to supervise and prosecute the applications raised by the prisoners, the Court cannot satisfy itself due to lack of any example of domestic practice on the issue.[874] And lastly, without specifying any reason, it does not accept validity of the argument by the Government that initiating "a private prosecution for minor bodily injuries could constitute an effective remedy in respect of a prisoner's complaint about the conditions of his or her detention".[875]

[871] *Supra* note 694.

[872] *Ibid*, para. 132.

[873] *Ibid*, para. 133.

[874] *Ibid*, para. 134.

[875] *Ibid*, para. 135.

Accordingly, given, in particular, the failure of the Government in proving "the three venues of complaint under domestic law they invoke would have prevented a breach of the applicant's rights contained in Article 3 of the Convention",[876] the Court unanimously comes to the conclusion that there has also a violation of Article 13 of the Convention.

In *Keenan*[877] the applicant, the deceased prisoner's mother, maintained that she had no domestic remedy avail to her for the examination of the liability of the authorities in respect of her son's death. On the contrary, the Government contended that both Mark Keenan and the applicant had the possible remedies of available to them. As for the former limb of the issue, that is whether Mark Keenan himself had available to him a remedy in respect of the punishment inflicted on him, the Court reiterated the facts that Mark Keenan had committed suicide on 15 May 1993 just one day after he had been informed about "twenty-eight additional days in prison together with seven days' loss of association and exclusion from work in segregation in the punishment block".[878] At that point, there were only nine days for his expected release from prison. Having noted that there were the 'remedies and complaints' system and the possibility of lodging a recourse to the Prison Ombudsman (since 1994), the ECtHR did not regard them effective within the meaning of Article 13 of the Convention by claiming as follows:

> [e]ven assuming judicial review would have provided a means of challenging the governor's adjudication, it would not have been possible for Mark Keenan to obtain legal aid, legal representation and lodge an application within such a short time. Similarly, the internal avenue of complaint against adjudication to the Prison Headquarters took an estimated six weeks. The Court notes the Prison Ombudsman's finding that there was no expeditious avenue of complaint for prisoners who required speedy redress.[879]

The Court furthered its analysis by stating that even if Keenan "was not in a fit mental state to make use of any available remedy, this would point not to the absence of any need for recourse but, on the contrary, to the need for the automatic review of an adjudication such as the present one".[880] It also expresses concern whether "effective

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[876] *Ibid*, para. 136.

[877] *Supra* note 648.

[878] *Ibid*, para. 37.

[879] *Ibid*, para. 126.

[880] *Ibid*, para. 127.

recourse against the adjudication would not have influenced the course of events".[881] According to the Court, Keenan had the right "to a remedy which would have quashed that punishment before it had either been executed or come to an end".[882]

As to the second limb of the issue, that is whether, after his suicide, the applicant, either on her own behalf or as the representative of her son's estate, had a remedy available to her, the Court analyses the assertion of the respondent Government that the applicant could have pursued an action, claiming that his son "suffered injury before his death or (if he had left dependants) in respect of his death under the Fatal Accidents Act provisions. These would, they stated, have provided a determination of liability and damages".[883] Yet again the ECtHR dismisses that argument by referring to the medical reports indicating the existence of 'fear and hopelessness, even terror' rather than the one of 'injury'. In the view of the Court:

> [t]here is no evidence that this would be regarded as "injury" in the sense recognised by domestic law and the Government accepted that anguish and fear are not covered. Furthermore, the applicant, as the mother of an adult child and a non-dependant, is unable to claim damages under the Fatal Accidents Act on her own behalf.[884]

Since such a consequence hindered the applicant to apply for compensation for non-pecuniary damage, the ECtHR refused the arguments of the respondent Government alleging the aggregate of remedies would be sufficient to redress the harm inflicted upon the applicant by a breach of the State's duty of care to prisoners. Accordingly, the Court unanimously declares a violation of Article 13 of the Convention.

In *Mandic and Jović v Slovenia*,[885] the applicants argued in particular about the structural problem of overcrowding in Slovenian prisons. Since such a structural problem cannot be resolved in due time merely by judicial decisions, it would have been 'pointless' for them to attempt to use any of the remedies theoretically available. The Government provided a comprehensive list of the remedies available for redressing the allegations of the applicants and argued that they could have, but had not, been used by the applicants.[886]

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[881] *Ibid*.

[882] *Ibid*.

[883] *Ibid*, para. 129.

[884] *Ibid*.

[885] *Supra* note 714.

[886] *Ibid*, paras. 96-105.

Subsequently, the Court considers upon the effectiveness of the measures as required by the Convention. Firstly, it assesses the possibility of transferring remand prisoners to another prison under the related provisions of the domestic legislation. Contrary to the arguments by the Government, the Court notes that "the request for the transfer of a prisoner could only have been made by the prison governor. This remedy was therefore not directly accessible to the applicants and could not be considered effective".[887] Apart from noting that the respondent Government failed to produce any case successfully redressing the issue in question by the domestic courts,[888] the Court also points out that "the civil remedy under section 179 of the Civil Code is merely of a compensatory nature and no domestic court has so far imposed an injunction in order to change the situation which had given rise to the infringement of a prisoner's personal rights".[889] Referring to its existing case law in respect of the overcrowding problems in Europe, the Court reiterates that the Human Rights Ombudsman's recommendations have not created any significant improvement on the issue.[890] As regards the supervising competence of the president of a district court invoked by the Government, the ECtHR "observes that no formal procedure for dealing with complaints was provided in the legislation, nor does it seem that the president could issue decisions which would be legally enforceable".[891] And lastly, since lodging a direct constitutional appeal is not possible and other legal venues expressed do not have a prospect of success in redressing the issue successfully, the Court finds that the constitutional appeal could not be assessed as an effective remedy within the meaning of Article 13.[892]

Accordingly, considering that 'none' of the above-mentioned domestic remedies provided by the Government could be regarded as constituting an effective remedy for the applicants, the Court finds a violation of Article 13 of the Convention.

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[887] *Ibid*, para. 110.

[888] Although acknowledging the importance of a domestic judgement dated 9 May 2011, the Court assesses it as "an isolated example which moreover has not been subject to review by the higher courts". (*Ibid*, para. 116)

[889] *Ibid*.

[890] *Ibid*.

[891] *Ibid*, para. 117.

[892] *Ibid*, paras. 118-119.

2.4.3.4 General Conclusions

As the last part of the tripartite analysis, Section 2.4.3 covers 'positive obligations to fulfil' under Protocol No. 1 – Article 3, Article 7, and Article 13. They mostly refer to technical issues necessitating proactive performance of domestic authorities so as to fulfil the human rights of prisoners. As regards right to free elections, there is no explicit ruling implying positive obligations of States regarding prisoners' rights. Nonetheless, *Hirst v the United Kingdom* has created a new momentum on the issue and narrowed the scope of margin of appreciation in an exclusive area traditionally left to the Contracting States. Even if the Grand Chamber in *Hirst* did not explicitly adjudicate the imposition of an obligation on the respondent State, the dissenting opinion criticised any imposition of an obligation, allowing disenfranchisement of prisoners, on national legal systems by the Court.

Again the number of cases under Article 7 of the Convention is highly limited. However, without making any explicit reference to positive obligations, the Court has ruled in a number of cases from Germany that States are under an obligation not to enact laws ordering retrospective detention of prisoners (*Jendrowiak v Germany) (M. v Germany).* Contrariwise, the Court also held that State authorities are *not* under an obligation to protect individuals from criminal acts of prisoners by means of unlawful measures in question.

And lastly, fulfilling obligations of States under Article 13 gives way to cases necessitating procedural guarantees for prisoners such as a functioning domestic judiciary in line with the Convention standards (*Silver and Others),* effective conduction of domestic inquiries (*Bazjaks v Latvia) (Davydov and Others v Ukraine),* and establishment of adequate and effective domestic remedies (*Artyomov v Russia*) (*Onoufriou v Cyprus*).

2.5 Positive Obligations of the State in the Turkish Penitentiary System

Till the end of 1990's, prison system in Turkey was largely encompassing a combination of the specific characteristics of classical penal theory: retribution and deterrence were the real determinants of the system which had ostensibly focused on the reformation and rehabilitation of prisoners. Furthermore, there were many structural deficiencies in the system which had been primarily administrated by a comprehensive regulation and a number of circulars. Since they were policy guidelines articulated by the Ministry of Justice and intrinsically not weighing various competing interests in the society, their legal quality fell short of the expected standards of the ECHR. Having found a violation of Article 8, the Court stated in the case of *Gülmez v Turkey* that domestic legislation was not "sufficiently clear and detailed to afford appropriate protection against any wrongful interference by the authorities with the applicant's right to family life" and concluded that "the interference with the applicant's family life was based on legal provisions which did not meet the Convention's "quality of law" requirements".[893]

There were also many infrastructural deficiencies in the system based primarily upon crowded wards consisting up to 200-250 inmates at the most. Many of the detention facilities were out of date and overcrowded. The number of the personnel in the system was highly insufficient in duly performing the standards expected from them. They were untrained and essentially not aware of the contours of their authority and responsibility. Efficiency of the administrative and civil controlling mechanisms over the penitentiary system was not effective since the possibilities of official scrutiny were highly constrained. In such a system security problems, killings, escapes, illicit trafficking, formation of illegal organisations were highly widespread. Since the authority of the prison officials within the detention facilities was relatively weak, wards had been functioning as autonomous units for illegal organisations that they were able to train their own members behind the walls. There were also widespread political activities, such as hunger strikes and death fasts, organised by extremist groups especially in 1990's.[894] Apart from many (and frequent) partial amnesties, eight general pardons had been enacted by the Turkish Grand National Assembly since the inception of the republic in 1923. Nonetheless, after the enactment of general pardons, the capacity of prisons was getting full again within a short period of time. The ratio of sentences to be executed before the prospective conditional release was merely 40 per cent of the term adjudicated by the competent domestic courts. Since the

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[893] *Supra* note 523, paras. 52 and 53.

[894] Timur Demirbaş, **İnfaz Hukuku**, 3. Baskı, seçkin, March 2013, pp. 198-203.

status of good conduct was automatically granted to any convicted prisoner, provisions of conditional release were applied to all inmates provided that they had not been subjected to disciplinary measures. Thus it is not easy to claim that penal policy and penitentiary system functioned as a one restoring social justice and procuring the rights of the victims and the society in general. Within such a context, ‘prison problem of Turkey’ was not seen as a systemic one to be resolved in a democratic debate platform but rather regarded as a one to be moulded unilaterally within a dominant State understanding being driven by the political motives and concerns of the Cold War. Military coups, political instabilities and economic crises also blocked the realisation of required reforms and ameliorations in the system.

Accordingly, prisoner cases brought before the Convention organs against Turkey extensively alleged the violation of negative State obligations.[895] For example, in *Diri v Turkey*, the applicant, *inter alia*, complained that he had been subjected to *falaka* (beating on the soles of the feet) twice by the prison guards in the Tekirdağ F-Type Prison. By taking into consideration the findings of two forensic reports, the Court ruled that the alleged acts had amounted to torture and violated substantial limb of Article 3 of the Convention. Since the public prosecutor confined himself with the three medical reports drafted by the prison doctor, the European Court thought that an effective investigation was not carried out by the domestic authorities and also declared the violation of the procedural aspect of the Article.

When protests against the activation of F-type prisons were getting spread across the country in 2000, security forces performed a joint operation, which was encoded as ‘Return to Life’ by the State officials, on 19 December 2000 so as to finalise hunger strikes continuing for a long time in various prisons of the country. Restoring State’s authority in the penitentiary system was also another leading motive lying behind the operation. Although the necessity of the operation has still been a matter of criticism, 30 inmates and 2 soldiers were killed in the operation. Such a consequence triggered extensive public discussions about the planning and carrying out of the operation. And allegations upon excessive use of force in the operation have still been carried out by the domestic judicial authorities.

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[895] Among many see *Diri v Turkey*, Application No. 68351/01, Judgement of 31 July 2007; *Atıcı v Turkey*, Application No. 19735/02, Judgement of 10 May 2007; *Ekinci and Akalın v Turkey*, *supra* note 528; *Kepeneklioğlu v Turkey*, *supra* note 528.

Nonetheless, the operation has also given way to the inauguration of a reform process by the State. New laws were enacted so as to improve the scrutiny and accountability of the fairly closed system.[896] As a part of the penal reform process, Law No. 5275 on the Enforcement of Sentences and Preventive Measures entered into force on 1 January 2005.[897] This was an important reformation in the system, capable of switching the very logic of the Turkish penitentiary system from the remnants of a classical penal policy to a modern one. The rehabilitative ideals and principles of the new penal policy have been clearly defined in Law No. 5275.[898] Amongst many articulations, it, for example, has explicitly enlisted provisions on prison discipline consisting of a list of punishable acts, the penalties relating to them, and the procedure to be followed.[899] By instituting a country-wide probation system, Law No. 5402, entered into force on 20 July 2005, has given way for the practices of *alternatives to custody*.[900] More specifically with the opening of membership negotiations with the EU in October 2005, cooperation programmes supported by the EU and the European Council, such as 'Dissemination of Model Prison Practices and Promotion of the Prison Reform in Turkey', have not only improved the capacity building of the system but also provided a new impetus for the continuation of the ongoing reformation process.[901] By focusing upon, *inter alia*, the elimination of recidivism risk factors, new generations of rehabilitative and re-integrative programmes have been developed and widely implemented.

Even though prisons in Turkey are still overcrowded, an extensive prison building process is being carried out by the Ministry of Justice. Approximately some 208 small and out of date prisons were closed and 68 high-technologically designed modern prisons were

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[896] Law No. 4675, entered into force on 23 May 2001, instituted the Enforcement Judges as a judicial scrutiny mechanism controlling the legality of administrative decisions and practices in prisons and detention houses. (http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.4675&MevzuatIliski=0&sourceXm=lSearch= (12 April 2013)) Again Law No. 4681, entered into force on 14 June 2001, formed Scrutiny Boards as an semi-administrative scrutiny mechanism, composed of 5 members, so as to visit prisons and detention houses and prepare regular reports about its findings to be presented, *inter alia*, to the Ministry of Justice. (http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.4681&MevzuatIliski=0&sourceXmlSearch= (12 April 2013))

[897] http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.5275&MevzuatIliski=0&sourceXmlSearch= (12 April 2013).

[898] Articles 2-3 an 6-7.

[899] *Gülmez v Turkey*, paras. 15 and 52.

[900] http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.5402&MevzuatIliski=0&sourceXmlSearch= (12 April 2013).

[901] http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/prison/Release_Prison_Reform.pdf (12 April 2013).

constructed between 2002 and 2012.[902] Although there exist exceptions, securing categorisation of prisoners, according to their specific characteristics and needs (such as gender, age, dangerous prisoners, etc.), is currently more possible.[903] According to the declaration by the Minister of Justice, overcrowding and infrastructural problems of the Turkish penitentiary system are to be solved to a great extent by the year 2017.[904] A new model prison, Metris R-type in Istanbul, has already been activated in 2012 as a novel form of penal institutions so as to rehabilitate mentally-ill and endangered prisoners under the scrutiny of medical and psychological experts such as psychiatrists, physiotherapists, and nurses. UYAP, a comprehensive intranet and software, has been used extensively in the judicial and penitentiary systems since the beginning of the new millennium. All official documents are created, transferred and preserved in the electronic environment instituted under the structure of UYAP. Since all official documents in the system are quickly transferrable and accessible for anyone who has the required authorisation, it has increased the speed of trials before the domestic courts. It has also contributed to a sharp decrease in the ratio of detainees from 47% in 2007 to 27% 2012.[905]

Another complementary initiative was the inauguration of training centres that they aim at improving the qualifications and capacities of the penitentiary staff. There are currently four training centres which have been activated with Law No. 4769 entitled ‘Personnel Training Centres of Prisons and Detention Houses’.[906] In these centres, prison staff is trained throughout pre-service, in-service and promotional training programs exclusively designed for improving their professional capabilities under the declared standards of domestic legislation and the revised 2006 EPR. The curriculum consists of courses on, *inter alia*, psychology of prisoners, communication skills, the EPR and human rights, prison security, prison management, anger management, etc.

The contribution of the ECtHR’s jurisdiction over the amelioration of the Turkish penitentiary system is also clear-cut. To exemplify, after the ruling of *Gülmez v Turkey*, the State enacted a new regulation by which the prisoners are given the opportunity to defend

[902] Sharply criticised F-type prisons have also been regarded in line with the Convention standards by the ECtHR. (See *Diri v Turkey, supra* note 895, paras. 31-33)

[903] *Çoselav v Turkey*, *supra* note 655. *X. v Turkey*, Application No. 24626/09, Judgement of 9 October 2012.

[904] http://www2.tbmm.gov.tr/d24/7/7-7569c.pdf (12 April 2013).

[905] Ceza ve Tevkifevleri Genel Müdürlüğü, www.cte.adalet.gov.tr (12 April 2013).

[906] http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.4769&MevzuatIliski=0&sourceXmlSearch= (12 April 2013). The fifth one of the training centres is planning to be opened in Denizli in September 2013.

themselves before the penitentiary judges for their disciplinary appeals.[907] Nonetheless, there are also some extra steps realised even if they are not a matter of *rights* for the present time in the view of the European Court: Under a regulation issued on 30 March 2013, intimate (conjugal) visits are accepted as a *reward* (but not a right) to be granted four times in a year to any prisoner (either a convicted prisoner or a detainee) if he/she is regarded having been in good conduct by the Administrative and Scrutiny Board (*İdare ve Gözlem Kurulu*).[908]

Although performance of the State since the inception of the reformation process seems highly affirmative, it has not a finalised process yet. There are signs that the remnants of the old system can still violate prisoners' rights.[909] The number and qualification of experts (psychologists, social workers, doctors, etc.) responsible for the rehabilitation and treatment of prisoners are not sufficient to meet and carry out the international standards. Securing the efficiency of regular in-service training programmes may positively contribute to increase their professional performance. Additionally, ensuring to perform training programmes regularly for the prison officials is also likely to ameliorate possible inefficiencies in the system. Medical conditions in prisons are also a sensitive issue due to the fact that "prisoners should enjoy equivalence of care to persons in the community outside".[910] Considering the arguments that the needs of prisoners are so much greater than the needs of the ordinary members of the community, meeting technical and personnel requirements of health standards is highly important for the success of the system.[911] Inclusion of members from NGOs into the scrutiny boards may also enhance their intellectual capacity. Finalisation of infrastructural and technical renovation, as has been foreseen, in 2017 is also crucial for the delayed modernisation of the Turkish penitentiary system. At last but not least, prospective case law by the ECtHR to be expounded upon the positive obligation of the State regarding prisoners' rights has certainly an indispensible potential of creating enthusiasm and synergy for the continuation of the ongoing reformation process in the system.

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[907] Law No. 4675, art. 6/2, *supra* note 896.

[908] Articles 11-18.

[909] See *X. v Turkey, supra* note 903.

[910] Van Zyl Smit and Snacken, *supra* note 235, p. 153.

[911] *Ibid.*

CONCLUSION

As the dissertation has tried to put forward, securing positive obligations incumbent upon States are but one way of many to respect, protect and fulfil human rights. Although ensuring negative obligations of States is another justified method of guaranteeing the enjoyment of rights by individuals, the latter comprises just one aspect ('to respect') of three layers of obligations. Accordingly, it can be maintained that effective protection of human rights might essentially be realised within the scope and width of positive obligations of States. Given that States are the sole actors with an all-encompassing responsibility under international human rights law; their regulatory and proactive roles have an e critical importance in particular in the realm of prisoners' rights where prisoners do not principally have related means so as to enjoy their human rights. In line with the ongoing tendency in international human rights law, the ECtHR has also expounded an ever enlarging positive obligations case law evidencing that provisions of the Convention, in conjunction with its Article 1, can generate such obligations. Acknowledging the importance of the positive obligation case law by the Court, the dissertation reveals that the Court, contrary to the apparently affirmative discourses and declarations, has not developed a specific evaluation method capable of exclusively assessing positive obligations of States. But rather, its existing methodological approach is still under the impact of the alleged dichotomy in human rights theory. Such a hypothetical limitation (or rather legal deficit) does also convey certain difficulties that hinder effective legal questioning in a specific environment where States do have exclusive obligations so as to secure the rights of individuals.

Albeit it may be regarded as a limited realm of human rights, it is beyond doubt that the practice of rights in prison is an indicator of assessing the very success of States for fulfilling their positive obligations. Indeed even if prisoners' rights are not a separate category of human rights, they are, as the dissertation puts forward, absolutely an exclusive category of human rights. First of all, even if setting justified restrictions arising from security and maintenance of good order is possible, prisoners' rights fall within the scope of direct State responsibility. Given the fact that prisoners do continue to enjoy all the same human rights as free individuals of the society save the right to liberty, securing their human rights in a physically closed environment where order and risk are the leading parameters is a real litmus test for States. Again as the dissertation points out, domestic judiciary systems have recently started to review the claims of inmates and intercede on

their behalf. Within the framework of such a relatively diffident domestic systems in protecting and fulfilling procedural and substantive aspects of prisoners' rights, the dissertation specifically has aimed at presenting the very nature and justiciability of positive obligations of States in European penitentiary systems by reviewing related case law of the Court on the issue.

Although human rights discourse pays special attention to the promotion and protection of *all* human rights and fundamental freedoms, the dissertation brings to light the existing theoretical flaw in human rights idea in identifying positive human rights as *true* human rights. It argues that even if there is apparently a holistic formal approach justifying the interrelatedness and interdependence of *all* human rights, the presumed distinction in question does still prevent justifying positive human rights as genuine human rights. Even though there exist figures within the classical liberal political thought favouring the very idea of positive rights, Henry Shue is the leading figure that dwells on the alleged distinction between two groups of rights. While searching for the very existence of basic rights, Shue challenges the conventional view and argues that subsistence rights are not less important than security rights. Apart from falsifying the conventional misunderstanding (or myth) that negative rights merely imply refraining from acting and that positive rights necessitate positive action, he additionally stresses the importance of correlative duties for making enjoyment of two groups of rights effective. However, Shue's unique contribution to the human rights theory and practice is the argument that security rights are not negative and subsistence rights are not positive. By presenting the theoretical arguments raised primarily by Shue, the dissertation points out that enjoyment of any human right does concomitantly require protection of negative and positive aspects of the right in question.

Additionally, in line with the formal recognition of the holistic human rights discourse, the dissertation presents the argument that the alleged dichotomy of rights is not a real distinction hindering the realisation and enjoyment of positive human rights but rather it is a means of efficiently assessing, classifying and securing *all* human rights. In order to justify the moral legitimacy of positive rights, Gewirthian *criterion of degrees* is an example of unveiling the importance of subsistence rights with respect to negative rights. Within such a perspective, funding of subsistence rights via taxation is not a threat to the right to property but rather it is essentially a way of providing support to the needy so as to enable them to be agents capable of controlling their own lives. It is also argued that performing correlative duties is not an overload for individuals but rather a 'more

finite set of institutional policies'. *Prospective purposive agent* is another unique Gewirthian concept establishing that everyone has the right to be treated in an appropriate way when he has the need. Such an understanding is also in line with the *equality* principle and *universality* claims of the human rights discourse.

The cleavage between negative and positive rights can also be identified in the form of distinction between civil and political rights and economic, social and cultural rights. Arising from the ideological and political controversies of history, contemporary political and legal systems may still continue to abstain from expressly recognising economic, social and cultural rights. Alleged difficulty for the realisation of economic and social rights is also another leading argument on the issue. However, considering that the very scope of each negative right intrinsically entails positive duties, it is provided that securing negative rights is not also cost free. Another counter-argument that can be raised here is that the strict requirement expected from States Parties is specifically to ensure minimum essential levels of economic and social rights. And given the theoretical and practical difficulties of ensuring this group of rights, it is easy to understand why international system has developed a special mechanism with a special emphasis for *progressively* achieving full realisation of the rights in question. Ever enlarging jurisprudence on socio-economic rights at domestic and international levels does also favour the arguments of those supporting the holistic ideal of human rights theory.

By referencing Henry Shue's genuine tripartite analysis, the dissertation also questions the very structure of positive obligations. It is seen that, like the failure of alleged dichotomy between negative and positive human rights, there is no identifiable distinction between negative and positive duties but rather there is a substantive interdependence in between them. In Shue's analysis, correlative duties *to avoid, to protect, and to fulfil* are by their very nature found in each human right, irrespective of the negativity or positivity nature of the right in question: i) duties to avoid refer to merely refraining from making an unnecessary harm destructive for the rights of others; ii) duties to protect aim at providing a constant and reliable protection for the enjoyment of the right in question; and iii) duties to fulfil, with the utmost urgency they have, are to be realised either in the form of material assistance or in the form of regulatory or complementary acts and/or policies of the authorities such as training of officials, empowering accountability, rule of law and democracy in a given State.

Identification of the duty-bearers is another issue to be clarified for the realisation of correlative duties. Even if practical impossibility of meeting the demands for securing

the rights of others by 'everyone' is specifically a point of criticism, Pogge's institutional approach provides an insightful basis for the fulfilment of human rights claims. Indeed, compared to the profound potential that social institutions have, individuals' personal capacity is not sufficient for setting a rational causality between individuals and ongoing human rights violations. Nonetheless, in line with the understanding of conventional human rights discourse, contemporary dominant view in human rights theory also opposes exclusion of responsibility from ordinary individuals, claiming that both institutions and individuals do undertake duties in so far as their existing capacity and power do suffice to alleviate the violation in question.

Within the context of such a controversial theoretical framework of positive obligations of States, ongoing systemic problems in penitentiary systems of the world do still persist: increasing number of prisoners, insufficient infrastructure, under-qualified penitentiary staff, lack of transparency of custodial institutions, problems of prisoners in reaching to the legal and other protective measures and mechanisms are amongst the leading issues to be encountered. Political inertia, supported by unwillingness of the general public for resolving the problems of those who committed crimes and economic restraints in an age of austerity, mostly prefers responding to the problems in prisons by reflexive solutions rather than rehabilitation or reformation of domestic penitentiary systems. Nonetheless, thanks to the positive impact of momentum created by international and regional human rights instruments, gradual recognition of prisoners' human rights has also started to take place in the world, in particular, as from the early 1970's. Legal obligations imposed upon domestic authorities and ever-enlarging sensitivity of judicial bodies in adopting and implementing reformative and rehabilitative approaches of the modern criminal justice systems within their jurisdictions have initiated a new rights-based awareness and orientation. Increasing number of litigations by prisoners has been a leading factor facilitating the ongoing recognition process of prisoners' rights. Recent academic and scientific responses from contemporary penology and criminology have also provided a hypothetical base so as to mitigate existing problems in the world prisons. Within this vein, the era of *penal welfarism* has started to turn into a new era of *alternatives to custody*. Although not being exempt from criticism, rehabilitative ideals of the former era have also been replaced by new modes of reintegrative programmes of reparation and restorative justice.

As regards the scope and width of international human rights law in defining positive obligations of States upon prisoners' rights, it has been pointed out that various

international organisations and human rights protection mechanisms have formulated a relatively comprehensive set of positive obligations with which States Parties have to comply. For example, the SMR, as the leading international instrument, has already set a comprehensive guidelines functioning as a benchmark for the protection of prisoners' rights at international fora. Nonetheless, essentially soft law nature of those instruments has substantially limited the role and function of international law for crediting the prisoners' rights at domestic level. Thus, even if a number of international human rights protection mechanisms have already developed promising criteria for legally testing the alleged violation(s) of positive human rights obligations, the precise impact of international law relating to prisoners' rights is not always as effective as one might hope. As such, interpretation of binding international conventions such as the ACHR and the ECHR by their related organs has conveyed a special mission so as to particularise on the rights of prisoners and correlative duties of States for their enjoyment as well.

Having viewed from a more specific perspective, the dissertation provides that examining unjustified interferences with human rights is principally subject to the well-established three step test of the ECtHR. Contributing to the formation of a uniform and predictable judicial interpretation, 'proportionality' and 'necessity' tests also provide legitimation for the European Court. As for examining cases alleging the violation(s) of positive obligations of States before the Court, it essentially applies a fair balance test which aims at striking a balance between the general interest of the community and the interests of the individual. Likewise, it has deliberately refused to formulate a general doctrine or theory of positive obligations incumbent upon the States Parties since *Plattform Ärzte für das Leben.* Since the 'other interpretative principles of the Convention' also serve to limit the extent and scope of positive obligations resulting from effective and dynamic interpretation of the Convention, it is seen that development of positive obligations of States under the auspices of the Court turns into a reflexive incremental approach rather than a one promising the emergence of a more principled method implying that positive obligations are an integral aspect of all human rights. Subsequently, it can be truly claimed that the dominant negatory paradigm (or rather dichotomous understanding) in human rights theory prevails once more upon positivity nature of State obligations.

As has been already provided, there is a preliminary set of cases that the Convention organs have credited the development of certain 'positive obligations' from the Convention text since *Belgian Linguistic Case* (No. 2). Although the number of preliminary cases remained occasional till the end of 1980's, they successfully managed to

create a legal basis for further expounding. It is clear that some specific provisions of the Convention, together with its Article 1, have contributed to the embodiment of a case law of positive obligations. However, the very reason lying behind the new tendency has been the development of an essentially judge-made structure as from the 1990's. In addition to the changing social fabric that forces States shifting in between prohibited interference and compulsory intervention, the Court has avoided from theorising the concept but rather favoured its incremental evolution by means of other interpretative principles.

In this context, by taking Henry Shue's tripartite analysis as a reference, the dissertation in its second part has aimed at discovering positive obligations of States in European penitentiary systems expounded under the case law of the ECtHR. Having already known that each fundamental right intrinsically entails all three levels of correlative duties for its fulfilment, the Convention rights are divided into three categories within which it has tried to expose articulation of positive State obligations in domestic prison systems by the European Court. By reviewing the breaches of Contracting States' correlative duties of care to prisoners, the dissertation not only sketches out the boundaries where the obligations lie but also tests the methodological capacity of the Court in truly assessing the scope and width of positive obligations incumbent upon States in prisons.

By reiterating the findings of the dissertation in its second part, it can be claimed that 'jurisdiction being improved so as to secure positive obligations to respect' is a one generally abstains from using the concept of positive obligations, but rather mostly prefers implying their existence. The interpretation methodology in this type of obligations is dominantly under the impact of negatory methodology. Nonetheless, it is also viewed that the Court is more dedicated to explicitly declare the existence of 'positive obligations to protect' within the scope of Convention articles reviewed under this heading. Since they are absolute ones and cannot be derogated from anytime including the time of war or public emergency, it is seen that the European Court acts in a more resolute stance explicitly defining the type and content of the obligation(s) in question. In this second type of obligations, it expresses more clear-cut terms reflecting (or rather defining) ideal type of positive obligations incumbent upon the Contracting States. As to the cases related to 'positive obligations to fulfil', the Court, similar to the cases related to 'positive obligations to respect', has a diffident approach rarely prefers using the concept of positive obligations.

To conclude, it can be maintained that positive obligation case law of the European Court is a highly constrained one still essentially under the impact of the dominant

paradigm of negative State obligations. Although there have been some striking cases (such as *Stjerna v Finland* and *Premininy v Russia)* heralding the institutionalisation of a unique positive obligation interpretation methodology, it is still too early to assert the existence of such an alternative methodology. Rather, it is possible to see the overwhelming existence of the negativity nature of human rights theory and practice within the very fabric of the Court's judge-made interpretation methodology. Given the fact that the impact of theoretical (mis)understandings and presumed difficulties on the justiciability and practicality of the concept of positive obligations is clearly traced and justified throughout the second part of the dissertation, claiming the vindication of the main argument of the dissertation truly seems possible. Considering the limited scope and width of positive obligations expounded by the Convention organs in an exclusive realm in which positive State obligations are expected to be performed with utmost care and intensity, it is not easy to declare a clear success of the stance and performance of the Convention organs. Interpreting upon cases related to positive obligation issues with a methodology genuinely developed for testing the existence of negative interferences is a legal deficit of the Convention system. Such a deficit is likely to diminish the realisation of a genuine balancing exercise between the parties by the Court. It also limits the Court's interrogation capacity, constraining fully enjoyment of the right in question. Furthermore, relatively limited number of jurisdiction by the Court does not only likely to delimit the efficacy of the European human rights protection system but also justify the main argumentation of the dissertation that dichotomous (mis)understanding in human rights and obligations negatively affect fully enjoyment of human and prisoners' rights. Without asking "what is/was to be (positively) done?" and legally formulating an objective and satisfactory answer to that question by the Court, it is not easy to secure fully enjoyment of the rights enlisted in the Convention.

In summation, acknowledging the importance of the jurisprudence adjudicated upon the alleged violation of prisoners' rights by the ECtHR, the dissertation, despite its explicit endeavour for putting stress on the continuing structural developments in European penitentiary systems, maintains that the contribution in question is not a systemic and comprehensive one but rather is an ambiguous and occasional one dominantly under the impact of traditional dichotomous understanding *still* continues to last in human rights theory and practice.

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