KU Leuven
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THE CONTENT AND EXTENT OF POSITIVE OBLIGATIONS IN THE PROTECTION AGAINST DISCRIMINATION, WITH SPECIAL ATTENTION FOR RACIAL DISCRIMINATION

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Preface

This thesis took a long time to be developed, thought through and concluded. But, finally, it has come to an end, with a feeling of joy and fulfillment. After this extensive journey, the author would like to share with the reader some thoughts about the path of events that shaped and led to the finalization of this thesis.

The research resulting in the present thesis was conducted in three different phases.

The first phase, between 2005 and 2008, when I was admitted to the Doctoral Programme of the Katholieke Universiteit Leuven, I concentrated in researching the main sources of this thesis *i.e.* in collecting, comparing, analyzing and making sense of the several books, articles, case law and other materials related to positive obligations, in general, and on equality and non-discrimination, in specific. I also participated in a number of academic activities, presented papers at conferences and discussed at length the foundations of my thesis with colleagues from the Law Faculty and from other institutions. In that phase, I had drafted most of the chapters of the thesis.

In a second phase, from 2009 to 2013, I gained practical experience with the topic of this thesis. I spent a significant part of my career as a human rights lawyer in Geneva, working closely with the UN human rights mechanisms. I dealt with equality and non-discrimination through the lenses of a State delegate, of a researcher and of a non-governmental organization representative. For instance, it was important for me to understand the complexities of the negotiations of the Durban Review Conference and to go through, on a number of occasions, the periodic reviews of the CEDAW and CRPD Committees.

After those intense years with hands-on in several legal issues relating to equality and non-discrimination issues, the thesis entered into its third and final phase, from 2014 to 2017. I analyzed the most recent scholarly articles, cases and other sources, and delved into the latest academic trends and debates. During this final phase, I attempted to sharpen the main arguments of my thesis, made an intensive revision of its text and submitted it to the Jury.

Having developed the research in three main stages, combining research and work in the respective thematic area, I hope that the reader finds in this thesis ideas, insights and conclusions that are not only grounded on legal international theory, but that are also complemented by the author's practical experience in international human rights.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter)
ACHR	American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969
AfCmHRP	African Commission on Human and Peoples' Rights
AfCtHRP	African Court on Human and Peoples' Rights
Beijing Declaration	Beijing Declaration and Programme of Action
Belém do Pará Convention	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46
CATCttee	Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46
CEDAWCttee	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990),
CMWCttee	Committee on Migrant Workers
CoE	Council of Europe
CRC	Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)
CRCCttee	Committee on the Rights of the Child
CRPDCttee	Committee on the Rights of Persons with Disabilities

DDPA	Declaratio of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, UN Doc. A/ CONF.189/12 (2001)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 005
ECRI	European Commission against Racism and Intolerance
ECtteeSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter (revised), ETS No. 163
HRC	Human Rights Council
HRComm	Commission on Human Rights
HRCttee	Human Rights Committee
IACFD	Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994)
IACHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171
ICED	International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006).
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195.
ICESCR	International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316

	(1966), 993 U.N.T.S. 3.
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organization
ILO Convention 169	ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries
Istanbul Convention	Council of Europe Convention on preventing and combating violence against women and domestic violence, Apr. 7, 2011, C.E.T.S. No. 210.
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000)
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, Annex II, 54 U.N.
UDHR	Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
UN Charter	Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
Basic Principles on the Right to a Remedy and Reparation	UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian LawG.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).
UNDHRET	United Nations Declaration on Human Rights Education and Training. UNGA Resolution 67/13, adopted on 19 December 2011. UN Doc. A/RES/66/137.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).
UN Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.
UNGPBHR	United Nations Guiding Principles on Business and

	Human Rights, HRC Resolution 17/4 of 16 June 2011.
UN Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Session.
VCLT	Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.
VDPA	Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

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Introduction Chapter

1 - The Aims of the Study

The present study has the main objective of researching State positive obligations in international human rights law. These obligations originate from human rights treaties or from interpretation of the international monitoring (judicial or quasi-judicial) bodies that monitor the relevant treaties.

By conducting this research, the study will, as a general framework (a) assess the general claims that validate the existence of positive obligations within the legal parameters of general international law; (b) conduct a survey in order to identify the diverse forms by which positive obligations manifest, either through provisions or judicial interpretation; and (c) identify the conditions that delimit the scope of these obligations.

After a preliminary research on the content and extent of positive obligations in general, this study will, at a second stage, concentrate on the positive obligations in relation to equality and non-discrimination, and, at a third stage, apply the results of previous stages to a more concrete research on positive obligations in the field with respect to racial discrimination.

2 - The Relevance of the Study

International human rights adjudicatory mechanisms have developed an important body of practice concerning State positive obligations. The practice of interpreting these positive obligations in treaties on civil and political rights ("CPRs") has gained increased attention in the last decades,[1] affirming the principle of effectiveness of human rights treaties in general,[2] and in the field of equality and non-discrimination in particular.[3]

Despite a generous body of practice on the subject matter of this study, there is insufficient discussion and conceptuatlization of positive obligations in international

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[1] E.g. ECtHR, *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31; IACtHR, *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, § 173; HRCttee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. Adopted on 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, § 8.

[2] ECtHR, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, stating that the ECHR is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

[3] E.g. ECtHR, *Enver Sahin v. Turkey*, no. 23065/12, 30 January 2018, § 66 (in the context of disability).

human rights law, as a global legal phenomenon. A better conceptualization and understanding of the various forms by which positive obligations, particularly in the area of non-discrimination, may present themselves, has the potential of improving clarity in the relevant case law and policy making dedicated to this area.

A vast amount of research about positive obligations has focused on the European system. [4] A much more modest body of case law output and research is found in the UN system, as well as in the Inter-American[5] and in the African systems[6], largely through academic articles. Moreover, the wealth of the research presented to date on the question of positive obligations consists on the analysis of these obligations in separate protection systems. Despite the undeniable importance of the research already conducted, there is a scarcity of studies examining State positive obligations in an integrated manner, instead of analyzing them in each system separately (silos-style research).

Such paucity on a comparative and integrated research contrasts with a growing cross-polinization among the regional human rights courts and UN treaty bodies on the question of positive obligations, particularly in the field of equality and non-discrimination. A critical analysis in this context would not only identify common principles through the different systems, but also inconsistencies and divergences among those systems, particularly if a general (CPR) system and a specific system (focusing on a particular right or on a particular issue) are compared.

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[4] Regarding the ECHR: Cordula Drögue, *Positive Verpflichtungen der Staaten in der Europaischen Menschenrechtskonvention* (Berlin: Springer, 2003); *Alastair Mowbray, The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, Oxford, 2004); Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Oxon: Routledge, 2012); Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge: Intersentia, 2016). Regarding the UN system, Wouter Vandenhole gave an important contribution on the positive and negative obligations related to equality and non-discrimination: *Non-Discrimination and Equality in the View of the UN Treaty Bodies* (Antwerp: Intersentia, 2005).

[5] Among a few: Felipe Medina Ardila, "La Responsabilidad Internacional del Estado por Actos de Partculares: Análisis Jurisprudencial Interamericano, (Bogota: Ministry of Foreign Affairs, 2009), available at [www.corteidh.or.cr/tablas/r26724.pdf], accessed on 7 February 2019, presenting a descriptive account of mainly the "due diligence" standard by the Inter-American System; Laurens Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights*", Inter-American and European Human Rights Journal* 7, No. 1 (2014): 94-115; Fernando Felipe Basch, "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers," *American University International Law Review*, 23, No. 1 (2007): 195-210.

[6] Among a few: Osita Mba, "Positive obligations under the African Charter on Human and Peoples' Rights: The Duty of the Nigerian Government to Enact a Freedom of Information Act," *Commonwealth Law Bulletin*, 35-2 (2009): 215-249.

After almost four decades since the *Marckx* judgment, followed by an ample relevant practice by systems other than the European, there is a need to conduct a comparative and analytical study in order to understand the development of positive obligations, in the context of international human rights law. In the field of non-discrimination, there is an increasing reading of "new" positive obligations in CPR treaties, taken from specialized human rights treaties.

Moreover, international practice has increasingly yielded varied patterns of State obligations, instead of a commonly assumed strict dichotomy between abstention (as a negative obligation) and the provision of protection through redress (positive obligations). In the field of equality and non-discrimination, relevant treaties are endowed with obligations of several other types, such as reasonable accommodation, elaboration of equality data, temporary special measures, and training and awareness-raising. At the same time, these treaties may be construed in consonance with contemporary legal thinking that exposes concepts such as the capability theory. This legal thinking has not been sufficiently analyzed and conceptualized in the field of obligations of States, deserving an analysis that provides a better grasp thereon.

3 - Research Problems

The present study will deal with the following research problems.

3.1 – In General

The qualifier "positive" for a range of State international human rights obligations has been object of concern. A first reason for such concern is the assumption that, through the Western liberal thinking, State human rights obligations would consist mainly through the non-interference with individual rights, specifically CPRs. At the same time, State action has been traditionally associated to economic, social and cultural rights ("ESCRs"), in order to comply with duties of welfare, social assistance, which would imply considerable resource mobilization. This separation is marked by the adoption of two separate Covenants at the UN level, and prominent CPR treaties regionally[7] at the so-called "Western block", compared to the later adoption of CESCR treaties also regionally[8]. The

[7] The ACPHR, the ACHR and the ECHR.

[8] The ESC and the San Salvador Protocol to the ACHR.

adoption of the Vienna Declaration and Programme of Action (1993) represented an important political statement after the Cold War that reaffirmed the indivisibility, interdependence and mutual reinforcement of all human rights.[9] In this context, the co-existence between both positive and negative obligations for CRPs and ESCRs has been invoked by case law and doctrine.[10]

And yet, in practice, positive obligations implied in CPR treaties remain something "exceptional".[11] Some treaties linked to classic CPRs, adopted at a later stage, such as the CAT (1984) and the CED (2010) are endowed with defined positive obligations. However, the main problem in this area remains the justification of positive obligations in the general CPR treaties, which contain mostly a listing of rights and only a few prescribed obligations. While negative obligations in these treaties are regarded as something rather natural, the positive counterparts, in order to be validated, require additional justifications.

"New" obligations, not originally foreseen by the drafters of CPR treaties, gain importance in the context of reading these treaties according to present time conditions (evolutive interpretation). This issue is frequently seen with caution,[12] if not skepticism[13] by important commentators and judges. The principle of effectiveness and the evolutive interpretation of treaties, frequently invoked in order to construe a "new" obligation in a CPR treaty, are at times regarded as exceptional methods, vis-à-vis other "traditional" methods.

The frequent use of such "exceptional" interpretation methods may raise at times specialty claims of human rights treaties vis-à-vis general international law. If so true, then the practice of reading positive obligations in CPR treaties, as a consequence, can be also considered a stranger in relation to the latter, which puts in question credibility of

[9] VDPA, § 5.

[10] See Chapter 1, Section 7.

[11] Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 214-220.

[12] See in particular the article of Paul Mahoney, "Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Judicial: Two Sides of the Same Coin," *Human Rights Law Journal*, 11 no. 1/2 (1990): 57-89.

[13] See ECtHR dissenting opinion of Judge Fitzmaurice in *Golder v. the United Kingdom,* 21 February 1975, Series A no. 18, § 39, demonstrating skepticism for this judgment for having read in the ECHR obligations that States "had not really meant to assume, or would not have been understood themselves to be assuming". In general: Marc Bossuyt, "Judicial Activism in Strasbourg," in *International Law in Silver Perspective. Challenges Ahead*, ed. Karel Wellens, Nijhoff Law Specials (Leiden: Brill, 2015), 31-56.

this practice and may attract thereupon the label of "human-rightism".[14] Obligations yielded by international courts and monitoring bodies should, as a matter of principle, be conceived by means of objective and recognized legal principles, in order to be clearly understood and implemented, in order to assure legal certainty for the relevant parties and stakeholders.

Besides the questions related to the validity of the claims of positive obligations, other problems relates to which extent obligations of this type can be claimed through judicial interpretation.

Evolutionary interpretation of human rights treaties hinges considerably on the methods a court applies in order to ascertain a new understanding of the law, requiring a "new" (positive) obligation, and to render a pertinent treaty provision effective. In the absence of an explicit obligation emanating from a treaty provision, monitoring bodies mostly apply the comparative method, seeking Member States' subsequent practice in modifying their own legislations (internal comparison) or in ratifying relevant treaties (external comparison). Depending on the choices and on the criteria to apply one or another method, the related outcomes may either anticipate new societal values before they are consolidated (acting in undue activism), or fail to embrace new social values (acting in undue restraint). In this regard, international monitoring bodies are faced with the constant challenge to maintain the *Zeitgeist* of a human rights treaty.

In order to maintain the *Zeitgeist* of a treaty, an international human rights monitoring body may risk overstretching CPR treaty obligations as to imply duties relating to ESCRs. Despite the fact that current case law has denied a watertight division between CPRs and ESCRs[15], CPR monitoring bodies, for instance, have increasingly received complaints relating to social security[16] and housing[17]. Such increase may also result in an interpretation that falls outside the object and purpose of CPR treaties. Renowned

[14] According to Alain Pellet, "*[h]uman rightism* can be defined as that 'posture' which consists in wanting at all costs to confer 'autonomy' (which, in my opinon, it does not possess) to a 'discipline' (which, in my opinion, does not exist as such): the protection of human rights", in "'Human Rightism' and International Law," *The Italian Yearbook of International Law*, 2000, 3. English translation of the "Gilberto Amado Lecture" (United Nations, Geneva) 18 July 2000 on "'Droits de l'hommisme' et Droit International".

[15] See, e.g., ECtHR, as early as in *Airey v. Ireland,* 9 October 1979, § 26, Series A no. 32. See also *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §53, ECHR 2006-VI, regarding gender discrimination in the pension system.

[16] See, e.g., ECtHR, *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011; IACtHR, *Case of the "Five Pensioners" v. Peru.* Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98.

[17] ECtHR, *O'Rourke v. the United Kingdom*, Appl. No. 39022/97, 26 June 2001.

scholars have been critical of the possibility of conceiving CPR obligations (and de facto extrapolating to ESCRs) entailing resource allocation, even as a means of realizing the former type of rights.[18]

The extent to which positive obligations may be implied in human rights treaties also involves questions about the institutional (and subsidiary) role of international courts and monitoring bodies, besides the purely normative considerations made above. In contexts where human rights treaties are relatively well known and accepted by domestic courts, as in Europe, the question of interference with democratic institutions becomes relevant.[19] Hence, the subsidiary role of international monitoring bodies gains even more relevance. International courts may be unduly imposing positive obligations upon democratically elected parliaments.[20] Reading a positive obligation that may have such effect in this are cautiously asserted, particularly when matters of resource allocation, policy and planning are at stake, with a considerable restraint by these courts. The margin of appreciation doctrine is applied as a pragmatic tool to address potential undue interference with States parties' domestic matters. Yet, instances of restraint may raise questions about undue judicial polycentricity[21], and undermine the very substance of a claim at stake, thus also undermining the effectiveness of a CPR treaty, for the sole fact that this claim entails resource allocation or policy modification.

But even if a monitoring body makes a correct interpretation of a treaty, the extent of a positive obligation, in a concrete case, may vary according to the proportionality assessment made by the national authorities. It may also vary, in this regard, according to

[18] See, *e.g.* Marc Bossuyt, "Should the ECtHR Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations," *Human Rights Law Journal* 28, no. 9 (2007): 321-333.

[19] See, ECtHR, dissenting opinion of Judge Fitzmaurice in *Golder v. the United Kingdom,* 21 February 1975, arguing that the ECHR, as other human rights treaties make "heavy inroads on some of the most cherished preserves of governments on the sphere of their domestic jurisdiction", an excerpt still very debated nowadays. By contrast, at the Inter-American system, the low absorption by domestic courts and administrations of the IACtHR's jurisprudence makes this Court to call its domestic counterparts to exert the so-called "conventionality control".

[20] See, e.g. Noel Malcolm, "Human Rights and Political Wrongs – A New Approach to Human Rights Law," Policy Exchange, 2017, 13-17, commenting on the well-debated case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), on the disfranchisement of prisoners, conflicting with an earlier decision of the British parliament. Available at: [https://policyexchange.org.uk/wp-content/uploads/2017/12/Human-Rights-and-Political-Wrongs.pdf], accessed on 15 May 2018.

[21] Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law*, ed. in Malcolm Langford (Cambridge: Cambridge University Press, 2008), 36, explaining about this practice of judicial restraint when dealing with complex issues that may have repercussions beyond the parties.

the width of the margin of appreciation afforded to these authorities in each case, according to the quality of the assessment made by the domestic authorities, including of the competing interests at stake. The margin of appreciation at the ECtHR nowadays is discussed through more elaborated terms than before, particularly in view of the so-called "procedural turn" of this Court, through which a wider margin of appreciation to authorities is granted if they have demonstrated sound procedural assessments and safeguards in a concrete case.[22] This new approach however needs to be better assessed in the field of non-discrimination, as seen *infra*.

3.2 - In the Context of Equality and Non-Discrimination

Positive obligations in respect of equality and non-discrimination, for their part, require from States actions in order to ensure equality, rather than just not intentionally discriminating individuals. Hence, States may be held in violation of a human rights treaty for failing to take steps to prevent or address instances of discrimination. The paradigm shift brought by the concept of substantive equality has introduced into international human rights law a number of State state duties, relating e.g. to promotion of equality[23], protection of vulnerable groups from violence[24], and acceleration of the equalization of enjoyment of rights[25].

However, this variety of State roles, translated into positive obligations, may not fully transposed to the case law pertaining to general CPR monitoring bodies, despite a welcoming referencing by the ECtHR and the IACtHR to case law and materials of specialized non-discrimination systems.

A first limitation is naturally of a thematic nature. Whereas a number of these non-discriminatoin treaties (adopted more recently) cut across several types of rights, thus allowing a mixed jurisprudence, CPR monitoring bodies are bound to a certain extent to

[22] See. e.g. Janneke Gerards "Procedural Review by the ECtHR: A Typology," in *Procedural Review in European Fundamental Rights Cases*, eds. Janekke Gerards and Eva Brems (Cambridge: Cambridge University Press, 2017) 127-160; and Oddný Mjöll Arnardóttir, "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance," *International Journal of Constitutional Law* 15, no. 1 (2017): 9-35.

[23] CEDAW, Art. 5(a), on the obligation to eliminate cultural patterns that lead to prejudices and to stereotypes on the social roles of men and women; CRPD's Article 8 on awareness-raising measures.

[24] E.g. *General Recommendation No. 35, on Gender-Based Violence against Women, updating General Recommendation No. 19*, adopted on 14 July 2017. UN Doc. CEDAW/C/GC/3.

[25] E.g., ICERD's Article 2.2, and CEDAW's Artic le 4.1, both on temporary special measures.

pursue the thematic object and purpose of the relevant treaties. There is openness by the ECtHR and the IACtHR to look into obligations arising out of the CRC, CRPD and CEDAW. Yet, the extent to which the latter bodies can deduce ESCR from CPR treaties, by referring to the specialized case law remains debatable.[26]

As a second limitation, specialized non-discrimination treaties operate through actions beyond individual rights, such as those aimed at addressing systemic inequalities[27], inspiring a sense of redistributive justice. The extent to which CPR treaties entail structural positive obligations is another open question, not only with respect to the risk of extrapolating to ESCR, but also given the tradition of CRP courts to entertain mainly individual rights. While, in the context of discrimination, structural discriminations may imply effectiveness of a treaty, the object and purpose of a CPR treaty may focus only on traditional individual rights. While case law has pointed out that the effects of a judgment are not limited to the individual, it is important to assess whether (and/or to what extent) structural concerns can be dealt with through interpretation of CPR treaties.

When a certain equality right is not provided in treaty law, human rights courts have shown hesitance in construing relevant "new" positive obligations and referred to the State's internal practice. This is the case of LGBTI rights, which were recognized by regional courts (and not yet by the HRCttee) at a substantially low pace. The IACtHR only recently accepted a full-fledged right to equal marriage, through a non-binding advisory opinion[28]. The ECtHR adopts a questionable "equivalence" stance, granting only the right of civil partnership, but not full-fledged marriage, through a notable deference to national jurisdictions.[29] In both cases, even if implicitly, State internal practice has had a key role in the development of international law in this field. Both the only recent

[26] See *e.g.* the dissenting opinion of Judge Lemmens in *Enver Şahin v. Turkey*, (no. 23065/12, 30 January 2018) inspiring caution at interpreting the ECHR's Article 2 of Protocol 1 (right to education) to entail an onerous obligation to provide accessibility (§ 9), particularly by delineating the progressive implementation of this obligation (§ 7) to the same extent as it would be conceived within the CRPD.

[27] For instance, Article 5 (a) of the CEDAW, obliging States "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

[28] IACtHR, *Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples. State Obligations in Relation to Change of name, Gender Identity, and Rights Deriving from a Relationship between Same-Sex Couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24.

[29] See ECtHR, *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010 (generally), and *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 197, 14 December 2017.

pronouncement by the IACtHR and a proctrated development by the ECtHR on the matter demonstrate the difficulties in evolving equality case law in some areas where reliance on State practice is in fact the only or the main source of interpretation of a general CPR treaty. But even when a group-specific treaty serves as a source of interpretation, there may be degrees of integration, which hinder the full potential of integration.

3.3 - The Question of Vulnerability

International human rights jurisprudence has decisively embraced a vulnerability language, beyond the traditional field of minority protection. Groups facing discrimination on several grounds receive increased attention by courts and monitoring bodies, in view of the historic marginalization, social invisibility, stigmas, higher likelihood to suffer violations and obstacles to obtain redress faced by these groups. Yet, vulnerability has appeared mostly in a declaratory fashion, with insufficient legal reasoning on how this approach impacts concretely the outcomes of a relevant decision. This concept intuitively implies a sense of prioritization by both international case law and national policies,[30] including by putting in place positive obligations. The ECtHR has for instance narrowed the margin of appreciation, if it recognizes that the group to which an applicant belongs, is considered vulnerable.[31] However, case law has not been consistent in specifying which groups are to be considered vulnerable or not, by not applying relevant criteria. This inconsistency also resonates the normative consequences of qualifying a group as vulnerable.

Some relevant studies have been published, like the doctoral thesis of Ivona Truscan (2015), on the concept of vulnerability in international law, in which she dedicates a section on State obligations vis-à-vis vulnerable groups.[32] Also, Peroni and Timmer have

[30] IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140. § 111; ECtHR, *Muskhadzhiyeva and Others v. Belgium,* no. 41442/07, 19 January 2010; CRCCttee, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*. Adopted on 2 March 2007, UN Doc. CRC/C/GC/8 § 21, requiring special protection for children against different forms of violence.

[31] ECtHR, *Alajos Kiss v. Hungary,* no. 38832/06, § 42, 20 May 2010.

[32] Ivona I. Truscan, "The Notion of Vulnerable Groups in International Human Rights Law" (PhD diss., Graduate Institute of International and Development Studies 2015). 255-310, dedicating a preliminary approach of her research on vulnerability to the normative effects this phenomenon may produce.

published an important article regarding the emerging concept of vulnerability within the ECHR.[33] They conclude that the ECtHR's approach to vulnerability is "relational, particular, and harm-based".[34] They also shed light on how this Court ascertains special positive obligations in this context, in view of a "special consideration"[35] to be attributed to certain groups. Several important insights were shared by these authors in that article that enumerate a number of occasions in which special positive obligations were imposed on States parties.[36] But beyond analyzing thoroughly a given protection system, it is necessary to establish more grounded principles on how the concept of vulnerability influences or articulates obligations. Research on how other systems approach vulnerability, in normative terms, is necessary in order to identify any areas of convergence that can provide support for a more grounded theory in this regard. The "harm" element,[37] consisting of a very basic concept that is easily understandable in the legal field, may show the path for further exploration in order to have a better grasp on what vulnerability actually implies, in terms of obligations.

4 - Research Questions:

Having regard to the research problems in the previous section, the following research questions, and sub-questions will guide the current study:

1 – Can the claims for positive obligations, in international human rights law, be justified under general international law?

If so:

1.1 – Is there a need to claim any specialty of international human rights law in relation to the practice of positive obligations?

1.2 – Can areas of *jus commune* be identified among the different systems, in relation to the different types of positive obligations?

[33] Lourdes Peroni and Alexandra Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law* 11, no. 4 (2013): 1056–1085.

[34] Id., 1064.

[35] Id., 1076, quoting i.a. *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012.

[36] Id., 1076-1079.

[37] This study takes as a point of departure the important consideration of Peroni and Timmer on harm and vulnerability, id., 1064-1069.

If so:

2.1 – What are the main drivers for convergence and divergence in the approaches taken by the several case laws analyzed?

2.2 – To what extent can positive obligations be claimed into CPR treaties?

These additional research questions also drive the argumentation of this study, as follows:

3.1 - What are the normative consequences of considering a given social group as vulnerable?

3.2 – If any consequence exists, are the limits and risks of asserting "special positive obligations" to a given vulnerable group?

5 - Methodology Overview

This study provides a comparative and an integrated perspectives of the practice and doctrine of positive obligations in international human rights law, as yielded by the (a) UN system (treaty-based and charter-based mechanisms), and (b) its regional counterparts, namely: (i) the European system, composed of the European Court of Human Rights; (ii) the African system, composed of the African Commission on Human and People's Rights and the African Court on Human and Peoples' Rights; (iii) and the Inter-American system, composed of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The several legal instruments adopted in the ambit of European Union relating to discrimination, and of the CoE's European Commission against Racial Discrimination and Intolerance (ECRI), will be considered in the Parts II, and III of this study.

The study takes a prominently legal approach, grounded on the main tenets of international human rights law. Accordingly, it uses as main sources[38] (a) the treaties adopted by the relevant multilateral systems; (b) the judgments and decisions yielded by

[38] Sources consist of "the processes through which international human rights and duties are created and/or identified as valid norms of international law." Samantha Besson, "Sources of International Human Rights Law: How General is General International Law?," *The Oxford Handbook of the Sources of International Law*, eds. Samantha Besson and Jean d'Aspremont (Oxford: Oxford University Press, 2017): 837. Besson undermines the specificities of international human rights law, in order to assert that international law, regarding sources, is nowadays less rigid and more variegated, admitting the co-existence of several regimes (including human rights law) within its general framework, at 869.

supranational human rights courts, international non-judicial monitoring bodies and high courts of domestic jurisdictions; and (c) the scholarly writings commenting on the two aforementioned sources. Other sources of relevance are the advisory opinions of supranational human rights courts and the general comments or recommendations by the UN treaty bodies.[39] Non-legal sources (e.g. blog articles, reports from international organizations, documents from NGOs, speeches of high authorities and relevant stakeholders and news articles) will be used to offer the pertinent social, economic and political contexts, particularly related to non self-contained legal concepts, such as legal realism and substantive equality. These sources were collected, classified and systematized in the Zotero reference management software.

5.1 - Methodological Approaches

This study was conducted through the following methodological approaches.

5.1.1 - A Comparative Approach

A heuristic comparative approach between several human rights protection systems at the current stage of the legal debates on positive obligations is necessary, given the scarcity of a cross-system research in this field. Consisting of a comparative study, this study takes the necessary care of not being a mere compilation of materials and case law from different human rights systems. It has been said that "[t]he classical technique of legal methodology of reading texts of all kinds and hoping for insight has serious limitations for collecting data to serve comparative inquiry adequately."[40] A complete inquiry should be expected not only to describe, but also do juxtapose, and to identify similar patterns, in order to engage in explanation.[41]

Through the comparative analysis of this study, similarities and differences on how positive obligations were approached through the different systems, when identified, are further contextualized. This contextualization takes into consideration *i.a.* the time when a given judgment or decision was taken; the relevant legal and societal debates influencing a given legal reasoning (particularly in the context of evolutive interpretation);

[39] The works of the UN Charter-based mechanisms, mainly the reports of the special procedure mandates, serve as a basis to orient the state of the law, as well as the trends perceived in a given topic.

[40] Esin Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century* (Dordrecht: Brill/Nijhoff, 2004), 53.

[41] Id., 54.

and the inherent diversity of case law profiles, among the different systems. Hence, this study attempts to seek not only for purely legal arguments or factors in order to unveil the raison d'être for those differences and similarities,[42] but also for social, economic and political arguments surrounding a given judicial decision.

Through this comparative effort, the diversity of approaches found among the various systems (when instances of *jus commune* are not found) enriches the research outcomes. This view is preferred over one that tends to force harmonization, as pointed out by specialized critique.[43] By exposing a diversity of approaches, and the relevant solutions adapted in each context, room for cross-polinization is created. Overall, this study is driven by the need to grasp the concept of positive obligations as a global legal phenomenon, and to examine how this concept is articulated among the different human rights systems.

Comparing different human rights monitoring systems requires taking into account their inherent differences, through many ways. Recognizibly, taking different systems out of their respective sylos in order to be compared is a challenging task. To begin with, not all systems are endowed with the same monitoring functions and mechanisms, such as petitions, advisory opinions (or similarly: general comments, general recommendations, and policy recommendations), or periodic reports. Likewise, the different international monitoring systems serve different purposes and have different functions, their relevant mechanisms alike. Moreover, the several normative sources enjoy different statuses are commonly classified as binding or non-binding norms. Such diversity requires the adoption of certain criteria in order to make the comparative works as consistent as possible.

Firstly, whenever applicable, a first comparison between obligations prescribed by the different treaty provisions themselves was conducted. Secondly, preference was given to the comparison between the decisions (in the petition systems) of the several monitoring bodies, as regards positive obligations. Not so much focus was given to the variances on the binding/non-binding natures of these decisions, although they have a bearing on the enforcement of these decisions. For this study, it was important to generally understand the interpretation by such a decision of the relevant instrument. Moreover, the differences

[42] Ibid.

[43] G. Samuel "Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?", 148.

between (a) an individual petition system, as in e.g. the IACtHR and the ECtHR, (b) a collective petition system, as in the ECtteeSR, and (c) the extent to which each of those systems operate, in practice, were considered whenever relevant for this thesis. Regarding the relevant output volume, the ECtHR has a far larger activity in individual petitions than the other systems, which makes its case law not only considerably more extensive but also the legal reasonings considerably variegated and nuanced. In order to avoid a bias towards a predominant analysis of the case law of this Court, and to ensure a fair variety of systems analyzed, this study attempted to single out the most relevant cases of this Court in each discussion, and refer to similar cases in a footnote. At the same time, this study compared these most relevant cases with other important cases of the homologous petition systems. As for the decisions of the UN treaty bodies, particularly dealing with equality and non-discrimination, of a lesser output, this study analyzed every pertinent decision, also in order to ensure a fair mix of cases contemplated.

Thirdly, whenever a given monitoring system is not endowed with a petition system, a relevant advisory material (if existing) was identified and compared against a decision of another system, as e.g. comparing the ECtHR and the ECRI, in the context of racial discrimination. An advisory position of a given body was also analyzed if the issue at stake was not yet examined by that body via its individual petition system, as it has been frequently the case with the CPRD and the CEDAW, which both have started to develop case law only recently. This approach is also used as regards the CESCR, which has an important output via its General Comments and only a few contentious cases under its new petitions system. Admittedly, this is not an optimal means of comparison, but this study attempted to capture, as much as possible, the general understanding of a treaty provision provided by these advisory materials. Overall, these materials were also used in order to grasp the general directions given by the relevant system on a given issue, which can serve as guidance also in individual cases.

Fourthly, all other materials, such as the concluding observations of the UN treaty bodies, reports of international organizations and the resolutions of the several international organizations, serve the purpose of complementing the main sources.

5.1.2 – An Illustrative Comparison

The research, representing one of the first to analyze positive obligations from the point of view of different international human rights systems (instead of a sylos-fashion research) did not engage in an exhaustive study of positive obligations in general, or in specific the context of equality and non-discrimination. There are various reasons for this. First, an exhaustive study including a broad range of monitoring systems, apart from being time consuming would also prove counterproductive to the objectives of this research. Given the inherent differences between the several systems, a complete analysis, including a comparison between these systems in each topic analyzed, remains practically impossible. Moreover, an exhaustive research would have missed the focus on especially relevant (and problematic) areas that are worthy dealing with, for a plain multi-system comparison devoid of practical purposes. Further, positive obligations imply an indeterminate scope of actions, which also changes with the passage of time, in view of the "birth" of new obligations through an evolutive interpretation of treaties and later treaty elaboration. This study, instead, focused on patterns of *jus commune*, i.e. on positive obligations that are significantly present (through varied levels and forms) in a number of the systems studied, which can be compared, juxtaposed and integrated. Hence, this study paid attention to the particularities of a given system only with the purpose of preparing the reader for subsequent chapters or sections, where the comparative and the integrated approaches are applied.[44]

Along the course of the research, variances were noted on the level of convergence among the several monitoring systems, as regards the duties to protect and to fulfill. The positive obligations identified within the "duty to protect" encompass a larger convergence among the several systems than within the "duty to fulfill". This latter type entails a rather variegated pattern, in which States enjoy a broad margin of discretion to determine the relevant measures of compliance. Hence, the duty to protect was analyzed in a comparatively structured manner, namely as an obligation: (a) to prevent violations through the adoption of legislation, monitoring, and regulation, and through direct acts of the public authorities; and (b) to redress through investigations, adjucation and provision of reparations, as in Chapters 2 (Section 1), 5 (Section 1) and (Section 1). The duty to fulfill, for its part, as in Chapters 2 (Section 2), 5 (Section 2) and 8 (Section 2), presented

[44] As is the case of e.g. the doctrine of margin of appreciation, in Chapter 3, Section 4.3.

illustrations of positive obligations, among an indeterminate spectrum of obligations of this type.

The choice of the latter illustrations followed certain criteria. Firstly it gave precedence to positive obligations provided in human rights treaties, particularly the treaties on equality and non-discrimination, given that the duty to fulfill has a prominent scope in these treaties. Such preference thus enabled an analysis on whether, or to what extent, these obligations, originating from specialized treaties, can be transposed to general human rights treaties. Hence, in each comparative effort, this study presented, whenever applicable, a treaty provision indicating such positive obligation in a given monitoring system, followed by the relevant references in other monitoring systems.

As a second criterion, the study selected positive obligations that were not provided in treaty law, but that were deemed relevant in view of the controversial scholarly and societal debates involved, which deserve specific examination, especially in view of the inherent challenges of construing positive obligations through judge made law and consensus of States. For instance, the obligation to recognize same-sex marriages deserved detailed attention in Chapter 6 (Section 1.2), given the complexity of the issue, the diverging views proposed among other supranational and national jurisdictions that have dealt with the matter, and the institutional limits of a supranational court.

Given that not each monitoring system deals with the topics examined in the study, it was impossible to have regard to the sources of each system in each section of the thesis. In each section of Chapters 2, 5 and 8, this study contemplates as many monitoring systems as possible, in order to ensure a wide diversity in the comparative effort. It mentions the most relevant sources in the body of the text and refers to other sources in the footnotes, in order to demonstrate that a given comparison has been conducted as thoroughly as possible. In some sections, in order to ensure a more dedicated discussion, two relevant systems are pinpointed, as an illustration of the diverging approaches to the whole body of international human rights law.

5.1.3 - A Normative Approach

Dealing with positive obligations of States originating in treaty law, State practice and judicial interpretation, this study is not limited to describing or systematizing norms, but

"takes normative positions and makes choices among values and interests."[45] Rather than merely looking for causal relations, as in exact sciences, legal doctrine is concerned with determining the existence of an obligation and the breach thereof, on the basis of elements present in a legal system itself via an internal logic[46]. This internal logic has been said to be an "attempt to render the law intelligible, but sometimes also to show the multiple possible readings and contradictions of existing law"[47].

However, as the study delves significantly into the principles of effectiveness and of substantive equality, an internal approach alone would render the study incomplete. Recognizably, this approach, embedded in legal formalism, cannot be totally ignored, as it helps reducing complexities and optimizes new elements to be dealt by a legal actor.[48] Yet, evolutive interpretation, a driving force of the development of positive obligations in human rights law is a compelling motive of the significant and frequent interactions between courts of law and societal debates from various natures. Hence, on a second stage, this study takes the view that "law should not be seen as completely autonomous, serving its own purposes, but as related to other ethical and social science perspectives".[49] Moreover, human rights research can hardly be assessed through a purely normative or neutral perspective, compared with other areas of law.[50] Interpretation of human rights treaties is open to teleological considerations and to the improvement of the enjoyment of rights and freedoms.

Substantive equality, regarded as a tenet of human rights law, is also forged by a critical assessment of a presumed ideal of equality, initially inspired by the UDHR that depicted the human being as male, white and able-bodied. In this context, far from being taken for granted, evolution in human rights law, specifically in the field of equality, is a result of

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[45] Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?," in *Methodologies of Legal Research*, (Oxford: Hart Publishing, 2011), 10.

[46] For McCrudden, the internal approach is "the analysis of legal rules and principles taking the perspective of an insider in the system", in "Legal Research and the Social Sciences," *Law Quarterly Review* 122 (2006): 633. Moreover, the task is "often to attempt to understand how these various elements fit together, to attempt to draw out the patterns of normative understanding that enable us to see the wood and the trees together as constituting a working whole" (at 634).

[47] Ibid.

[48] John Bell, "Legal Research and the Distinctiveness of Comparative Law," in *Methodologies of Legal Research*, 161.

[49] Id., 157.

[50] Any area of law in fact can hardly be regarded to be devoid of any "moral neutrality". See Tara Smith, "Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law," *Washington University Jurisprudence Review* 4 No. 1(2011): 49-95.

the action of the most marginalized groups acting as protagonists of their own emancipation, in connection with the permeability of legal operators and researchers to the plight of those groups.[51]

5.1.4 - An Integrated Approach

The comparative and normative approaches used in this study may be strengthened by favoring an integrated approach.[52] This study applies this approach based on the belief that human rights (as general international law), among their diverse areas, keep considerable common grounds and overlaps that can be better synergized, instead of consisting of a set of "boxes separated from each other"[53]. For the purposes of this study, an integrated approach, as a methodological tool, means, in simple terms, the identification of sources and concepts from a given human rights system by another system that can improve the understanding of a treaty provision of the latter, by means of interpretation. Moreover, this approach is mainly applied in this study as tool to better understand legal factors external to a given system that influence the evolution of positive obligations. This study, however, has not the purpose of deriving basic principles of formulating a general theory on human rights integration.

More specifically, such an approach in international human rights research has assumed various forms, [54] in view of novelty thereof. For the purposes of the current research, an integrated approach will, at first, combine correspondent sources from the several monitoring systems researched, in order to (a) improve the legal reasoning of the study

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[51] See, as regards the CEDAW: Susanne Zwingel, "From Intergovernmental Negotiations to (Sub)national Change," *International Feminist Journal of Politics*, 7 no. 3 (2005): 400-424; and as regards the CRPD: Vladmir Cuk and Dominic Haslan, "How Ten Years of the CRPD Have been a Victory for Disability Rights," *Huffington Post* (12 June 2016), available at: [https://www.huffingtonpost.com/entry/58473671e4b0cc9e7cf5dbdd?timestamp=1481064573703&guccounter=1], accessed on 7 February 2019.

[52] This approach taken by this work is inspired by the article of Eva Brems: "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration," *European Journal of Human Rights*, 4 (2014): 447-470; and by the collective work *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, eds. Eva Brems and Ellen Desmet (Cheltenham, Northampton: Edward Elgar Publishing 2017).

[53] Martin Scheinin, "Taking Seriously Indigenous Peoples' Right to Self Determination and the Principle of 'Free, Prior and Informed Consent': Human Rights Committee, 2102/2011, Paadar et al. v. Finland," in *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, 385.

[54] See the different forms by which this approach may assume: Eva Brems, "Introduction: Rewriting Decisions from a Perspective of Human Rights Integration," in *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, 11-13.

itself, by finding opportunities for synergies between the systems analyzed and (b) take into consideration in this study the challenges faced by victims in seeking international justice. The latter component is of elevated importance in a study, such as this one, which deals with the concepts of effectiveness of human rights, substantive equality and vulnerability.

Overall, a main advantage of an integrated approach, as it has been said, is to narrow the distance between human rights law and the ethical and political project of human rights.[55] While indivisibility and interdependence of human rights are goals to be pursued, the current scenario of international human rights law faces fragmentation and is composed of multilayers of several sources and monitoring mechanisms.[56] Paradigmatically, at the UN level, two separate Covenants, the ICCPR and the ICESCR, were adopted with texts dealing with separate types of rights. This pattern was followed by the adoption of several other conventions dealing with a single issue[57], or protecting a single group.[58] Not only separate texts were adopted, but also each relevant organ that monitors these treaties has a competence limited to a single treaty.[59] These challenges may lead to instances of partial justice, in view *e.g.* of the hard choices victims may be forced to chose between one or another course of international redress which, in either case, does not fully capture the specificities of the violations sustained.[60]

For the purposes of this study, this approach is important for three main interrelated reasons. A first reason is the presence of positive obligations in all the monitoring mechanisms studied. These mechanisms refer to external sources through different

[55] Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", 454.

[56] Id., 451, particularly through a human rights "user's" perspective.

[57] Such as the CAT and the CED.

[58] Such as the CEDAW, the CRPD and the CRC.

[59] For Brems, "[w]hen a single instance of justice touches upon several human rights, it is likely that the individual who seeks justice before an international human rights body will be able to invoke only some rights, the others remaining dead letter", in "Introduction: Rewriting Decisions from a Perspective of Human Rights Integration," in *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, eds. Eva Brems and Ellen Desmet, 7.

[60] Brems, " […] in many cases, their best hope is for the enforcement of only part of their human rights, as the other human rights they enjoy cannot be enforced before to the particular forum to which they have turned and therefore are not considered by the body that will decide on their case", in "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", 454.

levels.[61] In this context, interpreting "new" positive obligations construed by means of evolutive interpretation, involves the search by a monitoring system, of any developments on the respective area of law in other sources (e.g. treaties and case law).[62] As a second and more specific reason, this study examines the transposition of "special" positive obligations emanating from the specialized non-discrimination treaties to general (civil and political) rights treaties. Combining the "common humanity" values[63] enshrined in the latter, and the improvement of the situation of certain discriminated groups, enshrined in the former[64], in a single complaint (whenever possible) is indeed more beneficial than to expose a victim to a dilemma between choosing the strength of one or another type of treaty, in view of the several and separate existing venues for redress.[65]

By applying an integrated approach, this study focused on the interplay between general CPR treaties and group-specific treaties. Through a first perspective, general systems have referred to "special" positive obligations emanating from specialized treaties, in areas such as gender-based violence[66], disabilities[67], indigenous lands[68] and human

[61] As will be seen in this study, the IACtHR and the African regional systems have been historically more permeable to external sources. But also the ECtHR, for its part, has increasingly opening to legal developments outside the CoE. In *Demir and Baykara v. Turkey* [GC], this Court denied that regards the provisions of the ECHR as the sole reference for this Convention's interpretation. Instead, it "must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties" (No. 34503/97, § 67, 12 November 2008).

[62] Notably, in *Demir and Baykara v. Turkey* [GC], the ECtHR considered of relevance the consensus emerging form specialized international instruments, when interpreting, in specific cases, provisions of the ECHR (No. 34503/97, § 85, 12 November 2008).

[63] Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", 465. The author also emphasizes the existence of more clear State obligations in specialized human rights treaties, which can provide guidance for the enforcement of the general counterparts through an integrated approach.

[64] Ibid.

[65] Brems illustrates this case with the example of a woman who is a victim of domestic violence and has her case neglected by the police, explaining that this woman is entitled, as a citizen, to have her physical integrity protected. Concomitantly, as a woman, she is entitled to protection from gender-based violence. In the whole, both aspects are inseparable, arguing in favor of an integration of the relevant legal assessment (ibid).

[66] A notable example is *Opuz v. Turkey*, in which the ECtHR set an important precedent by integrating the question violence against women through Articles 3, 8 and 14 ECHR into gender-based violence. This Court made substantial reference to the CEDAW and the Belém do Pará Convention and works on the applicable positive obligations, thus enabling the ECHR to be read as to protect not only an individual who has her personal integrity violated, but also to protect a woman who was victim of gender-based violation because she is a woman.

[67] In *Çam v. Turkey* (no. 51500/08, 23 February 2016) and *Enver Şahin v. Turkey,* (no. 23065/12, 30 January 2018), the ECtHR took into consideration positive obligations emanating from the CRPD, in order to interpret the ECHR as also protecting disability rights.

[68] See. e.g. *Case of Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and reparations. Judgment of June 27, 2012. Series C No. 245), in which the IACtHR interpreted the general right to private property

trafficking[69]. Those references are frequently made in the context of filling lacunas when interpreting the general non-discrimination clauses. This is an opportune area for such an approach, given that, as it has been said, these clauses consist of "a polyvalent vehicle for human rights integration"[70]. Moreover, most of the group-specific treaties were adopted on a later stage than the general counterparts, providing the latter with important sources of evolutive interpretation. Throughout Chapters 5 and 8, this study identified instances in which general treaties absorbed ideas, concepts, and even positive obligations emanating from these group-specific treaties into their own reasonings. In Chapter 6 (Section 1.1), this study attempted to demonstrate the variable levels by which general systems adopt this approach, illustrating with the examples of violence against women and disabilities, within the discussions about the delimitation of the scope of positive obligations in equality and non-discrimination. In the subsequent Section 1.2 this study analyzed an area of hesitance to reliance to external sources in the case of same-sex civil relationships, demonstrating the disadvantages for a court to base its reasoning only on internal consensus.

Through a second perspective, on the contrary direction, group-specific systems refer to the general counterparts in order to reassess a given specific matter in light of the developments in the overall human rights scenario. Among a number of such examples[71], it is notable that the CERD has paid close attention to Article 19 ICCPR and to the relevant jurisprudence of the HRCttee, in order to revisit the issue of hate speech, in the context of Article 4 ICERD. As it will be seen in Chapter 9 (Section 5), the CERD clarified its understanding on the matter by e.g. applying the criteria used by CPR treaties to limit the possibilities of States to interfere with the right to freedom of expression.

(Article 21 ACHR) in order to protect communal lands of indigenous peoples, in accordance with the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.

[69] See, e.g. *Rantsev v. Cyprus and Russia* (no. 25965/04, ECHR 2010) in which the ECtHR has approached Article 4 ECHR (domestic servitude) by integrating it to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the "Palermo Protocol" (2000), and the CoE Convention on Action against Trafficking in Human Beings (2005).

[70] Brems, "Introduction: Rewriting Decisions from a Perspective of Human Rights Integration," in *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, 17.

[71] For instance, the CEDAWCttee reinforced its argument on State responsibility for acts of non-state actors by combining the works of the International Law Commission and other general sources, in its updated understanding about gender-based violation against women, see: *General Recommendation No. 35, on Gender-Based Violence against Women, updating General Recommendation No. 19*, adopted on 14 July 2017. UN Doc. CEDAW/C/GC/3. The CRPDCttee has, at least once, entertained the issue of margin of appreciation, when policy choices were at stake in order to implement the CRPD's provisions (*Jungelin v. Sweden*, communication No. 5/2011, views of September 2013. UN Doc. CRPD/C/12/D/5/2011, § 10.5).

A third reason is the issue of intersectionality. Even among the specialized group-specific treaties, experiences and identities of certain groups may be misrepresented[72], as these treaties often protect only one facet (*e.g.* gender, ethnicity, disability) of a person's whole identity, leading to further marginalization. An integrated view of human rights, through a "crossroad-thinking" may avoid, once more, undesirable choices for victims to choose whether to frame their claims as one or another facet of their identities,[73] in view of the severalty of group-specific normative sources and the restricted competence *ratione materiae* of the respective monitoring systems. This study, however, had a more modest examination in this regard. In Chapter 8, it identified areas in which intersectionality was considered, such of reparations (Section 1.5.3), temporary special measures (Section 2.1.3) and consultation with the affected (ethnic) communities (Section 1.3). This study went as far as proposing specific areas in which an integrated approach would have improved the reasoning of a monitoring body, beyond a general assessment made in Chapter 7 (Section 4.3). In the Conclusions Chapter, it is suggested that future research could deal in detail with the normative aspects of intersectionality, which implies better integration among the different human rights systems.

Recognizibly, there are limits for an integrated approach among different sources and monitoring systems, such as the respect for regional approaches for human rights, and the competence *ratione materiae* of monitoring bodies with respect to civil and political rights. Yet, given the absence of a water-tight division[74] between CPRs and ESCRs, this study proposed in Chapter 4 the capability theory[75] as a tool to enhance victims' claims in overlapping areas between both types of rights. Moreover, by researching on this matter, this study took the view that an integrated approach should (whenever feasible) be encouraged among the several systems. This is not, however to encourage uniformity, but rather synergies among these existing systems. [76]

[72] Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", 466.

[73] Ibid.

[74] ECtHR, *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

[75] Chapter 5 (Section 3.3).

[76] Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", 467.

5.2 - The Tripartite Typology of States' Obligations

This study is supported by the tripartite typology of state obligations, as a methodological tool, through the different positive obligations identified. Proposed initially by Henry Shue[77], this typology was further elaborated by Asbjörn Eide[78], divided into: (a) "obligation to respect",[79] (b) "obligation to protect,"[80] and (c) "obligation to fulfill",[81] the latter sub-divided into: (i) "obligation to facilitate",[82] and (ii) "obligation to provide".[83] Fried van Hoof, later on, proposed the obligation to promote, which consists of "measures aimed at long-term goals" that may entail the setting of training programs.[84] Steiner and Alston proposed the additional duty "to create institutional machinery essential to realization of rights".[85]

The strength of this method is to depict more realistically the several roles of contemporary States vis-à-vis their treaty obligations, beyond the positive and negative divide. Scholars writing on CPRs have suggested that the tripartite typology of duties can

[77]Henry Shue, *Basic Rights: Subsistence, Affluence and the U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 52, initially classifying human rights duties as: (a) to avoid depriving; (b) to protect from deprivation; and (c) to aid the deprived. In a later work, Shue has renamed these initial duties, for the sake of accuracy, as: (a) duty to respect; (b) duty to protect; and (c) duty to aid, in "The Interdependence of Duties," in Tomaševski, K. and Alston, P. (eds.) *The Right to Food*, (Utrecht: Martinus Nijhoff Publishers, 1984), 84.

[78] Asbjörn Eide, "Economic, Social and Cultural Rights as Human Rights," in *Economic, Social and Cultural Rights*, a Textbook. 2nd revised edition, eds. Asbjörn Eide, Katarina Krause, and Allan Rosas (Dordrecht: Martinus Nijhoff Publishers, 2001), 9-28.

[79] Implying "respect the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs, id., 23.

[80] Denoting the "protection of the freedom of action and the use of resources against others", particularly from "more assertive or aggressive subjects" id., 24.

[81] Ibid. The scholar explains that this category requires that States assist individuals or groups, which cannot enjoy autonomously their fundamental rights.

[82] Implying a duty "to facilitate opportunities by which the rights listed can be enjoyed", id., 24.

[83] Ibid.

[84] Godfried Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views," in *Economic, Social and Cultural Rights*, *a Textbook*. 2nd revised edition, 106.

[85] Henry J. Steiner, Henry and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. (Oxford: Oxford University Press, 2000) 182, explaining that that it consists not only of duty of non-interference, but also an obligation to "create the infra-structure on which the practical realization of the rights depends." In practice, this obligation has been absorbed within the obligation to facilitate.

be used to better conceive obligations in respect of these rights,[86] affirming the variety of State obligations, regardless of the nature of the right in question.

Moreover, besides the CESCR, treaty bodies specialized in non-discrimination, have made progressive use of the tripartite typology of duties.[87] In this context, one should not forget Vandenhole's seminal work on equality and non-discrimination by the works of the UN treaty bodies, which has made extensive application of this typology in both CPRs and ESCRs.[88]

Admittedly, critique on the tripartite typology exposes the difficulties to fit a given obligatoin category into a single category,[89] resulting in an artificial exercise. Prior research has found little use of this typology when applied to a single protection system that deals mostly with CPRs.[90] This typology has been inscribed in at least one national constitution, and has been applied by relevant case law,[91] but with no other relevant examples in national jurisdiction. The ECtHR, the IACtHR and the HRCttee have not engaged in this typology.

Despite the above shortcomings, there are still methodological advantages to use the tripartite typology of duties. The added value for the current research by applying this typology is to shed a light into a somewhat obscure area of positive obligations aside the classic obligation to protect. Indeed, a more varied set of obligations was found through

[86] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart: Oxford 2004) 223; Manfred Nowak, U.N. Covenant on Civil and Political Rights – A Commentary (Kehl am Rhein: Engel, 2005), 37-39; Dinah Shelton and Ariel Gould, "Positive and Negative Obligations", in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Sheldon (Oxford: Oxford University Press, 2015): 562-583.

[87] E.g. CEDAWCttee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, adopted on 10 December 2010, UN Doc. CEDAW/C/GC/28, § 9; CRPDCttee, *General Comment No. 5 (2017) on Living Independently and Being Included in the Community*, adopted on 27 October 2017. UN Doc. CRPD/C/GC/5, §§ 39-68.

[88] Wouter Vandenhole, *Non-Discrimination and Equality in the Views of the UN Human Rights Treaty Bodies* (Intersentia: Antwerp, 2005). See also, in the context of the ICERD, Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination – A Commentary* (Oxford: Oxford University Press, 2016), 161-163.

[89] Ida E. Koch, "Dichotomies, Trichotomies or Waves of Duties?," *Human Rights Law Review*, 81-103 (2005): 91. Gustavo Arosemena, in the same lines, criticizes the so-called category skepticism", in *Rigths, Scarcity and Justice* (Cambridge: Intersentia, 2014), 4.

[90] Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 13-14.

[91] See e.g., South African Constitution, Section 7.2, establishing an obligation on the State to respect, protect, promote and fulfil the rights in the South African Bill of Rights. See also Constitutional Court of South Africa, *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), § 105.

different systems, such as to build institutional machinery in order to realize rights[92], to provide impecunious litigants with legal aid[93], and to provide training and awareness-raising on human rights issues.[94] In the field of equality and non-discrimination, the duty to fulfill gains a wider scope, in relation with the general framework. In this field, CPR monitoring bodies have increasingly engaged in obligations such as reasonable accommodation[95] and the recognition of sexual identities[96] and particular lifestyles[97]. Moreover, this typology seems to be an appropriate platform for translating into human rights obligations the contemporary concept of capability, strengthening the transversal argument that resource-demanding obligations also aim as realizing one's autonomy and freedom, beyond a merely welfare approach. This study works under the assumption of the complementarity and interdependence between the several positive obligations within this typology, which also helps addressing skepticisms on the usefulness of this typology.[98]

At the same time, this study is aware of the limitations inherent in CRP treaties, particularly following from their relevant object and purpose, which delimits the possibility of "transposing" certain legal obligations from specialized treaties that encompass both CRPs and ESCRs. Hence, these limitations are reflected and discusssd in the present study.

The tripartite typology encompasses both positive and negative obligaitons. This thesis, however, will apply only the positive limbs thereof through the following scheme: (a) duty to protect; and (b) duty to fulfill, composed of the duties (i) to facilitate; (ii) to provide; and (iii) to promote. This scheme has gained sufficient acceptance through legal doctrine and international practice of the international human rights monitoring bodies.

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[92] ECtHR, *Makaratzis v. Greece* [GC], no. 50385/99, § 57 ECHR 2004-XI; IACtHR, *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 21, § 140.

[93] ECtHR, *Airey v. Ireland,* 9 October 1979, Series A no. 32, § 26.

[94] ECtHR, *Tekin and Arslan v. Belgium*, no. 37795/13, §§ 95-98, 5 September 2017; and HRCttee, *General Comment No. 31*, §§ 5 and 7.

[95] ECtHR, *Eweida and Others v. the United Kingdom,* nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 94 ECHR 2013 (extracts); *Çam v. Turkey*, no. 51500/08, § 65, 23 February 2016.

[96] ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 93, ECHR 2002-VI.

[97] ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 73, ECHR 2001-I; IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador**,** § 145; HRCttee, *General Comment No. 23 - The Rights of minorities (Art. 27).* Adopted on 4 August 1994. UN Doc. CCPR/C/21/Rev.1/Add.5, § 3.2**.**

[98] E.g. Ida E. Koch, "Dichotomies, Trichotomies or Waves of Duties?", 91.

5.3 - Relations between Certain Rights and the Concepts Related to Equality and Non-Discrimination

On a number of occasions, this thesis went somewhat beyond the analysis of the right not to be discriminated against, in respect of substantive rights. In fact, according to a traditional approach, an instance of discrimination may be based upon the comparison between the applicant and other individuals under similar conditions in the enjoyment of substantive rights.[99] In the present thesis, an extrapolation of this traditional approach was necessary in order to take into account the contours and the practical consequences of dealing with substantive equality. In this context, a number of treaty provisions and case law spell out a duty of the States to treat differently individuals or groups that are inherently different, instead of merely comparing individuals who are in similar conditions.[100] As a result, "special" positive obligations may be imposed in order to take into account those differences, including (a) to investigate the racist overtones of a possible racial offense; (b) to provide reasonable accommodation for persons with disabilities; (c) to provide asylum seekers with essential living conditions; and (d) to put in place temporary special measures in order to accelerate *de facto* equality of marginalized groups, as it is seen throughout this study.

Moreover, an important area of the study of substantive equality, which is translated into case law, is that of the recognition of certain identities of minorities or of special characteristics of vulnerable groups. This is the case with Article 8 ECHR that covers a broad range of perspectives of the right to private in family life, and may entail an obligation e.g. to recognize an individual's perceived gender in the national civil registry system[101], or to recognize the civil union between individuals of same sex.[102] Similarly,

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[99] E.g., *Marckx v. Belgium,* 13 June 1979, § 32, Series A no. 31, holding that Article 14 ECHR "safeguards individuals, placed in similar situations, from any discrimination."

[100] E.g., ECtHR, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV, holding that "the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." Similarly: HRCttee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, §§ 8 and 9.

[101] Notably in ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 93, ECHR 2002-VI.

[102] Notably in ECtHR, *Schalk and Kopf v. Austria,* no. 30141/04, § 94, ECHR 2010, or even a full-fledged marriage between same-sex couples, as in the IACtHR's *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, §§ 179-181.

this Article has been construed as to entail an obligation to recognize Roma individuals' (semi)-nomadic lifestyles.[103] The same could be said about Article 21 of the ACHR, which was interpreted also as to recognize indigenous communal property of lands, instead of a merely individual private property.[104] For this reason, the present author found it necessary also to take into account those instances that go somewhat beyond the traditional approach to equality.

Admittedly, international human rights courts have an inconsistent practice on this matter. At times, the judgments entertain the substantive right claimed with the general non-discrimination clause[105], whereas at times they find no issue arising under such a clause[106]. This study, however, worked under the assumption that the legal and social debates surrounding the recognition of certain individual identities, and of particular traits of certain (vulnerable) groups can be considered within the broader concept of substantive equality, by treating differently persons who are in inherently different situations. Hence, the general non-discrimination clauses of human rights treatie should be engaged consistenly in those cases.

5.4 – The Applicable Legal Framework

Consisting of a study on legal international obligations, it is necessary to delimit the applicable legal framework. Particularly when a study, such as the current one, works intensively with judicial interpretation and the related evolutive approaches, there is always a risk of extrapolating the boundaries of international law. Hence, this study works under the main assumption that international human rights law forms part of general international law, as it also tests the claims for positive obligations against the main tenets of international law.

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[103] Notably, in ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 73, ECHR 2001-I.

[104] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, § 167, regarding an obligation to recognize the communal property of indigenous lands.

[105] As e.g. in ECtHR, *Thlimmenos v. Greece*, finding a violation of Article 9 in conjunction with Article 14 ECHR; and *Enver Sahin,* no. 23065/12, § 74, 30 January 2018, finding a violation of Article 1 Protocol 1, in conjunction with Article 14 ECHR; and in the IACHR's *Advisory Opinion OC-24*, recognizing gender identity in an ample context of equality and non-discrimination, as in §§ 81 and 220.

[106] As e.g. in *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; or similarly in *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, §§ 89-96, 14 December 2017.

The main normative reference in this regard, in particular on the interpretation of treaties, is the Vienna Convention on the Law of Treaties (VCLT), Articles 31 through 33. This treaty is not endowed with a superseding character, so as to be imposed on any legal regime. However, it consists of written international law and is regarded as declaratory of international law.[107] It is also considered to "contain the fundamental rules of international law on treaties"[108]. This treaty's relevance is widely accepted as a general guidance in many different fields of international law, involving both bilateral and "law-making treaties".[109] International human rights courts and monitoring bodies have equally recognized the relevance of the VCLT system[110], in particular the rules and principles of treaty interpretation.[111] States similarly recognize the relevance of the VCLT as an authoritative source applicable to the rules of evolutive interpretation.[112]

6 - Structure of the Study

The present study is divided in three Parts.

Part I, titled *Positive Obligations, in General*, provides the legal foundations for the study and comprises three Chapters. Chapter 1 is aimed at inquiring the validity of the claims for positive obligations in international human rights law, as well as assessing their compatibility with general international law, particularly in view of the principles of effectiveness and evolutive interpretation. It also assesses the state of the art of the debates surrounding violations committed by non-State actors and the circumstances necessitating direct State assistance.

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[107] James Crawford, *Brownlie's Principles of Public International Law*, 8th edition. (Oxford: Oxford University Press, 2012), 367-368.

[108] Frédéric Vanneste*, General International Law before Human Rights Courts* (Antwerp: Intersentia, 2010), 47.

[109] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2013), 313.

[110] See e.g., ACtHPR, *Falana v. African Union,* File No. 001/2011, Judgment of 26 June 2012, § 49.

[111] ECtHR, *Demir and Baykara v.* Turkey [GC], no. 34503/97, §§ 65-68, HRCttee, *General Comment No. 31*, §§ 3-4; CATCttee, *Suleymane Guengueng et al. v. Senegal*, views of 17 May 2006, UN Doc. CAT/C/36/D/181/2001, §§ 8.3-8.5.

[112] The Copenhagen Declaration (13 April 2018), recognizing the ECtHR's authoritativeness in interpreting the ECHR, "in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions" (§ 26).

Chapter 2 is aimed at making a first in-depth survey on the various instances in which relevant case law identifies the need of positive obligations, by the several human rights systems delineated in this study, guided through the tripartite typology of duties.

Chapter 3 presents a critical analysis on the extent to which positive obligations, in general, can be claimed. It starts by addressing the interpretation methods used by courts to imply new treaty obligations through evolving interpretation and applies it to concrete cases. It also addresses parameters that may trigger State responsibility to take positive measures, namely the knowledge and the minimum severity of a given harm. Lastly, it examines the contours of the proportionality assessment and how it delimits the scope of positive obligations, through the question of margin of appreciation and the "proceduralization" trend by in the ECtHR's case law.

Part II of the study, titled *Positive Obligations in the Context of Equality and Non-Discrimination*, addresses positive obligations with respect to equality and non-discrimination. Chapter 4 lays the theoretical foundations of the main concepts delineating the claims for positive obligations in this context, namely substantive equality, which inspires the concepts of indirect discrimination, *de facto* discrimination and discrimination by non-state actors, and the theory of capability. This Chapter also gives a brief account of the transition from a merely minority approach and an approach based on the developing concept of vulnerability. Henceforth, this Chapter attempts to provide a more tangible normative scheme on vulnerability through the principle of substantive equality and the theory of disproportionate impact.

Chapter 5, building upon the initial research of Chapter 2, offers a detailed survey of the various instances in which case law identifies the existence of positive obligations in order to uphold the principle of substantive equality. Throughout this chapter, the study will take into account the legal consequences of invoking "special positive obligations" in the context of vulnerability and comment on how vulnerability modified the relevant general standards (*e.g.* due diligence). Using the tripartite typology of duties as a method, this Chapter also explores the possible expansion of any content within the duty to fulfill, in the specific area of equality and non-discrimination.

Chapter 6, building upon the basic research conducted in Chapter 3, applies the theoretical bases of the latter chapter to a critical assessment of the application of positive obligations related to equality and non-discrimination to concrete situations, such as the

slow pace in recognizing an obligation to change a civil name according to one's perceived gender, and the proctrated evolution on an obligation to recognize same-sex marriages. This Chapter will also assess the claims by critics of an unwarranted proliferation of vulnerable groups in case law, that would lead to an overflow of positive obligations, including of a welfare character. The influence of the concept of vulnerability in defining the width of the margin of appreciation, and the consistency in the relevant criteria, will also be dealt with herein.

Lastly, Part III of this study, titled *Positive Obligations in the Context of Racial Equality and Non-Discrimination*, aims to apply the outcomes of the previous part to this specific field of racial discrimination. Chapter 7 builds on the principle of substantive equality analysed in Chapter 4, in order to identify the instances in which international case law applied this principle in the area of racial discrimination. It also applies to this specific area the working scheme elaborated in Chapter 4 on vulnerability.

Chapter 8, building up on Chapter 5, further refines the research and conducts a survey on the relevant case law that imposes positive obligations upon States in order to ensure racial equality. As in Chapter 5, it also takes into account the consequences of invoking "special positive obligations" in the context of vulnerability. An extended exploration of the duty to fulfil, as in Chapter 5, will be conducted, focusing on the specific area of this Chapter.

Chapter 9 will assess the conditions delimiting the scope of positive obligations through concrete situations. Those situations are selected on the basis of the importance raised by the relevant legal and social debates and of the elevated asymmetry between the victims and perpetrators. To the knowledge condition, entailing State responsibility, specific cases of the protection of densely areas populated by a given ethnicity, and the construction of a hydroelectric power plant in an area affecting indigenous rights, will be applied. Assessing the severity of the impact parameter, the case of extractive industry on indigenous lands will serve as a practical test. On the extent of positive obligations to prevent discrimination from non-State actors, the problem of privatization of public services and the risks of racial marginalization will serve as another practical test. At last, the balancing of competing rights and interests will be tested through the conflicts between freedom of expression and protection of racial equality.

PART I – The Study of Positive Obligations in General

Part I is deoted to the theoretical approach of this study. It assesses in Chapter 1 the plausibility of the claims for positive obligations in human rights law as part of international general law, assessing the principle of effectiveness and the relevant consequences for the international human rigths courts and monitoring bodies to read into human rights treaties obligations beyond the mere State abstention. It also analyses the state of the law on the human rights obligations of non-state actors, as well the co-existence between positive and negative obligations in international human rights law.

A survey is conducted, in Chapter 2, of the case law and relevant legal writings on positive obligations, in general, through the tripartite typologies of States' duties related to positive obligations: duty to protect and duty to fulfil, in order to assess the state of the law in this regard.

The delimitation of the scope of positive obligations, through several factors, is discussed in Chapter 3, in order to conceive positive obligations within a manegeable scope. The factors analysed comprise the (extent of) evolutive interpretation leading to the reading of a positive obligations; the knowledge condition; the severity of a given impact; and the balancing of rights and competing interests (proportionality), in connection with the margin of appreciation.

Chapter 1 - Assessing the Justifications of Positive Obligations in General

Introduction

1. The drafters of the early human rights treaties have focused their efforts on elaborating a list of fundamental rights, rather than on establishing precise State obligations.[113] These treaties provide for States' duties of performance only in exceptional circumstances. At the time of the adoption of the early human rights treaties, the recognition of fundamental rights in positive treaty law represented an undeniable development, emphasizing States' obligations of abstention.

However, the evolving interpretation of these treaties by their relevant courts and monitoring mechanisms in the subsequent decades identified obligations upon States beyond their merely expected hands-off role. This evolving interpretation by case law has led to instnces in which "positive obligations", i.e., obligations implying more than abstention by States parties to a treaty.

Such a qualifier was seen as a novelty, mainly at times of sharp divisions between rights of a civil and political nature - which were traditionally understood as requiring state abstention - and rights of an economic, social and cultural nature – which were conventionally assumed to require State assistance for their fulfillment. Such a division between these types of rights was accentuated by the notion that the second type of rights was not justiciable.

The development of positive obligations in international human law has been based on the principles of effectiveness and evolutive interpretation of the relevant treaties. Moreover, the ascending global economic and political powers of actors other than States have put the role of the State into question in the last decades. States, international entities conceived by the sovereign Westphalian ideals that were reinforced in the 1950, have growingly co-existed in the global arena with other actors that impact the enjoyment of human rights, such as transnational corporations, multilateral organizations and, at the other end, terrorist and dissident groups.

This chapter will assess the justifications for the existence of positive obligations in international human rights law. A first analysis will focus on the principle of

[113] Arguably, the ICESCR, which contains a wide scope of State assistance obligations, was also adopted in the early age of international human rights law. However, its justiciability has been progressively recognized, particularly by the recent OP-ICESCR, which allows individual communications.

effectiveness (Section 1) including the claim that human rights treaties have strong normative component, vis-à-vis other treaties (Section 1.1), in connection with an alleged specific *effet utile* character of this type of treaty (Section 1.2). Subsequently, these claims for special nature of human rights treaties will be assessed against the principles set in international law, in particular by the VCLT (Section 2). Of elevated importance for this subject-matter, evolutive interpretation of human rights treaties has led to the reading of a number of positive obligations (Section 3). The main leitmotif in this regard is to keep the relevant provisions effective according to present time conditions. Concerns about an alleged active role of international human rights courts and monitoring bodies are based on the legitimacy of these institutions to interpret treaties beyond the literal meaning and the drafters' intentions.

The main argument through the analyses of the above sections is that both the principle of effectiveness and the evolutive method, frequently involved in human rights treaty interpretation, are not a novelty in this area of law. International courts and the relevant literature have largely accepted this principle and method, including to recognize obligations beyond abstention in other areas of law. Hence, any specialty of human rights law and practice cannot be claimed by recognizing positive obligations by rendering treaty provisions effective and according to present time conditions. In particular, the alleged more frequent resort to evolutive interpretation by human rights courts and monitoring bodies, whether or not it motives a classification of *lex specialis*, is not so relevant to de-legitimize them to read (new) positive obligations in the pertinent treaties.

Next, this Chapter will make a brief analysis on the whole of international obligations for human rights violations committed by non-state actors (Section 4), with a focus on international organizations (Section 4.1) and transnational corporations (Section 4.2). The main reason for this assessment is to reinforce the importance of positive obligations upon States in the global scenario. A main message in this regard is that States are not exonerated from their international obligations by the fact that they have delegated powers or functions to non-State actors. Indeed, those two types of global actors need to be accountable internationally in order to fill important normative gaps. However, it would be a mistaken idea to impose international obligations to these actors that merely replicate international obligations of States. Thus, it is argued that the State duty to not only respect, but also ensure rights internationally is still a necessary component.

Section 5 will make an account of the horizontal effect of international human rights law, which is commonly related to the so-called "Drittwirkung" doctrine, including its shortcomings and tis relations with the due diligence doctrine, as applied in this specific legal area.

Section 6 will make an introductory analysis on the circumstances that require State direct assistance. There is a growing body of law, including through supranational litigation, acknowledging obligations of provision of goods and services, as well as of promotion and awareness-raising of human rights issues.

Finally, Section 7, on the co-existence of positive and negative obligations in international human rights law, reinforces the case that the type of obligation involved to ensure effective protection of a right does not depend on the alleged nature of a right (civil and political—or economic, social, and cultural). The growing works on the latter type of rights proves that negative obligations may be necessary to realize them, at the same time as positive obligations may be necessary to realize the former type of rights.

1 –The Principle of Effectiveness

2. A main justification for the existence of obligations beyond the mere State abstention has been the so-called principle of effectiveness, according to which States should put in place additional measures in order to ensure the enjoyment of human rights. This principle has been, to a certain extent, spelled-out in the general human rights treaties, as an overall duty to "ensure" or "secure" respect for the rights enshrined therein[114], implying States' commitments beyond the formal recognition of these rights.

1.1 – The "Normative" Nature of Human Rights Treaties

3. The principle of effectiveness is said to flow from the fact that human rights treaties are endowed with the normative and objective nature (*traités-lois/law-making*

[114] Article 1 of the ACHPR, Article 1.1 of the ACHR, Article 1 of the ECHR, and Article 2 of the ICCPR.

treaties), creating a general rule to be observed by all States parties[115]. This stands in contrast to so-called contractual treaties, which simply regulate relations between the contracting States.

A classical definition of this normative nature is given by Fitzmaurice. For him, the obligations contained in these treaties are of "a self-existent character, requiring an absolute and integral obligation and performance under all conditions" [116]. Moreover, the ECtHR, as early as in 1968, stated that compliance with the ECHR by one State party does not depend on the performance by another State party (in comparison with the "reciprocal" treaties) [117], which underscores a remarkable feature of this Convention.

4. However, a clear-cut line between both categories remains difficult to draw. All types of treaties keep a strong contractual component between their parties.[118] At the same time, typical "contractual" treaties "are no longer contracts in the original sense".[119] But even the hypothesis that human rights treaties are "law-making" treaties cannot alone justify the practice of international monitoring bodies of implying positive obligations upon States parties. This factor should be considered in conjunction with other features of human rights treaties that are said to be prone to obligations beyond abstention.

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[115] Jacques Dehaussy, "Le Problème de la Classification des Traités et le Projet de Convention Établi par la Commission de Droit International des Nations Unies," in *Recueil d'Études de Droit International en Hommage à Paul Guggenheim* (Geneva: Faculté de Droit de l'Université de Genève, 1968), 305; Hervé Ascensio, "Les obligations Internationales des États en Matière de Protection des Droits de l'Homme," in *XXCIII Curso de Derecho Internacional*, (Washington: OAS, 2001), 8; Catherine Brölmann, "Law-Making Treaties: Form and Function in International Law," *Nordic Journal of International Law* 74, no. 3 (2005): 383-403 (criticizing this sharp distinction between law-making treaties and contractual treaties). In case law: ICJ, *South West Africa Cases*, *(Ethiopia v. South Africa; Liberia v. South Africa), ICJ Reports 1966*, § 266; ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310.

[116] ILC, *Second Report on the Law of Treaties by Gerald Fitzmaurice*, UN Doc. A/CN.4/107, YILC, Vol. II, 16, §19.1(iv), stating, however, that this is not an exclusive feature of human rights treaties, (§§ 124-126).

[117] ECtHR, *Wemhoff v. Germany*, 27 June 1968, § 8, Series A no. 7; IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, § 29.

[118] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014), 34, referring to the ICJ's Reservations to the Convention on Genocide, in which this Court underscored the principle of *pacta sunt servanda*, which is "directly inspired from the notion of contract", *Reservations to the Convention of Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15.* (21).

[119] Paul Reuter, *Introduction to the Law of Treaties* (Oxon: Routledge, 1995), 27.

1.2 – The *Effet Utile* of Human Rights Treaties

5. It is remarkable in human rights parlance that the obligations arising out of human rights treaties are to be taken seriously by States parties beyond the political lip service. As a matter of fact, although formal protection may exist in constitutional law or domestic legislation, the ECtHR has utilized the principle of effectiveness to ensure the factual realization of fundamental rights[120], also known as the as the *effet utile* of the human rights treaties.[121] In such efforts, the teleological approach is often used as an interpretative tool[122], lending additional support to the principle of effectiveness[123].

Translating the principle of effectiveness into concrete States' obligations, human rights monitoring mechanisms have systematically held that in the context of State behavior the relevant treaties may entail not only State restraint (negative obligations), but also State performance (positive obligations), as will be seen in the following sections.

1.3 – European Court of Human Rights

6. The early case of *Marckx v. Belgium* (1979), related to equality on inheritance rights for children born out of wedlock, remains relevant in this regard. The ECtHR, reaffirming the principle of effectiveness[124], held that Article 8 ECHR (right to private

[120] Frédéric Sudre, "Les 'Obligations Positives' dans la Jurisprudence de la Cour Européene des Droits de l'Homme," in *Protection des Droits de l'Homme: la Perspective Européenne: Mélanges à la Mémoire de Rolv Ryssda*, eds. *Rolv Ryssdal and Paul Mahoney* (Köln: Heymanns, 2000), 1359; François Ost, "Originalité des Méthodes d'Interpretation de la CEDH," in *Raisonner la Raison d'État*, ed. Mirelle Delmas-Marty (Paris: PUF, 1989), 445. Ost points out that such strong view developed by the European system has created a "meta-rule", which guides the entire case law of the European system.

[121] See: Jochen Frowein, "L''*effet utile*' dans la Jurisprudence de la Commission Européenne des Droits de l'Homme entre 1970 et 1985," in *Libertés, Justice, Tolerance - Mélanges en Hommage au Doyen Gérard Cohen-Jonathan* (Brussels, Bruylant 2004), 864.

[122] Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law," *Nordic Journal of International Law* 79, no. 2 (2012): 245; Birgit Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies," in *UN Human Rights Treaty Bodies, Law and Legitimacy*, eds. Hellen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 261; Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp: Intersentia, 2012), 93-97.

[123] Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 231.

[124] ECtHR, *Marckx v. Belgium, 13 June 1979*, § 31, Series A no. 31.

and family life), "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life."[125]

Rietiker, commenting on this landmark case[126], imparts that States "may have to go beyond being passive and take action to protect rights or ensure that individuals can take advantage of their rights under the Convention".[127] A decade later, this Court's approach in *Osman v. the United Kingdom* (1998), which revolved around the killing of a school teacher by a private individual, extended the State's international responsibility with respect to acts committed by non-State agents, as a consequence of the principle of effectiveness. In that case, the Court held that "the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein" [128] should guide the ECHR's interpretation.

1.4 – Inter-American Court of Human Rights

7. An important jurisprudential development of expanding States' obligations beyond restraint by pursuing the principle of effectiveness by the IACtHR is seen in *Velásquez Rodríguez v. Honduras* (1988). The case revolved around the issue of enforced disappearance, in which this Court dismissed the respondent State's exoneration argument, based on the fact that the victim had not been abducted by the security forces. Instead, it applied the traditional *due diligence* doctrine from public international law, integrating it into human rights litigation.[129] This case represents a tenet of effective protection of rights, particularly in the context of non-state actors (§ 22 below).

It is worth noting that applying the principle of effectiveness to the general human rights treaties by the imposition of duties of performance presumes the emergence of

[125] Ibid.

[126] Ibid.

[127] Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights", 257.

[128] ECtHR, *Osman v. the United Kingdom*, 28 October 1998, § 87, Reports of Judgments and Decisions 1998-VIII.

[129] IACtHR, *Case of Velásquez Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4, § 173.

the State's role of guarantor of the rights protected by these instruments, rather than that of a mere respecter of such rights.

2 - The Question of Conformity with the Vienna Convention on the Law of Treaties

8. Having considered such a development in international human rights law, it is fair to inquire whether human rights courts and monitoring bodies are entitled to interpret human rights treaties, so as they imply obligations of performance, stretching the ordinary scope of the pertinent treaty provisions further. Does the alleged objective nature of international human rights law, coupled with the principle of effectiveness, justify such approach, particularly in view of the obligations originally agreed upon by signatory States?

To answer this question, one has to consider the place of human rights treaties within the international normative system. In this context, the Vienna Convention on the Law of Treaties (VCLT) [130], is regarded as an authoritative legal reference in international law. As a starting point, its Article 31.1, provides:

> A treaty 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.[131]

Furthermore, Article 31.1 specifies that subsequent agreements between States parties, subsequent practice in the application of a treaty, and any other relevant rule applicable to the relations of the parties shall be taken into account while interpreting a treaty. Article 32 provides for the supplementary means of interpretation.

The VCLT, in strict terms, is binding only upon States that have ratified it and cannot be viewed as endowed by a superseding nature, so that the VCLT would oblige supranational courts to follows its rules of treaty interpretation. However, even with the creation a number of international legal disciplines, the VCLT's rules of interpretation have proven considerably authoritative. [132]

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[130] See considerations in the Introduction Chapter, "The Applicable Legal Framework".

[131] VCLT, Article 31.1.

[132] In fact, although it can be asserted the existence of a "fragmentation of international law", these new international system have not operated in isolation. See, *e.g.* ICJ's Judge Cançado Trindade, stating that "[w]ith the growth in recent decades of international instruments related to conservation, not one

9. Moreover, it is worth mentioning that principles of objectiveness and effectiveness are not exclusive to human rights treaties. Neither can it be asserted that these treaties operate under any "special regime". In fact, a rigid classification of international norms has been rejected, as the International Law Commission has found the term "self-contained regime" misleading in explaining differentiated treaty systems.[133] Instead, a nuanced stance was taken by this Commission by its recognition of some "special regimes"[134], although it could be argued that types of treaties, including the human rights ones, consist of *lex specialis*.[135]

In every case, the principle of effectiveness is a common aspect of international law as a whole, which is embraced by the VCLT's Article 31(1)[136] as it establishes that the treaties must be interpreted in *good faith*. Accordingly, such a provision "prevents an excessively literal interpretation of a term"[137]. The maxim *ut res magis valeat quam pereat* was used in very early interstate litigation with a very similar meaning to nowadays.[138] Accordingly, the fact that human rights practice may take a somewhat prominent approach on the principle of effectiveness does not justify any claim of exceptionalism under international law. Moreover, resort to the "object and purpose" of a treaty is not aimed at finding a meaning extraneous to a treaty, but consists of a method by which the ordinary meaning itself of a treaty is determined.[139]

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single of them is approached in isolation from the others: not surprisingly, the co-existence of international treaties of the kind has called for a systemic outlook, which has been pursued in recent years", separate opinion in ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 (§ 25, italics from the original).

[133] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2006), 16.

[134] ILC, Report of the Study Group of the International Law Commission (finalized by Martti Koskenniemi), Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. UN Doc. A/CN.4/L.682, § 152.1.

[135] See discussions in Frédéric Vanneste, *General International Law before Human Rights Courts* (Antwerp: Intersentia, 2010), 35-39.

[136] Supra note 131.

[137] Mark E. Villiger, "The Rules of Interpretation: Misgivings, Misunderstandings, Miscarriage? The Crucible Intended by the International Law Commission," in *The Law of the Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford: Oxford University Press, 2011), 108.

[138] See, "World Court and the United Nations Charter: The Principle of Effectiveness in Interpretation", *Duke Law Journal*, 1 (1962): 85-96.

[139] Villiger, "The Rules of Interpretation: Misgivings, Misunderstandings, Miscarriage? The Crucible Intended by the International Law Commission", 110; Magnus Killander, "Interpreting Regional Human Rights Treaties," *Sur International Journal on Human Rights*, 7, no. 13 (2010): 147.

In any case, under public international law, there has been no principled objection to imposing State's obligations beyond abstention (positive obligations) through the diverse existing treaties[140]. Thus, State obligations of performance are by no means an exclusiveness of international human rights law.

Overall, the idea that an alleged special nature of human rights treaties is incompatible with the VCLT regime has not gained substantive support among scholars[141]. For instance, Meron imparts that international human rights law is an element of the entire international normative system, rejecting isolationism.[142] Likewise, judicial human rights practice has rejected any exceptionalism of human rights treaties vis-à-vis general international law by reaffirming the authority the VCLT.[143]

10. Nevertheless, reading positive obligations into a human right treaty somewhat beyond its original text and the drafters' intention might place an international judge in a peculiar position. In principle, States did not originally agree to be bound by such new obligations. An insufficient justification for imposing upon States an implied positive obligation may raise concerns about legal certainty. Moreover, expansive judge-made law could be questioned on interfering with States' policy issues by

[140] James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 82, explaining the rule of State attribution of an internationally wrongful act, which may imply proactive State duties, in the context of consular relations.

[141] Vanneste, *General International Law before Human Rights Courts*, 227; Jonas Christoffersen, "Impact on General Principles of Treaty Interpretation," in *The Impact of Human Rights Law on General International Law*, eds. Meno T. Kamminga and Martin Schenin (Oxford: Oxford University Press, 2009), 61; Killander, "Interpreting Regional Human Rights Treaties", 145-69 (noting that the ACmHPR has hardly referred to VCLT's Article 31); Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law," *The European Journal of International Law*, 21, no. 3 (2010): 589-91; Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies", 19-20.

[142] Theodor Meron, "International Law in the Age of Human Rights: General Course on Public International Law," in *Collected Courses of the Hague Academy of International Law* 301, (Nijhof-Leiden: Brill, 2003), 195-96.

[143] ECtHR, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55 ECHR 2001-XI. In *Andrejeva v. Latvia* ([GC], no. 55707/00, ECHR 2009), Judge Ziemele partially dissenting, held: "[i]ndeed, since the Convention remains an international treaty, even with a special character, the rule of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides the backbone for the interpretation of the Convention as a matter of international law ..." (§ 19). See also: *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, ECHR 2008; *Correia de Matos v. Portugal* [GC], Application No. 56402/12 (4 April 2018), § 138. In the Inter-American practice: *Case of Caesar v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123, Separate Opinion of Judge Cançado Trindade, § 12; *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C No. 287, § 39. In the African practice: ACtHPR, *Falana v. African Unio*n, Judgment, File No. 001/2011 (26 June2012), § 49; *Tanganyika Law Society v. Tanzania*, Judgment, File No. 009/2011 (14 June 2013), § 108.

prescribing somewhat precise measures that fall within the exclusive competence of domestic authorities. This question is of special interest when new obligations are established in order to interpret human rights treaties according to the present-time circumstances, which is the scope of the following subsection.

3 – The Role of the Evolutive Interpretation in Human Rights Treaties

11. Social values and concepts, which are the underlying dynamics of the effective enjoyment of human rights, are mutable over time. Thus, the principle of effectiveness implies that the letter of a given treaty is to be periodically evaluated in accordance with current societal values.[144] In the European context, evolutive interpretation of the ECHR reflects a "temporal dimension of the principle of effectiveness", since it enables the ECtHR to consider present-day conditions not foreseen in the 1950s.[145] Indeed, the development of positive obligations in international human rights law has been greatly influenced by the claims of new generations of rights holders for new forms of enjoyment of rights, beyond the original concept of the relevant general treaties.

3.1 - Evolutive Interpretation Entailing Positive Obligations

12. More than naturally, human rights in a contemporary world cannot be restricted to the basic hands-off imperative, regardless of the right in question. Rather, for human rights to be rendered practical and effective, new roles by the State, including protection and assistance, had to be translated into legal obligations.

13. Accordingly, new obligations have been read into the texts of the general human rights treaties. In the European context[146], very soon after the practice

[144] David J. Harris, Michael O'Boyle and Chris Warbrick, *Law of the European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2014), 8: "it follows from the emphasis placed upon the 'object and purpose' of the Convention that it must be given a dynamic or evolutive interpretation."

[145] Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights", 261; Edouard Dubout, "Interprétation Téléologique et Politique Jurisprudentielle de la Cour Européenne des Droits de l'Homme," *Revue Trimestrielle des Droits de l'Homme*, 74 (2008): 392–93.

[146] Luzius Wildhaber, "The European Court of Human Rights in Action," *Ritsumeikan Law Review,* 21 (2004): 84, stating that this is "one of the best known principles of Strasbourg case-law"; Alastair

evolutive interpretation appeared in the ECtHR's case law[147], State duties beyond abstention were also at stake. Already in *Marckx v. Belgium*, this Court found that an obligation to integrate a child into its family, under Article 8 ECHR, had emerged after the entry into force of the ECHR. The Court, by also recognizing a legislative progress in a great number of CoE Member States on the matter (yet not in Belgium), found a violation of the ECHR.[148] Later, in order to establish new positive obligations on the various articles of the ECHR, this Court held:

> "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[149]

Accordingly, several obligations of a positive nature were construed through an evolutive interpretation by the ECtHR. For instance, in *Christine Goodwin v. the United Kingdom* (1995), an obligation to modify the birth registration system to take into account the applicant's gender option was established according to the developments in society and medicine.[150] Likewise, in *Siliadin v. France* (2005), Article 4 ECHR (prohibition of slavery and forced labor) was read as to imply an obligation to protect individuals from domestic servitude in view of a number of recently adopted international instruments.[151] One must also not forget the case law on environmental issues, such as in *Hatton and Others v. the United Kingdom* (2003), within the scope of Article 8 ECHR.[152] This very article, interpreted in a remarkably

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Mowbray, "The Creativity of the European Court of Human Rights," *Human Rights Law Review* 5, no. 1 (2005): 57; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 58–79; Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System*, 163.

[147] ECtHR, *Tyrer v. the United Kingdom, 25 April 1978,* § 61*,* Series A no. *26* 31, not related to positive obligations.

[148] ECtHR, *Marckx v. Belgium,* 13 June 1979, Series A no. 31.

[149] ECtHR, *e.g. Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI; *Scoppola v. Italy (no. 2*) [GC], no. 10249/03, § 104, 17 September 2009; *Milenković v. Serbia*, no. 50124/13, § 38, 1 March 2016, referring to this principle.

[150] ECtHR, e.g. *Christine Goodwin v. the United Kingdom* [GC], § 75.

[151] ECtHR, *Siliadin v. France,* no. 73316/01, § ECHR 2005-VII*; Rantsev v. Cyprus and Russia,* no. 25965/04, ECHR 2010 *(extracts)* (both relating to human trafficking).

[152] ECtHR, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII 2001.

elastic fashion, has embraced new rights and obligations that could have hardly been imagined by the drafters of the European Convention.[153]

14. The evolutive approach has been also widely accepted by the IACtHR,[154] which has consistently affirmed that the ACHR is a living instrument[155] that often recognizes new positive obligations, including providing consular assistance,[156] recognizing indigenous communal property,[157]and providing special protection to children[158] and to persons in custody,[159] among others.

15. Having seen the practice of these two supranational courts in applying evolutive interpretation in order to imply new (positive) obligations upon State parties, it is important now to inquire whether international human rights monitoring bodies actually are authorized and/or legitimized to do so, according to the general structure of international law or to any other specific regime.

3.2 – The Question of Authority to Interpret a Treaty Text beyond its Time

16. The fact that this method of interpretation transcends the *travaux préparatoires* of human rights treaties raised concerns among scholars and practitioners. Considering that human rights interpretation may endow some particular features, compared with general international law,[160] one may ask if judges

[153] Wildhaber, "The European Court of Human Rights in Action", 84.

[154] IACtHR, *Interpretation of the American Declaration of Human Rights and the Duties of Man within the Framework of Article 62 of the American Convention on Human Rights*. Advisory Opinion 10/89, of 14/07/1989, Series C. No. 10, § 37.

[155] Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights," *The European Journal of International Law*, 19, no. 1 (2008): 106.

[156] IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, § 114.

[157] IACtHR, *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of 31/08/2001. Series C No. 79, § 149; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, §§ 124-135.

[158] IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63; §§ 192-193.

[159]IACtHR, *Case of the Miguel Castro Castro Prison v. Peru*. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of August 2, 2008 Series C No. 181.

[160] In particular that the ECHR, even if discretely, attaches a lesser attention to the preparatory works as means of interpretation, in comparison with the ICJ. See: Liliana E. Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools: A Comparative* Analysis *with a Special Focus on the ECtHR, WTO and ICJ* (Berlin: Springer, 2018), 283.

are legitimated to read human rights treaties beyond their original context. As seen in the previous section, even treaties endowed with some peculiar features, such as human rights treaties, should conform to the VCLT framework. Hence, the question is on whether this framework allows such flexibility.

17. VCLT's Article 31.3 recognizes that a treaty may be interpreted by (a) "any subsequent agreement by the parties" or (b) "any subsequent practice in the application of the treaty" in question.[161] A subsequent agreement does not have to be in the form of a new treaty or a treaty amendment, but can also be in the form of a resolution, decision, a memorandum of understanding or a declaration requiring the States' active engagement. Perhaps a wider scope for evolutive interpretation in this very area of law can be found in the subsequent State practice, given that this practice, in turn, does not necessitate active engagement from the States.[162] Rather, a subsequent practice can be established by its reasonableness[163] and by the absence of objection by the States, which in this case configures a tacit agreement.[164] It is at times argued that interstate practice plays a reduced role only in this area[165], while States' domestic practice is highly taken into account in order to assess the existence of a "widespread practice"[166] to lend support for a new treaty interpretation that leads to the appearance of a new treaty obligation.

Rietiker reminds us that under general international law reference to the preparatory works of a treaty consists of a supplementary source of interpretation only[167]. Instead, recourse to this source takes place when the endeavours to discover the meaning of a provision through Article 31 of the VCLT do not sufficiently clarify it. This assertion is perhaps nuanced by the suggestion that treaty interpretation should consist of a

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[161] See comments in Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights", 262.

[162] In fact, the ECtHR relies considerably in internal practice of States in order to assess whether a new obligation can be construed via evolutive interpretation, in contrast with the IACtHR. See further discussions in Chapter 3 (§ 116).

[163] Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, 151.

[164] Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Leiden: Nijhoff, 2009), 431.

[165] Rudolf Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights," *German Book of International Law* 42 (1999): 12.

[166] Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System*, 153, quoting Bernhardt and Prebensen.

[167] Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights", 262.

"single combined operation"[168] of the several means of interpretation present in the VCLT, thus avoiding a rigid hierarchy among these different means. Hence, recourse to this means of interpretation is one among many means to discover the meaning of a treaty provisions.

18. This scholarly assertion goes in line with the ICJ's jurisprudence. For example, in *Gabčíkovo-Nagymaros Project*, the ICJ took into account the developments of international environmental law to conclude that the treaty at stake in the case "is not static and is open to adapt to emerging norms of international law".[169] The ICJ, furthermore, has given a rather dynamic interpretation on a hypothetical fixed meaning of a treaty provision. While interepreting and re-interpreting a treaty, a given meaning should be reassessed "each occasion on which the treaty is to be applied".[170]

19. Admittedly, the original intent of the parties to a treaty can serve as a starting point in order to discover the present understanding of a relevant provision. Yet, regarding the ECHR, the original intent of the parties, according to Letsas, can be twofold: an *abstract* intent to safeguard the rights set forth in the Convention; or a *concrete* intent on the instances these rights should cover. Letsas found that possibly the drafters had a stronger inclination to the former[171], which could imply that the abstract intention formulates general interpreting principles, rather than specific areas of interpretation in detail.[172] But even in general international law, a radical stance of obstinately discovering precise concepts or meanings of a treaty provisions has been downplayed. It has been said that the task of interpreting a treaty is "is not to discover a mythical 'ordinary meaning' within the treaty, but rather because the general terminology chose a long ago falls to be decided today"[173].

Interpretation of human rights treaties, as some other types of treaties, is said to hinge substantially in evolutive interpretation, to the point that States parties cannot deny

[168] ILC, Draft Articles on the Law of Treaties with Commentary, Yearbook 1996, vol. II, 219-220, § 8.

[169] ICJ, Gab Cikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1. C. J. Reports 1997, § 112.

[170] ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, § 64. The ICJ's latter point is of relevance for terms commonly used in equality and non-discrimination law, which undergo important evolving interpretation, such as gender, race and disability, as will be seen in Parts II and III.

[171] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 70.

[172] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014), 63.

[173] Declaration of Judge Higgins in *Kasikilil/Sedudu Island (BotswanalNamibia) Judgment, I.C.J. Report, 1999*, p. 1045, § 3.

that their original intent—however abstract or concrete they might be—could undergo some form of re-consideration according to present-time conditions. International arbitration has stated that human rights treaties

> "represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of the developing social attitudes"[174]

In this connection, the preamble of the ECHR indicates that the objective of the Council of Europe is not only the safeguard of rights and freedoms, but also of *development*.[175] Hence, it could be argued that to disregard the relevant new developments would be contrary to their purpose and objective of a treaty. It could also be argued that human rights treaties, placing teleological interpretation in an elevated position, make the practice of evolutive interpretation even more remarkable,[176] vis-à-vis other areas of international law. But such stark differentiation, based only on the interpretation of the object and the purpose of a treaty while disregarding also the intention of the parties, consists of an unbalanced approach.[177]

International courts have in practice considered subsequent practice of States and evolutive interpretation as complementary.[178] In the case of the ECtHR, such complementarity is clear as it ties such means of interpretation to a "consensus" among States parties in a given matter.[179] This practice contrasts with the one from the Inter-American counterpart, which hardly ever relies on State practice, as will be seen in Chapter 3.

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[174] Arbitration Institute of the Stockholm Chamber of Commerce, *RosInvestCo UK Ltd. v. The Russian Federation,* SCC Case No. V079/2005, § 39.

[175] Jean-Paul Costa*, La Cour Européenne des Droits de l'Homme: Des Juges Pour la Liberté* (Paris: Dalloz, 2013), 43.

[176] Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", 16-17. This scholar also notes that new ratifying States of a treaty are no allowed to reject the *acquis* on the respective instrument, nor are the original States to be bound only by the original meaning of their texts, at 14.

[177] Bjorge, *The Evolutionary Interpretation of Treaties*, 36.

[178] ICJ, Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 3, § 31.

[179] ECtHR, *A, B and C v. Ireland* [GC], no. 25579/05, § 234, ECHR 2010, recalling the principle held in *Tyrer v. the United Kingdom* (1978), by which "the existence of a consensus has long played a role in the development and evolution of the Convention protection". But this Court does not always invoke subsequent State practice to enhance the protection of Rights. In *Mangouras v. Spain* [GC], the Court recognized an increasing concern for the protection of the environment by States Parties, including in criminal matters, in order to find legitimate the high amount of bail set the applicant, arrested for an oil spill (No. 12050/04, § 86, ECHR 2010).

20. Given the compelling evidence that human rights treaties, like other types of treaties, may suitably be interpreted through the evolutionary method, including within the framework of the VCLT, little room has been left to legal traditionalists. A very emblematic stance against this method is illustrated by the dissenting opinion of Judge Fitzmaurice in *Golder* case (1975). For the first time, the ECtHR implied access to a court as a component of Article 6, entailing additional obligations for States parties. For this judge a restrictive (rather than evolutive) interpretation of this provision should have been preferred, since the chosen method could lead to impose obligations that States "had not really meant to assume or would not have been understood themselves to be assuming".[180]

21. In practical terms, however, the process of reading a new (positive) obligation into a general human treaty via judicial interpretation requires a careful and well-elaborated process on the part of an international human rights court. On the one hand, an international court can be said to act in undue judicial activism if it extends the scope of an obligation way beyond the literal meaning of a relevant provision by anticipating new social trends that have not been consolidated yet. On the other hand, a court can be said to act in judicial restraint when it procrastinates a new treaty interpretation and turning a blind eye to new social values. Thus, the crux of the question is how far a judge may go beyond the literal meaning of a treaty provision, depending on the pace of the adjustment of a treaty to the pertinent social developments.

Firstly, one has to consider the literal possibilities of interpretation of a given treaty provision, an exercise that explores the boundaries of the relevant text. Moreover, questions may arise if a given treaty interpretation entails obligations extraneous to the type of a relevant treaty. This is the case of obligations emanating from specialized treaties (e.g. the CAT or the CRPD) "incorporated" in general treaties. It

[180] ECtHR, *Golder v. the United Kingdom,* 21 February 1975, Series A no. 18, dissenting opinion of Judge Fitzmaurice, § 39. Similarly, see the dissenting opinion by the same judge in *Marckx v. Belgium*, in which he was of the opinion that evolutive interpretation would lead to an abuse of power by the ECtHR (§ 31). In the US Constitutional practice, Antonin Scalia, an exponent of constitutional originalism understood that evolutive interpretation undermines the value of State consent, in *A Method of Interpretation – Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 45. Scalia further explains that "[t]he theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated", in Speech at the Catholic University of America (18 October 1996)**,** accessed on 7 February 2019, available at [http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml].

can be also the case of reading a certain provision in a civil and political treaty provision that "emulates" obligations typical to economic, social and cultural rights. These questions will be addressed in detail Chapter 3 (§ 124 below).

4 - States Are the Main Duty Bearers in International Human Rights Law

22. The debates on human rights obligations upon non-state actors in international law aims at re-balancing the equation of duties in relation to their participation in international society in line with Article 29.1 of the UDHR.[181] In broader terms, the *Drittwirkung* doctrine is read in accordance with the principle that international human rights law is opposable *erga omnes*, i.e. that covers the international community as a whole.[182] Both UN Covenants refer to this UDHR's provision in their fifth common preambular paragraphs and re-reaffirm the duties of individuals vis-à-vis other individuals the community to respect and promote fundamental rights. Likewise, a number of human rights treaties speak of behaviors to be observed by other actors than States, including the ACHPR's list on Part I, Chapter II,183 The ACHR's Article 32, Article 10.2 of the ECHR, Article 19.3 of the ICCPR, and Article 18 of the CRC.

At the same time, the ongoing efforts towards a growing recognition of obligations upon non-State actors is focused on addressing the relevant international normative gap, rather than on replacing existing State international obligations. For the purposes of this study, the cases of international organizations and transnational corporations will be considered.

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[181] UDHR, Article 21.1: "Everyone has duties to the community in which alone the free and full development of his personality is possible". See, *e.g.* ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*. *Advisory Opinion*: *I.C.J. Reports* 1949, 179 (recognizing the international capacity of the UN to bring claims against a State); Andrew Clapham, "The 'Drittwirkung' of the Convention," in *The European System for the Protection of Human Rights*, eds. Ronald St J MacDonald, Franz Matscher and Herbert Petzold (Dordrecht: Martinus Nijhoff, 1993), 167-170; Lori Damrosch, Louis Henkin, Sean Murphy and Hans Smit, *International Law: Cases and Materials*, (Boston: West Publishing, 1980), 224; Theo van Boven, "Non-State Actors; Introductory Comments," in *Human Rights: from Exclusion to Inclusion: Principles and Practice: An Anthropology from the World of Then van Boven,* eds. Fons Coomans et al. (Nijhof: Brill, 2000), 369.

[182] A possible construction of the *erga omnes* obligations implies the existence of individual rights imposable against non-state actors. See, for instance, Peter van Dijk and Godefridus, J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 2018), 26 (indirectly as regards the ECHR); and Teraya Koji, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights," *European Journal of International Law*, 12, no. 5 (2001): 935.

[183] However, jurisprudence yielded by the ACommHRP and by the ACtHPR has not clarified the legal content and extent of this list of duties upon individuals.

4.1 - International Organizations

The accession of European Union to human rights treaties is a fine example of the specific type of international obligation that is at stake. Amended Article 6.2 of the TEU and Protocol 14 ECHR, introducing Article 59.2 to the ECHR, opened the possibility for the EU to ratify this Convention.[184] The exact objective of the ratification is to address the issue of the *succession fonctionnelle et limitée*[185] with respect to the functions member-States have delegated thereto, rather than to create competing human rights obligations. This is also true as to the completed accession of the EU to the CRPD.[186] The main concern here is related to possible protection gaps, when States transfer administrative or legislative powers to an international organization to which they become parties. In this case, the guarantees provided in the ECHR could be impaired.[187] It can also be the case that a State may attempt to circumvent its human rights obligations by allowing this organization to act in breach of such an obligation.[188]

Such specificity of the human rights obligations to be imposed on international organizations, it is once more stressed, serves the purpose complementing the international normative framework in areas which State delegated to these organizations certain powers. It does not, however, serve to replace the States' original obligations under international law.

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[184] Draft Accession Agreement of the EU to the ECHR was held incompatible with the EU and other FEU treaties by the CJEU, Opinion 2/13 (Full Court), of 18 December 2014, including due to the lack of precise provision of co-responsibility between the EU and a Member State (§ 308). Further reading: Annelies Verstichel, "European Union Accession to the European Court of Human Rights," in *Protocol No. 14 and the Reform of the European Court of Human Rights*, eds Paul Lemmens and Wouter Vandenhole (Antwerp: Intersentia, 2005).

[185] Pierre Pescatore, "La Cour de Justice des Communautés Européennes et la Convention Européenne des Droits de l'Homme," in *Protecting Human Rights: The European Dimension,* eds. Franz Matscher and Herbert Petzold (Cologne: Carl Heymanns, 1988), 450.

[186] The European Union completed the ratification process to the CRPD on 23 December, 2010. Upon ratification, it made the following interpretative declaration, "[i]n accordance with Article 44(1) of the Convention, this Declaration indicates the competences transferred to the Community by the Member States under the Treaty establishing the European Community, in the areas covered by the Convention".

[187] ECtHR, e.g. *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, § 154, ECHR 2005-VI; *Michaud v. France,* no. 12323/11, § 89, ECHR 2012; and *Pirozzi v. Belgium,* application No. 21055/11, § 62.

[188] ILC, Draft Articles on the Responsibility of International Organizations, (2011). UN Doc. A/66/10, § 87. Similarly: CESCR, Substantive Statement "Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights" (24 June 2016), UN Doc. E/C.12/2016/1, § 9; *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, § 39.

4.2 – Transnational Corporations

23. A key objective of international law making on the regulation of transnational corporations (TNCs) is to address the evasion of domestic jurisdictions, which poses hindrances for victims in seeking remedies for the respective violations. Human rights as a body of international standards of conduct for business is a reality,[189] though no direct international human rights obligations on TNCs exist at present. One example of this lack of direct responsibility is the ICSID's arbitral award in the case of *Urbaser et al. v. Argentina* (2016). The case involved a dispute on a concession agreement for services of water and sewage. The Argentinean government argued that the consortium and the affiliate company at stake were bound internationally to provide safe water to the population at stake. The panel rejected this claim. Though accepting that the issue could not be seen in isolation from international (human rights) law[190], an obligation upon the corporation to ensure proper access to water found no under basis international law. Hence, the human right to water entailed a compliance duty on the part of the State, but not an international obligation of performance upon a company under a concession agreement.[191]

Unlike the case of international organizations, it remains inconclusive whether the relevant negotiations on a binding instrument on TNCs will result in the creation of direct obligations thereto, as stated in an earlier report of the former Human Rights Commission, of 2003.[192] The baseline of the current negotiation process of a binding

[189] See the statement of Louis Henkin: "[t]he Universal Declaration applies to them all", in "The Universal Declaration at 50 and the Challenge of Global Markets," *Brooklyn Journal of International* Law, 25 no. 1 (1999): 25. A number of non-binding schemes have been adopted in the last four decades, such as the OECD Guidelines for Multinational Enterprises (1976, revised in 2000); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); UN Draft International Code of Conduct on Transnational Corporations (1984); EurParl: Resolution on EU Standards for European Enterprises operating in developing countries: towards a European Code of Conduct (1999); the UN Global Compact (2000); EurComm: Green Paper: Promoting a European Framework for Corporate Social Responsibility, (2001); and the Guiding Principles on Business and Human Rights (UNGPBHR) (2011).

[190] ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Case No. ARB/07/26, "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law", § 1191.

[191] Id., § 1208. The award added that that it was the State's "primary responsibility to exercise its authority over the Concessionaire in such a way that the population's basic right for water and sanitation was ensured and preserved" (§ 1213). The UNGPBHR provide for a "negative obligation" on corporations to respect human rights "independently of States' abilities and/or willingness to fulfil their own human rights obligations" (Guiding Principle 11).

[192] UN Sub-Commission on the Protection and Promotion of Human Rights (2003), UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, justifying direct international obligations on TNCs. See comments on David Weissbrodt and Maria Kruger, "Norms on the Responsibilities of Transnational Corporations

instrument is actually the primary responsibility of States vis-à-vis these corporations.[193] Parallel to this negotiation, a special mandate in the form of a working group[194] was established to monitor the compliance of the Guiding Principles on Business and Human Rights (UNGPBHR). This document aims at "elaborating the implications of *existing* standards and practices for States and businesses", and is grounded on the States' primary obligations to respect, protect and fulfil rights.[195] Yet, these Principles to date had little impact in human rights case law.[196]

24. However, it does not mean that the relevant legal status quo is adequate. While it is recognized that direct international obligations upon TNCs will hardly result from the consensus among the drafters of this binding instrument, much hope is put on extraterritorial obligations of home States where TNCs are registered. In practical terms, this approach has the advantage of filling a key protection gap, namely the evasion of jurisdictions of both home and host States. Another advantage of this approach is that the concept of extraterritorial jurisdiction is considerably more developed than the concept of international liability for TNCs.[197] In this context,

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and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law*, 97 (2003): 901-22.

[193] See, the first draft of the "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporation and Other Business Enterprises", Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9", (29 September 2017), 3, available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf], accessed on 7 February 2019. The negotiations of a binding instrument for TNCs were approved by HRC Resolution 26/9, "Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights", UN Doc. A/HRC/RES/26/9. A project for a World Human Rights Court has put forward the idea of a judicial body with jurisdiction for non-state actors, including transnational corporations, see: Julia Kozma, Manfred Nowak and Martin Schenin, *A World Court of Human Rights – Consolidated Statute and Commentary* (Vienna/Graz: Neuer Wissenschaftlicher Verlag, 2010), 27.

[194] HRC, Resolution 17/4, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/17/4. Interestingly, this Working Group has established the practice of receiving complaints of violations by TNCs and of requesting directly to them responses to the allegations.

[195] UNGPBHR, General Principle 1. See comments in: David Bilchitz, "The Ruggie Framework: an Adequate Rubric for Corporate Human Rights Obligations?," *SUR International Journal on Human Rights* 7, no. 12 (2010): 199-229, criticizing Ruggie's excessive pragmatism and contending that TNCs may have both positive and negative obligations internationally.

[196] Perhaps and opportunity in this regard was missed in *M. Özel and Others v. Turkey,* particularly regarding a more refined standard on the remedies available for the victims. (nos. 14350/05 and 2 others, 17 November 2015).

[197] See, *e.g.* ICJ's *Gabćikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J.* Reports 1997, p. 78, §140: "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment", confirmed in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J.* Reports 2010, p. 14, §§ 193-194; Arrondissementsrechtbank Den Haag: *Akpan v. Royal Dutch Shell PLC,* (30 January 2013), Case No.

traditional interstate judicial cooperation can play a significant role in allowing victims to pursue remedies for the violations committed by corporations registered abroad.

4.3 - Reflection

25. Is worth noting that, however idealistic direct international accountability for non-state actors might appear, it cannot lead to replace the inherent function of States to care for the individuals under their jurisdictions, especially through the exercise of some non-transferrable functions, such as planning, legislation, regulation and (not less important) investigation and adjudication, including on criminal matters. States are still the legitimate actors for articulating democracy and participation. Conceiving international duties for non-state actors in the same fashion as for States may further complicate the already fragile state of affairs rather than enhance the protection of victims.

5 – The Horizontal Effect of International Human Rights Norms

26. Human rights are not limited to the public sphere, within the strict relationship between public authorities and individuals. The most usual feature in domestic jurisdictions is the handling by courts of violations of rights committed by private parties, of both lesser offensive character (*e.g.* privacy, honor) and grave crimes (*e.g* homicides, rape). Thus, a great debate concerning international human rights litigation is no stranger to domestic law.

At the same time, there is an increasing body of human rights case law invoking treaty violation by States parties for acts of non-State entities, in addition to the traditional State-individual scheme. However, since only States and some

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C/09/337050/HA ZA 09-1580; the Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012 (The Recast Brussels Regulation). Ian Brownlie affirms that the State "is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State", in *System of the Law of Nations: State Responsibility* (Oxford: Clarendon Press, 1983), 165. See further comments in, Nicola Jägers, *Corporate Human Rights Obligations: In Search for Accountability.* (Antwerp-Oxford-New York: Intersentia, 2002), 172. See also the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011). Alexandra Montgomery and Daniel Cerqueira, in *Extraterritorial Obligations: a Missing Component of the UN Guiding Principles that Should be Addressed in a Binding Treaty on Business and Human Rights*, stress the need of the elaboration of a binding treaty on TNCs. Justicia en las Americas blog, available at [https://www.escr-net.org/news/2018/blog-international-community-must-deliberate-binding-treaty-fill-eto-gaps-un-guiding], accessed on 7 February 2019.

intergovernmental organizations may formally be bound to human rights treaties, a compliance gap remains in relation to violations committed by non-State actors in the absence of a direct accountability mechanism.

5.1 – The "Drittwirkung" Doctrine in International Human Rights Law

In this context, it is frequently stated that human rights treaties keep some features of constitutional law. According to the horizontal effect doctrine, individuals may invoke fundamental rights based on the constitution not only against the State (vertical effect), but also against other private parties (horizontal effect). The horizontal effect of human rights treaties is mainly explained by the *Drittwirkung* doctrine, which was introduced by German constitutional law. Under this doctrine, principles underlying constitutional fundamental rights may be raised before courts in private litigation (*mittelbare Drittwirking* or indirect third-party effect). Also, a fundamental right itself may sometimes be invoked by a private party against another one before courts (*unmittelbare Drittwirkung* or direct third-party effect). [198]

This doctrine reflects the evolution of constitutional law itself, mainly after the 1950s that expanded its scope to contemporary questions via constitutional debates. Cases related to the constitutional right of freedom of expression under German law represent a paradigm shift vis-à-vis the traditional thinking that human rights violations are restricted to the public sphere.[199] Concomitantly, international human rights courts have followed suit. For instance, in Advisory Opinion 18 on assessing the extent of the protection granted to an employment relationship, the IACtHR derives the existence of positive obligations under the ACHR by the general acceptance of the *Drittwirkung* doctrine "according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals."[200]

Such a bold statement by this Court, however, deserves careful consideration. Despite the growing argument that international human rights bring about a process of

[198] Clapham, *Human Rights Obligations of Non-States Actors*, 166.

[199] German Constitutional Court, *Lüth, BVerfGE 7, 198* (1958), regarding a dispute between a private citizen and a private film company that intended to screen a movie allegedly favorable to the Nazi regime. This Court held that relationships between private individuals should also be interpreted in accordance with fundamental rights, attributing thereto a third party effect.

[200] IACtHR, *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A, No. 18, § 140.

"constitutionalization" of international law, international monitoring structures are not endowed with the same features as their domestic peers. The *Drittwirkung* proposal was designed for domestic constitutional law. The basic procedural difference between both structures is that currently only States may respond for the breaches of human rights treaties before international courts and bodies.[201] Hence, in order to claim a violation by a non-state actor, the State intervenes as a necessary guarantor vis-à-vis the enjoyment of the right in question. [202]

Further, as Andrew Chapham clearly states: "[t]he European Court of Human Rights is not seeking to harmonise constitutional traditions but to ensure international protection for the rights contained in the Convention".[203] State constitutions, for their part, are legal structures that bind entire nations, regardless the public or private nature of the individuals and entities. At the same time, human rights treaties may be invoked in domestic courts of some jurisdictions, depending on the relevant legal or constitutional provisions governing the application of treaties domestically (either "monist" or "dualist" constitutional regimes). Furthermore, one must not lose sight of the institutional function of supranational human rights courts simply as subsidiary organs that monitor compliance of human rights treaties.

Accordingly, the horizontal effect of the human rights treaties is only of an indirect nature (*mittelbare Drittwirkung*), which was clearly pointed out by the HRCttee in its General Comment 31. According to this Committee, since the ICCPR cannot be regarded as a substitute for domestic (civil or criminal law),[204] the conformity of private action to international human rights law still operates through the international responsibility of a State party for violations of non-state actors. Such State role is a corollary of the principle of effectiveness, applying the obligation to "ensure" or "secure" the effectiveness of a given treaty.

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[201] Until December 2018, the European Union had not completed the accession process to the ECHR.

[202] Dean Spielmann, *L'effet Potentiel de la Convention Européenne des Droits de l'Homme entre Personnes Privées* (Brussels: Bruylant, 1995), 72; Frédéric Sudre, "Les Obligations Positives dans la Jurisprudence Européenne des Droits de l'Homme," *Revue Trimestrielle de Droits de l'Homme* 23 (1995): 363-384.

[203] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon, 1993), 181-182. On the different connotations that the concept of *Drittwirkung* may have, see Eric Engle, "Third Party Effect of Fundamental Rights (Drittwirkung)," *Hanse Law Review* 5, no. 2 (2009): 165-173.

[204] HRCttee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, § 8.

5.2 – The Due Diligence Doctrine in International Human Rights Law

In this context, international human rights law has incorporated the due diligence doctrine[205] in an expansive manner, implying a duty to protect an individual under a State's jurisdiction. Examples of the existence of this obligation are evident in supranational case law. Two important cases from regional human rights courts are representative, as follows:

The *Velásquez Rodríguez* case (1988), regarding the enforced disappearance of a civilian, entertained the attribution of State responsibility for acts of an unknown person or group. The respondent State maintained during the pleadings that, since it remained unproven that any State agent or private person acting on its behalf, no responsibility thereto could be attributed. In fact, the material authors of the disappearance perpetrated against the victim were unknown at that time. Nevertheless, the IACtHR stated:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) 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.[206]

This Court goes on to explain that violations of the ACHR exclude psychological factors, such as the intent or motivation of the agent who has violated a given right. Instead, violations of the ACHR may occur by acts of non-state actors perpetrated "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".[207]

The ECtHR, for its part, formulated very similar reasoning in *Osman v. the United Kingdom* (1998), in which the respondent State was held responsible for a violation of

[205] The due diligence doctrine is traditionally understood as a duty of a State to protect nationals of foreign States under its jurisdiction. See Jan A. Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," *International Law and Politics* 36, no. 4 (2004): 265-306.

[206] IACtHR, *Case of Velásquez-Rodríguez v. Honduras. Merits,* § 172. Simlarly, AfCmHPR, Commission Nationale des Droits de l'Homme et des Libertés v. Chad, communication no. 74/92, (1995), §§ 2-5.

[207] Id., § 173.

Article 2 of the ECHR (right to life) for the killing of an adolescent by his schoolteacher. The ECtHR stated:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[208]

27. In both cases, it remains clear that it is not the act of a private party that engages the responsibility of the respondent State, and thus does not consist of a direct *Drittwirkung*. Rather, it is the failure of the State to act in compliance with the due diligence standard, through a positive obligation to prevent or redress the violation, that gives rise to the State international responsibility. Such attribution of State responsibility, commonly known as "responsibility by catalysis", is well known in international practice and scholarly articles, despite that it has not been fully incorporated in the 2002 ILC's Articles on State Responsibility.[209]

28. Having stated that the State's responsibility for private violations is engaged under circumstances in which a proactive behavior of the State is expected, thus implying positive obligations on its part, requires further consideration. The due diligence as a standard is composed of a number of parameters. Firstly, a State can only be liable to acts of third parties to the extent that is *knows or should have known* of the imminence of a violation to materialize or of its actual occurrence. This parameter encompasses several scenarios, in view of the complexity of specific situations brought to international litigation, as will be seen in Chapter 3 (§ 129 below). Moreover, another parameter delimiting the scope of positive obligations in this regard is the minimum severity of the impact suffered by a victim, which will be analyzed in Chapter 3 (§ 143 below), within its several ramifications. Thirdly, dealing violations by private parties may put the State in in a position of prioritizing rights of

[208] ECtHR, *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII. The ECtHR pushed further this obligation to protect in the *Ilascu* case [GC] (2004). In this case, the applicants fell in the hands of the Moldavian Republic of Transdniestria, in a territory *de facto* under the control of the Russian Federation. This Court, departing from the principle of attribution of responsibility, established in *Loizidou*, (which would engage the responsibility of Russia) held: "even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention", no. 48787/99, § 331, ECHR 2004-VII.

[209] Of interest for this study, *e.g*. CEDAWCttee, *General Recommendation No. 35*, in which State responsibility for private acts of gender-based violence against women, are derived from this very concept (discussed in Chapter 4). See comments in Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals," in *The Law of State Responsibility*, Oxford Commentaries on International Law, eds. James Crawford et al. (Oxford: Oxford University Press, 2010), 275-277.

certain individuals in detriment of other rights or general interests of the society. This prioritization materializes through the proportionality assessment of a concrete case, in which the extent of a positive Duty to Protect may be restricted by the width of the margin of appreciation afforded to the authorities. This specific issue is deal with in Chapter 3 (§ 146 below).

6 - Circumstances Requiring State Direct Assistance

29. The pursuance of the effectiveness of the respective treaties' provisions may also make States accountable for circumstances where no private interference takes place. Hence, positive obligations may imply duties of provision of goods, services and opportunities by the authorities, regardless of the nature of the right in question.

As early as the 1970s, the ECtHR had the occasion to deal with costs in judicial separation proceedings in *Airey v. the United Kingdom* (1981), in which the issue of State provision was at stake. The applicant claimed a violation of Article 6 ECHR, inasmuch as the applicant could not have an effective right to access to a court, given the highly expensive costs of legal aid. The Court recognized that this Article did not provide for specific legal aid in civil proceedings, like in criminal cases. However, given that she could not meet the costs of hiring a solicitor to act on her behalf before a high court, this circumstance considerably undermining her chances of success, the respondent state was found in breach of Article 6 ECHR. [210]

30. The duty to provide individuals directly with services in order for them to enjoy civil and political rights has also appeared in more structural contexts. On the right to vote, this is illustrated by *Mathieu-Mohin and Clerfayt v. Belgium* (1993) (Article 3 of Protocol No. 1 ECHR), which involved an alleged discrimination on the appointment to Dutch-speaking City Councils of candidates who are French speakers. A violation was found regarding the State's obligation to organize general and periodic elections.[211] This reflects the duty of States to take measures within the public administration in order to give effect to human rights treaties.

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[210] ECtHR, *Airey v. Ireland*, 9 October 1979, §§ 26-28, Series A no. 32.

[211] ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium,* 2 March 1987, § 50, Series A no. 113: "the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections". See also, *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 63, ECHR 2012.

31. In the same token, the enjoyment of rights may imply duties of implementation. In this regard, the ACHR has expressed wording in its Article 2, obliging States to take legislative or other measures to implement rights and freedoms enshrined therein. Regarding the protection from violations by public agents and private actors alike, the IACtHR has emphasized as a principle the duty of organizing "the governmental apparatus 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".[212]

32. Likewise, the engagement of governments in human rights also presupposes the adoption of measures to promote and educate public staff and the public at large. Such idea has been concreted in the adoption of the UNDHRET, in 2011, which includes knowledge about human rights norms, principles and values; learning and teaching through human rights values; and education on human rights to empower individuals to enjoy their rights and respect and support the rights of the others.[213]

33. As guise of a preliminary analysis, it appears from the above cases that the effective enjoyment of rights may require, in addition to abstention from violation and protection of rights against private actors, other actions of public administration of assistance and promotion of rights. This variety of types of positive obligations justifies a closer survey on this variety of obligations through the tripartite typology of duties, as per Chapter 2 of this study.

7 - The Co-Existence between Positive and Negative Obligations in International Human Rights Law

34. Originally, "negative obligations" corresponding to State "abstention" were conceived as a means of fulfilling civil and political rights, while 'positive obligations' corresponding to State "assistance" have been conceived as a means of fulfilling economic, social and cultural rights. The UN and the regional organizations[214]

[212] IACtHR, *Case of Velásquez-Rodriguez v. Honduras*. Merits, § 166.

[213] UNDHRET, Article 2.2.

[214] In the European context: ECHR and European Social Charter. In the Inter-American context: the San José Protocol. However, the Protocol and the Convention have been applied separately. The African Charter encompasses both rights in a single text and the remaining UN treaties are beneficiary-oriented, comprising both rights.

adopted separate documents. Later on, however, the Vienna Declaration and Plan of Action (1993) underlined that all rights are "universal, indivisible and interdependent and interrelated"[215], suggesting, in this respect, that the fulfillment of a right is not attached to a certain type of obligation. Early doctrine has also rejected the dichotomy of rights and the necessary relation with a type of obligation.[216] The ECtHR, for its part, has held for decades that there is not a watertight division separating both types of rights[217], although this Court in fact performs a thematic control through its cases, as will be seen in Chapter 3.

In line with this thinking, the evolving works on economic, social and cultural rights have increasingly indicated the presence of negative obligations as possible means of compliance with this type of right. Craven notes that "it is clear that, in some circumstances, economic, social and cultural rights require State 'abstention' or 'restraint'".[218] In the same vein, the General Comments of the CESCR confirm the existence of negative obligations related to several ESCRs[219].

Concomitantly, case law on civil and political rights has steadily acknowledged that positive obligations apply to civil and political rights. The ECtHR had already ascertained in *Marckx v. Belgium* that the right to respect for private life involves a duty beyond State abstention. On the examination of the alleged violation of right to private life (Article 8 ECHR), the Court held in a historic *dictum*:

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[215] VDPA, § 5.

[216] *E.g.* Godefridus, J.H. van Hoof, *Rethinking the Sources of International Law* (The Hague: Kluwer International Law, 1983), 129.

[217] ECtHR, *Airey v. Ireland,* (1979), § 26, because, for the Court, civil and political rights may have also financial implications.

[218] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (Oxford: Claredon Press, 1998), 110. Likewise, on the right to adequate housing, Report of UN Sub-Commission – Special Rapporteur, Mr. R. Sachar, adopted on 22/06/1993, UN Doc. E/CN.4/Sub.2.1993/15; on the right of education: Report of UN Sub-Commission – Special Rapporteur, Mr. Mehedi, adopted on 8/07/1999E/CN.4/Sub2/1999/10.

[219] CESCR, e.g. *General Comment No. 12: The Right to Adequate Food (Article11)*, adopted on 12/05/99, UN Doc. E/C.12/1999/5, § 15; *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, adopted on 11/08/2000, UN Doc. E/C.12/2000/4, § 34; *General Comment No. 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*), adopted on 20/01/2003, UN Doc. E/C.12/2002/11, § 31. See, Magdalena Sepúlveda, *The Nature of State Party Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 125. presenting a comprehensive spectrum of obligations, demonstrating the existence of both positive and negative obligations under the ICESCR.

> it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.[220]

This principle is also present under the ICCPR structure. The HRCttee acknowledges the existence of positive obligation in Article 2.1, thus making it applicable to all substantive rights of this Covenant. In *General Comment No. 31*, the Committee has asserted:

> The legal obligation under article 2, paragraph 1 [to ensure the ICCPR's rights], is both negative and positive in nature.[221]

35. Therefore, it is recognized today that both positive and negative obligations co-exist regardless of the type of right in question. This result presents a positive step towards a more comprehensive and universal conception of fundamental rights and the related obligations. On the other hand, one should not lose sight of the thematic predominance of a human rights text, which poses an obstacle to an integrated perspective between both rights. Chapter 3 (§ 124 below) will elaborate further on this matter.

Concluding Remarks

36. Human rights treaties are said to be endowed with specific dynamics. This relevant specificity has a bearing on their normative framework, emphasizing objective and teleological interpretation to render their provisions effective. As a consequence, positive obligations may be implied in order to ensure a substantive, rather than merely formal, realization of rights. This aspect is particularly salient regarding the evolutive interpretation of human rights treaties, which has been intrinsically related to the recognition of new obligations in these instruments.

Nevertheless, notwithstanding these alleged differences between human rights treaties and other treaties (whose debates remain inconclusive), these instruments do not operate outside of the regime of the Vienna Convention on the Law of Treaties. To the contrary, scholarly writings and practice of the relevant courts have upheld the normative framework of VLCT, rather than claiming any zone of exclusion for human rights treaties.

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[220] ECtHR, *Marckx v. Belgium*, § 31.

[221] HRCttee, *General Comment No. 31*, § 6.

37. The international society has seen a proliferation of non-state actors that have gained economic, social and political importance, with significant impact on the enjoyment of human rights. Each of these actors has a specific legal nature and a single normative framework to regulate their behavior as regards abuses is naturally impossible. The UDHR, as an inspiring source, foresees duties to all States and non-state actors. While international law evolves, through different paces and tracks, on the recognition of direct responsibilities for these actors, the relevant efforts are complementary (instead of substitute) to the original State responsibility. States, as the articulators of democracy, security, and social affairs, should continue to bear international responsibilities to secure human rights. This is a compelling argument to foster the conception of positive obligations upon States to ensure rights for the individuals under their jurisdictions.

In this context, the indirect *Drittwirkung*, through positive obligations of States, remains a prevailing concept of international human rights law in order to curb violations by non-state actors through the State preventive and repressive apparatus.

38. Besides the occasions in which violations occur by private acts, States may be held accountable to provide direct assistance to individuals, which operates in the traditional vertical individual-state relations. These obligations entail the organization of the government apparatus to comply with the treaty obligations, promotion and training and (under certain circumstances) direct provision of goods and services.

39. Last, but not least, it important to understand that both positive and negative obligations co-exist regardless of the so-called nature of the right in question. Positive obligations may be imposed to ensure civil and political rights to the same extent that negative obligations are necessary to guarantee the enjoyment of civil and political rights. This understanding helps mitigate the idea of closed normative silos in respect to each of these types of rights. Although separate treaties dealing with each of these types of rights have been adopted, some integration through case law has emerged.

Chapter 2 – The Content of Positive Obligations in General

Introduction

40. Chapter 1 assessed the validity of the legal claims for the existence of positive obligations in international human rights law. In order to advance in the research, it is now necessary to inquire on whether the so-called positive obligations can be conceived into a reasonable content. In other words, it is important, not only for States, but also from a user's perspective, to gain clarity on what is exactly required when a given positive obligation is at stake, through the several areas in which such obligations have developed. Attempting to demarcate elementary yardsticks into such a content can arguably add predictability to a practice that has been, to a large extent, a product of praetorian interpretation.

Moreover, in order to understand what is exactly required by the States through positive obligations, it is relevant to investigate if there are different types of actions ordered by courts and other monitoring bodies. Should a variety of obligations exist, their corresponding legal bases should also be examined in order to validate their justifications against the principle of effectiveness.

Obligations beyond the traditional State abstention have been construed by various international human rights adjudicatory mechanisms. Yet, it is necessary to inquire whether these different mechanisms apply positive obligations similarly. If so, to what extent can it be claimed that positive obligations, as interpreted through different mechanisms, form part of a uniform set of norms? Otherwise, can a few areas of *jus commune* be identified?

In order to examine these questions, this chapter will conduct a survey of case law, relevant works of the international monitoring bodies, and writings of specialized commentators on the content of positive obligations in general. The content of positive obligations will be classified in two general groups: the duty to protect and the duty to fulfill. The first general group will be seen through the obligations of adopting legislative measures (Section 1.1), as well as regulation and monitoring (Section 1.2) as *ex ante* obligations and an obligation to prevent imminent violations from materializing (Section 1.3). Further, the State obligation to afford redress (Section 1.4), including an analysis of the different possible avenues will be addressed.

The duty to fulfill will be disaggregated into three sub-groups: the duty to facilitate (Section 2.1), the duty to provide (Section 2.2), and the duty to promote (Section 2.3).

41. This Chapter will also attempt to identify areas in which general (CPR) monitoring bodies seek authority from specialized (thematic) treaties (and relevant interpretation), in order to fill normative gaps existing in the general CPR treaties or to strengthen their own reasonings as a whole.

1 – The Duty to Protect

42. The duty to protect consists of two sets of obligations. A first set of obligations is aimed at preventing violations from materializing, including the ones committed by private actors. These obligations operate by (a) putting in place deterrent legislations and policies to discipline private behavior and to curb abuse, thus heightening the costs of perpetration and diminishing the likelihood of violations; and (b) preventing imminent violations by the direct action of the authorities. Contemporary effective human rights protection is one that is capable of establishing general rules *ex ante*, rather than providing post remedial responses.[222] A second set of obligations is aimed at redressing violations when prevention is not possible, by enabling the victims to pursue material and procedural avenues for redress for the violations sustained.

Duties of this type are mainly developed through judge-made law, according to the principle of effectiveness. The IACtHR's *Velásquez-Rodríguez* judgment (1988)[223] is said to approach the duty to protect through the *due diligence* standard, as seen in Chapter 1, though not disclosing a precise meaning of the obligation to prevent violations. *Velásquez* raised the question of State responsibility in a somewhat blurred manner, focusing on *ex post facto* obligations of redress (investigation and punishment) and leaving aside other important aspects related to the obligations to

[222] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Oxon: Routledge, 2012), 73; Pascuale de Sena, "Responsabilité Internationale et Prévention des Violations des Droits de l'Homme," in *La Prévention des Violations des Droits de l'Homme*, eds. Emmanuel Decaux and Sébastien Touzé (Strasbourg: Publications de l'Institut International des Droits de l'Homme 2015), 39-53.

[223] IACtHR, *Case of Velásquez Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4.

prevent violations.[224] This case's relevance was indeed justified by a socio-political response to grave violations in the region rather than by its legal content. As seen throughout this chapter, the specific content of the obligation to prevent violations in that regional system was incrementally developed in a later stage, inspired in other protection systems.

1.1 - Obligation to Adopt Legislation with a Deterrent Effect

43. A primary function of the enactment of legislation is to define the limits of action of non-state actors and to establish the scope of action of state actors by an *ex ante* rule prohibiting violations by those two categories of actors. Some human rights treaties establish literal obligations upon States parties, *e.g.*, to enact criminal legislation for the absolute prohibition of the gravest human rights violations, like the CAT[225] and its Inter-American homologue,[226] as well as the UN and the Inter-American conventions on enforced disappearances.[227] Such a well-defined obligation, considerably restricting sovereignty in criminal matters and considerably intervening in domestic legislative activities, is justified by the very nature of the rights of a non-derogable nature whose violations are considered international crimes.

These literal treaty obligations have indeed influenced general human rights treaties. The HRCttee has underscored the protective nature of legislation with respect to torture and other cruel treatment or punishment under Article 7 (prohibition of torture) of the ICCPR.[228] Likewise, the ECtHR has consistently emphasized that States parties

[224] Heidy Rombouts and Pietro Sardaro, "The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights," in *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations*, eds. Koen de Feiter et al. (Antwerp: Intersentia, 2005), 403, who regarded the *Velázquez* judgment (merits) as "enigmatic".

[225] CAT, Article 4.

[226] IACAT, Article 3.

[227] UN Convention on Enforced Disappearances: Article 4. Inter-American Convention on Forced Disappearances, Article I. Compare with Article 2 ACHR, which establishes only a general obligation to enact legislation to implement its respective obligations.

[228] HRCttee, *General Comment No. 20: Prohibition of Torture and Cruel Treatment or Punishment,* adopted on 10/03/92. UN Doc. A/47/40 (1992), Annex VI (pp. 193-195), § 13.

to the ECHR are under an obligation to put "in place effective criminal-law provisions to deter the commission of offences against the persons".[229]

The standard of legislation that States are obliged to enact domestically, whether civil or criminal, has been checked by international courts and monitoring bodies according to the effectiveness standard required in different contexts. Indeed, the obligation to criminalize reproachable acts domestically applies only to most serious violations. For instance, regarding the right to life (Article 2 ECHR), the ECtHR has held that only intentional killing is to be criminalized while other offenses can be addressed by civil legislation, even when the right to life is at stake.[230] Criminal legislation has been required in order to provide effective protection of vulnerable groups.[231]

44. As will be seen in the following sections, in less serious contexts, States may be obligated to enact civil, administrative or other forms of norms in order to prevent violations.

1.2 - Obligation to Prevent Violations by Regulating and Monitoring Private Activities

45. Human rights in contemporary societies are undoubtedly ingrained in public policy. Based upon that assumption, besides the enactment of deterrent legislation, the prevention of violations by regulating and monitoring private activities has also been regarded as a positive obligation. This type of obligation consists of putting in place a set of administrative measures in order to provide the necessary enforcement tools for the protective legislation. Thus, it also consists of an *ex ante* obligation.

46. The phenomenon of privatization is of particular interest in this context.[232] International human rights courts have carefully overseen the new ways of

[229] See, on the right to life: ECHR *i.a. Osman v. the United Kingdom,* 28 October 1998, § 115 Reports of Judgments and Decisions 1998-VIII; *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; *Perevedentsevy v. Russia*, no. 39583/05, § 91, 24 April 2014.

[230] ECtHR, *Vo v. France* [GC]*,* no. 53924/00, § 91*,* ECHR 2004-VIII, on medical negligence leading to the death of a fetus.

[231] This specific issue is addressed in Chapters 5 and 8.

[232] Privatization policies may assume a number of different forms, including transfer of ownership from state-owned companies to the private sector, the transfer of management from state authorities to private entities, through contracting out of services, and, more critically, withdrawal of a certain function given the State's inability to manage it. See, Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Antwerp: Intersentia, 2012), 42-43.

management of public services such as prison facilities, health services, educational institutions, and welfare. It has been understood that a State is not exonerated from the responsibility of violations committed by private entities performing activities that normally carried out by public authorities. De Feyter and Gómez Isa emphatically contend that "[p]rivatization does not affect the legal responsibility of the State under international human rights law."[233] In fact, the ICISD *Urbase* award (2016), by excluding the international responsibility of the corporation under a concession agreement, held that it was the State positive obligation of the State to ensure water through regulation the appropriate avenue to ensure safe drinking water.[234] As seen in Chapter 1, the State, in fact, is not directly responsible for the acts of private actors attributed to the State. However, the State is under an obligation to take a series of measures, including preventing such acts from occurring.

Similarly, the CATCttee considers that the State remains responsible for taking effective measures in detention centers not publicly run or owned, including to set up a regulatory framework to prevent torture and ill treatment in the relevant facilities.[235]

The ECtHR alike has continually held that "[t]he State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals."[236] In fact, in a considerable number of cases, the State responsibility remained unchanged by the Court, regardless of whether an activity at stake was operated directly by the State or by private or privatized companies. In *Powell and Rayner v. the United Kingdom* (1990), the Court dismissed the respondent State's objection of responsibility for air pollution caused by a privatized airport service.[237] In the subsequent *Hatton and Others v. the United Kingdom* (2003), also related to the privatized service of Heathrow Airport, the Court's Grand Chamber reaffirmed this

[233] Koen De Feyter and Felipe Gómez Isa, "Privatization and Human Rights – An Overview," in *Privatisation and Human Rights in the Age of Globalization*, eds. Koen de F. et al. (Antwerp, Intersentia, 2005), 3.

[234] See, Chapter 1, Section 1.4 *supra*.

[235] CATCttee, *General Comment No. 2, Implementation of Article 2 by States Parties*, adopted on 24 January 2008. UN Doc. CAT/C/GC/2, § 17. Similarly, HRCttee, *Cabal and Pasini Bertran v Australia,* communication no. 1020/2001.2. UN Doc. CCPR/C/78/D/1020/2000, §7.

[236] ECtHR, *Van der Mussele v. Belgium,* 23 November 1983*,* §§ 28-30*,* Series A no. 70 (regulation of legal profession); *Storck v. Germany,* no. 61603/00, § 103, ECHR 2005-V (health facility); and *O'Keeffe v. Ireland* [GC]*,* no. 35810/09*,* § 150, ECHR 2014 (extracts) (private school).

[237] ECtHR, *Powell and Rayner v. the United Kingdom,* 21 February 1990, § 41 Series A no. 172.

approach,[238] implying an obligation to regulate privately run activities, regardless of whether they are caused by direct conduct of the State or by private actors.[239] In another number of cases regarding companies formerly owned by the State that have been later privatized, the Court noted that the relevant authorities maintained control over the relevant activities through the imposition of operating conditions, monitoring and supervision, thus retaining its international responsibility for the breaches of the ECHR.[240] Likewise, in *Calvelli and Ciglio v. Italy* (2002), the ECtHR held that the protection of the right to life (Article 2 ECHR) applies to public health governance, thus requiring appropriate regulation so as to compel health institutions, whether public or private, "to adopt appropriate measures for the protection of their patients' lives."[241]

For its part, in *General Comment No. 24* (2017), the CESCR reads emphatically into the ICESCR an obligation to regulate the provision of goods and services by corporations, in respect with accessibility and adaptability of the services thereby provided:

> States thus retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs.[242]

47. In sum, States are not prohibited under international human rights law from outsourcing public functions to private entities. But since they are not discharged from their relevant treaty obligations, ensuring effective enjoyment of rights by individuals may imply that a protective framework (regulation and monitoring) must

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[238] ECtHR, *Hatton and Others* [GC] § 98. In both cases, violations were not found since the government was found to be acting within its margin of appreciation. See further discussions in Chapter 3, § 160 below.

[239] ECtHR, Hatton and Others v. the United Kingdom [GC], § 98, 2003-VIII.

[240] See, *i.a. Fadeyeva v. Russia,* no. 55723/00, § 90, ECHR 2005-IV (lack of implementation of safety and environmental regulations in respect with a steel plant); *Ledyayeva and Others v. Russia, nos. 53157/99 and 3 others*, § 109, 26 October 2006 (inability to demonstrate environmental licensing for a steel plant); *Jugheli and Others v. Georgia,* no. 38342/05, § 75, 13 July 2017 (lack of regulatory framework after the privatization of a power plant).

[241] ECtHR, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I. Repercussion in the IACtHR's *Case of Ximenes Lopes v. Brazil.* Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, relating to abuse of a patient at a private hospital. The IACtHR speaks of an obligation to supervise the performance of private parties (§ 96).

[242] CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, adopted on 10 August 2017. UN Doc. E/C.12/GC/24, § 22.

be put in place to prevent or mitigate the impact of violations materialized during the conduct of these activities, including by private parties. On the other hand, privatization schemes have been criticized in practice, given the disregard to the negative consequences on the enjoyment of rights.[243]

1.2.1 - Dangerous Activities

48. Case law has elaborated a somewhat detailed obligation to regulate and monitor private activities, specifically those that may expose people to serious harm (dangerous activities), mainly by the ECtHR [244]. This understandingt could complement, in this regard the UNGPBHR, which does not make a differentiation between dangerous activities and non-dangerous activities [245].

Regarding the right to life, in *Öneryıldız v. Turkey* (2004), surrounding an explosion of industrial waste caused the death of 39 individuals, the Grand Chamber reinforced a State obligation to control industrial activities in order to protect the right to life,[246] in view of the contingency of the risk to which the applicants were exposed. The Court placed emphasis on the obligation to regulate in the context of activities posing particular risk to individuals' lives and health. This judgment expressly held:

> In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those

[243] See e.g. UN Special Rapporteur on the Right Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, explaining that "[p]rofits made by the public sector are almost fully distributed among shareholders, rather than being reinvested in maintaining and extending service provision, the result being increased prices for consumers, continued need for public investment, and potentially unsustainable services" (§ 44); and that the principle of progressiveness is disregarded when the authorities fail to implement adequate regulation, monitoring, oversight in the long term (§ 16). UN Doc. A/HRC/24/44 (2013).

[244] *e.g. L.C.B. v. the United Kingdom,* 9 June 1998, *Reports of Judgments and Decisions* 1998-III (nuclear tests); *Öneryıldız v. Turkey* (waste collection site), § 71, *Iliya Petrov v. Bulgaria,* no. 19202/03, §§ 55-56, 24 April 2012 (electricity distribution facility); *Vilnes and Others v. Norway,* nos. 52806/09 and 22703/10, § 235, 5 December 2013 (professional diving); *Brincat and Others v. Malta,* nos. 60908/11 and 4 others, §79-70, 24 July 2014 (exposure to asbestos); *Cavit Tinariouğlu v. Turkey*, no. 3648/04, § 66, 2 February 2016 (maritime traffic); and *Jugheli and Others v. Georgia,* no. 38342/05, § 75, 13 July 2017 (thermal power plant). Hallo de Wolf explains that this obligation can be construed within the "duty to protect", *Reconciling Privatization with Human Rights*, 143.

[245] Foundational Principle I.A.1. These Principles indicate throughout that the States must enforce existing regulations on business conduct and that corporations should comply with such regulation.

[246] ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71 ECHR 2004-XII, § 71.

> concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[247]

Applying this general understanding to a more specific context, in *Jugheli and Others v. Georgia* (2017), regarding air pollution caused by a thermal power plant, the Court noted that the industrial activity at stake operated under "virtual absence of a regulatory framework applicable to the plant's dangerous activities before and after its privatisation"[248]. The Court noted a general failure to conduct *due diligence* measures in order to assess the competing interests, a situation that was exacerbated by the passive attitude on the part of the authorities to follow up on the few mitigating measures adopted.[249] This negligent act led the Court to find a violation of Art. 8 ECHR.

49. Besides, international human rights case law, in general, has developed a practice of finding violations of the duty to protect in relation to the risks that a given activity poses to enjoyment of rights. In the context of dangerous activities, there is a presumption of high risk, requiring stringent observance on the part of the authorities in preventing violations. This particular issue, deserving further elaboration, will be dealt with in Chapter 3 (§ 138 below).

50. The issue of State responsibility for acts of private activities, however, as framed by good part of jurisprudence, has paid insufficient attention to discrimination *e.g.* to the effects that privatization may cause. While this section aims at setting the basic state of the law on this type of preventive positive obligations, prop179 belower regulation and licensing of public services receives particular attention in the context of equality and non-discrimination. Ill-designed policies or regulatory mechanisms that fail to take into account certain particularities of groups in situation of vulnerability or that adopt these measures without proper consultation with these groups risk incurring in diverse forms of discrimination. This issue is dealt with in detail in Chapter 5, Section (§ 182 below) and with a specific attention to racial discrimination in chapter 9 (§ 454 below).

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[247] Id., § 90. See also: *Tătar v. Romania,* no. 67021/01, § 88, 27 January 2009; *Di Sarno and Others v. Italy,* no. 30765/08, § 106, 10 January 2012; *Jugheli and Others v. Georgia*, § 75.

[248] ECtHR, *Jugheli and Others v. Georgia*, § 75.

[249] Id, § 76.

1.2.2 - Provision of Information and Participation (with a Preventive Effect)

51. Another type of positive obligation that has been detailed in general human rights treaties, in particular the ECHR, is the provision to compile and disseminate information in order to make individuals aware of the risks inherent to dangerous industrial activities that have an impact on fundamental rights. This obligation has been construed as an element of transparency and public participation.

In *Guerra and Others v. Italy* (1998), the ECtHR took into account the fact that the applicants could not assess the inherent risks of living in the vicinity of a fertilizer factory given the absence of information on the relevant health issues provided by the local authorities. In connection with this requirement, in the later case of *Hatton and Others*, the GC inferred a participatory element through its reasoning. Given the complexities involved in licensing industrial activities with environmental concerns, the Court deemed it necessary "to consider all the procedural aspects, [and] the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure"[250]. The Court implicitly absorbed this participation component from environmental law, probably influenced by the entry into force of the Aarhus Convention[251]. In similar vein, the IACtHR's Advisory Opinion OC-23, related to the environment in the context of the protection of human rights, makes clear the existence of an obligation to provide access to information to the public at large.[252]

In the ambit of the ECLAC, a new convention was adopted in order to implement the Principle 10 of the 1992 Rio Declaration on the access to information, participation and justice regarding environmental issues. This convention provides for the obligation of the State to ensure with maximum disclosure access to the public on

[250] ECtHR, *Hatton and Others* [GC], § 61. See also: *Giacomelli v. Italy,* no. 59909/00, § 82, ECHR 2006-XII; *Hardy and Maile v. the United Kingdom,* no. 31965/07, § 219, 14 February 2012. See further discussions in Chapter 3 (§ 160) on the "proceduralization movement" at the ECtHR.

[251] UNECE Convention, Article 3.1, resonating in *Öneryildiz v. Turkey* [GC], § 90. De Feyter, K. and Gómez Isa, in the context of privatization, contend that regulation implies the establishment of rules that require previous public consultation and the provision of sufficient information about the privatization process, in "Privatization and Human Rights", 3. The CESCR has identified under the ICESCR an obligation to offer allow participation in the assessment of public goods and services provided by private actors (*General Comment No. 24*, § 22).

[252] IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Grotection and guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, §§ 213-218.

environmental information it is possession (Art. 5) and to ensure public participation in the pertinent decision-making processes (Art. 7).[253]

52. If the provision of information and participation in respect with projects or events that may impact human rights is important for the overall public, this importance is elevated for groups that face obstacles in having a voice in policy making. A very specific standard developed in this regard is the "free, prior and informed consent", arisen out of the law on the protection of indigenous peoples. This specific standard aims at meeting instances of vulnerability by addressing the pertinent participation deficit of indigenous peoples in public affairs. This issue will be dealt with in Chapter 8 (§ 399 below).

1.3 - Obligation on the Public Authorities to Take Measures to Prevent Imminent Violations

53. Within the obligation to prevent violations to materialize, direct action from the authorities may be required. A consolidated approach within international human rights jurisprudence indicates that, under defined circumstances, an obligation to prevent imminent violations from occurring may arise, particularly if the right to life or the right to personal integrity is at stake.[254] In the case *Osman v. the United Kindgom* (1998), the ECtHR emphasized that, beyond the positive obligations to enact criminal legislation, with deterrent effect, backed up by appropriate enforcement machinery, the right to life may entail

> "a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[255]

Such an obligation of diligence can be said to derive from the general principle of the due diligence principle *i.e.*, a duty of proactive performance in order to prevent violations from materializing.[256] Specifically in this case, the ECtHR's majority found

[253] ECLAC, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018), CTC-XXVII-18.

[254] Alastair Mowbray, *Cases, Materials and Commentaries on the European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2012), 122.

[255] *ECtHR, Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII.

[256] IACtHR, *Case of Velásquez Rodríguez v. Honduras. Merits*, § 172.

that the applicant failed to point out any specific stage when it could be said that the police had knowledge of the risk faced by the victim.[257] This Court's rationale implies a contextual analysis of the imminent risks at stake and the conduct of the relevant authorities. It also entails a *reasonable* duty of diligence, different from clear negligence, where the cognition of the threat is well established and no action is taken.[258] In this context, the State responsibility, in order to be engaged, must be based upon foreseeable risks[259] in accordance with an assessment of the relevant risks and harms.[260]

54. Naturally, the diversity of concrete situations confronting domestic authorities in complying with this proactive duty cannot be addressed through a single solution. The ECtHR itself recognizes *i.a.* the "difficulties involved in policing modern societies" so that such an obligation cannot be interpreted as imposing a disproportionate burden on the authorities.[261] Xenos has suggested that, given that the ECtHR is considered a "living instrument", the knowledge element triggering State responsibility should be seen in a flexible manner.[262] Accordingly, the ECtHR has held that "the more predictable a hazard, the greater the obligation to protect against it"[263]. Lavrysen infers that "under the knowledge condition, the State can only be held responsible to the extent that the relevant risk of harm is foreseeable".[264] The ability for the State to foresee the relevant risks is clearly related to the quality of its own legal and administrative framework, including monitoring of potentially harmful

[257] ECtHR, *Osman v. the United Kingdom*, § 121. The dissenting Judges de Meyer, Lopes Rocha and Casadevall noted, however, that the killer had been obsessed with the victim and harrassed him for over a year, leaving no doubt that more serious harm was very likely. Likewise, Judge Lopes Rocha, in a separate opinion, found that the police had underestimated the real and imminent threat faced by the victim, according to the victim's own perspective.

[258] Applying this principle, the CATCttee, in *Hajrizi Dzemajl et al. v. Yugoslavia***,** held that there was a violation of Article 16 of the CAT, given that the police was present at a mob during which an individual was aggressed and the police took no measure to prevent this violation. Communication No. 161/2000, UN. Doc. CAT/C/29/D/161/2000.

[259] Vladislava Stoyanova, "Human Trafficking and Slavery Reconsidered: Conceptual Limits and Positive Obligations in European Law" (PhD diss., Lund University, 2015). 446.

[260] Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights," *Netherlands Quarterly of Human Rights* 28, no. 3 (2010): 418.

[261] ECtHR, *Osman v. the United Kingdom,* § 116.

[262] Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 75.

[263] ECtHR, *Finogenov and Others v. Russia,* nos. 18299/03 and 27311/03, § 243, ECHR 2011 (extracts).

[264] Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge: Intersentia, 2016), 137.

actions.[265] Moreover, the capacity of foreseeing risks greatly relies on the capacity built by government staff to interpret such risks as potential human rights violations, which calls for a more detailed view of the positive obligation to fulfil/promote.[266] In connection with this general obligation, Chapter 3 (§ 129 below) will consider the parameter of knowledge, delimiting the scope of this obligation to prevent violations.

55. Moreover, this general obligation takes different contours when individuals sustaining forms of vulnerability are at stake, given for example the prejudices by the authorities themselves in addressing their specificities, the related obstacles to remedies, and other constraints, as studied in Parts II and III.

1.4 - The Obligation to Redress

56. The duty to protect comprises the obligation to redress human rights violations domestically, representing a distinct area of international human rights law. The mere existence of legislation and regulatory framework may not suffice if the existing mechanisms of redress - fundamental parts of the modern State's functions - are not available or are infefficient. While the term "remedy" does not have a unified meaning, three main clusters can be identified. The first, which has a procedural nature, implies an obligation to offer possibilities to present a complaint for the harm allegedly suffered before national judicial or administrative bodies (*recours*). The second refers to the substantive dimensions of the harm suffered or, in the words of Tomuschat, to "make good for the damages caused"[267] (*réparation*). The third, regarding gross and systematic violations, involves the "access to relevant information concerning violations and reparation mechanisms".[268]

The first aspect of the obligation to provide remedies (*recours*), implying a procedural limb of a set of positive obligations to offer redress, finds its source in treaty law in more detail, finding common grounds in the several international human rights mechanisms. The second aspect (*réparation*), implying a more substantive perspective of this obligation, however, has been developed to a larger scale through

[265] See, e.g. ECtHR, *Jashi v. Georgia,* no. 10799/06, § 65-66, 8 January 2013.

[266] See § 95, below.

[267] Christian Tomuschat, "Reparation for Victims of Grave Human Rights Violations," *Tulane Journal of International and Comparative Law* 10 (2002): 168.

[268] Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 11(c).

judicial interpretation. The latter's scope of application varies considerably, with the IACtHR having a more proactive role than any other international monitoring body.

1.4.1 - Procedural Avenues of Redress - Remedies

57. The obligation to establish the appropriate procedural avenues to redress for a harm sustained finds authority in the UDHR itself[269] and in most human rights treaties. The ICCPR provides, in Article 2.3(b), that States parties undertake the duty

> "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy".

58. The ACHR, Article 25[270], for its part, stipulates that everyone has the right to a simple, prompt recourse for the protection against acts that violate his or her fundamental rights. The relevant duty is construed as a conjunction of the applicability of Article 1.1 (obligation to ensure rights), Article 2 (obligation to adopt domestic measures), Article 8 (judicial protection), and 25 (judicial guarantee). Within this aggregate of Articles, the IACtHR implies general duties of access to justice and of provision of remedies.[271] More specifically, Article 25 relates to a more general obligation for the State to afford an effective remedy for the violations of the ACHR, while Article 8 provides the requirements in procedural terms in order for victims to seek justice for the violations sustained.[272]

59. The ECHR likewise provides for the right of an individual, who claims to have her or his right violated, to an effective remedy under Article 13 ECHR (right to

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[269] UDHR, Article 8 "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[270] ACHR, Article 25.1: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[271] See, e.g. Separate Opinion of Judge Cançado Trindade in the *Case of Almonacid Arellano et al. v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, §§ 20-25, on the interrelatedness of these Articles; and Separate Opinion of Judge Ventura-Robles, in the *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, explaining that Articles 8 and 25 are not self-standing within the ACHR's architecture.

[272] This differentiation is clarified in the *Case of Vera Vera et al. v. Ecuador*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011. Series. C No. 226, § 86.

a remedy).[273] The ECtHR has affirmed that an individual should have a remedy before a national authority whenever an arguable claim of a violation of the ECHR can be established in order to obtain redress.[274] Similar to the Inter-American case, a general duty to redress is read in a conjunction of Articles. Article 13 is frequently read in connection with Article 6 (right to fair trial). The ECtHR does not define explicitly what is a remedy in the context of the ECHR. In early cases, this Court considered that Article 13 comprised a more general obligation to provide remedies, whereas Article 6.1, providing stricter guarantees, absorbed the content of the latter.[275] Accordingly, the Court frequently found it unnecessary to examine a violation of Article 13 if a violation of Article 6.1 had been found. However, in the wake of the accumulation of several cases concerning fair hearings in a reasonable time, the Court departed from this understanding and, since *Kudla v. Poland* (2000), it has seen the need to consider Article 13 in an independent manner, regardless if a violation of Article 6.1 has been found.[276] Another important aspect is that Article 6.1 implies a right to a court[277], i.e., a right to bring civil cases into courts, added to the requirements of organization and composition of a Court as components of a fair hearing[278] Parallel to that, the ECtHR has developed a procedural obligation to investigate and try alleged violations of Articles 2 and 3, prominently dedicated to criminal process (*infra)*. Naturally, remedies are to be provided efficiently and not "unjustifiably hindered by the acts or omissions of the authorities of the respondent State."[279]

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[273] ECHR, Article 13: "Everyone whose rights and freedoms as set forth in this 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."

[274] ECtHR, *Klass and Others v. Germany,* 6 September 1978, § 64, Series A no. 28.

[275] ECtHR, *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 41, Reports of Judgments and Decisions 1997-VIII.

[276] ECtHR, *Kudla v. Poland*, [GC]*,* no. 30210/96, §146-149, ECHR 2000-XI.

[277] ECtHR, *Golder v. the United Kingdom,* 21 February 1975, §§ 28-36, Series A no. 18

[278] Id., § 36. This requires that the parties should have an effective remedy that enables them to assert their (civil) rights (*Běleš and Others v the Czech Republic,* no. 47273/99, § 49, ECHR 2002-IX), and that the have "have a clear, practical opportunity to challenge an act that is an interference with his rights" (*Bellet v. France,* 4 December 1995, § 36, Series A no. 333-B).

[279] ECtHR, *Aksoy v. Turkey*, 18 December 1996, § 95*,* Reports of Judgments and Decisions 1996-VI; and *Mahmut Kaya v. Turkey,* no. 22535/93, § 106*,* ECHR 2000-III.

1.4.2 - Different Standards of Due Diligence

60. As will be seen in the following sections, while the standard of due diligence requiring criminal sanctions is rather comprehensive, entailing defined effectiveness parameters, for other types of violations, the standard applicable requires only reasonable steps on the part of the authorities to investigate the allegations or irregularities made by the applicant. But before going into the specificities of the due diligence standards, it is necessary to explore the circumstances requiring more or less stringent avenues of redress, as discussed in the next section.

1.4.3 – Civil, Administrative, or Criminal Avenues?

61. The judicial (or equivalent) phase of redress, which serves the purpose of establishing the law applicable to the concrete facts at stake and attributing the relevant responsibilities, whether civil, administrative or criminal, is an inherent function of the State. Coupled with the *due diligence* standard, the principle of effectiveness applies, according to the level of stringency required by an international monitoring body in each case. In principle, the use of a certain avenue (administrative, civil or judicial) will vary according to the gravity of the case at stake and on the relevant obligation to put in place a legislative or regulatory framework. Yet, this requirement is only the starting point of the subject matter. In general terms, the stringency applied by an international monitoring body ranges from an mere requirement of effective procedure from an administrative or judicial system to a thorough criminal investigation and prosecution.

In this regard, domestic authorities may comply with the obligation to provide redress through an aggregate of remedies.[280] Contemporary human rights have witnessed the burgeoning of non-judicial instances that are empowered to hear allegations and settle disputes, including ombuds-institutions and National Human Rights Institutions (NHRIs).[281] These instances can count on the collaboration of victims and their

[280] ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 96-102*,* ECHR 2002-II. Overall, the investigative authority did not allow victim participation and had no power to summon the victims. The civil courts were not able to award pecuniary and non-pecuniary reparations. Similarly, IACtHR, *Mapíripán v. Colombia*, § 235. See, for instance, in *Armani da Silva*, the variety of measures, including criminal investigation, administrative inquiry and payment of civil compensation paid to the victim in order to comply with a procedural obligation under Article 2 (no. 5878/08, § 230, ECHR 2016).

[281] UNGA, The Paris Principles on National Human Rights Institutions. Similarly the OECD Guidelines for Multinational Enterprises (2011) establish the National Contact Points to handle

representatives in order to settle private disputes or to facilitate relevant judicial proceedings. Yet, one should not leave aside the role of the State as the primary duty-holder in international law, in the sense that remedies provided by private entities without sufficient State scrutiny may not qualify as effective remedies.[282]

62. It is, however, important to underline that even in cases which only administrative or civil remedies may suffice, the authorities should offer them effectively, demonstrtating *reasonable steps* to investigate the violations alleged by the applicant.[283]

In cases alleging violations of Articles 2 and 3 ECHR, which were not caused intentionally, redress may be satisfied by civil, administrative or disciplinary measures.[284] The requirement of an effective criminal investigation arises when the negligence attributable to public bodies or authorities is not a mere error of judgment or carelessness.

In *Öneryıldız* v. *Turkey* (2004), the ECtHR made an important remarkd by stating that in the case of dangerous activities, where the relevant knowledge by the authorities is sufficient to analyze the complex phenomena causing a violation, criminal procedure is the appropriate avenue.[285] In a more recent case, this Court had the occasion to apply this same principle, revolving around the explosion of a projectile in military zone that led to several deaths. The Court held that, given the high level of negligence of the State, criminal remedies (and not only civil remedies, as the authorities offered)

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inquiries on the compliance with this instrument, on a non-mandatory basis. The UNGPBHR also establishes the "operational level grievance mechanisms", to be implemented domestically in order to monitor compliance with these Principles (Art. 29).

[282] See Caroline Rees et al, "Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned," on the national grievances mechanisms for violations from corporations, recalling that i.a. these mechanisms should be compatible with international human rights standards", 21. Available at [https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/grievance-mechanism-pilots-report-harvard-csri-jun-2011.pdf], accessed on 7 February 2019.

[283] See: e.g. ECtHR, *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 88-92, 8 April 2010. Similarly, HRCttee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, § 15: "administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies."

[284] ECtHR, *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII (medical error leading to an abortion of the victim).

[285] ECtHR, *Öneryıldız*, § 93, attracting the standard of use of lethal force.

were necessary.[286] In cases related to road accidents, the Court makes a distinction between cases involving by "pure negligence without aggravating circumstances"[287], requiring only civil remedies, and cases in which loss of life occurs in suspicious circumstances, requiring criminal remedies.[288]

The ECtHR's practice has underscored that the stringency of the procedures required is not completely reliant on which right is at stake, but on the gravity of the violation itself.[289] For instance, on the right to property, if elements of criminal nature are present, the stricter standards (similar to the ones on Articles 2 and 3) apply.[290] Likewise, procedural obligations related to Article 8 attract the stringency typical of Articles 2 and 3 to the extent that violence is an important component of the violation under analysis.[291] In other non-violent contexts, the Court requires a general standard only, on the basis of reasonableness,[292] without a clear pattern.[293]

63. It is worth noting that the ECtHR has frequently enhanced the stringency of the procedural obligations *ratione personae*, where an important facet of the individual's is at stake, particularly when it recognizes an instance of vulnerability. In those cases, civil remedies may not suffice.[294] It will be seen further in Chapter 5 (§ 227 below) that the vulnerability factor has the effect of altering general standards of positive obligations in the context of the duty to protect.

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[286] ECtHR, *Oruk v. Turkey,* no. 33647/04, § 66, 4 February 2014. See, similarly in *Asiye Genç v. Turkey,* no. 24109/07, § 83, 27 January 2015, on the high risk of baby deaths in a neonatal hospital functioning in precarious conditions.

[287] ECtHR, *Cioban* v. *Romania,* no. 18295/08, § 25, 11 March 2014.

[288] ECtHR, *Railean v. Moldova,* no. 23401/04, § 28, 5 January 2010.

[289] ECtHR, *Zorica Jovanović* v. *Serbia*, concerning stolen babies, the Court treated the case as one of enforced disappearance (no. 21794/08, §§ 70-75, ECHR 2013).

[290] See, e.g. ECtHR, *Blumberga v. Latvia,* no. 70930/01, § 67. 14 October 2008; *Craxi v. Italy (no. 2),* no. 25337/94, § 75, 17 July 2003.

[291] Eva Brems, "Procedural Protection – An Examination of the Procedural Safeguards Read into the Substantive Convention Rights," *Shaping Rights in the ECHR*, eds. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013), 144.

[292] ECtHR, *Namat Aliyev v. Azerbaijan,* no. 18705/06, § 88, 8 April 2010, concerning allegations of irregularities in an electoral process, the Court required "reasonable steps to investigate the alleged irregularities […] to obtain more information and verify the accuracy of the applicant's allegations".

[293] Ibid.

[294] ECtHR, *e.g. K.U. v. Finland,* no. 2872/02, §§ 45-49, ECHR 2008.

1.4.4 - Standards in Criminal Proceedings

64. Given the more stringent (and more detailed) requirements of the due diligence standards in criminal proceedings in comparison with other procedural avenues, the following sections will examine in detail what are the components of this specific standard.

1.4.4.1 – Investigations

65. The investigations stage, whether started by the authorities themselves or by the victims' motion, is the point of departure for engaging state responsibility in this context. The obligation to conduct investigations is enshrined in specialized human rights treaties related to serious violations.[295]

The general human rights treaties, for their part, have been interpreted as to impose such an obligation through case law. In *Velásquez Rodríguez*, for instance, the IACtHR deduced this specific obligation from the general due diligence standard,[296] mostly for serious violations.[297] The HRCttee's *General Comment No. 31* affirms that under the ICCPR regime, a failure to investigate allegations of violation may entail a separate breach of the relevant Covenant,[298] although the pertinent obligation under Article 2.3 ICCPR (right to a remedy) in conjunction with a substantive provision of that Covenant is devoid of a free-standing nature.[299] Violations of ESCR may also

[295] CAT, Article 12; and IACPPT, Article 8. See CATCttee, *General Comment No. 2*, § 18; ICED, Article 3; IACFD, Article VI. See also, Article II(b) of the Basic Principles on the Right to a Remedy and Reparations.

[296] IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Merits, § 176: "The State is obligated to investigate every situation involving a violation of the rights protected by the Convention [vis-à-vis Articles 1 and 2 of the ACHR]*"*. Likewise in *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, § 100.

[297] IACtHR, *Case of García Cruz and Sánchez Silvestre v. Mexico.* Merits, Reparations and Costs. Judgment of November 26, 2013. Series C No. 273, §§ 57-58. (torture); *Case of Escué Zapata v. Colombia*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, § 87 (arbitrary detention); *Case of Gutiérrez and Family v. Argentina.* Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 271**,** § 97 (extrajudicial execution). But see also in the context of medical negligence: *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, § 122. Rape, as one of the gravest forms of violence against women, is dealt with in (Chapter 5).

[298] HRCttee, *General Comment No. 31*, § 15. See also Ludovic Hennebel, La Jurisprudence du Comité des Droits de l'Hommes des Nations Unies – Le Pacte Civil Relatif aux Droits Civils et Politiques et Son Mécanisme de Protection Individuelle (Bruxelles: Bruylant, 2007), 49. The obligation to investigate is embedded under the general duty to provide remedies, see: Sarah Joseph and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary, 3rd ed. (Oxford: Oxford University Press, 2013), 871.

[299] HRCttee, *Kazantxis v. Cyprus*, communication no. 972/2001. Views of 7 August 2002, UN Doc. CCPR/C/78/D/972/2001, § 6.6*; Benitez Gamarra v. Paraguay,* communication no. 1829/2008. Views

give rise for States to conduct criminal investigations, as in the case of abuses by private businesses.[300]

66. The ECtHR, for its part, has concentrated the obligation to start criminal proceedings in cases alleging violations of articles 2 and 3 ECHR or when the violation at stake reveals a certain gravity under other articles. On the use of lethal force by State agents, this Court made clear in *McCann and others v. UK* (1995) that "there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *e.g.*, agents of the State."[301] This also applies to violations committed by non-state actors,[302] including in dangerous activities.[303] The Court has established a judge-made law by creating a procedural obligation to conduct investigations into those serious allegations.

67. The standard of investigations has been construed *pari passu* with the principle of effectiveness, thus rejecting that investigations are not carried out as a mere formality. This very standard has been elaborated by case law through the following components:

i – Promptness and Expedition

68. Under this criterion, investigations refer to two aspects. Firstly, it is required that they should be started without delay.[304] It implies, in fact, an obligation to provide a prompt response by the criminal authorities to serious violations of rights, which is key to "maintaining public confidence in their adherence to the rule of law

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of on 22 March 2012, UN Doc. CCPR/C /107/D /1945/2010, §. 7.5. Further reading: Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 869.

[300] CESCR, *General Comment No. 24*, § 40. This is a reaffirmation of the Committee's practice, see: concluding observations on Macedonia, E/C.12/MKD/CO/1 (2008); and on Austria, regarding violations of corporate activities E/C.12/AUT/CO/4 (2013). See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26 1997, Article 16.

[301] ECtHR, *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012; Armani Da Silva v. the United Kingdom [GC], § 230.

[302] ECtHR, *Ergi v. Turkey,* 28 July 1998, § 82*,* Reports of Judgments and Decisions 1998-IV.

[303] Supra (§ 48). See also: Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry," *German Law Journal* 8, no. 3 (2007): 248.

[304] IACPPT, Arts. 1, 6 and 8. See in case law: IACtHR, *Case of the "Mapiripán Massacre" v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134**,** noting the exceedingly long time the investigative authorities took to recover the bodies of the victims of a massacre, thus deeming the investigations ineffective; HRCttee, *Marija and Dragana Novakovic v. Serbia*, communication no. 1556/2007. Views of 24/11/2004, UN. Doc. CCPR/C/100/D/1556/20, § 9.5. (on the death for medical malpractice, it took two years until the forensic expertise was concluded, leading to a violation of Article 1, in connection with Article 6 of the ICCPR).

and in preventing any appearance of collusion in or tolerance of unlawful acts".[305] Unjustified delays also compromise both the quantity and the quality of the evidence available and imprint an appearance of lack of diligence, putting in question the good faith of the relevant investigative steps and dragging out the ordeal of the members of the family.[306] For the IACtHR, delays in starting the investigation may frustrate efforts to establish key elements of the violation, rendering the investigation ineffective.[307] The ECtHR keeps a tight scrutiny over this obligation, even when an obstacle to comply with such obligation is invoked.[308] At the same time, the Court analyzes this obligation contextually, in view of the real ability of the authorities to comply with this obligation.[309]

Secondly, regarding serious violations, investigatory procedures are to start *ex officio* by the authorities, independent of a formal complaint lodged by the victim or her representative.[310] Frequently, the knowledge of the violations occurred lies with the authorities, *e.g.*, in cases of torture and enforced disappearance, significantly hindering the chances of the victims of pursuing redress on their own.

ii – Thoroughness

69. This component indicated that investigations must be conducted to the extent that they are able to identify the main elements and causes of the violation at stake.

[305] ECtHR, *Kelly and Others v. the United Kingdom*, no. 30054/96, § 97, 4 May 2001; *Šilih v. Slovenia* [GC], no. 71463/01, § 195, 9 April 2009.

[306] ECtHR, Paul and Audrey Edwards v. the United Kingdom, § 86.

[307] IACtHR, *Case of the "Mapiripán Massacre" v. Colombia* (Merits, Reparations and Costs), § 228.

[308] In *Varnava and Others v. Turkey* [GC], the Court reinforced the "unambiguous" approach on this criterion (nos. 16064/90 and 8 others, § 191, ECHR 2009). See also *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 164, ECHR 2011 (delay of nine months to reopen a flawed investigation into the killing of the victim by an English soldier in an external occupation context).

[309] ECtHR, in *Šeremet* v. *Bosnia and Herzegovina, Montenegro and Serbia*, the Court took into consideration the period since 2005, when the investigative authorities overcame post-war difficulties to dealing with disappearance cases (Application No. 29620/05, § 37). See also, *Palić v. Bosnia and Herzegovina,* no. 4704/04, § 70, 15 February 2011. Compare with the IACtHR's *Case of Vereda La Esperanza v. Colombia,* in which the Court disregarded the difficulties of the authorities to investigate, in view of the complex transitional process in the country (Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, § 235).

[310] ECtHR, *Ergi v. Turkey*, § 82: "the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death." In the Americas, see *e.g.* IACtHR *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 21, §108, and *Case of Rochac Hernández et al. v. El Salvador*, in which a NGO filed a petition before the prosecutor to investigate the disappearance of 141 boys and girls, but no specific investigation was carried out (Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 285), §§ 141-144.

The ECtHR applies the "adequacy" standard, meaning that the authorities must be able to establish the facts surrounding a violation and (where applicable) to identify those responsible and punish them.[311] This assessment is also circumstantial to the facts of the case. The Court usually takes into account large or structural or grave failures, as in *Güleç v. Turkey* (1998), due to a disregard to several eyewitnesses and negligence in the forensic analysis,[312] or as in *Avsar v. Turkey* (2001), where the authorities failed to establish the identity of the alleged suspects.[313]

The IACtHR, for its part, has held that the effectiveness standard is not satisfied by discharging the duty to investigate as a mere formality.[314] The Court has put emphasis on the need of investigations to be rigorously carried out through competent staff and through appropriate procedures.[315] The relevant case law has borrowed authority from external expertise in order to ascertain whether a given investigation can be deemed to be thoroughly conducted.[316] Effective investigations into the grave violations of human rights in the regional context have been regarded as a key component of seeking justice and, accordingly, of strengthening the rule of law, in which the State is the actor in charge of safeguarding the rights of the individual.[317] This Court has been historically attentive to the question of impunity, as it defined as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations [...]"[318]. The strict supervision by the Court on the investigative and judicial

[311] ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 172, 14 April 2015; Armani Da Silva v. the United Kingdom [GC], § 233.

[312] ECtHR, *Güleç v. Turkey,* 27 July 1998, § 79, Reports of Judgments and Decisions 1998-IV.

[313] ECtHR, *Avsar v. Turkey*, no. 25657/94, § 396-400, ECHR 2001-VII (extracts). Compare with *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], in which the Court held that the absence of the collection of the fingerprint on the weapon used for the presumed suicide could be considered a shortcoming, but not a decisive flaw in the investigations, not leading to important implications (§ 195).

[314] IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Merits. Judgment of November 19, 1999. Series C No. 63, § 227; *Case of Heliodoro-Portugal v. Panama.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, § 144.

[315] IACtHR, *Case of the "Mapiripán Massacre" v. Colombia* (Merits, Reparations and Costs), § 224.

[316] IACtHR, *Case of Baldeón García v. Peru. Merits, Reparations and Costs*. Judgment of April 6, 2006. Series C No. 147, § 96; and *Case of Luna López v. Honduras.* Merits, Reparations and Costs. Judgment of October 10, 2013. Series C No. 269, § 159, both referring to the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/.12 (1991). In the *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, § 91-93, referring to the Istanbul Protocol.

[317] CEJIL, *La Debida Diligencia en la Investigación de Graves Violaciones de Derechos Humanos*, CEJIL/Buenos Aires, Argentina (2010), 3. Available at [https://cejil.org/es/debida-diligencia-investigacion-graves-violaciones-derechos-humanos], accessed on 6 December 2017.

[318] IACtHR, *i.a. Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, § 211.

machinery of States is also due to the profile of its docket, including cases of (self) amnesty laws, presenting a major obstacle for victims to seek justice.[319]

iii – Independence

70. This standard implies that the agents or organs conducting the investigations independently assess and produce the evidence in order to establish the facts in an impartial manner. It implies both practical and institutional independence. As for the institutional independence, the IACHR noted in its report on Brazil the lack of independence in the investigations of crimes committed by the military police forces in that the relevant complaints were investigated by their peers, leading to worrying levels of impunity.[320] On the practical independence, for instance, the ECtHR looks into the particulars of the case, beyond the formal independence criterion. In *Kelly* (2001), the investigations into the death of the victim were carried out by a special unit in cooperation with officers of the police unit implicated in the deaths of the victims.[321] On the other hand, in *Giuliani and Gaggio* (2011) the Court observed that the carabinieri, the police force implicated in the deaths of two protesters, were also called by the prosecutor to conduct some diligences, such as compilation of photographic evidence and initial inspection in the corpses. The Court, however, deemed that those tasks had a technical and objective nature only, thus not compromising the factual independence of the investigation.[322]

iv – Information to the Victims on the Outcomes of the Proceedings

71. Under this criterion, it is required that the investigation and its findings are not restricted to the authorities, but that the victims and their next-of-kin know about the relevant outcomes, in order to elect the best avenues in pursuing remedies for the violations sustained. In *Dragan Dimitrijevic v. Serbia and Montenegro* (2004), the

[319]See, especially: *Guerrilha do Araguaia v. Brazil*, § 128. Similarly, in Europe, ECtHR, *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014 (extracts). In Africa, endorsing the Inter-American *acquis*: *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication no. 245/02. Decision of 21 May 2006, § 211.

[320] IACHR, *Report on the Situation of Human Rights in Brazil* (1997), Chapter 3(c). OAS Doc. OEA/Ser.L/V/II.97, Doc. 29 rev.1 29/09/1997, § 58.

[321] ECtHR, *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001. Alastair Mowbray notes that practical independence must supplement institutional independence so as to prevent the investigating authorities from relying automatically on the versions and reports of the State agents without carrying further their own inquiries, in "Duties of Investigation under the European Convention on Human Rights," *International and Comparative Law Quarterly* 51, no. 2 (2002): 440.

[322] ECtHR, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 322, ECHR 2011 (extracts).

CATCttee held that the investigations were not sufficient as the authorities failed to inform the victims of the results of the investigation, which prevented them from seeking further redress.[323]

v - Participation of the Victims in the Proceedings

72. Effectiveness also entails the participation of the victims in all stages of the proceedings[324], as well marked in the case law of the IACtHR. Since *Blake v. Guatemala* (1988), the Court cemented the understanding that Article 8 ACHR presupposed the right of victims to participate in the proceedings from the investigation phase.[325] However, the Court's assessment of this component tempers the diligent approach of the authorities with the reasonableness of the measures taken in practice. In *Vereda la Esperanza v. Colombia* (2017), the Court was satisfied that the prosecutor correctly represented the interests of the applicants and that the victims were heard during the peace process and managed to re-qualify some crimes under investigation. The specific allegation that they could not make pleadings and requests directly to the judiciary was not deemed decisive for this Court to find a violation of Article 8 ECHR.[326]

1.4.4.2 - An Obligation to Prosecute?

73. Prosecution, as a part of the whole of the investigations, is related with the duty to secure the victims to pursue further avenues of redress.[327] In cases when criminal procedures are a requirement of an effective remedy, an obligation to press charges cannot be regarded as absolute in international human rights law. Indeed, the CAT provides the strongest wording in this sense, combining Articles 6 and 7, which together establish the *aut dedere aut judicare* principle in that convention.[328] Article

[323] CATCttee, *Dragan Dimitrijevic v. Serbia and Montenegro*, § 5.4. Similarly, ECtHR, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 105, 4 May 2001.

[324] See a comprehensive study on victim's participation in criminal proceedings: Raquel Aldana-Pindell, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-sponsored Crimes," *Human Rights Quarterly,* 26, no. 3 (2004): 605-685.

[325] IACtHR, *Case of Wong Ho Wing v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2015.

[326] IACtHR, *Case of Vereda La Esperanza v. Colombia*, §§, 214-218.

[327] Kamber, *Prosecuting Human Rights Offences*, referring to the AComHPR's case of *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, § 92.

[328] Chris Ingelse, *The UN Committee against Torture* (The Hague: Kluwer Law International, 2001), 327.

7.1, in fact, establishes that if the authorities do not extradite the person accused of torture, they should "submit the case to its competent authorities for the purpose of prosecution". While this provision leaves some margin for discretion, such a margin is narrow.[329] For its part, the Inter-American Court has consistently spoken on the obligation to prosecute perpetrators of human rights offenses (those identified in the relevant judgments of the court) beyond an obligation to enact relevant criminal legislation. In these cases, it has been noted that this Court "assumes functions of international law".[330] The broad statement by which states must prosecute and punish every single violation of a right protected by the ACHR[331] could lead to a misleading interpretation that this obligation applies across the board.[332] This statement, however, should be seen in the context of the Court's own docket, heavily represented by the most serious violations of human rights, and not as an affirmation of an absolute obligation to prosecute offenders identified in a case.[333] The African system, likewise, does not define in precise terms when an obligation to prosecute offenders in a given case materializes through the relevant case law. This obligation, in general terms, is construed through Article 1 ACHRP in connection with a given substantive provision of this treaty.[334]

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[329] Chris Ingelse, *The UN Committee against Torture,* 327. For Claire A. Hubert, this margin of discretion is left to be set by national authorities, as long as they consider this case, in the same manner as ordinary offenses of a serious nature (Article 7.2 CAT), in *The Right and Duty of States to Prosecute Torture Committed Abroad amongst Foreigners: Universal Jurisdiction over Torture under Customary International Law and the un Convention against Torture* (Institutt for Offentlig Rett: Oslo, 2005), 91. Krešimir Kamber identifies a minimum obligation to "proceed with the prosecution when there is sufficient evidence against the defendant, and to punish him or her, if proven guilty according to the law", in *Prosecuting Human Rights Offences - Rethinking the* Sword *Function of Human Rights Law* (Leiden: Brill, 2016), 149. See, in this regard, CATCttee *Suleymane Guengueng and Others* v. Senegal, Communication. No. 181/2001, views of 17 May 2006, §§ 98-99.

[330] Kamber, *Prosecuting Human Rights Offences*, 176, noting the development of concepts such as "state crime" and "state terrorism", referring to the dissenting opinion of Judge Cançado Trindade, in the case of *Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, §§ 9–25. Similarly, HRCttee*, General Comment No. 31,* implying an obligation to bring criminal charges of cases of torture, summary and arbitrary killing and enforced disappearances (§ 18).

[331] E.g. IACtHR, *Case of Loayza Tamayo v. Peru*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, §§ 169-170.

[332] Fernando B. Basch, "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers," *American University International Law Review* 23, no. 1 (2007): 220.

[333] For instance, in *Pacheco León and Others*, the Court was focused in making a strict assessment of the due diligence applied by the authorities (investigation and prosecution) than to single out the duty of the prosecutor to press charges on the violation of the right to life at stake.

[334] Kamber, *Prosecuting Human Rights Offences*, 192.

It is the ECtHR, in fact, that has seen this very obligation through a more nuanced approach given the diversity of its case law. Beyond the general statement that no individual has a right to obtain a prosecution in the absence of "culpable failures in seeking to hold perpetrators of criminal offences accountable", [335] the Court has elaborated several considerations on this relative obligation. This general statement is balanced by the consideration that national courts should not be prepared to allow violations of Articles 2 and 3 ECHR go unpunished[336], imposing a high threshold in the due diligence standard to be applied. At the same time, not every case involving these rights, which would require criminal investigation, entails an obligation to prosecute as it transpires from the ECtHR's case law, particularly in most recent cases. In scholarly writings, the question of prosecutorial discretion[337], even in serious violations, is progressively accepted in the human rights discourse. For instance, it has been argued that the principle of effectiveness can be read in conjunction with the so-called "democratic limit" to the positive obligation in question. [338]

74. Even when analyzing the "hard cases", one should bear in mind that international human rights courts are tasked to supervise the compliance by States parties with the relevant treaty according to established standards and not to determine which specific actions the authorities should take. The case of *Armani da Silva v. the United Kingdom* (2016) provided an opportunity for the ECtHR make a detailed assessment on the matter. The Court held that the decision by the authorities to not prosecute the policemen who mistakenly shot a terrorist suspect was not in violation of the procedural obligation under Article 2 ECHR. A main reason for noting the Court not finding a violation was the compelling evidence advanced by the responding State that "the investigation has complied with Article 2 and the procedural requirements that flow from it". [339] The human rights requirements

[335] ECtHR, *Söderman v. Sweden* [GC], no. 5786/08, § 83, ECHR 2013. See also §§ 90-91.

[336] ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 95-96, ECHR 2004-XII; *Ali and Ayşe Duran v. Turkey,* no. 42942/02, § 61, 8 April 2008.

[337] Discretion here is understood in the context of responsible choices, accountable in democratic societies, see: Kamber, *Prosecuting Human Rights Offences* (at 393), or "permissible in so far as the human rights requirements are complied with at every stage of decision-making" (at 420).

[338] Id., 417, making reference to Dimitris Xenos. Kamber adds: "[a]ssigning the requirement of mandatory prosecution to the instances of criminal infringement of an absolute right does not imply the removal of a range of possibilities in the particular aspects of decision-making, which adequately incorporated the relevant human rights considerations", (at 419).

[339] ECtHR, *Armani Da Silva v. the United Kingdom* [GC], § 80. The review of the decision to not prosecute was also guided by the procedural standards of Article 2 ECHR (§§ 92-98).

considerably influenced the analysis and decision-making involved in that procedure, including the analysis on the use of lethal weapons, which could not be disapproved by the Court. At the same time, in every respect, the Court held a strict supervision on the level of diligence (as an obligation of means), taken by the investigative authorities and concluded that the investigations were effective.[340]

In all cases, however, the possibility for the victim to avail herself or himself of any form of recourse to the decision of not bringing charges should exist.[341]

1.4.5 - Delay in Dispensing Justice

75. A significant obstacle to the efficiency of judicial or administrative remedies is the delay in procedures. Both Article 6.1 of the ECHR and Article 8.1 of the ACHR establish that domestic courts should dispense due process within a reasonable time.[342] The ECtHR, conscious of the seriousness of this problem in the region, has established a test to ascertain whether the proceedings are unreasonably delayed. The following criteria have been established by this Court: (a) the complexity of the case; (b) the conduct of the applicant and of the authorities; (c) the issue at stake for the applicant in the dispute.[343] In the wake of this regional phenomenon, this Court has established under Articles 13 and 6.1 ECHR the existence of an autonomous obligation to provide individuals with a legal avenue to file claims alleging unduly delayed proceedings.[344]

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[340] Compare with *Dimitrova and Others v. Bulgaria*, in which the ECtHR found a violation of the procedural limb of Article 2 ECHR, inasmuch as the use of the discretion by the prosecutor to discontinue the case and concluding a plea bargaining agreement with the aggressor was faulty. In particular, it was found that that important evidentiary elements and information were disregarded when this agreement was concluded. For the Court, though this agreement was a legal option for the prosecution, the choice for this agreement, under the concrete circumstances, was in discordance with the principle of effectiveness. No. 44862/04, §§ 78-82, 27 January 2011.

[341] CATCttee, *Danilo Dimitrijević* v. *Serbia and Montenegro,* communication no. 172/2000. Views of 16 November 2005, UN Doc. CAT/C/35/D/172/2000, § 7.3.

[342] The ECtHR, underscores " the importance of administering justice without delays which might jeopardise its effectiveness and credibility", in e.g. *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 224, ECHR 2006-V.

[343] ECtHR, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII. This standard has been widely adopted by the IACtHR, *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, § 157.

[344] ECtHR, *Kudla v. Poland* [GC], no. 30210/96, § 159, ECHR 2000-XI; *Rumpf v. Germany,* no. 46344/06, § 52, 2 September 2010.

76. Furthermore, in view of the systemic problems in Member States' procedural delays, the ECtHR has established the *pilot-judgment procedure* in order to tackle the root causes of such systemic delays. This procedure, inaugurated in *Broniowski v. Poland* (2004),[345] aims at freezing the examination of other similar cases by the Court and encouraging the State party to take measures in order to allow a large number of victims to obtain speedily and efficient remedies.[346] The Court then entertained the right to effective remedy in a structural manner, allowing States to adopt large remediation schemes.[347]

1.4.6 - Point of Reflection: What does the Due Diligence Doctrine Really Require from States in Human Rights Law?

77. The principle of due diligence doctrine in human rights law has not embraced strict liability in absolute terms. Accordingly, the general duty to prevent and redress violations is one of means and of result.[348] As seen in the previous sections, this doctrine is not manifested through a set of descriptive obligations. Instead, it is embedded by the principle of effectiveness as its core ethos, rejecting the formalism by which the obligations to prevent and to redress violations were dealt with in early litigation.

It is worth recalling that in *Velásquez Rodrígues*, the IACtHR prevented the Honduran State from circumventing its treaty obligation by applying the general due diligence doctrine in the field of human rights law. This State argued that since its was not proven that the victim was disappeared by any agent of the State, no responsibility could be established for the violation at stake. The IACtHR held instead that Honduras was under an obligation to carry out an investigation into the pertinent allegations, even if the identity of the perpetrator was unknown.

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[345] ECtHR, *Broniowski v. Poland* [GC] no. 31443/96, ECHR 2004-V.

[346] Further reading: Lise R. Glas, "The Functioning of the Pilot-Judgment Procedure at the European Court of Human Rights in Practice," *Netherlands Quarterly of Human Rights* 34, no. 1 (2016): 41-70.

[347] For instance, in *Wolkenberg and Others v Poland* (Application No. 50003/99) Strike-out Decision, § 77. This decision to strike out the case from the docket was followed by the national authorities' implementation of a compensation scheme as a remedial measure to provide the applicants with relief.

[348] *Inter alia*, HRCttee: *S.E. v. Argentina*, views of 26/03/1990, § 5.5; and *H.C.M.A. v. the Netherlands*, view of 30/03/1989, § 11.6; ECtHR, *Kudła v. Poland* [GC], § 157.

Moreover, this doctrine is interpreted in a holistic manner. As seen in the previous sections, it requires proactiveness from the authorities, including a sound analysis of the seriousness in each case, in order to apply the correct standard of process, and an expeditious resolution thereof. This doctrine further requires caring for each victim, ensuring thereto transparency and participation in the procedures in each context. This assessment also takes into consideration the relevant normative framework in place domestically. This assessment is also holistic because it relies substantively on training and expertise of the authorities to discharge their duties through a human rights perspective. The seriousness and good faith required through the effectiveness ethos are well illustrated by the IACtHR's claim that the argument of an obligation of means for compliance with a procedural obligation cannot be justified if the investigation at stake is "condemned beforehand to be unsuccessful".[349]

78. Now, analyzing two contemporary cases by regional courts, one will note that the standard of due diligence consists of a single combined assessment.

The first case, *Nogueira de Carvalho v. Brazil* (2006), revolves around the death of a human rights defender who was assassinated by local militia due to his work in that area. The decision of the prosecutor to not bring charges was taken after six different hypotheses of the crime, which underwent judicial supervision.[350]

The investigations were further reopened at the request of a victim's friend, who collected new evidence on the case privately,[351] leading to new police diligences. This evidence led to new paths of investigation, which resulted in the identification the author of the crime and consequence charges against him. Overall, around 100 witness statements were taken. The parents of the victim could bring motions to the procedures, though some of them were rejected. Despite that the IACHR (as the main petitioner) and the representatives of the victims could point out to some failures in both the investigations and trial of the material author of the case, the IACtHR did not find that these failures were so serious as to compromise all the overall redress measures of the case.

[349] IACtHR, *Case of Ibsen Cárdenas and Ibsen-Peña v. Bolivia*. Merits, Reparation and Costs. Judgment of September 1, 2010. Series C No. 217, § 153.

[350] IACtHR, *Case of Nogueira de Carvalho v. Brazil*, Series C. No. 161, § 67.12.

[351] Id., §§, 67.13-67.14.

Institutionally, the authorities shifted the criminal proceedings to the federal (better) competence. The case was closely followed by the local human rights ombudsoffice of the State court and by the National Secretariat for Human Rights. The office of the prosecutor formed a special task force to investigate his deaths. Both institutional and procedural aspects presented by the authorities, albeit showing a number of failures in the conduction of the investigations and trial, were key for the IACtHR to not find any violation of Articles 8 and 25 ACHR.[352]

In Europe, *Armani da Silva v. the United Kingdom* (2016) involved the killing of a terrorist-suspect by the police (which eventually was an error). Soon after the error was found, the authorities conducted a thorough review of police administrative procedures under close scrutiny of the Office of the Prosecutor. Under these circumstances, the prosecutor in charge decided to discontinue the case. The ECtHR, analyzing the details of the case, considered the proceedings as a whole, in contrast withhe applicant's allegations of a few failures of the investigations.[353] It was established by the ECtHR that the authorities did not fail to secure the relevant evidence and that the investigations were conducted by an impartial body that interviewed over 800 witnesses and produced a wealth of other evidence.[354] The failures indicated by the applicant did not disclose "institutional deficiencies" according to the ECtHR's case law.[355] The domestic legislation provided a wide scope of review of the prosecutorial decision of dropping the charges.[356] The government recognized that the victim's death was a result a of a systemic failure and thus decided to prosecute the Office of the Police and not the individuals who shot the suspect themselves. Taking the investigative steps as a whole, together with the normative framework in place to regulate the use of lethal weapons by the police, the Court did not find a violation of Article 2 ECHR.[357]

[352] Id., § 78.

[353] Id., § 243.

[354] Id., § 258.

[355] Id., § 263-264.

[356] Id., §§ 277-281.

[357] ECtHR, *Armani Da Silva v. the United Kingdom* [GC], § 283. The Court also acknowledged that the police presented its apologies to the family and proposed an ex gratia compensation including legal costs. Civil action and indemnity settlement between the family and government were also facilitated by the police department.

Now turning to general international law, there is not a single standard of due diligence.[358] In international human rights law, a context-dependent set of standards, entailing stringent criminal law and process or an overall duty of due process, has been analyzed in the above sections. In the case of the former, minimum parameters have been carefully tailored by the pertinent case law. While these parameters should be seriously pursued, the notion of due diligence, implying a duty of best efforts, is appraised against overall aspects, including legislation and regulation in place and the behavior of the authorities. Accordingly, a court may combine in a single assessment the quality of the legislation and regulation, the capacity of the authorities to enforce these norms, the remedies available, and the means by which these remedies were pursued. In essence, the due diligence doctrine, in both international law and international human rights law, requires "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances".[359]

1.5 - Obligation to Afford Reparation

79. The obligation to afford reparation as a consequence of a breach of international obligation - a tenet of public international law[360] - has been progressively recognized as an obligation to provide reparations vis-à-vis the individual.[361] The UN Basic Principles on the Right to a Remedy and Reparation, focusing on the most egregious violations, sets an important normative framework.

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[358] ILA, "Study Group on Due Diligence in International Law". Second Report: Tim Stephens (Rapporteur) and Duncan French (Chair), July 2016, 2.

[359] Alwyin V. Freeman, "Responsibility of States for Unlawful Acts of their Armed Forces," *Collected Courses of the Hague Academy of International Law*, 88 (1955-II), 277-278. Some arbitration awards, have requested the "democratic state" expected behavior of States, as in ICSID's *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Case No. ARB (AF)/00/2, (29 May 2003), §177. See also, the ILA, "Study Group on Due Diligence in International Law" (2016): "[r]ather than posing answers to questions of breach, due diligence instead tends to inquire whether States have taken reasonable and appropriate steps to avoid or mitigate injury…" (at 3).

[360] PCIJ, *Chorzów Factory* (Jurisdiction) *(Germany v. Poland),* 26 July 1927, Series A, no. 9, 21, reinforced by the ICJ in *LaGrand* (Merits) (*Germany v. United States of America),* 27 June 2001, § 48. It remains uncontested nowadays that a violation of human rights law consists of an internationally wrongful act, see: Heidy Rombouts, Pietro Sardaro and Stef Vandenginste, "The Right for Victims of Gross and Systematic Violations of Human Rights", 363.

[361] ILC, *Commentaries on State Responsibility Draft Articles*, stating that individuals should be regarded as the "ultimate beneficiaries" and right holders of the obligation to afford reparations for the breach of human rights treaties. (Article 33) UN Doc. A/56/10. See further: Ricardo Pisillo Mazzeschi, "Reparation Claims for Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview," *Journal of International Criminal Justice*, 1, no. 2 (2003): 339-347; Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (Oxford: Oxford University Press: 2015), 14.

However, this positive obligation transcends the material scope of these guidelines and is applicable whenever any breach of human rights treaty is a result of an act attributable to the State.[362] In this context, the HRCttee makes it clear that the obligation to provide reparations is an inseparable part of the general duty to redress under the ICCPR:

> [w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged.[363]

The CESCR, in the same vein, has clearly stated that victims of ESCR are entitled to reparations under the ICESCR[364] as a component of the general duty of the State to afford redress for victims of ESCRs.

The IACtHR, for its part, deduces this State obligation from the relevant principle of international law.[365] This Court also relies on the strong wording of Article 63.1 ACHR to yield a generous case law on reparations.[366] Comparatively, the European

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[362]See: Brigitte Stern, "The Obligation to Make Reparation," in *The Law of International Responsibility*, eds. James Crawford et al. (Oxford: Oxford University Press, 2010), 563, noting the applicability of this secondary obligation "in all legal systems", besides international law. Similarly, Schabas, as regards the European system, in *The European Convention on Human Rights – A Commentary* (Oxford: Oxford University Press, 2015), 836. The IACtHR held: "reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage": *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile.* Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, § 411.

[363] HRCttee, *General Comment No. 31*, § 16. The paucity of explicit provisions on reparations in contemporary treaties, such as the ICCPR's Article 9.5 (compensation for unlawful arrest); the CED's Article 24.4 (compensation and reparation); and the CAT's Article 14 (compensation and rehabilitation)) do not undermine the existence of such an obligation across the board. See also, Heidy Rombouts, Pietro Sardaro and Stef, Vadeginste, "The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights", 368-369.

[364] CESCR, *e.g. General Comment No. 14 - The Right to the Highest Attainable Standard of Health,* UN Doc. U.N. Doc. E/C.12/2000/4, § 21 (availability and accessibility of appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational and prevention programs); CESCR*, General Comment No. 24*, §§ 40-41 (in the context of violations from business enterprises).

[365] IACtHR*,* e.g. *Case of Caballero Delgado and Santana v. Colombia. Reparations and Costs. Judgment of January 29, 1997*. Series C No. 31, § 15, (explaining that Art. 63.1 ACHR, as interpreted by the Court, is based on the case law of the ICJ and of the PICJ). In *Baena Ricardo et al. v Panama*, the IACtHR has elaborated on its implied competence to supervise the enforcement of its judgments. Judgment of November 28, 2003. Series C No. 104.

[366] ACHR, Article 63.1: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." See comments in: Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2013), 233-34.

Court relies on a specific procedure by CoE's Council of Ministers to monitor the execution of its judgments, which makes it less compelling to elaborate in detail the modalities of reparations in its judgments.[367]

Hence, the obligation to afford reparations does form part of the general scope of the duty to redress, particularly when international monitoring bodies emphasize that remedies should be real, adequate and effective.[368] Despite the subsidiary nature of these bodies, and the primary responsibility of States to provide redress domestically, [369] the practice arisen from the relevant case law provides an authoritative legal source and has consistently influenced domestic courts. The following section will further examine the modalities of reparations that have been awarded by these international bodies.

80. Given the generic nature of the very term of reparations, [370] the scope of a relevant positive obligation is considerably variable, relying greatly on the specificity of a treaty provision or a tribunal award in a concrete case. International human rights adjudication has to a considerable extent applied the different types of reparations arisen out of general internationa law or derived variations from the relevant general principles, which are analyzed in this section.

1.5.1 - Non-Pecuniary Measures

81. A series of reparations of a non-pecuniary character have been awarded or recommended by international litigation mechanisms, as follows.

Restitution measures entail a duty to reinstate the victim to the status that *would* have existed before the violations, which is regarded as a preferred measure that should be

[367] As early as in 1984, the Committee of Ministers of the CoE adopted a recommendation in order to strengthen Article 13 ECHR, by affirming: "[r]eparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule." Recommendation No. R (84) 15.

[368] Shelton, *Remedies in International Human Rights Law*, 17.

[369] Note the important remark that the IACtHR makes in *Gómez Paquiyauri Brothers v. Peru* on the matter. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, § 75.

[370] See, IACtHR, *Case of Garrido and Baigorria v. Argentina*. Reparations and Costs. Judgment of August 27, 1998. Series C No. 3, § 41. Compare with the ECtHR's understanding by which, given the declaratory nature of its judgments, it is, in principle, incumbent upon the State concerned the choice of the means to repair a violation. Exceptionally, due to the gravity of the violation or its systemic implications, specific forms of reparations are ordered as in e.g. *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV.

attempted in the first place.[371] These measures include return of property,[372] restoration of personal liberty,[373] reinstatement of a person's employment,[374] retirement benefits,[375] and of political rights.[376] The Inter-American system has remarkably embraced the relevant *restitutio integrum* paradigm,[377] at the same that it recognizes that it represents "only one way in which the effect of an international unlawful act may be addressed".[378] Moreover, States show certain hesitance to this modality[379] in view of structural measures implied in this modality.[380]

The broad range of measures of *satisfaction* are aimed at repairing the moral damage sustained by the victims by *i.a*. acknowledgement of their suffering and reaffirming their dignity or by rebuilding the social tissue of the affected community[381] and by acknowledgement of responsibility,[382] apologies,[383] memorials,[384] or the mere finding

[371] The *Factory at Chorzów* judgment remains authoritative in this regard. See also Shelton, *Remedies in International Human Rights Law*, 298.

[372] See, UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, Principle 16, stating restitution programs should be broadly protective and extend to a wide range of tenants, occupiers and owners. UN Doc. E/CN.4/Sub.2/2005/17(28 June 2005). In domestic practice, see, the Colombian Victims and Land Restitution Law (2012).

[373] ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202-203 ECHR 2004-II. This Court, exceptionally has considerably reduced the State's scope of discretion, as it held that the violation "by its very nature (…) does not leave any real choice as to the measures to remedy it".

[374] IACtHR, *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, §124.7.

[375] IACtHR, *Case of Loayza Tamayo v. Peru.* Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, § 8.

[376] IACtHR, *Case of López Mendoza v. Venezuela*. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, § 217 (restitution of the victim's right to run for candidate).

[377] IACtHR, *Case of Velázquez-Rodríguez (Reparations)*, § 26. Even the ECtHR, modest in reparations approach, has at times reaffirmed the *restiutio in integrum* principle e.g. *Ilaşcu v. Moldova and Russia* [GC], no. 48787/99, § 490, ECHR 2004-VII.

[378] Former Judge Sérgio García Ramírez has underscored that, to restore the state of things after a violation is an impractical idea, given the indelible experience of certain (grave) violations, in: *Reparaciones de Fuente Internacional por Violación de Derechos Humanos*, UNAM Working Paper, 142. Available at [http://www.corteidh.or.cr/tablas/r29012.pdf], accessed on 7 February 2019.

[379] Pietro Sardaro, "Serious Human Rights Violations and Remedies in International Human Rights Adjudication" (PhD diss., Katholieke Universiteit Leuven, 2007). 298.

[380] See discussion in Chapters 5 and 8 on the limitations of the restitution measures in the context and equality and non-discrimination.

[381] Gina Donoso, "Inter-American Court of Human Rights' Reparation Judgments. Strengths and challenges for a comprehensive approach," *Revista IIDH* 49 (2009): 65.

[382] IACtHR, *Case of Guerrilha do Araguaia v. Brazil*, § 277.

[383] IACtHR, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150**.** § 34.

[384] IACtHR, *Case of Kawas Fernández v. Honduras.* Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, § 206.

of a violation itself.[385] Re-opening of cases, however, has been awarded with parsimony by international human rights bodies, in view of the obstacles to re-discuss the related issues at a moment much later than the events.[386]

The measures of *guarantees of non-repetition*, for their part, are designed to rebuild public confidence and to restore the social tissue itself, somewhat beyond an individual approach only. They include a wealth of actions, such as legal reforms[387], training programs for judges[388] and prison officers[389] and the creation of a website designed to search disappeared children[390]. Measures under this type transcend the traditional concept that human rights apply to "particular and identifiable individuals" [391]. The Inter-American system, for instance, has taken a strong stand on the matter, reiterating that "[t]he American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention"[392].

The *measures of rehabilitation* serve the purpose of recovering the victim's physical or emotional status in order to overcome the harm sustained,[393] particularly for serious

[385] For instance, in *Olmedo Bustos and Others v. Chile* the IACtHR, on prior censorship of a film (§ 99). Similarly, the European counterpart frequently rules that the judgment itself is a form of reparation, except in cases "where it is satisfied that the loss or damage complained of was actually caused by the violation it has found" (e.g. in *Lagardere v. France* (2012), § 72.) Commentary: Heidy Rombouts, Pietro Sardaro and Stef, Vadeginste, "The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights" in *Out of the Ashes*, p. 394. In *Myrna Chang v. Guatemala*, the IACtHR, in view of the gravity of the violations, deemed other forms of reparation necessary.

[386] Sardaro, "Serious Human Rights Violations and Remedies in International Human Rights Adjudication", 308, commenting that this reparation measure has not been completely excluded from the ECtHR's docket. See, for instance, *Balažoski v. the former Yugoslav Republic of Macedonia*, no. 45117/08, § 39, 25 April 2013. However, this Court often refers to that possibility, without necessarily ordering a re-trial, see: *Gençel v. Turkey,* no. 53431/99, § 27, 23 October 2003.

[387] IACtHR, e.g. *Case of Castillo Petruzzi et al. v. Peru. Merits*, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, § 222 (repeal of the military jurisdiction for trying civilians); *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 289, § 322 (drawing up of protocols on torture and sexual violence).

[388] IACtHR, *Case of Zambrano Vélez et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, § 157.

[389] IACtHR, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, §149.

[390] IACtHR, *Case of the "Las Dos Erres" Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, § 272.

[391] Pietro Sardaro, "Serious Human Rights Violations and Remedies in International Human Rights Adjudication", 314, speaking of a broad and comprehensive conception of human rights.

[392] *E.g.*, IACtHR, *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, §§ 88 and 130. See also Sardardo, "Serious Human Rights Violations and Remedies in International Human Rights Adjudication", 314-315.

[393] For Shelton, "[t]he psychology of victims requires appropriate mechanisms to confront and process trauma and abuse, facilitating closure rather than repression, recognizing that dealing with grief and

violations.[394] Thus, unsurprisingly, the CAT,[395] the ICED[396] and the Basic Principles on the Right to a Remedy and Reparation (2005)[397] expressly provide for this modality. Supranational organs have also awarded rehabilitation where no relevant treaty provision exists.[398]

1.5.2 - Pecuniary Measures

82. Pecuniary measures, as means of *compensation*, are an assessment of a quantifiable sum in cash awarded to a victim for the damages incurred by a given violation. Within this modality, pecuniary damages entail compensation for the direct economic losses originating from the violation, either in the more concrete calculation of ceasing profits (*lucrum cessans*) or future losses (*damnum emergens*).[399] They include legal assistance, court fees, fines incurred domestically or internationally[400], loss of professional incomes[401] or pension benefits for disappeared relatives[402]. Non-pecuniary damages, in turn, imply a compensation for non-economic losses in the

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anger, as well as rehabilitation of physical injury takes time", in *Remedies in International Human Rights Law*, 394.

[394] Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/65/273 (2015), § 63: "the harm inflicted may be so profound that it shatters the very identity of a person, the ability to feel any joy or hope, to engage with his or her environment, or to find any meaning in life". In *Garcia Lucero v. Chile* (2013), the IACtHR ordered the payment of a sum of money cover the applicant's costs of rehabilitation in the United Kingdom, his current country of residence (§ 233).

[395]CAT, Art. 14. See also CATCttee, *Gerasimov v. Kazakhstan*, communication no. 433/2010. Views of 24/05/2012, UN Doc. CAT/C/48/D/433/2010, § 14.

[396] ICED, Art. 5(b).

[397] UN Basic Principles a on the Right to a Remedy and Reparations for Victims, § 18.

[398] HRCttee, *General Comment No. 31*, § 16; IACtHR, *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257, § 326 (considering the serious impact on the victim's psyche of an arbitrary judicial decision prohibiting in vitro fertilization).

[399] IACtHR, *Case of Chocrón-Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. Series C No. 227, § 146.

[400] IACtHR, *Case of Dismissed Employees of Petroperú et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344, § 237; ECtHR, *Colombani and Others v. France*, no. 51279/99, § 74, ECHR 2002; HRCttee, *Wilson v. The Philippines*, views of 30 Oct 2003, UN Doc. CCPR/C/79/D/868/1999, § 9.

[401]IACtHR, *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, § 273 (denial of diploma recognition, leading to the impossibility of the legal exercise of profession).

[402] IACtHR, C*ase of Torres Millacura et al. v. Argentina.* Merits, Reparations and costs. Judgment of August 26, 2011. Series C No. 229 (payment of pension benefits to the victim's relatives, until the victim re-appears). Similarly, ECtHR, *Cakici v. Turkey* [GC], Judgment of 8 July 1999, §127, ECHR 1999-IV.

victim's personal conditions[403] on the basis of equity[404]. These include anguish caused by the death[405] or disappearance of a relative[406] or distress due to prison conditions.[407] The IACtHR has devised a specific modality, the *damage to a life plan*, which includes the personal attributes of the victims, options that would lead to self-fulfillment and potential ambitions and goals, which were interrupted by a human rights violation.[408]

2 - The Duty to Fulfill

83. Positive duties can also disclose sets of obligations beyond the prevention and redress of violations originated by private parties, thus not necessarily implying a horizontal effect of human rights. These additional duties imply roles of the State such as assistance in the enjoyment of rights, promotion of and capacity building for human rights and, under specific circumstances, direct provision actions. As mentioned in the Introduction Chapter, the present work will subdivide the duty to fulfill into three sub-duties: duty to facilitate, duty to provide, and duty to promote.

Given the wide variety of obligations that may fall within the scope of this type of State duty, a number of obligations that are remarkably identified, either via treaty provision or through judge made law, are analysed as guise of illustration, in detail in this section.

[403] IACtHR, *Case of Chocrón-Chocrón v. Venezuela,* § 185.

[404] See, for instance, ECtHR's *Abdulaziz, Cabals and Balkandali v. United Kingdom*: "some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof". However, this does not prevent the Court from awarding compensation if it considers that it is reasonable to assume that an applicant has suffered injury requiring financial compensation." Series A no. 94, § 96.

[405] IACtHR, *Case of Luna López v. Honduras*. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C No. 269, § 252 (having particular regard to the brutal manner the relative was shot by the police).

[406] IACtHR, *Case of Torres Millacura et al. v. Argentina*. Merits, Reparations and costs. Judgment of August 26, 2011. Series C No. 229, § 195.

[407] ECtHR, *McGlinchey v. United Kingdom,* involving the death of a prisoner after sustain asthma and drug withdrawal syndrome. The Court awarded 22,900 Euros for moral damages since it considered that the State's disregard to the victim's condition contributed to her distress and pain (no. 50390/99, ECHR 2003-V).

[408] IACtHR, *Loyaza Tamayo v. Peru*. Reparations, §§147-148; *Case of Zegarra Marín v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 15, 2017. Series C No. 331, §§ 223-224. Occasionally, the ECtHR has referred to a similar approach, *e.g.* in *Thlimmenos v. Greece* [GC], ECHR 2000-IV, § 70.

2.1 - Duty to Facilitate

84. The duty to facilitate, in broader terms, implies that the State takes positive measures in order to enable or assist individuals in the *de facto* realization of their human rights. The underlying rationale is that rights cannot render effective solely by the enactment of laws, regulation, monitoring or redress. In addition, there is also a need to put inplace proactive measures from the State to *create institutional machinery* for the realization of rights.[409]

2.1.1 - General Measures

85. The duty to facilitate encompasses a broad spectrum of obligations, of an indefined scope. Through relevant practice, the CESCR has not prescribed specific measures, but has allowed the adoption of measures to fufill with this duty according to relevant national contexts. On the right to social security, for example, it has recommended the adoption of a social security strategy and a plan of action[410]. On cultural rights, it has underscored the creation and support of public institution, relevant cultural infrastructure and financial assistance[411]. Similarly, this Committee has recommended to adopt action plans to combat poverty[412]. When a given policy has been already adopted, this Committee may recommend the relevant effective implementation at the State party's choice[413].

86. Arguably, human rights of civil and political nature also presuppose the "creation of institutional machinery" for the realization of rights[414]. Within this machinery, there is indeed the obligation to adopt legislative measures to give effect to the provisions of a treaty given the non-self executing nature of a treaty, depending

[409] Magdalena Sepúlveda, *The Nature of State Party Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 240.

[410] CESCR, *General Comment No. 19, The Right to Social Security (art. 9)*, adopted on 4 February 2008, UN Doc. E/C.12/GC/19, § 48.

[411] CESCR, e.g. *General Comment No. 21: Right of Everyone to Take Part in Cultural Life, adopted on 21 Dec. 2009*. UN Doc, E/C.12/GC/21, § 52.

[412] CESCR, Concluding Observations on the Dominican Republic (2016). UN Doc. E/C.12/DOM/CO/4 (CESCR, 2016), § 49 (a).

[413] CESCR, Concluding Observations on Angola (2016). UN Doc. E/C.12/AGO/CO/4-5 (CESCR, 2016), § 32.

[414] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary **(**Kehl am. Rhein: N.P. Engel, 2005), 38.

on a given domestic constitutional and legal architecture.[415] In general, States enjoy an ample margin of discretion on the means of implementation the relevant measures. The compliance with these obligations is checked against the effectiveness standard on a case-by-case basis.

2.1.2 - Specific Measures

2.1.2.1 - Establishment of Judicial and Law-Enforcement Institutions

87. Specifically on the rights to life and personal integrity, the ECtHR makes a clear point that criminal-law provisions with a deterrent effect should be backed-up by a "law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[416] The rationale intuively entails a proper functioning of the judicial and law enforcement apparatus by the proper functioning of courts, police departments, and other organs, in order to ensure appropriate redress for violations committed by public authorities themselves or by private entities.

2.1.2.2 - Recognition of Civil Statuses

88. The duty to fulfill/facilitate has also been construed as to imply the obligation to recognize legal statuses of individuals, consisting of one of the most basic functions of the State. The rights to legal personality and to a name, textually prescribed in some human rights treaties (Articles 6.1 ACHPR; 3 ACHR; 18 ACHR and 24.2 ICCPR), and also a right to a nationality (Article 15 UDHR and Article 20

[415] For instance, under Article 2 of the ACHR and Article 2.2 of the ICCPR. According Cecilia Medina Quiroga, States should develop in their legislations those rights that, vis-à-vis international law, require the necessary precision, in order to be applied by the organs of the State, in *La Convención Americana: Teoria y Jurisprudencia, Vida, Integridad Personal, Libertad Personal Debido Proceso y Recurso Judicial* (Santiago: Centro de Derechos Humanos – Facultad de Derecho Universidad de Chile, 2003), 24-25. See, e.g. *Case of Valencia Hinojosa et al. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 29, 2016. Series C No. 327, § 118. For Marc Bossuyt, a treaty can be only deemed self-executing if it (a) is self sufficient (if a treaty or a provision thereof "give[s] an answer valid for all States parties); and (b) does not require to be incorporated into domestic law, according to the pertinent constitutional regime, in "The Direct Applicability of International Instruments on Human Rights (With Special Reference to Belgian and U.S. law)," *Revue Belge du Droit International* 15 (1980): 318.

[416] ECtHR, *Makaratzis v. Greece* [GC], no. 50385/99, § 57 ECHR 2004-XI; *Valiulienė v. Lithuania,* no. 33234/07, § 74-77, 26 March 2013. Similarly, IACtHR states that the States are under the duty to "organize the governmental apparatus, and, in general, all the structures through which public power is exercised", as in *Velásquez Rodríguez v. Honduras,* Merits, §166 and *Gomes Lund*, §140.

ACHR), in fact enable an individual to enjoy a number of other rights.[417] The civil registration of an individual, in this context, represents the fundamental legal bond between an individual and a State.

Likewise, the right to marriage (ICCPR, Article 23.2; ACHR, Article 17.2, and ECHR, Article 12) implies an obligation to officially register the relevant this status order to make it enforceable under national law.

2.1.2.3 - Holding of Periodic Elections

89. Another example of an obligation in this regard is enshrined in Article 3 of Protocol 1 ECHR, which mandates signatory States to hold *free elections* at reasonable intervals by secret ballot. The ECtHR was called to interpret this provision soon after the entering into force of this Protocol, in *Mathieu-Mohin and Clerfayt v. Belgium* (1987). The main point in the case was the method of appointing representatives of the Flemish Council. This Court's reasoning was that mere abstention of the States for the compliance if this rights may not suffice. Rather, it held:

> "the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections".[418]

While this broad pronouncement of the ECtHR stipulates a general duty to organize elections, particular circumstances are taken in consideration according to the specific case.[419]

90. In the context of equality and non-discrimination, the duty to facilitate main conote the implementation of specific policies to assist certain clusters of individuals who face *de jure* or *de facto* obstacles to enjoy their rights on equal footing. It will be

[417] The ECtHR does not contain similar provision, but regards it as a "means of personal identification and a link to a family" and "the right to establish relationships with others" under Article 8 ECHR, see: *Burghartz v. Switzerland,* 22 February 1994, § 24.

[418] ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 50, Series A no. 113. In *Shindler v. the United Kingdom* (2013), the ECtHR reaffirmed the *effet utile* on this right, as it held that "Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system" (§ 99).

[419] E.g. in *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 71, ECHR 2012, regarding the right to vote for expatriates.

seen in Chapter 5 (Section 2.1) that States may be obliged *e.g.* to recognize in their civil registration systems an individual perceived gender or same-sex civil statuses, to put in place temporary special measures, to implement reasonable accommodation or accessibility measures or to produce equality data. In Chapter 8 (Section 2.1), it will be seen, in the same vein, that treaties and case law may impose obligations to recognize traditional lifestyles of certain ethnicities, to provide (racial) temporary special measures, to elaborate racial equality data or to put in place measures to facilitate documentation or registration of some discriminated groups.

2.2 - Duty to Provide

91. The duty to provide is a component of the tripartite typology of duties designed for individuals who are unable to realize rights for themselves. In general terms, its scope is reduced even in the practice of the CESCR that avoids expansive interpretation of this duty beyond the ICESCR's text. The ICESCR itself does not impose an obligation of provision across the board, which led the CESCR to be careful in not often requiring from States measures implying direct assistance[420]. Such an obligation is justifiable when individuals fail to realize rights autonomously, due to reasons beyond their control.[421]

92. It is arguable that civil and political rights can be conceived as requiring this duty under exceptional circumstances, mainly owing that the object and purpose of the pertinent treaties do not offer significant room for obligations of provision.[422] A few provisions, explicitly on the right to legal counsel and the right to an interpreter in criminal cases[423] and case law establishing an obligation to provide legal aid in civil cases, ensure equitable litigation.[424] Regarding prohibition of ill-treatment, the HRCttee held Cameroon in violation of Articles 9 and 9 of the ICCPR for failing to provide minimum hygiene conditions in the applicant's cell in *Mukong v. Cameroon*

[420] Magdalena Sepúlveda, *The Nature of State Party Obligations under the International Covenant on Economic, Social and Cultural Rights*, 242.

[421] Ibid.

[422] Such an approach in both types of rights helps decrease an overrated contrast between these two types, in normative terms.

[423] ICCPR, Article 2(d) and 2(f); ACHR, Article 8.2 (a) and 8.2 (d); ECHR, 6.3(c) and 6.3(e).

[424] See, *Steel and Morris v. the United Kingdom*, no. 68416/01, ECHR 2005-II, applying this obligation to civil cases.

(1994). This Committee argued further that States could not seek exoneration of this obligation alleging an underdeveloped stage of their economy.[425]

93. In this regard, claims involving this type of obligation are tempered by monitoring bodies with considerations of allocation of public resources and choices of means of implementation. Such arguments frequently lead to self-restraint by these bodies through a polycentric attitude, thus affording a wide margin of appreciation to national authorities[426].

94. However, the duty to provide has an important equality component, given its very objective of enabling individuals to realize their rights. Accordingly, its scope is considerably larger in cases involving claims for substantive equality. Chapters 5 (on discrimination in general) and 8 (on racial discrimination) will proceed with a careful and detailed analysis of this type of duty.

2.3 - Duty to Promote

95. An important component of the realization of human rights is the knowledge and the skills required from State agents oversee their own arbitrary actions (duty to respect). Education of private actors on human rights issues can also have a direct impact on the reduction of violations caused by them (duty to protect). Additionally, raising awareness of the population at large on the respective rights and avenues of redress has an overall potential in the improvement of the realization of rights of a given society. The duty to promote human rights has gained increased importance among scholars, case law and, more recently, treaties.

The UDHR speaks of a duty to ensure education as a means to strengthen respect for human rights[427]. In the same vein, scholars have imparted that the duty to promote

[425] HRCttee, *Mukong v. Cameroon*, views of 10 August 1994. UN Doc. CCPR/C/51/D/458/1991. See Chapter 5 (Section 2.2.2) on the duties imposed as regards persons under the custody of the State.

[426] See, e.g. *Sentges v. The Netherlands* (2003), No. 27677 (inadm.); *Costache v. Romania* (2012), no. 25615/07 (inadm.); *Strzelecka v. Poland*, no. 14217/10 (inadm.), § 52. Further reading, Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 226-227.

[427] UDHR, Article 26. See also VDPA, §§ 79 and 80; and the World Programme for Human Rights Education (UNGA Resolution 59/113 A).

involves long-term goals to set training programs for government staff.[428] Or, in a broader sense, this obligations requires States to bring about "changes in public consciousness or perception or understanding about a given problem or issue".[429]

It was only six decades after the adoption of the UDHR that the UNGA adopted the United Nations Declaration on Human Rights Education and Training (UNDHRET) in 2011, comprising "educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights"[430], in specific education, training, information, awareness-raising and learning activities. Under Article 7 thereof, it is the primary responsibility of States to "to promote and ensure human rights education and training, developed and implemented in a spirit of participation, inclusion and responsibility".[431] To comply with this obligation, a safe and enabling environment should be created by the authorities for the engagement of private sector, civil society and relevant stakeholders[432] with the maximum of the available resources.[433] Education and training should be provided for public servants, such as military personnel, judges, law enforcement staff, teachers, and educators in a broader sense.[434]

96. This very duty, however, is not prescribed in the general human rights treaties, but appeared progressively in the specialized ones[435]. The HRCttee has underscored that "it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large" regarding all rights[436]. The CESCR, for its part, has reinforced this duty via General Comments,

[428] Fried, J.H. Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights": A Rebuttal to Some Traditional Views," in *The Right to Food*, eds. Katarina Tomasevski and Philip Alston (Leiden: Martinus Nijhoff, 1984) 106-108.

[429] Henri Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2000)**,** 184.

[430] UNDHRET. Art. 2.1. See, within the OAS, the Declaration on Human Rights in Formal Education in the Americas, Res, AG/RES. 2604 (XL-O/10).

[431] UNDHRET, Article 7.1.

[432] Id., Article 7.2.

[433] Id., Article 7.3.

[434] Id., Article 7.4.

[435] Article 10.1 of the CAT, Article 7 of the IACPPT and Ariticle 23.1 of the ICAED. See, Jan H. Burgers and Hans Danelius, The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment (Dordrecht: Martinus Nijhoff, 1988), 141.

[436] HRCttee, *General Comment No. 31*, §§ 5 and 7; *General Comment No. 21: Humane Treatment of the Persons Deprived of Liberty*, adopted on 10/04/1992. UN Doc. HRI\GEN\1\Rev.1 at 33**,** § 7.

e.g. on right to work, requiring the undertaking of promotional and informational programs to inculcate awareness in the population.[437] On the knowledge of the ICESCR itself, it has been recommended for States to offer training to judges, lawyers and parliamentarians on the possibility of invoking the pertinent provisions before domestic courts.[438]

Human rights litigation has only recently openly proclaimed the existence of this type of obligation in the context of the use of lethal force by security agents, according to the strict necessity of interference, where a typical obligation to abstain is applied.[439] This is a demonstration of the close interrelateness between positive and negative obligations. Unequivocally, in *Abdullah Yilmaz v. Turkey* (2008), the ECtHR recognized a positive obligation under Article 3 (such as in Article 2) ECHR to train officials of law enforcement duties "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".[440]

97. The duty to promote takes a wider scope and more varied form than its general scope in the context of equality and non-discrimination, including a more precise content of awareness-raising in order to combat stereotypes and specific training of State officials to deal with specific vulnerable groups (*e.g.*, women, children, immigrants, racially discriminated groups). It will be seen in Chapter 5 (Section 2.3) that a prominent body of law has been produced by the specialized equality bodies, such as the CEDAWCtee and the CRPDCtee, given the existence of explicit provisions in their respective conventions. Likewise, in Chapter 8 (Section 2.3) bodies like the CERD and ECRI have also elaborated substantially on the matter.

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[437] CESCR, *General Comment No. 19 – The Right to Work*, adopted on 06/02/2006, UN Doc. E/C.12/GC/18, § 28.

[438] CESCR, Concluding Observations on Honduras (2017). UN Doc. E/C.12/HND/CO/2, § 6.

[439] ECtHR*, McCann and Others v. the United Kingdom*, 27 September 1995, §§ 211-214, Series A no. 324.

[440] ECtHR*, Abdullah Yilmaz v. Turkey* no. 21899/02, § 57, 17 June 2008, including training of officials in penitentiary institution in view of the absolute prohibition of torture and of the prevention of ill-treatment in custody. See also *Davydov and Others v. Ukraine,* nos. 17674/02 and 39081/02, § 268, 1 July 2010; and *Tekin and Arslan v. Belgium*, no. 37795/13, §§ 95-98, 5 September 2017.

Concluding Remarks

98. Overall, positive obligations, as seen through their diverse forms in this chapter, do not introduce any significant novelty in international law. Rather, they encapsulate ordinary states functions, such as dispensing justice and the obligation to afford reparations and assistance for the enjoyment of rights as well as promotion, training and awareness-raising about human rights.

99. Through the different monitoring bodies, positive obligations were approached differently, which is arguably due to the different legal cultures, particularly between the regional courts and to their different objectives and working methods. For instance, the *Velásquez-Rodríguez*, a celebrated case by the IACtHR for emanating the well-known due diligence doctrine in international human rights law, does not differ in essence from the homologous *Osman* in the European context. Likewise, the approach taken by the HRCttee on the duty to protect in *General Comment No. 31* is largely similar to the content enunciated by the regional courts. Whether one does or does not call it the basic duty to prevent and redress private abuse as due diligence or otherwise has no practical implications. In this regard, an important focus of synergy between the several monitoring bodies research has been identified.

Similar principles were also recognized in the ramifications on the general duty to protect. The several monitoring bodies researched have similarly recognized basic obligations, such as to enact legislation with a deterrent effect and to monitor and regulate private activity. The obligation to provide information with a preventive character has been explicitated to a larger extent by the ECtHR, but underlying principles are also found in the Inter-American context.

100. An important level of cross-polinization among the different systems was found, particularly by the fact that the monitoring bodies of general treaties borrow concepts from specialized treaties to interpret the provisions of the former. But also among the general treaties, cross-referencing is not negligible. Since their early stages, the IACtHR and AfCtHPR frequently refer to other systems. More recently, the ECtHR has shown openness to case law and materials from outside Europe.

With regards to the obligation to redress violations, the ECtHR, differing from its counterparts, has established a more nuanced approached on the required procedural avenues (criminal, civil or administrative) of redress. This difference can be attributed to a much more varied docket at the ECtHR than its counterparts, thus requiring the

Court to specify what are the required procedural means of redress. However, it could be noted that the effectiveness standards applicable to the obligation to carry out criminal investigations are broadly similar, using the same criteria. Different approaches are a result of regional specificities dealt with by a given system, such as the IACtHR's strong stance on impunity and the ECtHR's pilot-judgment procedure. The HRCttee, for its part, has shown hesitance in referring to external treaties and case law.

The provision of reparations as a positive obligation emanating from human rights monitoring bodies does not differ from the general duty under international law, including the modalities of reparations afforded (restitution, compensation, satisfaction etc.). The IACtHR, with a prominent practice on reparations, profits from a pertinent wider scope given by the ACHR itself.

The obligations related to the duty to fulfil/facilitate and fulfil/provide and fulfil/promote, in this general context, have a modest scope. Their scope is more expressive in the area of equality and non-discrimination, as will be seen in Parts II and III, given their very objective of supporting (vulnerable) individuals in enjoying their rights.

Chapter 3 – Delimiting the Scope of Positive Obligations in General

Introduction

101. In order to keep the promise of rendering rights practical and effective rather than theoretical and illusory, the various instances where positive obligations apply must be understood within a manageable scope. Consisting mainly of judge-made law, unpredictability, in normative terms, may risk legal certainty by neither providing States with safe guidance on what is required from their part, nor by informing applicants on realistic expectations on the relevant outcomes. Aiming to address this core objective, this Chapter will analyze the different forms by which the scope of positive obligations is delimited. It will consider a number of areas of concern in which positive obligations develop and should be conceived within a manageable scope, thus consistently indicating both the clear parameters engaging State proactive responsibility and the corresponding boundaries.

102. To begin with, the pace by which new obligations are recognized through an evolutive interpretation is of central relevance. A dilemma is posed in this regard. Should international mechanisms be placed at the forefront of emerging social phenomena, anticipating trends, and risking imposing unnecessary duties upon States? Or should courts, for the sake of certainty, await more consolidated scenarios, without being standard setters at the cost of ineffectiveness? This point of departure is dealt with in Section 1. After some preliminary considerations on the question of the pace of evolution itself (Section 1.1.) and on the quest for legal certainty in the context of evolutive interpretation (Section 1.2), this chapter will deal with in more detail on the methods used by international courts to mark a departure from a previous understanding in order to read "new" positive obligations in a treaty (Section 1.4). Another important method to delimit the scope of positive obligations is the comparison of the pertinent treaty and case law with domestic practice of Member States (internal comparison) and with other systems abroad (external comparison). Beyond a theoretical overview on these matters, one must bear in mind the practical implications of expanding the normative scope of a treaty with positive obligations. In this regard, this study finds relevant parameters such as the semantic scope of a right (Section 1.4.1); the impact of new social phenomena on the enjoyment of rights, vis-

à-vis the existing obligations (Section 1.4.2); and the extrapolation of civil and political rights treaties to economic, social and cultural rights (Section 1.4.3).

103. Other factors not related specifically with substance, which delimit the scope of positive obligations have gained prominence in the international case law, deserve a careful analysis in this Chapter. The element of knowledge, triggering State responsibility to act, is by no means absolute or static. Instead, the *ought to have known* standard requires a contextual evaluation, also in view of practical constraints and the foreseeability of the involved risks. Besides a straightforward direct knowledge, international case law has dealt the complex questions of risks (indirect knowledge), particularly in cases involving (dangerous) activities or when dealing with statistics and indicators. The pertinent questions and contours of these parameters will be analyzed in Section 2.

104. Further, the intensity of the impact sustained is another area that can arguably define actionable thresholds for proactive measures, which also ascertains the scope of obligations to prevent or redress a given violation. This factor will be dealt with in Section 3. This factor has been significantly applied in cases requiring positive obligations with respect to new social concerns, such as the environment.

105. Subsequently, Section 4 will concentrate on the proportionality assessment by domestic authorities and relevant judicial supervision. This is an area permeated by intense evolution, through case law and doctrinal debates. Section 4.1 will provide the reader wit a preliminary theoretical insight on a possible prevalence between positive a negative obligations. The use of the limitation clauses of human rights treaties, originally conceived for negative obligations, is a core contentious matter involving the several propositions to analyze positive and negative obligations through similar parameters (Section 4.2). The margin of appreciation doctrine, also object of heated debates in both doctrine and judicial practice, is a factor that delimits the scope of the positive obligations or that guides justifications for (non)compliance these obligation. This docrine will be analyzed in the context of the new debates about the ECtHR's subsidiarity role, coupled with the shared responsibility with domestic actors, through which this Court has increasingly required qualified procedural assessments by national authorities (Section 4.3).

1 – Delimiting the Scope of Positive Obligations through Treaty Interpretation

106. Positive obligations in civil and political right treaties have been significantly read through evolutive interpretation. It was seen in Chapter 1 that evolving interpretation does not entail any specialty of human rights treaties, but it is a common feature of the VCLT itself. However, in order to enhance legitimacy, human rights courts must demonstrate in clear and reasonable terms the recognition of obligations in order to maintain the *Zeitgeist* of a treaty. Logically, the pace by which new obligations are recognized for the sake of improving a treaty effectiveness comes into play in this context, as it follows.

1.1 - The Question of the Pace of Evolution

107. As seen in Chapter 1, a strict rejection of evolving interpretation of human rights treaties has lost its prominence in the legal doctrine. Yet, criticism persists on the risk of forcing the pace of evolution, case in which a court's adjudicatory credibility would be put in question. For Merrills, an international court may risk acting in undue judicial activism by anticipating or encouraging current trends rather than embracing the treaty's consolidated social developments.[441] Thus, the heart of the debate is not about the interpretative method itself[442] but about the risk of hasty recognition of new social developments that would impose undue positive obligations. Therefore, a justifiable degree of judicial activism is the one that interprets the relevant human rights treaty *pari passu* with social developments.[443] Conversely, excessive judicial restraint risks rendering the relevant treaty socially obsolete by not taking stock of the present time conditions.

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[441] John G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed. (Manchester: Manchester University Press, 1983), 80; Frédéric Vanneste, *General International Law before Human Rights Courts* (Antwerp: Intersentia, 2010), 251, pointing out that, both ECtHR and IACtHR, at times, might find themselves "anticipating developments before they have occurred"; Paul Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism," *Human Rights Law Journal* 19, no 1 (1998): 12; Luzius Wildhaber, "The European Court of Human Rights in Action," *Ritsumeikan Law Review*, 21(2004): 85, for whom, it is not the ECtHR's role to "engineer changes in society." See also, George Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 68-74.

[442] Vanneste*,* in *General International Law before Human Rights Courts*, admits that "[a]s long as evolutive interpretation is based on the changing circumstances or the changing context it seems rather unproblematic to reconcile it with the VCLT", 339.

[443] Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp: Intersentia, 2012), notes that the risk of exceeding activism is of judges entering the realm of treaty amendment by being overly creative, 55.

In his seminal 1990 work, Paul Mahoney[444] analyzed the ECtHR's evolving approach as an interplay between judicial activism and judicial restraint. Judge Popović, revisiting and endorsing that work nineteen years later, averred: "a judge's task is to measure and define the application of judicial activism and judicial restraint in the practical world of judicial application,"[445] by also suggestiong a balanced use of both practices, suggesting that the Court should operate in moderate activism.

In fact, maintaining the *Zeitgeist* of a human rights treaty hinges on a number of legal considerations and methods that lend transparency and consistency for a court. They also provide guidance to the parties in litigation and to policy makers dealing with the relevant issues. In what follows, a closer look will be taken into these relevant factors that influence an international court reading new positive obligations in a human rights treaty.

1.2 - The Quest for Legal Certainty within the Evolutionary Approach

108. The search for legal certainty while interpreting human rights treaties evolutionarily when positive obligations are at stake is a main concern since early adjudication. In *Golder v. the United Kingdom* (1975), the ECtHR recognized an implied obligation of access to a court in the ambit of Article 6.1, in view of the applicant's reduced ability to file a civil libel as a prisoner. It made it clear:

> "this is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the sentence of Article 6 para. 1, read in its context and having regard to the object and purpose of the Convention".[446]

This *dictum*, of seminal importance in that regional system, symbolizes the caution involved in the Court's role of filling the normative lacunae[447] of the ECHR, in response to the myriad of future social phenomena unforeseen by the drafters. Filling these gaps would have been impossible without a certain degree of evolutionary

[444] Paul Mahoney, "Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Judicial: Two Sides of the Same Coin," *Human Rights Law Journal* 1, No. 2 (1990): 57-89.

[445] Dragoljub Popović, "Prevailing of Judicial Activism over Judicial Restraint in the Jurisprudence of the European Court of Human Rights," *Creighton Law Review* 42 (2009): 365.

[446] ECtHR, *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18. The Court considered that it would be *inconceivable* for Article 6.1 ECHR to elaborate an entire list of procedural guarantees afforded to the parties, thus necessitating praetorian action to fill this lacuna.

[447] Certainly, filling substantive gaps is a main focus of evolutive interpretation of this Court. For further analysis, see: Daria Sartori, "Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights," *Tulane European and Civil Law Forum* 29 (2014): 47-78.

approach. However, for a court to well manage the pace of evolution in its case law, it needs to elaborate its reasoning in solid terms—either to justify the validity of its current approach as it stands or to justify the need to step further in the meaning of a given provision.

109. The rule of precedent is a pertinent component for this search of certainty. Through evolutive interpretation, an international court should clearly indicate a new understanding of a treaty, which might imply additional duties on the authorities.[448] Public international law does not embrace a radical approach, such as the radical *stare rationibus decisis* that makes previous rulings binding, compared with common-law jurisdictions. Even so, international courts have acted in parsimony in maintaining consistency in their judgments vis-à-vis previous cases.[449]

110. Of course, the issue of precedent is also of importance in the reasoning of the ECtHR. When identifying an occasion of departure from its precedents, the Court frequently uses a well-tailored phrase to state: "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, *without a good reason*, from precedents laid down in previous cases."[450] International courts do not follow a strict protocol in order to inform the departure form a previous understanding. It suffices to expose the current state of affairs in a clear and logical manner and the underlying reasons for the need of a new understanding of a treaty provision.

In *Demir and Baykara v. Turkey* (2008), the ECtHR brought for the first time the right of unions to collective bargaining, within the scope of the freedom to form trade unions. It firstly exposed the current constituent elements of freedom of association and the governing principles under its case law[451]. Thereafter, the Court showed the

[448] Luzius Wildhaber, *The European Court of Human Rights 1998-2006; History, Achievements, Reform* (Kehl: N.P. Engel, 2006), 155.

[449] See, e.g. joint opinion of seven judges in *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections, Judgment) [2004] ICJ Rep 1160, 1208. Further reading: Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement* 2, no. 1 (2011): 5–23.

[450] ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI; *Bayatyan v. Armenia* [GC], no. 23459/03, § 98, ECHR 2011. Commentary: Alastair Mowbray, "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law," *Human Rights Law Review* 9, no. 2 (2009): 179-201.

[451] ECtHR, *Demir and Baykara v.* Turkey [GC], no. 34503/97, §§ 140-145, ECHR 2008. Indeed, reading new rights into a general human rights treaty begs a consequential consideration of the obligations following from them, see: Alastair Mowbray, "The Creativity of the European Court of

insufficiency of the relevant acquis vis-à-vis a wealth of developments on the matter in Europe and abroad, which justified the recognition of collective bargaining in the context of Article 11 ECHR.[452] This important precedent, has however been nuanced in later judments. The Court, in *Tănase v. Moldova* (2010), has in fact proposed a "filter" to the sources it refers to, stating that it up to it to decide which sources it considers relevant and how much weight it should attribute to them.[453] Though the latter case does not appear consistently when this Court integrates new elements from external sources, it may well serve as a precedent to limit the extent to which sources originating form other systems may be considered.

1.3 –Evolutive Interpretation and the Comparative Method

111. The quest for legal certainty also relies on clear and consistent interpretative methods, among which the comparative one plays the most significant role.[454] This method consists in comparing standards, instruments, materials or arguments from external sources[455] that may guide a court's own interpretation[456] in order to ascertain the current stage of State practice (internal or external)[457]. State consensus can be regarded as a form of State subsequent practice under the terms of Article 31.3 of the VCLT in that "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[458] Subsequent practice, however, is an important, but not necessary factor for the interpretation of a treaty.[459] In the European system,

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Human Rights," *Human Rights Law Review* 5, no. 1 (2005): 68, mentioning the careful approach of the Court not to impose undue burden upon CoE States.

[452] ECtHR, *Demir and Baykara v.* Turkey [GC], §§ 147-154.

[453] ECtHR, *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, § 176.

[454] Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union, 165. She further explains that "[w]hen applying this method of interpretation, it is not the text or the purpose of the provision, but the outcome of a comparative study that supports a certain choice of interpretation" (at 112).

[455] Robert Alexey, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Clarendon Press, 1989), 239.

[456] Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, 117.

[457] State practice includes treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations and policy statements. David J., *Cases and Materials on International Law*, 5th ed. (London: Sweet and Maxwell, 1998), 26.

[458] ILC, Yearbook of the International Law Commission 1996, Vol. II, p. 221, § 15.

[459] ILC, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, by Georg Nolte, Special Rapporteur. UN Doc. A/CN.4/660, 14.

consensus is a key determinant of the scope and pace of evolution.[460] In any event, the main challenges for ascertaining the existence of a "uniform, extensive and representative State practice"[461] are the frequent inconsistencies by international courts and the complexities of the case at stake. A closer look into the "internal" and "external" comparative approaches, as follows, will enable one to see in detail both challenges and potentials of each approach.

1.3.1 - Internal Comparison - Convergence Among Signatory States' Domestic Practice

112. The assessment of the consensus among signatory States of a given instrument, which would seem a logical choice of regional systems due to a greater *solidarity* among the States parties to treaties of this nature,[462] is a considerably more frequent practice of the ECtHR.[463] The IACtHR has had a comparatively more modest and contradictory approach on State internal practice, as seen e.g. in *Atala Riffo v. Chile*, revolving around the adoption of a child by a lesbian couple (rejection) and in *Artavia Murillo v. Costa Rica*, regarding in-vitro fertilization and the right to life.[464] In the African practice, consensus is also seldom applied domestic practice as a comparative approach.[465]

113. This practice, however, has been received with a certain degree of criticism, *viz*. that it "consists of a judicial policy of finding a middle ground,"[466] or that it

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[460] See, e.g.: Laurence, R. Helfer, "Consensus, Coherence and the European Convention on Human Rights," *Cornell International Law Journal* 26, no. 1 (1993): 135.

[461] Vanneste, *General International Law before Human Rights Courts*, 264.

[462] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc. A/CN.4/L.682, § 207.

[463] ECtHR, *Van der Mussele v. Belgium,* 23 November 1983, § 32, *Series* A no. 70, taking stock of "the standards prevailing amongst the Member States of the Council of Europe." See comments by Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation," *German Law Journal,* 12, no. 10 (2011): 1743.

[464] IACtHR, *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 23; and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

[465] See e.g., in the ACmHPR's case of *Constitutional Rights Project and Another v. Nigeria.* (2000) AHRLR 235, §26; and *Prince v. South Africa*. (2004), AHRLR 105.

[466] Janneke Gerards, "Judicial Deliberations in the European Court of Human Rights," in *The Legitimacy of the Highest Courts' Rulings*, ed. Nick Huls et al. (The Hague: T.M.C. Asser Institute,

represents a risk of ignoring the individual autonomy in favor of the majoritarian practice.[467] Further, it has been suggested that this method may lead to a selective approach (cherry-picking), varying the importance of the relevant outcomes according to their own purposes[468] by, *e.g.*, downplaying the value of the consensus reached without further assessment, such as the balancing of competing interests.[469] Further, it is doubtful that the object and purpose of human rights treaties are satisfactorily materialized[470] beyond the "middle-ground assessment".

The ECtHR (implicitly) endorsed the "majority approach"[471] in *Demir and Baykara v. Turkey* (2008) by regarding it as a reality that cannot be disregarded when clarifying a provision of the ECHR where other means of interpretation have not provided sufficient level of certainty.[472] This pronouncement has the added value of valorizing the internal consensus (although the Court, at least in theory, deems as secondary[473]).

114. Courts may require external aid to accomplish this complex task[474] or may need to make a clearer assessment on the several national practices.[475] For instance, the steps to assess the quantity and quality of consensus may not be straightforward, leaving doubts on its clear outcomes.[476] Besides cases showing a clear numerical

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2008), 18. *Cf.* John R. St. MacDonald, "The Jurisprudence of the European Court of Human Rights," in *Academy of European Law – Collected Courses* Volume I, Book 2-95 (1992), 124.

[467] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 74. See also Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002), 196; David Harris et al., *Law of the European Convention for the Protection of Human Rights* (London: Butterworths, 1995), 16-17.

[468] Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, 127-128.

[469] For instance, see Vanneste's criticism on the approach taken by the ECtHR in *Odièvre v. France*, *General International Law Before Human Rights Courts*, 276.

[470] Id., 265. For him "consensus must serve the object and purpose of the treaty or will otherwise appear irrelevant".

[471] Expression already used by Helfer, see: "Consensus, Coherence and the European Convention on Human Rights", 159.

[472] ECtHR, *Demir and Baykara v. Turkey* [GC], § 76. For Helfer, "beyond this threshold, the justification for creating a uniform perspective increases." (Ibid).

[473] At the same time, the ILC has noted that subsequent practice, under Article 31.3 (b) cannot be viewed in isolation, but as part of a "single combined operation" with the other elements. See: Draft Articles on the Law of Treaties with Commentary, Yearbook 1966, vol. II, 219-220.

[474] This Court has established a research unit within its Registrar, in order to undertake such comparative research, at the request of the judge-rapporteur.

[475] Evolving that trend, a clear list enumerating the relevant state practices was elaborated, for instance, in ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 32-35, ECHR 2012.

[476] Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", 69.

consensus[477], the absence of such indication poses challenges in ascertaining the precise scope of consensus. Also, questions related to clarity or ambiguity of the consensus may arise when a court compares different sorts of norms for a specific matter.[478] Still, given the novelty or specificity of a claim (and in view of lack of a specific State practice), the consensus may be measured only against the nearest general practice.[479]

115. In any event, some areas of the ECHR in fact remains a focus of unreasoned originalism, such as Article 12 (right to marry), relying strongly on domestic practice. In *Johnston and Others v. Ireland* (1986), the ECtHR refused to recognize an obligation to recognize divorce, arguing that it would distort the original language of that article.[480] The Court resorted to the preparatory works of the ECHR, which deliberately omitted debates on this issue[481]. The Court also refused to compare this case with *Airey v. Ireland* (1979)[482], in which an obligation to provide legal aid in order to facilitate legal separation proceedings was read afresh into Article 8[483]. Yet, it had already stated that a textual omission was not an insurmountable problem, even when it expressly rejects a given interpretation[484]. It took the CoE member States

[477] ECtHR, *Ünal Tekeli v. Turkey*, no. 29865/96, § 61, ECHR 2004-X. Turkey was the last CoE Member State to pass legislation allowing a woman to retain her maiden name after divorce (violation of Article 12).

[478] Vanneste*, General International Law before Human Rights Courts*, 272, referring to the ECtHR's *Evans v. the United Kingdom* [GC]*,* no. 6339/05, § 79, ECHR 2007-I (in vitro fertilization). Similarly, in *Artavia Murillo and Others*, the IACtHR noted different types of norms regulating in vitro fertilization in Latin America, §§ 254-255.

[479] See: *Dickson v. the United Kingdom* [GC], no. 44362/04, § 81, ECHR 2007-V, with joint dissenting opinion of judges Zupančič, Jungwiert, Gyulumyan and Myjer. In *S.H. and Others v. Austria* (2011), while the majority of judges understood that there was only a only a relevant "clear trend" (§ 96), five dissenting judges argued that, already in 1999, when the applicants' case was decided by the Austrian Constitutional Court, a large majority of European jurisdictions allowed any type of assisted fertilization and only eight countries prohibited similar practice, deeming that the majority applied a "particularly low threshold" in the consensus assessment (no. 57813/00, § 8, ECHR 2011).

[480]Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights* (Oxford: Hart Publishing, Oxford, 2004), 170. Further discussion on the case, Kathleen M. Dillon: "Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention of Human Rights at Odds in Johnston v. Ireland," *Cornell Journal of Intl Law,* 2, no. 1 (1990): 64-90.

[481] ECtHR, *Johnston and Others v. Ireland*, 18 December 1986, § 52, Series A no. 112, referring to the report of the Committee on Legal and Administrative Questions, which confirmed that the Consultative Assembly did not mention Article 16.1 of the UDHR in order to guarantee only the right to marriage.

[482] ECtHR, *Airey v. Ireland*, 9 October 1979, Series A no. 32.

[483] ECtHR, *Johnston and Others v. Ireland*, § 57.

[484] ECtHR, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 52, Series A no. 44, concerning the right to leave an association.

three decades to resolve the issue by recognizing the right to divorce in their domestic legal orders[485] . This unreasoned stance failed to acknowledge the emergence of a new development particularly as family affairs has evolved considerably since the 1950s. The literal meaning of Article 12 ECHR remained virtually untamed by the ECtHR, even if its anachronistic heteronormative meaning is challenged by claims of same-sex marriages, as will be further seen in Chapter 6 (§ 261 below).

116. The question of consensus in the European system is intertwined with the margin of appreciation doctrine. When the ECtHR concludes that there is no relevant consensus through domestic practice of Member States, the margin of appreciation afforded to the authorities is often wide. In this hypothesis, the Court does not read a new positive obligation in the ECHR, since it finds that a consensus among the States parties on a treaty provision does not exist or is still insufficient for this purpose. The margin of appreciation doctrine is analyzed in detail in Section 4.3. However, at this stage, it is important to emphasize that this doctrine does not only operate in gauging the stringency level at the proportionality stage, discussed *infra*, but also has an important element of substantive law-making. This is of particular relevance for positive obligations, since the Court in this context takes into consideration questions of resource allocation, legislative choices, policy matters, as well as its own subsidiary role.

1.3.2 - External Comparative Method – Treaties from Other Systems

117. International human rights courts may resort to sources originating abroad (external comparison), such as the literal meaning of human rights treaties outside a courts' competence, status of ratification of these treaties, and case law emanated from other international or national courts. The uniformity of a treaty's text reduces problems on assessing the specific content of the consensus.[486] Some treaties enjoy almost universal ratification, such as the CRC.[487] Regionally, the ICCPR was ratified by all OAS members under IACtHR's competence, while the CAT was ratified by all

[485] Malta, the last country to allow the divorce in Europe, adopted legislation recognizing this right in 2011.

[486] Obviously, when certain provisions are not subject to considerable reservations or declaratory interpretations.

[487] See, *e.g.* ECtHR, *Siliadin v. France*, no. 73316/01, § 87, ECHR 2005-VII; and IACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, § 161.

European States.[488] As will be seen throughout Parts II and III of this study, specific treaties on equality and non-discrimination, defining positive obligations literally in their texts of specialized, can be persuasive as external sources.

118. Reliance on external case law, however, enjoys a somewhat lower status, given that the respective judgments and decisions cannot be regarded as State practice to confirm or refuse consensus.[489] Still, States can adapt their domestic laws and practices to conform to the relevant decisions, creating emerging State practice[490], or a domestic court may strengthen its own reasoning by relying on external case law.

The IACtHR makes far more use of external comparison with its European counterpart, as confirmed in its advisory practice.[491] In a region where jusnaturalism is influential among its international judges, the IACtHR avoids excessive legal positivism[492] in its judgments. This is also due the fact that its docket still concentrates gross violations on matters where domestic practices of the OAS Member States have little to contribute. In any case, this regional contrast is nuanced by the steady attention of the Strasbourg court on external law[493], as reinforced by

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[488] This type of consensus can be regarded as "established rules of international law" or "relevant rules of international law", according to Article 31(3)(c) of the VCLT. See, Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press 2008), 366. See, e.g. *Selmouni v. France* [GC], in which the ECtHR relied upon the CAT to modify its definition of torture under Article 3 ECHR (no. 25803/94, §§ 96-97, ECHR 1999-V).

[489] ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, 18-19. However, the ILA considers that, even binding only upon the parties to the case, external case law has a considerable persuasive force.

[490] Vanneste, *General International Law Before Human Rights Courts*, 288. See *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012 where the ECtHR observes that, after its judgment in the first case (2004), both Constitutional and Federal Courts of the respondent State have made a consistent review of their case laws, according to the ECtHR's *acquis* on right to privacy and freedom of press. Cf. Mark E. Villiger, for whom continuing practice applies to State practice only, in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009), 431.

[491] See, IACtHR, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)".* Advisory Opinion OC-1/82, September 24, 1982, A, No. 1, § 48; and "Juridical Condition and Rights of the Undocumented Migrants." Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18. But also in contentious cases, e.g. *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140 31, 2006, § 124, referring to *Kiliç v. Turkey* and *Osman v. The United Kingdom*, in order to evoke a positive procedural obligation on the right to life.

[492] Ludovic Hennebel, "l'Humanisation du Droit International des Droits de l'Homme**,** Commentaire sur l'Avis Consultatif n°18 de la Cour Interaméricaine Relatif aux Droits des Rravailleurs Migrants," *Revue Trimestrielle des Droits de l'Homme* 59 (2004): 752. *Contra*: Vanneste, *General International Law before Human Rights Courts*, 297.

[493] The speech of the ECtHR's President, in 2001, evidenced the fact that the ECtHR has steadily paid attention in the developments outside Europe. L. Wildhaber, "Speech on the Occasion of the Opening

Demir and Baykara, in which occasion gained renewed importance.[494] More recently, in *Marguš v. Croatia* (2014), the ECtHR, dealing with issues of transitional justice and the validity of (self-)amnesty laws, a frequent topic overseas, made a lengthy analysis of the Inter-American rich practice on this matter and borrowed also insights from other external sources[495]. The HRCttee, as a general practice, is somewhat hesitant to incorporate external sources of law, although, some positive examples are found, as the absortion of the comprehensive concept of discrimination from the CEDAW and the CERD, as seen in Chapter 3 (Section 2.1).

1.4 – Considerations on The Expansive Interpretation in Deriving Unwritten Obligations

119. Besides the doctrinal opinions and methodological approaches involved in ascertaining a new understanding of a treaty under present day conditions that may lead to the reading of a new positive obligation, one must keep in mind the limits of treaty interpretation. In this regard, some considerations on the frequent expansive interpretation of human rights treaties by monitoring bodies, which may entail unwritten obligations, are to be taken into account. Among the several considerations onf expansive interpretation, the following sections will present three of those considerations that are relevant for the purposes of the present study.

1.4.1 - The Extent of the Scope of a Right

120. The first consideration of expansive interpretation involves a question on whether (or to what extent) a given claim for positive obligation falls within the material scope of the relevant treaty. It is an inquiry about the semantic coherence between the nature of a given claim and the extent to which the correspondent treaty

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of the Judicial Year", *Annual Report 2001*, Registry of the European Court of Human Rights Strasbourg, Strasbourg, 2002, 22.

[494] ECtHR, *Demir and Baykara v. Turkey* [GC], § 85.

[495] ECtHR, *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014 (extracts), referring to important regional cases, such as *Gelman v. Uruguay* (2011). See also ECtHR, *Šilih v. Slovenia* [GC], no. 71463/01, § 160, 9 April 2009; referring to the ICTY's *Furundžija* case (1998) and other ad-hoc court. This trend reflects the burgeoning of "hard cases", when ECtHR tends now to turn to the Inter-American court, particularly when non-derogable rights are at stake.

provision is able to protect.[496] This challenge is recurring, as international courts, by entertaining new contemporary debates and social relations, should assess whether a new claim is in accordance with a treaty's object and purpose.

Prior to engaging in the merits phase itself, courts exercise what can be called an *exegetic control*, by which they ascertain if a claim presented before them raises a human rights issue at all. An obvious illustration is Article 8.1 ECHR from which the term "private life" has proven to provide "the most elastic provision" in the last decades,[497] ranging from an individual's personal development[498] and important elements of social relations[499] to claims on environmental protection, homosexuality and transsexuality, reproductive matters, industry regulation, gender, Internet privacy, immigration and family reunion, and disability.

For instance, a "new" obligation to protect one's reputation, which is absent in the ECHR (such as in Article 17 ICCPR), was read for the first time in *Pfeifer v. Austria* (2007), a case involving defamation of the applicant by a magazine.[500] On the other hand, a given specific claim may not fall within the scope of Article 8 in order to meet the particular expectations of the applicant. In *Serife Yigit v. Turkey* (2010), the ECtHR rejected the applicant's aim to have her religious marriage registered by the civil registrar after the death of her partner. At the same time, it recognized that her relationship generally fell within the ambit of Article 8 ECHR. The Court held that Article 8 does not impose an obligation to establish a separate civil regime for specific categories of unmarried couples[501]. Beyond a mere exegetic control, the Court was careful in not obliging the State party to open undue exceptions in the respondent State's Civil Code to meet the applicant's specific expectations.

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[496] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Oxon: Routledge, 2012), 92-93.

[497] Luzius Wildhaber, "The European Court of Human Rights in Action," *Ritsumeikan Law Review,* 21(2004): 84.

[498] ECtHR, *Van Kück v. Germany*, no. 35968/97, § 69, ECHR 2003-VII; *Campagnano v. Italy*, no. 77955/01, § 53, ECHR 2006-IV; *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I; *Özpınar v. Turkey*, no. 20999/04, § 45, 19 October 2010.

[499] ECmmHR, *X v. Iceland*, Decision, 87: "[…] the right to respect for private life [...] comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality". See also: *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, §§ 39-40, 16 October 2008; and *Bigaeva v. Greece*, no. 26713/05, § 23, 28 May 2009.

[500] ECtHR, *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007.

[501] ECtHR, *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 102, 2 November 2010.

In short, an international court may find difficult to construe an understanding that leads to a positive obligation if the applicant's claims may not fall within the general scope of a right.

1.4.2 - The Impact Approach Impact Not Modifying the Scope of a Right

121. A number of claims for positive obligations is read into human rights treaties on the basis of the general impact a given phenomenon may have on the enjoyment of an existing right. This is consequentialist approach.

During the 1990s, when environmental protection was vividly present in social debates, the Strasbourg Court took a proactive stance[502], accepting that environmental imbalances may imply violations of the ECHR. In *López Ostra* (1994), the Court underscored the noxious effects of smell, noise, and smoke produced by a waste treatment facility on the applicant's peaceful private life. Hence, the Court examined whether the authorities had taken significant measures to protect the right to respect for private and family life[503]. In fact, the Court recognized a new interfering factor (environmental pollution) into Article 8 ECHR to be protected by the traditional duty to protect instead of recognizing a new right to a balanced environment. This precedent was followed by a vast case law, involving obligations that were not unfamiliar to international law[504].

Similarly, a contemporary concern is the impact of drug policies on human rights. A first comprehensive report of the UN High Commissioner on Human Rights (2015) on the matter is an overall account of human rights are negatively impacted by several

[502] Daniel Rietiker, "The Principle of Effectiveness in the Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis," *Nordic Journal of International Law* 79, no. 2 (2010): 263; Dzehtsiarou, "European Consensus and the Evolutive Interpretation," 1732; Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights*, 182.

[503] ECtHR*, López Ostra v. Spain,* 9 December 1994, § 57, Series A no. 303-C. Also on nuisance caused by airport activity: *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 40, Series A no. 172, and *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, 13 December 2012. In the Americas, The San José Protocol to the ACHR provides for in Article 11 a right to a healthy environment, but it is not justiciable before the IACtHR. In OC-23, the IACtHR has amply underscored the interrelations between human rights and the protection of the environment, without declaring categorically an existence of an individual right to a healthy environment under the ACHR: *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23**.** §§ 56-70.

[504] See, e.g. the obligation to provide information with a preventive nature (Chapter 2, § 51 above).

flawed drug policies. To cite only one example, it demonstrates how over-incarceration for drug-related offenses contributes significantly for the already-known problem of prison overcrowding in the context of Article 10 ICCPR.[505] This current concern, illustrated by this report, identifies new forms of violations that can be deduced by interfering factors that gain relevance in present times, which may entail positive action by the States. This report's outputs may lend support to international courts to "update" the relevant treaties according to present-day conditions, without necessarily creating new (positive) obligations.

122. In fact, this approach has contributed to maintain the *Zeitgeist* of human rights treaties without extrapolating their object and purpose and without charging the human rights treaties' ever-growing lexicon.[506] The extent to which a given impact may trigger State responsibility will rely on its intensity, as discussed elsewhere.[507]

123. In both parameters (scope and impact), the ECtHR, conscious of the dilemma between acting within the ECHR's object and purpose and upholding effectiveness, denies that a new right to a healthy environment,[508] a right to health, or a "right to sleep well"[509] are read therein.[510] Rather, its rationale goes in line with the understanding that existing human rights permeate a wide range of contemporary social relations and phenomena. On a more technical note, it has been correctly argued that these "environmental" cases in fact are "strictly confined to the results of

[505] OHCHR, Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights. UN Doc. A/HRC/30/65, § 45, referring to reports of the Working Group on Arbitrary Detention (E//CN.4//2003/8/Add.3, § 44, A/HRC/4/40/Add.3, § 64, and A/HRC/4/40, § 59-80). See also mention to the impacts on the rights to life, §§ 38-41; to health, §§ 6-34; to a fair trail, §§ 42-45; and on the prohibition of torture and ill-treatment, § 37. A global perception, on the part of States, that drug policies should be designed and conducted in full respect with human rights is reflected in the recent UNGA Resolution 69/201 "International Cooperation against the World Drug Problem", operative paragraph 2. See also: HRC Resolution 28/28, UN Doc. A/HRC/RES/28/28 (Apr. 25, 2015), on the impact of drug policies on the enjoyment of human rights.

[506] See, the so-called "human rights inflation", a term used to criticize the ECtHR's alleged "creation" of new rights, particularly through positive obligations, See: Laurens Lavrysen, "The Scope of Rights and The Scope of Obligations," in *Shaping Rights in the ECtHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013), 173.

[507] See Section 3 of this Chapter.

[508] As Article 37 of the European Charter on Fundamental Rights.

[509] Letsas, A Theory of Interpretation of the European Convention on Human Rights, 126.

[510] See the special caveat in *Hatton and Others*, [GC], no. 36022/97, § 96. In the Americas, similar strategy is applied, as e.g. in *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. See also: Dina Shelton, "Derechos Ambientales y Obligaciones en el Sistema Interamericano de Derechos Humanos", *Anuario Chileno de Derecho Humanos* (2010), 112-127, confirming this indirect reference by the IACtHR.

the two-stage-model", considering the concrete elements of the case, instead of an enlargement of Article 8.[511]

1.4.3 - Extrapolation to Economic, Social and Cultural Rights

124. Despite the inspiration brought by the Vienna Declaration (VDPA) of 1993,[512] ESCRs and CPRs treaties are generally monitored by separate mechanisms. Indeed, the stark contrast between both rights, based on the justiciability argument, is today nuanced by the additional protocol to the ICESCR on individual communications. It was seen in Chapter 1 that both "types" of rights might entail positive and negative obligations for their effective enjoyment. This Declaration has inspired by the universality and indivisibility of all rights.

Such inspiration, however begs the question: to what extent ESCRs can be read into general civil and political rights treaties through judge-making law? One must first look at the object and purpose of a CPR treaty in order to start elaborating on the matter. It might be hardly accepted that the ECHR's objective and purpose would allow such interpretation.[513] For its parts, ACHR's referst to ESCRs in its preamble[514], but to date it has not clearly explain the relevance of this reference, including on a possible autonomous application of the relevant Article 26 that provides for a general clause on ESCRs[515].

125. It is true that contemporary judicial interpretation has rejected a watertight division between rights, allowing a number of socio-economic concerns to be brought

[511] Lavrysen, "The Scope of the Rights and the Scope of Obligations", 174.

[512] VDPA, Part I, § 5: "[a]ll human rights are universal, indivisible and interdependent and interrelated".

[513] For instance, the ECHR's preamble does not mention ESCRs, but its text provides for the right to education under Article 2 of Protocol No. 1, which not only does protect an individual from any denial of this right, but also provides its effective dimension, namely drawing profit from the education received and the right to obtain official recognition from the studies completed, see: *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 23 July 1968, § 4, Series A no. 6; and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 137, ECHR 2012 (extracts).

[514] The ACHR makes reference to "social justice" and affirms: "everyone may enjoy his [or her] economic, social, and cultural rights, as well as his civil and political rights".

[515] Gabriela Kletzel et al., "Democracia y Subsidiariedad," in *Desafíos del Sistema Interamericano de Derechos Humanos - Nuevos Tiempos, Viejos Retos*. Colección De Justicia (2015), 223. The IACtHR makes indirect reference to ESCRs as, for instance, *Case of the "Juvenile Reeducation Institute" v. Paraguay.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, § 149.

within the context of CPR treaties.[516] For instance, the ECtHR dealt with labor rights, such as freedom of association and the "sympathy strike" through a negative obligation.[517] Yet, the Court made clear that the methods of the Court are different from the social rights monitoring bodies, particularly in that does not rule on social policy legislation *in abstracto*. Rather, it assessed the manner by which domestic legislation on strike infringed Article 11 ECHR.[518] Similarly, the ECtHR has dealt with several cases related to medical negligence and violations in psychiatric institutions through the traditional duty to protect.[519]

126. Focusing now on social benefits, both European and Inter-American Courts have incorporated them into the right to property. Such an expansion has been an object of criticism. A most vocal critic of this approach in Europe is Marc Bossuyt. He evokes the *travaux préparatoires* of the ECHR to contend: "one should not lose sight of the fact that the European Convention was never intended to guarantee all possible human rights".[520] Bossuyt's important warning concentrates on the risk of an excessive "social" content the ECtHR applies to Article 1 of Protocol 1 (right to property) entailing genuine social security cases, calling for a self-restraint by the Court.[521] His warning may well serve to prevent that the Court entertains positive actions such as implementation of social security schemes and provision of basic income.[522] One wonders how a judge can legitimately infer such obligations from

[516] ECtHR, *Airey v. Ireland*, 9 October 1979, Series A no. 32, § 26.

[517] ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom,* no. 31045/10, § 76, ECHR 2014, reinforcing the previous understanding in *Demir and Baykara* [GC], § 85.

[518] Id., § 99. Concurring joint opinion of judges Ziemele, Hirvelä and Bianku reinforced the Court's consideration that Court may even overrule domestic social policies for the sake of protection of civil and political rights. They add: "[t]he supervision over the protection of these rights having been the very purpose of the Court's creation". At the same time, they warn that "the Court should be reluctant to render a binding judgment which would require the modification of an important social and economic policy principle with wide implications for the country's economy." Judge Wojtyzcek, for his part, though also concurring, demonstrated its dissatisfaction at the Court's lack of explanation on the need to interpret the ECHR in connection with the ILO Convention 87 and the ESC, without further elaboration.

[519] See: Chapter 2, § 62 and ss, above.

[520] Marc Bossuyt, "Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights on Social Security Regulations," *Human Rights Law Journal* 28, no. 9 (2007): 328. Similar criticism: Marc Bossuyt, "Is the European Court of Human Right in a Slippery Slope?," in *The European Court of Human Rights and its Discontents – Turning Criticism into Strength*, eds. Spyridon Flogatis et at. (Cheltenham: Edward Elgar, 2014), 27-36.

[521] Bossuyt, "Should the Strasbourg Court Exercise More Self-Restraint?", 328.

[522] Such as in CESCR, *General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)*, adopted on 4 February 2008. UN Doc. E/C.12/GC/19, §12.

CPR provisions like Article 1, Protocol 1 ECHR, or Article 25 ACHR without overstretching the treaty's scope.

But, as a matter of fact, it cannot be assertively concluded that both regional courts recognize genuine ESCR obligations in this regard. It is true that, by an autonomous interpretation, social security entitlements are considered as a beneficiary's property. Yet, there is a sizeable difference from this approach to accepting a full-fledged right to social security. Relevant case law brings a frequent caveat that it does not impose an obligation to enact legislation or to establish a social benefit scheme. Simply, when States decide to do so, the legislation at stake is regarded as generating an asset within the ambit of the right to property.[523] In recent years, the ECtHR has acted rather prudently in a series of cases related to fiscal austerity measures and applied restraint in claims involving reduction of social benefits. This restraint is conditioned to a demonstrable care on the States that the relevant cuts and temporary and proportional.[524] In its adjudicatory function, the CESCR took a similar view, in *Miguel Ángel López Rodríguez v. Spain* (2016), explaining that the reduction on non-contributory benefit is not in all cases incompatible with the ICESCR, particularly in view that this type of benefit draws exclusively on public funds.[525]

127. Yet, in other occasions, the ECtHR can be said to have performed a lax thematic control of the ECHR, as in the case of *Otgon v. Moldova* (2016). The Court found a violation of Article 8 ECHR for a failure of the respondent State to compensate the applicant, who got ill after having ingested water distributed by a state-owned company. The Court's overall reasoning seemed to depart from previous environmental cases *without a good reason*. It did not elaborate on the why this case, given its specificity, would fall within the ambit of Article 8 ECHR without reading therein a typical right to a safe environment, which the Court has not to date

[523] ECtHR, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X; *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011. Further reading: Klaus Kapuy, "Social Security and the European Convention on Human Rights: How an Odd Couple has Become Presentable," *European Journal of Social Security*, 9, No. 3 (2007): 221 - 241. Comparably at the Inter-American System: IACtHR, *Case of the "Five Pensioners" v. Peru.* Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, §95, approaching indirectly social benefits as an "acquired right" to property.

[524] ECtHR, *e.g. Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, § 45, 1 September 2015 (inadmissibility).

[525] CESCR, *Miguel Ángel López Rodríguez v. Spain*, views of 4 March 2016, § 13.3, UN Doc. E/C.12/57/D/1/2013.

recognized.[526] Judge Lemmens, in a dissenting opinion, put in check the thematic boundaries of the Convention, contending that the complaint should have been declared inadmissible *ratione materiae,* given also that the applicant never complained before national courts about a violation of his right to private life.[527]

128. In sum, in the above circumstances of (a) semantic control, (b) the impact approach, and (c) the extrapolation to ESCRs, judges have a difficult task to update the content of human rights treaties through the so-called "borderline fine-tune,"[528] an interplay between judicial activism and judicial restraint. In other words, it means to explore effectiveness potential from the object and purpose of a treaty within the realm of the relevant text.

2 - The Element of Knowledge

129. The core of effective protection of rights lies in its substantive character, *i.e.*, the material possibility of the authorities to intervene in order to prevent a violation. However, not all violations of human rights committed by non-state actors (or violations otherwise requiring a responsive measure by the authorities) give rise the State's responsibility. Authorities can only be held liable if any type of involvement can be established,[529] primordially if they have knowledge of a violation or of its imminence. Otherwise, States would be illogically liable to an incommensurable scope of positive obligations of which they could never have the practical means to address.[530]

130. In this regard, nternational human rights law has not embraced the strict liability standard. Instead, State responsibility is engaged when the State incurs a

[526] The precedent of *López Ostra* has not given margin to such an interpretation.

[527] ECtHR, *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016, dissenting opinion of Judge Lemmens, noting "I do not think that this means that any damage to a person's health attracts the applicability of Article 8" (§ 3).

[528] Luzius Wildhaber, *Rethinking the European Court of Human Rights* (Oxford: Oxford University Press, 2014), 214.

[529] Jan De Meyer, "The Right to Respect for Private and Family Life, Home and Communications in Relations to Individuals, and the Resulting Obligations for States Parties to the Convention," in *Privacy and Human Rights: Reports and Communications Presented at the Third International Colloquy about the European Convention on Human Rights*, ed. Arthur H. Robertson (Manchester: Manchester University Press, 1973), 273.

[530] Xenos, in this connection, notes that "since a claim for a positive obligation to actively protect human rights can be raised almost everywhere, the state may not be said to be 'involved' if knowledge of the need of human rights protection does not lie with its agents", in *The Positive Obligations of the State under the European Convention on Human Rights*, 75.

violation of a negative or a positive obligation imposed by the relevant treaty,[531] according to the rule of attribution of international responsibility. In general terms, this responsibility is conditioned *i.a.* to the element of knowledge, well-known in public international law.[532]

131. In the sphere of negative obligations, in which direct interference by the State is certain, public authorities hold the information of the occurrence or the imminence of a violation. Hence, the knowledge element is deemed to be "obvious,"[533] and is thus implicit. In this regard, a series of safeguards are put in place even before the interference materializes.[534]

132. In the context of positive obligations, and more prominently with respect to horizontal relations, State responsibility is mainly assessed against the level of diligence dispensed to prevent or redress violations. Given the inherent difference on the information held by the State (in comparison with negative obligations), the element of knowledge gains significance in ascertaining the existence and the extent of State responsibility. These variable degrees of information held by the State are inherent to democratic societies, in contrast with authoritarian regimes that hold excessive control and information over private relations.

133. Elaborating further from Chapter 2 (§ 53 above), within the spectrum of the duty to protect, *Osman v. the United Kingdom* (1998) inaugurates a nuanced stance on

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[531] Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Antwerp: Intersentia, 2016), 131 (in the context of the ECHR).

[532] See the seminal judgment of the ICJ, *Corfu Channel Case, Judgment and Preliminary Objection: I.C.J. Reports*, 1948, in which the primordial element for the ICJ to find Albania in breach was "whether it has been established by means of indirect evidence that Albanian has knowledge of the mine-laying in its territorial waters, independently of any connivance, on her part in the operation", at 18.

[533] In *Velásquez Rodríguez*, the IACtHR, noting the lack of cooperation form the part of the respondent State to cooperate with the IACHR in the investigations, held "The State controls the means to verify acts occurring within its territory" (Merits, § 136). See also: Xenos: "the only obvious explanation [for engaging State responsibility] is that the State, as the initiator of the act complained of, knows of the likely interference with the human right of an individual", in *The Positive Obligations of the State under the European Convention on Human Rights,* 76.

[534] See cases on use of lethal force: ECtHR: *McCann and Others v. the United Kingdom*, 27 September 1995, § 115, Series A no. 324 (police arrestment operation); *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 191, ECHR 2011 (police shooting during a protest); ACmHPR, *Sudan Human Rights Organization v. Sudan*, § 147. Note the relations between the need to put in place safeguards in the context of negative obligations, and the need to train police officers (duty to promote) to correctly implement these safeguards (Chapter 2, § 95 and following). See also comments by Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 77-78.

the extent of the State's positive duty to protect a person's life against threats from private individuals. It held:

> [w]here there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their [...] duty to prevent and suppress offences against the person [...] it must be established to its satisfaction that the authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[535]

The formula *know or ought to have known*, as a condition to engage State responsibility, transcends the hypotheses in which such responsibility arises from the simple cognisance of a violation or its imminence (*know* - concrete knowledge). Its second part (*ought to have known* – presumed knowledge) further represents degrees by which the authorities are expected to presume the inherent risks in a given context and to be prepared to prevent violations from materializing.

This condition relies on the foreseeability of a risk at stake[536] and, naturally, on the degree of diligence employed. In *Osman*, this criterion was applied in order to exonerate the respondent State's responsibility fom an obligation to protect, since the Court found no identifiable moment in which the authorities could have taken preventive action. This understanding applies to circumstances when the risks are sporadic. In other contexts, where public or private activities are considered dangerous, the risk is more tangible, entailing a different approach as to how State responsibility is triggered.

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[535] ECtHR, *Osman v. the United Kingdom,* 28 October 1998, § 116*,* Reports of Judgments and Decisions 1998-VIII. This knowledge condition is regarded by Lavrysen as a principle governing State positive obligations, in *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 132, quoting several cases. It could likewise be said that it consists of a governing principle in the Inter-American system, if one compares with at *i.a. Case of Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, § 123; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, §158; and *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, §§ 282-283.

[536] See: Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights," *Netherlands Quarterly of Human Rights* 28, no. 3 (2010): 418.

This Section will analyse the variables in which the knowledge parameter may operate, dividing them in two parts: direct knowledge (2.1) and indirect knowledge (2.2).

2.1 - Direct Knowledge

134. On several occasions, reliable knowledge is obtained directly by the authorities, thereby engaging State international responsibility.

2.1.1 – Direct Knowledge from a Formal Complaint

135. Commonly, positive obligations are required when the authorities are notified of a violation or its imminence through their official channels.[537] In *Osman,* a *prima facie* responsibility was engaged by the notification by the relatives about the risk of the victim being killed. The Court examined whether the authorities had discharged their obligations by doing what was realistically required under those circumstances, *viz.* to prevent loss of life and to conduct investigations into the facts.[538]

In the Inter-American jurisprudence, the IACtHR has made a clear division between the time lapse when the knowledge was not sufficiently established to trigger State responsibility and the time from which the knowledge was certain. In *Sawhoyamaxa v. Paraguay* (2006), it noted that as long at the respondent State had only "certain clues" about the precarious situation of the indigenous community in question, no responsibility could be engaged. However, once members of that community had formally presented concrete evidence to the authorities through a formal complaint, the State had a responsibility to protect the group in question.[539]

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[537] Reports of international experts can be included when precise information on threats or violations is revealed. See, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, 18 June 2012. UN Doc. A/HRC/20/22/Add.4; and in case law: IACtHR, *Case of Cepeda Vargas v. Colombia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, § 77; ECtHR, *Rantsev v. Cyprus and Russia,* no. 25965/04, § 294, ECHR 2010 (extracts).

[538] ECtHR, *Osman v. the United Kingdom*, §116. The Court held that the applicants failed to demonstrate a decisive moment that the victim's life was at a concrete and eminent risk and was satisfied with the administrative actions taken by the police. Compare with *Opuz v. Turkey*, no. 33401/02, ECHR 2009 (violence against women) where the State took no action after several complaints from the victims, §§ 133-136. See also: Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 78-79.

[539] IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, §158. Similarly, the "*Cotton Field"* case (disappearances and mass sexual violence), IACtHR divided the State responsibility between a general

136. A complaint does not require to be lodged through a specific channel or procedure, particularly when the right to life is at stake. For instance, it is common practice among NGOs working before multilateral organisms to warn a relevant State of the risk that one of its nationals (human rights defenders) is subject by collaborating with a given international mechanism.[540] Hence, a positive obligation to prevent any threat or harassment against this defender is triggered at the time the relevant State delegation is advised thereon. With that informal complaint at hand, that delegation may *e.g.* transmit a cable to its capital requesting protective measures at the defender's return.

2.1.2 - Direct Knowledge by the Authorities Not Requiring a Complaint

137. A positive obligation may also arise even when the authorities, though not formally notified, are proven to have learned through other sources of a given violation or its imminence, especially in particularly dangerous contexts. Knowledge can also be obtained from direct contact between the authorities and the public at large, which may in certain cases give rise to an obligation to take proactive measures. The IACtHR's *Valle Jaramillo and Others v. Colombia* case (2008) dealt with the assassination of human rights defenders, presumably by paramilitary groups. Though the authorities did not receive any formal notification on the specific threat, the victim was a known activist working in a densely militarized area and had received previous death threats, which leads the Court to conclude that knowledge was certain. A positive obligation was breached in relation to the victims' right to life (Article 4 ACHR) given the inertia of the authorities to provide necessary protection.[541]

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obligation of prevention, in the first moment, and then a more precise obligation, given the existence of a solid complaint by the country's National Human Rights Institution, §§ 282-283.

[540] See, e.g. the new UN mechanism to receive complaints on reprisals against individuals cooperating with the UN mechanisms, HRC Resolution 36/21: "Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights". UN Doc. A/HRC/RES/36/21.

[541] IACtHR, *Case of Valle-Jaramillo et al. v. Colombia***.** Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, § 82. Likewise, in *Mahmut Kaya v. Turkey*, no. 22535/93, § 89, ECHR 2000-III, the victim was a medical doctor, living in the south-east of that country, famous for working for the Kurdish cause. He had received several previous threats and was eventually killed. See in Chapter 2 (§ 68 above), that the promptness standard of an effective investigation is grounded on the mere knowledge of the killing or suspicious death of a victim.

2.2 - Indirect Knowledge of Risks Presumed in Dangerous Activities

138. In several other contexts, harmful occurrences are frequent and the likelihood of violations to materialize is accordingly considerably high. The dynamic character of the ECHR's provisions has attracted complaints of violations related to diverse activities considered "dangerous"[542], implying a new perspective in the knowledge standard. In *Öneryildiz v. Turkey* (2004), the ECtHR has highlighted the positive obligation to prevent violations of Article 2 ECHR, specifically recognizing the "potential risks inherent" in industrial activities, entailing a presumption of danger of such activity. The Court held that this obligation applied

> "[in] the context of any activity, whether public or not, in which the right to life might be at stake, and *a fortoriori*, in the case of industrial activities, which by their nature are dangerous."[543]

Hence, in this context, the cognitive element is translated into an obligation to assess *ex ante* the potential to which industrial activities may affect the enjoyment of human rights, as seen in Chapter 2 (§ 138 above). This obligation entails an active search for knowledge through the elaboration of impact studies, consultations with, and the participation of the affected communities in the relevant discussions, as wel as the dissemination of relevant information thereto on the implied risks.[544] It has been noted that the mere absence of the actual knowledge does not exonerate the State from its positive obligations.[545] Such positive (procedural) measures also serve the purpose of proactively gathering and analysing all information available in order to make the best risk assessment possible. These measures are of elevated importance in cases involving vulnerable persons and groups who are frequently excluded from

[542] ECtHR, *e.g. L.C.B. v. the United Kingdom,* 9 June 1998, *Reports of Judgments and Decisions* 1998-III (nuclear tests); *Öneryıldız v. Turkey* (waste collection site), § 71; *Iliya Petrov v. Bulgaria,* no. 19202/03, §§ 55-56, 24 April 2012 (electricity distribution facility); *Vilnes and Others v. Norway,* nos. 52806/09 and 22703/10, § 235, 5 December 2013 (professional diving); *Brincat and Others v. Malta,* nos. 60908/11 and 4 others, §79-70, 24 July 2014 (exposure to asbestos); and *Cavit Tinariouğlu v. Turkey*, no. 3648/04, § 66, 2 February 2016 (maritime trafic).

[543] ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 65-71, ECHR 2004-XII. See, in general Dimitris Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry," *German Law Journal,* 8, no. 3 (2007), 231-254.

[544] See: ECtHR, *Tătar v. Romania*, no. 67021/01, § 124, 27 January 2009, holding that the inherent risk involved in industrial activities required a duty of precaution even if the causal link between the pollution at stake and the applicant's illness could not be established.

[545] Laurens, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 135, quoting Stoyanova (2014).

decision making processes and from whom there is insufficient knowledge of how certain phenomena impact their rights (see Chapter 8 § 399 below).

139. In any event, the ECtHR has not applied single standard on knowledge through the diversity of cases appearing before it, but it has approached it contextually and in a flexible manner[546].

In *Finogenov and Others v. Russia* (2011), the Court held that "[…] the more predictable a hazard, the greater the obligation to protect against it."[547] Hence, not every cognizance of a danger entails an obligation to protect. This limitation of this liability is clarified in *Prilutskiy v. Ukraine* (2015), regarding the injuries and death by a car accident involving individuals participating in a gymkhana. The Court held that serious incidents occurred in those games were not so widespread to require the authorities additional measures.[548] Similarly, in *Cavit Tinarlioglu v. Turkey* (2016), the Court detached the (general) knowledge about the country's overall problems of unsafe boating activities from the (specific) knowledge of cases related to boating accidents involving swimmers at sea. For the Court, it was decisive to ascertain that the local maritime authorities had received no information of incidents like the one who caused harm to the applicant. Hence, the State was under no obligation to ensure the applicant's safety, in specific.[549]

2.3 - Knowledge Obtained from Indicators and Statistics

140. Another instance of interest in the assessment of the knowledge parameter is information obtained from indicators and statistics.[550] If human rights are in fact

[546] Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 75.

[547] ECtHR, *Finogenov and Others v. Russia,* nos. 18299/03 and 27311/03, § 243, ECHR 2011 (extracts). In the specifics of the case, a substantive violation of Article 2 ECHR was found, given the several flaws in the rescue and evacuation plan during a hostage crisis, while the Court acknowledged that "some measure of disorder is unavoidable" (§ 266).

[548] ECtHR, *Prilutskiy v. Ukraine,* no. 40429/08, § 37, 26 February 2015.

[549] ECtHR, *Cavit Tinarlioglu v. Turkey*, § 106.

[550] OHCHR, Human Rights and Indicators – A Guide to Measurement and Implementation, explaining that indicators are "specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights." Available at [http://www.ohchr.org/Documents/Issues/HRIndicators/AGuideMeasurementImplementationChapterI_en.pdf], accessed on 7 February 2019.

entrenched in public administration, then sound planning, including the collection of such data, is of fundamental importance. Whether quantitative or qualitative, they contribute to address the gaps "between official proclamation and actual implementation of human rights".[551]

The obligation to produce human rights statistics and indicators is presumed in some general treaties, whereas it is explicit in some specialized treaties.[552] However, when States decide to elaborate statistics and indicators, patterns of human rights concerns, as a product of their assessment, do normally emerge. Thus, to the extent that the relevant data are concrete and accurate, a positive obligation to address them may well arise given the evidence the data produce. At least, data produced by public institutions, forming part of the State internal documentation, presumably reveals a knowledge that is certain and that may trigger state responsibility. For their part, independent indicators, externally produced but of public knowledge, may entail at least a duty to verify the accuracy of the data and the gravity of the alleged concerns.

141. Admittedly, statistical data hardly reveal instances of individual violations.[553] Neither do they identify timely preventive actions for specific cases. Yet, positive obligations are not circumscribed to reactive individual protection. These data may reveal structural problems that directly impact States' international obligations, which at a minimum should channel public efforts of different sorts in order to address the problem areas identified.

142. Of specific interest to this study are the instances when indicators reveal occurrences of inequality regarding certain vulnerable segments of society. The quotation "if it is not counted, it tends not to be noticed"[554] depicts the need for an active search of knowledge, particularly regarding marginalized groups, which is translated in specific State obligations, analyzed in Chapter 5 (Section 2.1.6).

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[551] OHCHR, *Measuring Human Rights: Principle, Practice, and Policy* (2012), 2: "Indicators are seen as useful for articulating and advancing claims on duty-bearers and for formulating public policies and programmes that facilitate the realization of human rights." Available at, [http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf], accessed on 7 February 2019. See also Todd Landman and Edzia Carvalho, *Measuring Human Rights* (New York: Routledge, 2010), 23-24.

[552] Chapter 5, Section (§ 269 belo2) and Chapter 8 (§ 424 below).

[553] On the difficulties of obtaining information on individuals: Todd Landman "Measuring Human Rights: Principle, Practice, and Policy," *Human Rights Quarterly* 26, no. 4 (2004): 919, footnote 42.

[554] OHCHR, *Human Rights and Indicators*, quoting J.K. Galbraith, p. 1.

3 – The Severity of the Impact Sustained

143. Another parameter entailing active State behavior involves the magnitude of an impact sustained by an individual, which is claimed to be a violation. Rights claims are based not only upon the evidence of harm to a protected interest in law, but also on the extent to which an impact can be considered serious enough to consitutte a violation.

The principle of *de minimis non curat praetor* has influenced the creation of admissibility (meaningful disadvantage) criteria for claims under the ECHR and the OPESCR[555] (and also substantive law) with specific focus on the importance of the damage inflicted by a given interference (public or private) or by the individual in need of State assistance.

144. Within the context of positive obligations, practice has demonstrated certain claims requiring State assistance can only be validated inasmuch as a minimal impact is perceived.[556] This understanding derives from a body of case law about,[557] or the severity of harships prisoners suffer, so as to establish specific levels of suffering, in the concrete case.[558]

This practice also permeates with other rights and less serious circumstances. A good illustration is *Stjerna v. Finland* (1994), in which the applicant's claims were regarded as part of the conceptual meaning of Article 8 ECHR. Yet, a positive obligation could not be engaged since the inconvenience suffered by the applicant (the difficulty of spelling his family name) was not serious enough to be entertained as a violation. Likewise, the right to one's reputation, also examined above, can only be argued when the offense reaches a critical level.[559] In the same vein, the ECtHR found no violation of Article 8 in *Karakó v. Hungary* (2009) on the dissemination of a flyer that

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[555] ECHR, Article 35.3, as amended by Protocol 14; OP-ICESCR, Article 4. This procedural filter, in both cases, was not designed for the specific purposes of positive obligations.

[556] See, *supra*, also on the impact approach, in which not every negative event can be deemed as a violation.

[557] ECtHR, *Ireland v. United Kingdom,* No. 25 (1979-1980), §§ 162-163; IACtHR, *Case of Caesar v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123, § 67.

[558] Given the special attention of this work on vulnerable groups, the rights of detainees is examined in Part II, Chapter 6, as appropriate.

[559] ECtHR, *Stjerna v. Finland*, 25 November 1994, Series A no. 299-B, § 42.

criticized the applicant's performance as a politician. The Court held that an actionable threshold in this regard is only reached "when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life."[560]

Another context in which the minimum impact works as an actionable threshold is the one of the environmental nuisances impacting rights, as seen in Chapter 2. Only claims demonstrating a minimum severity and prolonged effect can be further analyzed by courts. [561] One of the problems, however, is that the severity level cannot be objectively determined by courts[562] given their lack of specific expertise. Rather, courts increasingly rely upon objective parameters elaborated by specialized organizations and technical expertise. In *Oluiç v. Croatia* (2010), a violation of Article 8.1 ECHR was mainly found because a bar functioning in the other part of the applicant's house was emitting daily noises at a level of 35.9 dB (decibels), exceeding the permitted level of 5.9 dB set by the World Health Organization. This transgression was also in violation of domestic law.[563] Moreover, the medical report brought to the case attested that serious hearing impairment occurred to the victim, meaning that she could not be *continuously* exposed to the source of the noise in question.[564]

145. It is worth nothing, however, that the severity of the impact, giving rise to a positive obligation, is experienced differently according to *i.a.* a person's age, gender, ethnicity, mental, or physical ability and to the social context in which the person is inserted. In the context of equality and non-discrimination, studied in Chapter 6

[560] ECtHR, *Karakó v. Hungary*, no. 39311/05, 28 April 2009, § 23.

[561] ECtHR, *López Ostra v. Spain*, § 51. See also: *Hatton and Others v. the United Kingdom* [GC] § 118, and *Fadeyeva v. Russia,* no. 55723/00, § 69, ECHR 2005-IV, where the applicant's health had considerably "deteriorated as a result of her *prolonged* exposure to the industrial emissions" from the steel company operating in the neighbourhood of the applicant, reaching an actionable level to violate Article 8.1 ECHR (italics added). The threshold of the relevant severity is also assessed according to the prolongation of a negative environmental imbalance. Compare with Judge Lemmens' dissenting opinion on *Otgen v. the Republic of Moldova* (2016), criticizing the lax approach of the majority in this case, in which the illness caused by the applicant was only temporary and could not be regarded to have reached a threshold in order to constitute a violation of the ECHR.

[562] Since *Hatton and Others* [GC], the dissenting judges Costa, Ress, Türmen, Zupančič and Steiner have pointed out to the problem of the lack of an objective assessment of a minimum threshold: "[a]ccording to the World Health Organisation (WHO) Guidelines, measurable effects of noise on sleep start at noise levels of about 30 dBLA. These criteria are objective" (§ 14).

[563] ECtHR, *Oluić v. Croatia,* no. 61260/08, §§ 28-31 and 60, 20 May 2010. Contrarily, in *Fägerskiöld v. Sweden* (inadmissibility decision, 2008), the noise emitted by wind turbines near the applicant's house was within the permitted limits.

[564] ECtHR, *Oluić v. Croatia*, § 61.

(Section 4), it will be seen that instances of vulnerability may lead to the assessment of specific thresholds.

4 – The Proportionality Assessment in the Context of Positive Obligations

146. Indeed, a pivotal element delimiting the scope of positive obligations is the proportionality assessment performed by human rights courts. This assessment is an eminent manifestation of contemporary human rights in which the judge is called to oversee the justifications by national authorities' related to their choices in dealing with competing rights and interests.

Such a practice is "ubiquitous" in the case law of the ECtHR,[565] or, in the words of the Courts itself, it is "inherent in the whole of the Convention."[566] Yet, in the Americas, there is growing recognition of this exercise is ongoing, as remarkably seen in the IACtHR's *Kimel v. Argentina* (2008), which regards a conflict between the right to privacy and the right to freedom of expression. This Court emphasized that every fundamental right needs to be exercised in harmony with other rights, constituting a duty of the State to determine the key responsibilities of the parties and the proportionate sanctioning.[567]

4.1 - Preliminary Question – A General Prevalence of Positive or Negative Obligations?

147. Before delving into the complexities of this matter, a question is necessary: can it be said, in general terms, that negative obligations prevail over positive obligations in the proportionality assessment? At a first thought, this question could be answered in the affirmative, given the fact that human rights treaties are preponderantly meant to curb State abuse, and to a lesser extent to require State assistance. However, this very simplistic answer requires further reflection.

The first important consideration is that balancing competing interests consists of a very contextual exercise, to be rather applied in a concrete case than to be considered

[565] Alastair Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights," *Human Rights Law Journal* 16, no. 2 (2010): 289.

[566] ECtHR, *e.g. Soering v. the United Kingdom,* 7 July 1989, § 89, Series A no. 161; *Rees v. the United Kingdom,* 17 October 1986, § 37, Series A no. 106; *Harroudj v. France,* no. 43631/09, § 47, 4 October 2012.

[567] IACtHR, *Case of Kimel v. Argentina.* Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, § 50.

by way of a general hypothesis.[568] Even when dealing with difficult dilemmas, such as the fight against terrorism, a universal hierarchy cannot be set. Sottiaux imparts that positive obligations today "stem from the same fundamental legal guarantees"[569] as their negative peers. For him, attaching greater weight to the latter than the former would reduce the question to an anachronism of hierarchizing of rights on each of the sides of the "balance".[570]

Further, from a teleological point of view, some authors argue that the ECtHR, wishing to preserve a liberal society, favors State's abstention through negative obligations.[571] If this was indeed the original aim of the ECHR, this Court noticeably today praises the interplay between fundamental rights in a contemporary democratic society grounded on dialogue, participation, and a certain measure of compromise. *Osman* is at times cited as a case in which the ECtHR, by not finding a violation of Article 2 ECHR, attached greater weight to the presumption of innocence of the accused in detriment to rights of the victim's relative, the applicants.[572] It appears, however, that was not the central matter of the case.[573] What was really at stake was the issue of knowledge in light of "the difficulty of policing modern societies"[574] in relation to a disproportionate burden on the authorities. Should the case have disclosed an instance of blunt neglect, one might wonder whether the Court would have reached similar conclusions.

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[568] Recently, the ECtHR has adopted a middle-ground approach, by applying deference to Member States' legislative choices. Accordingly, general measures can be applied to pre-defined situations, regardless of the concrete facts of each fact provided that those measures have been soundly reviewed by domestic courts and parliaments. See: *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 106, ECHR 2013 (extracts). However, after a general analysis of compatibility of these measures, the Court should perform an individual proportionality assessment.

[569] Stefan Sottiaux, Terrorism and Limitation of Rights – The ECHR and the US Constitution (Oxford: Hart Publishing, 2008), 8-9.

[570] Ibid., quoting Posner on the fallacious dilemma between liberty and security. For Lavrysen, sometimes positive obligations are regarded as exceptional features under the ECHR, given the liberal concept still influencing civil and political rights, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 214-221.

[571] Olivier De Schutter and Françoise Tulkens, "Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution," in *Conflicts between Fundamental Rights,* ed. Eva Brems (Antwerp: Intersentia, 2008), 182.

[572] Ibid.

[573] ECtHR, *Osman v. the United Kindgom*, §121.

[574] Id., §116.

4.2 - The Question of the Limitation Clauses in Human Rights Treaties

148. The exception clauses of human rights treaties, which under certain circumstances exonerates States' interference with individual rights,[575] provide a priviledged, but not exclusive, occasion in which the balance test is carried out. Under the ECHR regime, the proportionality test operates across the board, and not exclusively deriving from the exceptions from Arts. 8-11 ECHR, despite the wealth of legal discussions and highly debated cases on these exceptions[576].

As early as in *Rees v. the United Kingdom* (1986), regarding an obligation to recognize the newly assigned gender of a transsexual in the national registration system, the ECtHR introduced the following criterion for positive obligations: "a fair balance […] has to be struck between the general interest of the community and the interests of the individual".[577] In relation to the aims justifying an interference, under the second paragraph of Articles 8-11, it declared that they "may be of a certain relevance" for the relevan assessment, although this provision refers only to "interferences".[578] Through these unclear pronouncements, the Court has sought to at least set very basic parameters on how claims for positive obligations can expected to be treated through the proportionality analysis.

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[575] ACHR, Arts. 12. 3 (freedom of conscience or religion), 13.2 (freedom of thought and expression), 16 (freedom of assembly); ICCPR, Arts. 19.1 (freedom of expression), 21 (right to peaceful assembly), 22 (right to freedom of association); ECHR Arts. 8 (right to family and private life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association); Banjul Charter, Article 11 (freedom of assembly).

[576] ECHR, Article 8.2: "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"; Article 9.2: "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"; Article 10.2: "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 or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"; Art. 11.2: "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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."

[577] ECtHR, *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106, referring to *Marckx v. Belgium*, § 31.

[578] Ibid.

4.2.1 – The "Merger Solution"

149. In the wake of the debates about the applicability of the proportionality test to positive obligations, Judge Wildhaber in *Stjerna v. Finland* (1994) proposed a "merger solution" by which the term "interference" would cover facts related to both negative and positive obligations. Thus, regardless of whether a claim is about a negative or a positive obligation, the Court should assess whether such interference meets the criteria of (a) accordance with the law; (b) legitimate aim; and (c) necessity in a democratic society.[579] This proposal gained support among scholars who gave additional meanings to the term "interference".[580]

150. At a first sight, is doubtful if such straight replication of parameters designed for direct State interference can be applied to instances of state omissions, especially because these parameters have been strictly construed.[581] Moreover, the criterion (a) has different overtones in the context of positive obligations, including State responsibility for infringing national legislation or for failing to legislate, in certain cases.[582] For their part, the parameters "legitimate aim" and "necessary in a democratic society" of a qualitative nature already form part of the core of the proportionality assessment throughout the ECHR.

Nevertheless, Wildhaber's solution was not totally rejected by the ECtHR or by scholars, who elaborated subsequent models considerably grounded on his initial proposal, as will be seen further in this section.

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[579] ECtHR, *Stjerna v. Finland,* 25 November 1994, Series A no. 299-B, concurring opinion Judge Wildhaber.

[580] Pieter van Dijk, "Positive Obligations Implied in the European Convention on Human Rights: Are States Still the 'Masters' of the Convention?," in ed. Fried van Hoof et al., *The Role of the Nation-State in the 21st Century – Human Rights International Organizations and Foreign Policy*, *Essays in Honor of Peter Baehr*, (The Hague: Kluwer, 1998), 25. See also, Sudre, "Les Obligations Positives", proposing a distinction between "active interference" for violations committed by State agents, and "passive interference" for acts of non-State actors, 1374.

[581] ECtHR, The Sunday Times *v. the United Kingdom (no. 1),* 26 April 1979, §§ 46-49, Series A no. 30.

[582] Such as in ECtHR, *Moreno Gómez v. Spain,* no. 4143/02, ECHR 2004-X. Moreover, for Van Dijk, "one must conclude that the 'interference', which consists in the non-fulfilment of an implied positive obligation, finds its cause in the law and is, therefore, provided by the law", in "Positive Obligations Implied in the European Convention on Human Rights: Are States Still the 'Masters' of the Convention?", 26.

4.2.2 – The ECtHR's Current Approach

151. Even in the wake of the debates arisen from the merging proposal, the Court still has not adopted a specific standard to Paragraph 2 (of Arts. 8-11 ECHR) when a positive obligation is at stake. Though not fully embarking in Wildhaber's "merger" solution, it did not offer a very different solution therefrom. It kept a recurrent pronouncement:

> […] in the context of Article 8 of the Convention, whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the rights of an applicant under the Article or in terms of an interference by a public authority, to be justified in accordance with paragraph 2 of the Article, the applicable principles are broadly similar.[583]

This statement remained largely declaratory until 2012, when the Court handed down two "mirror-judgments". In *Von Hannover (No. 2)*, the applicant pleaded for the compliance on the part of the responding State of a positive obligation under Article 8 to respect the privacy of public figures from having details of their private lives exposed in tabloids[584]. Conversely, in *Axel Springer AG*, a publishing house pleaded for the compliance on the part of the responding State with a negative obligation under Article 10, owing to the punishment it received by publishing the details on the arrestment of a known artist.[585]

152. Through the reasoning of both cases combined, the Court delineated the specific limits and interplays between the freedom of the press in publicizing private matters and the right of privacy against publications from popular magazines. A combined analysis of these cases leads one to conclude that they both may represent two different aspects of the same grievance[586] or "only a matter of exposition",[587] as commentators have already noted. The Court has made clear that the "balancing exercise" may occasionally reduce the scope of positive obligations—but not necessarily simply because a positive obligation is at stake in a concrete case.

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[583] ECtHR, *Hatton and Others v. the United Kingdom* [GC], § 98.

[584] ECtHR, *Von Hannover v. Germany* (no. 2) [GC].

[585] ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.

[586] Alpha Connelly, "Problems of Interpretation of Article 8 of the European Convention on Human Rights," *International and Comparative Law Quarterly*, 35-3 (1986): 589.

[587] De Schutter and Tulkens, "Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution", 186.

Hence, the Court demonstrated that, notwithstanding the obligation at stake, the underling principles in the proportionality test are *similar* but may be not identical. Yet, this "test" is circumscribed to the ambit of Articles 8 and 10. At least, the Court formulated a workable prototype through this "mirror cases".

In order to further understand how the scope of positive obligations is delineated by the proportionality analysis, the following section will make an appraisal of the several legal writings before and after the handing down of cases analysed above.

4.2.3 – Wildhaber's Continuous Influence in Current Scholars

153. The concurring opinion of Judge Wildhaber in the case of *Stjerna v. Finland*, though sometimes controversial, became along the decades a milestone on the question whether similar principles apply in relation with both types of obligations. A number of commentators are of the opinion that the standard of scrutiny, in general, is more rigorous for negative obligations than for positive obligations due to the strict conditions of the second paragraph of the relevant articles[588], particularly when balancing the individual's right against the "general interest"[589].

However, a closer analysis has emerged from scholars who have devoted a more meticulous examination on the matter. For Drögue, the criterion "according to the law" cannot be directly replicated, but it can be applied in similar vein as the "merger proposal" since States are obliged to enact legislation in specific circumstances.[590] For Xenos, this criterion can work as a parameter to assess violations due to the lack of adoption of legislation or of effective implementation thereof[591]—or even as legal

[588] See, Frédéric Sudre, "Les 'Obligations Positives' dans la Jurisprudence Européenne des Droits de l'Homme", ed. Paul Mahoney et al. *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal,* (Cologne: Carl Heymanns Verlag, 2000), 1373; Henry Post, "*Hatton and Others*: Further Clarifications on the "Indirect Individual Right to a Healthy Environment," *Non-State Actors and International Law*, 2-3 (2002): 264; Dean Spielmann, "Obligations Positives et Effet Horizontal des Dispositions de la Convention", in *L'Interprétation de la Convention Européenne des Droits de l'Homme*, ed. Frédéric Sudre (Brussels: Nemesis/Bruylant, 1998), 151; and Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 71 (casting doubts that both types of obligations will be examined under similar stringency).

[589] See Caroline Forder, "Legal Protection under Article 8 ECHR: *Marckx* and Beyond," *Netherlands International Law Review*, 37, No. 2 (1990): 178, pointing out on the risk of "the general interest" of the overall test be much wider than prescribed in Article 8.2 ECHR.

[590] Cordula Dröge, *Positive Verplichtungen der Staaten in der Europaischen Menschenrechtskonvention* (Heildeberg: Springer 2003), 390.

[591] Xenos, *The Positive Obligations of the State under the European Convention on Human Rights,* 122, referring to *Rotaru v. Romania* [GC], no. 28341/95, § 62, ECHR 2000-V, regarding insufficient legal

safeguards to legitimize an initial interference[592] Similarly, Lavrysen has pointed out that the Court has required the State to demonstrate legal safeguards (and not only an absence of legal prohibition) in order to interfere with a right.[593] The latter author also illustrates his point with cases in which inactions were deemed unlawful by the ECtHR[594] or were held in violation of the ECtHR because the State condoned illegalities of non-state actors.[595] And more importantly, he explains that in some cases the criterion "the quality of the law" is interchangeable between both types of obligations in this context.[596]

As for the "legitimacy" criterion, it appears to be the most straightforward parameter to be replicated.[597] Accordingly, a State could justify its failure to comply with a positive obligation only according to the conditions expressly enumerated in § 2 of the relevant articles.[598] Although these conditions are considerably broad, they serve for the Court to at a minimum reject manifestly illegitimate reasons for non-compliance.[599] In fact, this criterion reflects the quality of democratic deliberations by which States elaborate sound rationales through participative and democratic and processes.

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protection of privacy in the context of unlawful surveillance, and to *Makaratzis v. Greece* [GC], no. 50385/99, § 70-72, ECHR 2004-X, regarding poor legal standards applicable to use of force by the police. For Xenos, the legality test may fail "when such safeguards do not exist of have not been implemented to the standard of effectiveness" (at 121).

[592] Id., 125.

[593] Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 317, referring to *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002.

[594] ECtHR *Guerra and Others v. Italy,* 19 February 1998, Reports of Judgments and Decisions 1998-I; and *Brincat and Others v. Malta,* nos. 60908/11 and 4 others, § 101, 24 July 2014.

[595] ECtHR, *López Ostra v. Spain,* 9 December 1994, §§ 54-58, Series A no. 303-C; and *Giacomelli v. Italy,* no. 59909/00, § 93, ECHR 2006-XII.

[596] Lavrysen, *Human Rights in a Positive State*, 326, referring to *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 156, ECHR 2012, in the context of media pluralism.

[597] Id., 329.

[598] Ibid.

[599] Ibid., referring to the joint dissenting opinion of Judges Sajó, Keller and Lemmens in *Hämäläinen v. Finland* [GC], no. 37359/09, § 13, ECHR 2014, by which the implicit social dislike for homosexuals cannot serve as a legitimate interest for this purpose. See also *Bayev and Others v. Russia, nos. 67667/09 and 2 others*, § 69-70, 20 June 2017, rejecting the legitimate aim of combatting pedophilia through a distorted conception of homosexuality.

4.3 – The Margin of Appreciation Doctrine

154. In making proportionality assessments, domestic authorities enjoy a certain margin of appreciation, representing "the latitude a government enjoys" to appraise concrete situations and to apply the treaty provisions concretely.[600] This doctrine enjoys a much wider acceptation and detailed elaboration in the ECtHR case law,[601] compared to other systems.[602] It is regarded essentially as a doctrine of judicial restraint by which a supranational monitoring organ defers[603] to domestic administrative and courts the appraisal of a number of elements (*e.g.* facts, domestic interests and balance of competing rights and interests) to the concrete applicability of treaty rights.

This doctrine is a manifestation of the principle of the subsidiary role of supervisory mechanisms[604] in view of the States' primary responsibility to realize rights and their better position to assess on-the-ground situations.[605] It presumes that democratic States find sound solutions rather than take arbitrary decisions,[606]particularly on

[600] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* 2. For Letsas: "[w]e have no prior theory of what falls within the state's margin of appreciation which we can use to find out what states acts (*or omissions*) amount to a violation. Rather, we use other tools, such as 'balancing' or the proportionality principle in order to find out the limits of the Convention Rights", in *A Theory of Interpretation*, 88.

[601] Sudre calls this doctrine the functional necessity of the European System, in *Droit Européen et International des Droits de l'Homme* (Paris: PUF, 2003) 211. Protocol 15 to the ECHR (not yet in force until 10 August 2018) adds a new recital to the Preamble thereof in order to recognize the margin of appreciation doctrine in the very Convention's text.

[602] See IACtHR**,** *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84, adopted on 19/01/1984. Series A, No. 4, §§ 36, 58-59 and 62-63; HRCttee: *Hertzberg and Others v. Finland*, communication no. 61/1979. Views of 2 April 1982, UN Doc. A/37/40, § 10.3; CESCR, *General Comment No. 12: The Right to Adequate Food***,** adopted on 12 May 1999, UN Doc. E/C.12/1999/5, § 21.

[603] Mahoney, "Judicial Activism and Judicial Self-Restraint", 82.

[604] See in case law: ECtHR, *Handyside v. the United Kingdom*, judgment of 07/12/1976. Series A, No. 24, § 48; IACHR, *Abella and Others v Argentina*, Report 55/97, adopted on 18/11/1997, § 114; HRCttee: *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29/03/2004. UN Doc.: CCPR/C/21/Rev.1/Add.13, § 8. Subsidiarity is, together with margin of appreciation, a principle of the ECHR supervision role, under Protocol 15 ECHR.

[605] Howard C. Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Right's Jurisprudence* (The Hague: Martinus Nijhoff, 2000), 13; Aaron A. Ostrovsky, "What is so Funny About Peace, Love and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals," *Hanse Law Review* 1, no.1 (2005): 49.

[606] Mahoney, "Marvelous Richness of Diversity or Invidious Cultural Relativism", 2; Sir Noel Malcolm, "Human Rights and Political Wrongs - A New Approach to Human Rights Law," *Policy Exchange*, 2017, 44, available at [https://policyexchange.org.uk/wp-content/uploads/2017/12/Human-Rights-and-Political-Wrongs.pdf], accessed on 2 March 2018. Compare with Howard Yourow,

issues pertaining to economic policies[607] that rely greatly on national contexts[608]. For these reasons, the IACtHR, still dealing with gross violations and with transition to democracies in the region, remains hesitant towards this doctrine [609]. In this context, it is worth recalling that contemporary human rights claims frequently put States in difficult situations of arbitrating conflicting rights among individuals [610], thus justifying a certain measure of restraint by international monitoring bodies.

4.3.1 – The Freedom of Choice of Means of Implementation

155. It is commonly accepted that national authorities are free to choose the means to implement positive measures, even on the right to life, which allows for more than one avenue for compliance.[611] The Court's relevant practice has (rhetorically) named this freedom of choice margin of appreciation, underplaying the difference in nature between both types of discretion [612] or merging both in the same reasoning[613]. In cases involving regulation of private horizontal relations, [614] the Court leaves unexplained

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describing it as "[…] the latitude of deference or error …", in *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer, 1996), 13.

[607] Yves Winisdoerffer, "Margin of Appreciation and Article 1 of Protocol No. 1," *Human Rights Law Journal* 19, no. 1 (1998): 20.

[608] For instance, on the right of property, ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V, particularly in the context of transitioning political and economic regimes.

[609] See, Manuel Nuñes Poblete, "Sobre La Doctrina del Margen de Apreciación Nacional. La Experiencia Latinoamericana Confrontada y El *Thelos* Constitucional de Una Técnica de Adjudicación del Derecho Internacional de los Derechos Humanos," in *El Margen de Apreciación en El Sistema Interamericano de Derechos Humanos: Proyectiones Regionales y Nacionales*, ed. Pablo A, Alvarado et al. (Mexico City: IIJ, 2012), 3-49. Compare with Amaury A. Reyes Torres, "Una Cuestión de Apreciación, El Margen de Apreciación en la Corte Interamericana de los Derechos Humanos," *Revista General de Derecho Público Comparado,* 18 (2015), proposing a compromise between allowing a certain margin to States, when applicable, while maintaining tighter scrutiny in gross violations cases.

[610] ECtHR, *Chassagnou and Others v.* France [GC], nos. 25088/94 and 2 others, § 113, ECHR 1999-III.

[611] ECtHR, *Fadeyeva v. Russia*, § 96. See also, *Budayeva and Others v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 156, ECHR 2008 (extracts), where the Court looked beyond the measures referred to by the applicants to comply with the right to life. A violation was found as the responding State could not demonstrate that it took any preventive measure whatsoever until the day of the disaster. Similarly, *Ciechońska v. Poland,* no. 19776/04, § 65, 14 June 2011. This stance, in fact, had been taken as early as in *Marckx v. Belgium*, under Article 8 ECHR (§31).

[612] E.g. *Colozza v. Italy*, 12 February 1985, § 30, Series A no. 89. See: Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 65; For Jan Kratochvíl, this term relates to "obligations where States are free to choose the means by which to achieve the result," in "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights*, 29, no. 3 (2011): 333.

[613] ECtHR, Budayeva and Others v. Russia, § 134, ECHR.

[614] ECtHR, *Söderman v. Sweden* [GC], no. 5786/08, § 79, ECHR 2013; *Mosley v. the United Kingdom,* no. 48009/08, § 107, 10 May 2011.

why this consideration is particularly relevant in this very context.[615] Contradictorily, in *Von Hannover (No. 2)*, analyzed above, the Court held that the freedom of choice of means applies irrespective of the obligation that is at stake.[616]

156. It is doubtful whether this practice is of any added value to this already overcharged doctrine. Further, it has no effect of gauging the bandwidth of the scrutiny in concrete cases.[617] Instead, this approach conflates the normal State discretion to implement a treaty with the question of the breadth of scrutiny afforded to the States[618]. It tends to generate (even if implicitly) a more deferential approach to domestic authorities in relation to positive obligations than in relation with negative obligations.[619]

It is understandable that the Court may wish to affirm it subsidiary role by making a remark of the various avenues to implement a given provision of the ECHR and avoids second-guessing hypothetical alternatives[620] or suggesting optimal solutions.[621] Yet, States must be rightly guided on what is exactly required by them, and

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[615] Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 206.

[616] ECtHR, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §104, ECHR 2012.

[617] Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", 334. For Gerards, the margin of appreciation consists of a "sliding scale model of intensity review", in "Pluralism, Deference and the Margin of Appreciation Doctrine," *European Law Journal* 17, no.1 (2011): 105.

[618] See: Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 64.

[619] Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 209.

[620] The ECtHR has, in some important cases regarding positive obligations, attached importance to less restrictive (or other better) means of compliance, as in the *Hatton and Others* [GC], §95 (Judges Kerr and Greve dissenting on this specific issue). However, the Grand Chamber judgment (2003) overruled this understanding. In *K.H. and Others v. Slovakia,* involving a positive obligation to provide the applicant with access to his medical records, the ECtHR found that, instead of simply denying access thereto, the authorities should have put in place safeguards in order to establish the relevant rules on such disclosure. (no. 32881/04, § 56, ECHR 2009 (extracts).

[621] ECtHR, *Animal Defenders International v. the United Kingdom* [GC], § 110; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 260, ECHR 2015. Compare with *Mouvement raëlien raëlien suisse v. Switzerland* [GC], no. 16354/06, § 75, ECHR 2012 (extracts), in which the Court did not require the "least onerous" measure. See also, in the seminal work of De Schutter and Tulkens, the limitations of the so-called *Praktische Konkordanz* jurisdictional control, in: "Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution", 203-206. Brems and Lavrysen, in a recent study, have concluded that the "less-restrictive means" in this Court's case law is prevalent in cases involving negative obligations. Furthermore, according to them, this approach has not been fully developed by the ECtHR. In "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights," *Human Rights Law Review* 15, no. 1 (2015): 166-167.

particularly on the relevant types of freedom of maneuver, which justifies such a marked differentiation between these two different concepts.

4.3.2 - A Wider Margin of Appreciation on Positive Obligations?

157. An answer to whether a wider margin of appreciation applies to positive obligations will hinge on the perspective one adopts, depending on the role that the margin of appreciation plays in defining the scope of positive obligations in a given case. As seen above, this doctrine assumes several meanings and functions in the case law of the ECtHR. Among the doctrinal debates around the matter, two main perspectives are identified.

Dröge, in her seminal work, contends that both negative and positive obligations are subject to the same criteria. For her, the often-wider margin applied under Article 8 ECHR stems rather from the width of this very provision than from the normative nature of the doctrine itself.[622] This strong methodological approach ("quantitative" difference) was in subsequent years followed by writings that took into account other arguments related prone to policy matters ("qualitative" difference) and subsidiarity. Arai-Takahashi, for instance, attaches considerable importance to the fact that a wider margin of appreciation in positive obligations is grounded on different types of arguments from negative obligations, such as policy choices of the allocation of limited resources.[623] Another key study by Gerards and Senden indicates an inclination of the ECtHR to allow a wider margin of appreciation in "almost every case" related to positive obligations, irrespective of the relevant individual right in question, connoting a qualitative approach.[624]

In a comprehensive and more recent review on the issue, Lavrysen contents with ample exemplification that both approaches co-exist in the Court's case law. This author quotes instances of the "quantitative" approach in a number of cases related

[622] Dröge, *Positive Verplichtungen der Staaten in der Europaischen Menschenrechtskonvention*, 390.

[623] Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 218.

[624] Janneke Gerards and Hanneke Senden, "The Structure of Fundamental Rights and the European Court of Human Rights," *International Journal of Constitutional Law* 7, no. 4 (2009): 651. The terms "qualitative and "quantitative" are applied by Lavrysen, in *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 193-202.

e.g. to Article 8[625], Article 2[626] and Article 10[627], where it is demonstrated that deference is more frequently based on the positive obligation at stake. Equally, he makes a comprehensive assessment of instances in which the Court uses the "qualitative" approach, as in *Women on Waves and Others* (2009), in which it is affirmed that there is a narrower margin of appreciation in relation with negative obligations.[628]

158. The departure from a strong legal-methodological view from Dröge to wider policy considerations, as valid arguments to apply a wider margin of appreciation to positive obligations, reflects the evolution of the doctrine itself. On the one hand, it is important to hold a solid theoretical view on a doctrine that has acquired a number of meanings and usages, in order to ensure that the Court applies clear and consistent methods for ascertaining the appropriate level of stringency. On the other hand, to a certain extent, it is legitimate for the Court to consider local contexts, political choices, and resource allocations and to use the margin of appreciation as a tool also to guide its institutional role, grounded on the principle of subsidiarity.

159. It is possible and legitimate for a subsidiary monitoring body to take the "qualitative" approach, provided that the object and purpose of the relevant treaty is pursued until this very last stage: the protection individual rights instead of a mere policy assessment. The Court has also given examples that such middle-ground is possible by assessing what is at stake for the applicant, upholding the "priority-to-rights" principle[629] in the proportionality assessment. It has marked areas in the case law where "the very essence" of a right[630] requires a strict review by the Court.

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[625] Lavrysen, *Human Rights in a Positive State*, 195, regarding change of name (*Stjerna v. Finland*); ovum donation (*S.H. and Others v. Austria*); and "wrongful birth" (*M.P. and Others v. Romania*).

[626] Id., 196, regarding protection of the society against criminals while in parole (*Choreftakis and Choreftaki v. Greece,* no. 46846/08, 17 January 2012).

[627] Ibid. Regarding freedom of expression in a privately-run space (*Appleby and Others v. the United Kingdom,* no. 44306/98, ECHR 2003-VI).

[628] Id,, 201, referring to *Women On Waves and Others v. Portugal*, no. 31276/05, 3 February 2009; and *Communist Party of Russia and Others v. Russia*, no. 29400/05, 19 June 2012.

[629] See, in general, Steven Greer, "'Balancing' and the European Court of Human Rights: a Contribution to the Habermas-Alexey Debate," *International Journal of Constitutional Law* 63, no. 2 (2004): 412-434.

[630] ECtHR, *Bellet v. France,* 4 December 1995, § 31, Series A no. 333-B § 31; and *Mosley v. the United Kingdom,* no. 48009/08, § 109, 10 May 2011. Arai-Takahashi, in *Margin of Appreciation*, notes the efforts of the ECtHR in improving its reasoning on the matter, at 36-41.

This warning is important because the Court is increasingly called upon to settle cases involving autonomy or minority rights in which *e.g.* a lax review favoring "general interests of the society" or similar considerations may render their individual rights illusory. Further, a hasty resort to the "disproportionate burden" argument, in view of the implied resources that may enable one's autonomy, may hinder the very realization of the right at stake. Additionally, when dealing with cases involving vulnerable groups, the Court has initiated a practice of applying a narrow margin of appreciation only, which still requires further elaboration by the Court and pertinent doctrine. This specific issue, more related to the area of equality and non-discrimination, will be dealt with in Chapter 6 (Section 5).

4.3.3 – The "Proceduralization Movement" at the ECtHR

160. The ECtHR has progressively required procedural quality in the assessment by the domestic authorities of competing interests.[631] Procedural positive obligations, in fact, were a remarkable area in which the Strasbourg case law was developed in a very detailed manner, as seen in Chapter 2 (duty to protect). In *Hatton and Others*, the Court made a preliminary assessment on whether the authorities had thoroughly assessed the competing interests at stake before proceeding to the margin of appreciation stage.[632] Following this trend, the Court has attached importance to the participation in the decision-making process.[633] This Court's "procedural turn",

[631] Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, 66.

[632] ECtHR, *Hatton and Others v. the United Kingdom* [GC] §§ 155-160, ECHR 2003-VIII. See also, in *Gaskin v. the United Kingdom,* the Court held accepted that it might be legitimate for the national authorities to deny access to the applicant's individual files concerning placement in foster care, but not as a general policy. Instead, a denial required a balancing assessment, in order to ascertain whether the reasons for denial are compelling to restrict access to data in a case-by-case basis (7 July 1989 Series A no. 160).

[633] See. *e.g.*, in *Fadeyeva* v. Russia, § 128: "[i]t is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests."

privileging equitably and impartially[634] of domestic procedures, has added credibility to the Court's reasoning.[635]

In addition to the bourgeoning practice of the ECtHR to require stronger procedural safeguards to protect substantive rights, fostered procedural requirements are relevant to the proportionality test in the context of positive obligations. When combining proportionality and procedural protection elements, the ECtHR acts by reasons of "efficacy," assuming that it enhances the protection of substantive rights.[636]

161. In any case, between the criticisms from one side – of abandoning the substantive analysis of the ECHR[637] – and from another side – of legislating on behalf of national parliaments[638] - lies the subsidiary nature of the ECtHR itself. A calibration of the Court's role in this regard has been translated into the shared responsibility between the Court and domestic actors to protect rights.[639] Accordingly, the Court has intensified national dialogues, requiring from those actors to deliver their fair share in protecting rights in Europe.[640]

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[634] Françoise Tulkens and Sébastien Van Drooghenbroeck, "L'Évolution des Droits Garantis de l'Interprétation Jurisprudentielle de la CEDH," *Table Ronde dans le Cadre de la 3e Académie Européenne d'Eté*. 27 September 2002, available at [http://cejm.upmf-grenoble.fr/userfiles/TULKENS.pdf.]; Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press 2006), 265.

[635] Tulkens and Van Drooghenbroeck, "L'Évolution des Droits Garantis de l'Interprétation Jurisprudentielle de la CEDH", at 19.

[636] Eva Brems, "The 'Logics' of Procedural-Type Review of by the European Court of Human Rights," in *Procedural Review in the European Court of Human Rights Cases*, eds. Janneke Gerards and Eva Brems (Cambridge: Cambridge University Press, 2017), 19; Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, 180.

[637] Jonas Christoffersen, *Fair Balance, a Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (The Hague: Martinus Nijhof Publishers, 2009), 463.

[638] E.g. the UK Conservative Party's position paper, pointing at the "mounting concerns" that the Strasbourg Court attempts to overrule decisions of democratic parliaments (2014), available at [https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document], accessed on 7 February 2019. See also: Gerards and Brems, noting the pragmatic nature of this approach, viz. to avoid going deeply on sensitive issues that are better dealt with by national authorities, in "Procedural Review in European Fundamental Rights Cases: Introduction," in *Procedural Review in the European Court of Human Rights* Cases, eds. Janneke Gerards and Eva Brems (Cambridge: Cambridge University Press, 2017) 5.

[639] See, the Brussels Declaration (27 March 2015), reaffirming this shared responsibility (OP3), but also inviting "the Court to remain vigilant in upholding the States Parties' margin of appreciation" (OP7). See also the Copenhagen Declaration (13 April 2018), recitals 33-35.

[640] See discussions on the "responsible court" doctrine, in Başak Çalik, "From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights," in *Shifting Centres of Gravity in Human Rights Protection – Rethinking Relations between the ECHR, EU, and National Legal Orders,* eds. Oddný Mjöll Arnardóttir and Antoine Buyse, (London: Routledge, 2016), 144-160.

A development of this shift in the wake of the debates on increasing the quality of the Court's practice in this area is what Eva Brems names "substance-flavoured procedural review".[641] According to her, this practice does not consist of a mere review by the Court of the domestic processes, but also of "a review of the quality of the human rights scrutiny performed at the domestic level."[642] In other words, this new approach does not only argue *if* the domestic authorities perform any review, but also *how* they appraise the substantive obligations under the ECHR. As a consequence, one cannot speak of a purely procedural review but of a review that takes into account (certain) relevant components that are stake for the parties.[643] In this context, in which the domestic Courts perform the proportionality test themselves,[644] the Court's own assessment assumes a secondary status.[645]

162. Regarding the review by domestic courts, *Von Hannover (No. 2)*, is a clear example in which a wider margin of appreciation was afforded, in view that a high national court made a sound proportionality assessment according to the ECtHR's applicable standards.[646] The Court found no violation of Article 8, given that the domestic court made a careful balancing of the conflicting matters at stake: (a) the freedom of the media to publicize personalities not holding public offices (Article 10 ECHR) and (b) the right of the applicants not to have some of their lives details made public (Article 8 ECHR).

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[641] Eva Brems, "The 'Logics' of Procedural Type Review by the European Court of Human Rights", 34-35.

[642] Ibid.

[643] Id., 36.

[644] Sébastien van Drooghenbroeck, La Proportionalité dans de Droit de la Convention Européene des Droits de l'Homme (Brussels: Bruylant, 2001), 321.

[645] Oddný Mjöll Arnardóttir, "Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation," *ESIL Conference Paper Series* Conference Paper No. 4/2015, commenting that, in this case, the a Court's own proportionality review than assumes a secondary status (at 13).

[646] ECtHR, *Von Hannover (No. 2*), §107, stating: "the Court would require strong reasons to substitute its view for that of the domestic courts". Similarly, in *Palomo Sánchez and Others v. Spain*, regarding the dismissal by a private company of employees who have published an offensive cartoon, the ECtHR approved of the "in-depth examination of the circumstances of the case and a detailed balancing of the competing interests at stake" (nos. 28955/06 and 3 others, § 74, ECHR 2011). Contrariwise, in *Kyriakides v. Cyprus*, involving moral damages claimed by a police officer, a violation of Article 8 ECHR was found, since the domestic process failed to offer a sound proportionality analysis on the restriction of the individual right at stake (§ 51, 16 October 2008).

This enhanced procedural review has been extended to the assessment that national legislatures perform on the compliance of the ECtHR within their debates. *Animal Defenders* (2013) is a fine example in which the Court underscored that:

> [t]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the relevant margin of appreciation.[647]

The case related to the prohibition of paid political advertising by the applicant, a NGO that advocated for animal rights. The main point of dispute was the necessity of the national legislation that imposed a blanket ban on a particular type of expression covered by Article 10 ECHR. It could be said, in principle, that such general prohibition is of difficult acceptance under the proportionality criterion under the pertinent paragraph 2. However, for the Court, in order to examine the proportionality in this case, it should consider the legislative choices leading to this blanket ban. For the majority of the Court, it was relevant that the Parliament made an extensive analysis of the Strasbourg case law pertinent to the bill under debate, including an analysis of the compatibility of the said legislation with the ECtHR.[648] Moreover, the law in question counted on a cross-party support and was sufficiently debated at a number of occasions. Even in the case of a blanket ban, a deferential stance by the Court was based on such well-tailored assessment by the domestic legislature in what can be classified as a "positive subsidiarity" by the ECtHR.[649]

Methodologically, the Court, by accommodating its subsidiary role, somewhat flexibilized the operationalization of pertinent Paragraph 2 of Article 10 by not focusing so much on the impact of the general measure on the applicant, but rather

[647] ECtHR, Animal Defenders International v. the United Kingdom [GC], § 108.

[648] Id., §§ 114-116.

[649] Brems, "The 'Logics' of Procedural Type Review by the European Court of Human Rights", 24, referring to instances when the Court finds that domestic courts or parliaments have make an effective assessment of the relevant ECHR matters. *A contrario*, a "negative subsidiarity", refers to cases in which the Court finds that the domestic actors have not performed an adequate assessment of balancing of the issues at stake for the compliance with the ECHR. The latter example is illustrated by *Hirst v. the United Kingdom (No. 2)*, involving legislation that banned convicted prisoners to vote. The Court held that neither the Parliament, nor the domestic judiciary, have performed any compatibility or proportionality assessment of the impact of such ban on the prisoners' rights. See also: Roberto Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14 (2014): 497-499.

justifying it by the argument of the overall quality of the process.[650]

163. In sum, despite that the legal writings have indeed marked this important evolution, it appears that this Court does not make a stark differentiation in its case law on whether it is dealing with a matter of substance or with a matter of proportionality. The Court has re-calibrated this practice in order to maintain the fine balancing between subsidiarity and effective protection of rights. For instance, the "outsourcing" to domestic counterparts of its own proportionality balance represents a strategic move by the ECtHR to stimulate those synergies, which in turn requires from them a more robust knowledge of the Strasbourg's substantive *acquis*. However, as the ECHR is primordially tasked to protect *individual* rights, the Court, if missing this balance, risks by this collaborative proportionality assessment restricting itself to merely perform policy review instead of guarantee of rights.

Concluding Remarks

Although evolving interpretation of human rights treaties, leading to the reading of new positive obligations in general CPR treaties in itself enjoys a wider acceptance, there is still a risk of anticipating to current social debates, thus creating new understanding of the relevant law that does not reflect consolidated social changes. Hence, in order to secure legal certainty in this process, such a body should clear state the need of a new understanding and avoid departing from a previous state of the law without a good reason, through clear methods. Nowadays, it is recognized that both methods of assessing legal developments - internal comparison and external comparison - have been better conjugated, avoiding an excessive use of the former, remarkably by the ECtHR, which has an important practice thereon.

[650] See, the criticism of dissenting Judges Ziemele, Sajó *et al*, arguing that the fact that a law was carefully enacted by the Parliament "does not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights." (§ 9). See also, Tom W. Lewis, "Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?," *Modern Law Review*, 77, no. 3 (2014): 460-474. The level of controversy in such cases is also demonstrated by Angelika Nussberger, explaining that this procedural approach does not necessarily ease the tensions between the ECtHR and national actors, citing *Konstantin Markin v. Russia* (2010), on the lack of assessment on the number of military male staff taking parental leave; and *Hirst v. the United Kingdom (No. 2)* (2005), on the lack of debates on penal policy in accordance with human rights standards, in: "Procedural Review by the ECHR: View from the Court" in Procedural Review", in *Procedural Review in the European Court of Human Rights* Cases, eds. Janneke Gerards and Eva Brems. (Cambridge: Cambridge University Press, 2017), 162-163.

However, as it was seen in this chapter, in practice, hardly any human rights case could be said to anticipate the social debates. To the contrary, some areas such as family rights represent focus of hesitance, in this regard. There is also a risk of a court to read a new positive obligation so as to imply ESCRs, thus extrapolating its new understandint beyond the material scope of *a* CPR treaty, although both CRP and ESCR may in theory be indivisible and overlap on an number of circumstances. It was found that cases extrapolating to ESCR were exceptional, since the relevant courts have been particularly careful on this matter.

On a more technical note, the knowledge parameter engaging State responsibility to take positive action has assumed different forms, including both direct and indirect knowledge, requiring at times the authorities to actively search for information in order to prevent violations.

Likewise, the minimum severity of a violation, sustained by a victim, serves as a parameter to delimit the scope of positive obligations. Relevant rulings have developed more concrete baselines for this parameter.

An important factor delimiting the scope of positive obligations is indeed the balancing of competing rights and interests. This practice is more prominent in Europe than in other regions, though the IACtHR has incipiently engaged therein, particularly through the assessment of the scope of an obligation through the doctrine of the margin of appreciation. This assessment involves not only purely legal elements, but also arguments around the subsidiarity of the international monitoring bodies, policy choices of domestic authorities and the observance of a human rights treaty by domestic courts. During the last decade, the enhanced debates on a shared responsibility between the ECtHR and domestic counterparts in securing the rights protected in the ECHR, has resulted in the "procedural turn" of the ECtHR, by which a wider margin of appreciation is afforded to States perform a sound analysis of the competing issues at stake. Important in this regard is that this Court assumes a secondary role, by deferring the proportionality analysis itself to the domestic authorities.

PART II – Positive Obligations in the Context of Equality and Non-Discrimination

Part II of the present study applies the theoretical background from the previous Part I to the context of equality and non-discrimination. Chapter 4 is devoted to the assessment of the claims for "special positive obligations" through the maxim of substantive equality, which may lead to various States duties, beyond the abstention from discrimination, but including the prevention of discrimination from non-state actors, the promotion of equality, and the removal of de facto obstacles for equal enjoyment of rights. This chapter also attemps to better reconcile the evoling concept of vulnerability with the normative framework of equality law.

A survey of the current case law related to equality and non-discrimination is conducted in Chapter 5, through the tripartite typology of duties, in order to give a practical support to the theoretical claims of the previous chapter. Of particular interest for this chapter in the extent to which general CPR monitoring bodies read new positive obligations of this subject matter by seeking provisions of specialized non-discrimination treaties or relevant interpretation.

The delimitation of the scope of positive obligations (Chapter 6), in the context of equality and non-discrimination, builds on the previous Chapter 3, by bringing into the study the question of vulnerability and by inquiring on how the issue of vulnerability shapes the scope of positive obligations, including on the extent to which these obligations can be claimed within this very context.

Chapter 4 – Assessing the Justifications of Positive Obligations in the Context of Equality and Non-Discrimination

Introduction

164. Not only rights themselves entail obligations of both negative and positive obligations. It has been claimed that *equal* enjoyment of rights, in addition to the mere abstention from States, requires positive action in order to *de facto* ensure equal rights. However, while positive obligations are more explicit in specific non-discrimination treaties, the general counterparts contain only general non-discrimination provisions from which positive obligations are mostly implied.

165. The prohibition of discrimination is a central principle in human rights law that enunciates a formal equality of individuals, constituting a fundamental point of departure in human rights law. According to the relevant seminal standard, an instance of discrimination occurs when a differential treatment between individuals under the same conditions is neither objective nor reasonable. The ECtHR's traditional approach in Art. 14 ECHR performs this straightforward comparative approach. Already in the *Belgian Linguistic Case* (1968), this Court requires the proof of difference of treatment between the applicant and the remainder of other individuals in analogous or similar situations.[651]

This elementary analysis of non-discrimination claims entails a straightforward State responsibility scheme based on the intent to discriminate. In fact, the general human rights treaties' non-discrimination clauses[652] have been drafted under the very idea of negative obligations[653] by establishing an overall prohibition of discrimination by States parties.

166. Nonetheless, non-discrimination law has evolved alongside human rights as a whole. Legal realism has exposed the limitations of the formal concept of equality, in

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[651] ECtHR, Case *"relating to certain aspects of the laws on the use of languages in education in Belgium" (merits)*, 23 July 1968, Series A no. 6. In National Union of Belgian Police v. Belgium, (27 October 1975, § 44, Series A no. 19), the Court held that the principle of non-discrimination "safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms". In Marckx v. Belgium, 13 June 1979, § 32, Series A no. 31 states: "safeguards individuals, placed in similar situations, from any discrimination".

[652] Article 14 ECHR, and Protocol 12; Article 1.1 ACHR; Article 19 ACHPR; Article 26 ICCPR.

[653] For instance, in the drafting process of Article 26 ICCPR, a Greek and British amendment, which was eventually adopted, was not intended to recognize duties such as prohibiting discrimination in private relations. UN Doc. A/C.3/L.946. See: Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Leiden: Martinus Nijhoff, 1987), 489.

particular by unmasking the fallacy that "holds out as universal and neutral the characteristic of dominant group expecting conformity to the norm as the price for equal treatment."[654] Moreover, it has been well noted that the formal concept of equality had not made significant impact on factual disadvantages.[655] New developments in legal theory, case law and treaty-making have made evident persistent instances of unequal enjoyment of rights despite the introduction of the prohibition of discrimination in general human rights treaties.

In this context, the objective of this Chapter is to analyze the validity of the claims of positive obligations in the context of non-discrimination by assessing the relevant doctrine, case law, and specific non-discrimination treaties that imply State obligations beyond the mere abstention from discrimination.

1 – General Approach on State Responsibility Beyond the Abstention to Discriminate

167. On a first analysis, it suffices to state that State abstention in relation to discrimination has not been regarded as the only type of State obligation in question. Indeed, early international jurisprudence and specialized treaty-making have envisaged positive obligations in this regard. Two examples can be mentioned.

1.1 - Early Jurisprudence

168. State obligations beyond the mere prohibition of discrimination by the authorities have been considered since the early times of international law. The PCIJ has incorporated such an understanding in the *Albanian Minorities* Advisory Opinion (1935). The case revolved around the closing of private schools by the Albanian government. The respondent State contended that the closing of these schools was not discriminatory given that it applied uniformly to all individuals.

The PCIJ, however, by noting that the closing of private schools would *in fact* deprive members of minority groups of the possibility to study in their own mother language, held that such an act would be detrimental to these minorities. Thus, for this Court, the aim of

[654] Sandra Fredman, "Substantive Equality and the Positive Duty to Provide," *South African Journal on Human Rights* 1, no. 2 (2005): 165-166.

[655] See, in general, Peter Westen, "The Empty Idea of Equality," *Harvard Law Review* 95, no 3 (1982): 537-596.

ensuring factual equality "may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."[656] This broad understanding of substantive equality has remained latent until decades later by the adoption of specific equality treaties and expansive interpretation of the non-discrimination provisions in their general counterparts.

1.2 - Specific Equality and Non-Discrimination Treaties

169. Key provisions of specific equality and non-discrimination treaties, including their very concept of discrimination, increase the possibility for the relevant monitoring bodies to requires positive obligations from States parties. For instance, the CEDAW's Art.1 provides that

> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[657]

This comprehensive definition of discrimination, including discrimination by effect in addition to discrimination by purpose, lends support to the understanding that merely negative obligations – reflecting simply an absence of intent on the part of the public authorities to discriminate – may not suffice for States parties to comply with the CEDAW.

2 – Substantive Equality

170. It can be said that the principle of effectiveness, in the context of equality and non-discrimination keeps is translated into the term *substantive equality* as an expansion of the traditional *formal equality*. More specifically, a seminal work of Sandra Fredman

[656] PCIJ, *Advisory Opinion regarding Minority Schools in Albania*, 6 April 1935, PCIJ Reports, Series A/B, No 64, 1935.

[657] CEDAW, Article 1 (emphasis added). See also CRPD, Article 2: ""Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

and Sarah Spencer has elucidated that substantive equality has multiple objectives.[658]First, substantive equality aims at breaking the cycle of disadvantages led by continuous discrimination against a certain group.[659] Further, upholds respect for equal dignity and redress stigma, stereotyping, violence, and humiliation by the fact of belonging to a group.[660] Substantive equality also encompasses the objective of accommodating and affirming "different identities, aspirations and needs."[661] It also aims at facilitating "full participation in society," in order to give voice to those groups affected by marginalization and exclusion.[662] In general normative terms, these objectives cannot be fulfilled simply by the formal concept of discrimination, denoting negative duties. Rather, "development from formal to substantive equality goes a long way towards recognizing the centrality of positive duties."[663] Hence, it also requires of the State an active role not only as a guarantor of the equal rights, but also as promoter articulator of relevant policies—and provider of goods and services when needed. Accordingly, the concept of equality, beyond mere discrimination, discloses a number of different perspectives, as demonstrated in the following sub-sections.

2.1 - Indirect Discrimination

171. The notion of indirect discrimination is a first manifestation of the overall concept of substantive equality. For instance, the HRCttee has pointed out, as a general principle, that an instance of indirect discrimination occurs when a certain norm or practice, though neutral at *face value*, may disproportionately affect certain social sectors.[664] Given that the ICCPR does not contain a specific definition for discrimination, the HRCttee has embraced the ample definition enshrined by the CERD and CEDAW.[665]

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[658] Sandra Fredman and Sarah Spencer, "Beyond Discrimination: It's time for Enforceable Duties on Public bodies to Promote Equality Outcomes," *European Human Rights Law Review* 6 (2006): 598-606.

[659] Id., 603.

[660] Ibid.

[661] Ibid.

[662] Id., 604.

[663] Sandra Fredman, *Human Rights Transformed.* (Oxford: Oxford University Press, 2008), 178.

[664] See, Anthony Lester and Sarah Joseph, "Obligations of Non-Discrimination," ed. David Harris et al., *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), 575.

[665] SHRCttee, *General Comment No. 18: Non-Discrimination,* adopted on 10/11/1989. UN Doc. CCPR/C/21/Rev.1/Add. 1, § 7. Indirect discrimination in the case-law of HRCttee, see: *Althammer et al. v. Austria* (2003), alleged violation of Article 26 ICCPR regarding the discontinuation of household allowance,

172. This concept changes the very logics of comparison. Direct discrimination is assessed on the basis of a comparison between of treatment of individuals in comparable circumstances.[666] Indirect discrimination, for its part, implies in a comparison of equal treatment among different groups who find themselves in different conditions.[667] This concept had been yielded by early US Supreme Court's jurisprudence[668] and the practice of the CJEU,[669] which both were influential in a proactive reading of the non-discrimination clauses of general human rights treaties.

Indirect discrimination in fact is identified on the basis of a critical assessment of laws, regulations, and practices revealing the underlying problems of unequal social structures. This requires a substantive analysis of the outcomes of these norms with respect to disadvantaged groups[670]. This approach seeks greater fairness than the formal concept of equality is able to deliver. In this context, indirect discrimination is said to be designed to prevent the circumvention of the formal prohibition of discrimination[671] and to assist governments in the achievement of ampler social goals through law. These social goals,

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combined with an increase of child allowance payments (communication no. 998/2001, views of 8 August 2003. UN Doc. CCPR/C/78/D/998/2001, § 10.2 - no violation of Article 26 ICCPR). Repercussion in *i.a. Leonid Raihman v. Latvia*, communication no. 1621/2007. Views of 28 October 2010, UN Doc. CCPR/C/100/D/1621/2007, § 8.4 (violation of Article 17 ICCPR).

[666] Ibid.

[667] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed. (Oxford: Oxford University Press, 2013), 649.

[668] US Supreme Court, in *Griggs v. Duke Power Co*, 401 US 424, held that the defendant company's skill requirements adversely affected black individuals. For a seminal article, see, Michael J. Perry, "The Disproportionate Impact Theory of Racial Discrimination," *University of Pennsylvania Law Review* 125, no. 3 (1977): 540-589. Admittedly, nowadays, this Court has taken a tempered approach in this matter, as it held in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (576 U.S. __ (2015)), that the disparate impact can only be considered unconstitutional if it is considerably "artificial, arbitrary, and unnecessary barriers" to a group in question. The Court was confronted with the question whether excessive housing subsidy for predominantly black areas, in contrast with insufficient subsidying in white suburban areas, generated a disparate impact by creating geographic segregation.

[669] For instance, in the CJEU's *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607, the denial of promotion for part-time positions was deemed discriminatory because it disproportionately affected women, who are overrepresented in this type of workforce. The EC adopted in 2006 Directive 2006/54/EC on equal opportunities for men and women in the fields of work and occupation, taking abreast of the CJEU's *acquis*. Its Art 2.1(b) specifies that indirect discrimination may raise "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". Directive 2000/43/EC, the "Racial Equality Directive" is examined in detail in Part III.

[670] Dagmar Schiek, "Indirect Discrimination," in *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, eds. Dagmar Schiek et al. (Oxford: Hart, 2007), 328.

[671] Ibid. Schiek's argument here seems to be quite restrictive, given the irrelevance of the intent in this context. Thus, it seems that besides preventing circumvention, the best function of indirect discrimination is designed to correct distortions reflected in the legal norms and practices.

within the context of international human rights law, entail State obligations such as combating stereotypes or harmful practices or obligations as wide as addressing structural inequalities within the State, as will be seen *infra* in this chapter.

173. In any event, indirect discrimination and its direct counterpart cannot be regarded as antagonistic but as inseparable and complementary parts of an effective system to address unequal enjoyment of rights.[672]

2.2 – Addressing Inherent Asymmetries in Human Rights Law

174. Another ramification of the concept of substantive equality is the recognition of intrinsic asymmetries within societies, resulting in unequal enjoyment of rights for certain groups even if the formal concept of equality is correctly applied. As seen above, this perspective, comparing different groups in different circumstances, aims at the equal realization of rights to individuals in recognizable different circumstances instead of offering formally equal treatment vis-à-vis the remainder of the society, regardless of the results. In this context, substantive equality involves the recognition of diversity by allowing adaptation to the specific case instead of conformity or assimilation to the general pattern.[673] In sum, individuals or groups require some form of differentiated treatment to enjoy on equal footing fundamental rights and freedoms.[674]

175. The ECtHR's important *Thlimmenos* case (2000) sheds light on the existence of State responsibility for not taking into account such asymmetries. The case regards the punishment of a conscientious objector who had his appointment as chartered accountant rejected on the basis of a previous criminal record due to his refusal to wear a military uniform, leading to a punishment for disobedience. He had refused such an order alleging religious grounds. The Court's Grand Chamber, after referring to the formal concept of discrimination, held: "this is not the only facet of the prohibition of discrimination in Article 14."[675] In addition, it made clear that

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[672] See also Wouter Vandenhole, naming direct and indirect discrimination "twin concepts", in *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005), 35.

[673] HRCttee, *General Comment No. 18: Non-Discrimination*, adopted on10 November 1989. UN Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), § 7.

[674] Eric Heinze, *The Logic of Equality – A Formal Analysis of Non-Discrimination Law* (London: Ashgate, 2003), 129.

[675] ECtHR, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different[676]

By this pronouncement, the ECtHR has shown its readiness to deal with measures of specific adaptations, which had important ramifications in its recent case law.[677] Importantly, it has also shown that the general clause of Art. 14 ECHR may be interpreted beyond the formal concept of discrimination.

176. Treaties on the rights of specific groups enshrine explicit provisions for measures of this type. The best example is the CRPD that stipulates under Art. 9 (accessibility measures) a series of obligations to enable persons with disabilities access *on an equal basis with others* to the physical environment, information, and communications. Complementarily, reasonable accommodation measures are stipulated throughout this Convention.

177. The examples mentioned above illustrate the limitations of formal equality to recognize inherent asymmetries of societies. Despite efforts in public administration to combat discrimination, States' rules, policies, and practices are frequently designed through the dominant social values, which, as a consequence, tend to perpetuate discriminatory laws and practices, according to the relevant prevailing values.

178. However, the above-discussed approach by supranational systems faces practical challenges. Firstly, most relevant petition mechanisms are concentrated to individual rights and exceptionally are collective or structural perspectives are considered.[678] Moreover, in order to find evidence about significant instances of inequality, specific and

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[676] Id., § 129. In the CJEU's practice, see *Gerster v. Freistaat Bayern*, on the apparently neutral treatment for part-time work from the calculation for promotions and benefits, Case 1/95, 1997. E.C.R. 5253.

[677] See, ECtHR, *Glor v. Switzerland,* no. 13444/04, ECHR 2000 (failure to consider the applicant as a person with disability and imposition of an army exemption tax, violation of Article 14, in conjunction with Article 8 ECHR); *Price v. the United Kingdom,* no. 33394/96, ECHR 2001-VII (lack of adaptable facilities for an inmate in a wheelchair); *Eweida and Others v. the United Kingdom,* nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 2013 (extracts), (reasonable accommodation on the grounds of religion); *Guberina v. Croatia,* no. 23682/13, 22 March 2016 (failure to recognize disability as a condition for special tax regime applicable for persons lacking basic housing infrastructure); *Enver Sahin v. Turkey*, no. 23065/12, 30 January 2018 (insufficient provision of physical accessibility for a paraplegic student to attend classes in the relevant building).

[678] Exceptionally, the ECtteeSR has a genuine mechanism of collective complaints. The ECtHR has started the practice of approaching structural violations through the pilot-judgment procedure, which is analysed in Chapter 6 (Section 6.2).

credible methods are required both in litigation and in public policy. Supranational courts have progressively accepted statistical data as a means of evidence of discrimination on the basis of such data and have found States in breach of human rights treaties. Yet, an analysis of the scope of State obligations to prevent or address patterns of inequalities deserves a more comprehensive approach. For instance, the question whether statistic data plays an important role on the knowledge parameter in order to give rise to State responsibility to address structural discrimination has not been sufficiently studied. These challenges are are addressed throughout this study.

2.3 – State Responsibility for Discrimination by Non-State Actors

179. Chapter 1 analyzed the contours of violations committed by non-state actors and the question of the (indirect) horizontal application of human rights treaties, which entails an array of positive obligations for the State, going as far as protecting rights in interactions between individuals. This section will examine the general application of this doctrine to the context of equality and non-discrimination. For this aim, the specific cases of domestic violence, of discrimination in relation with purely private deeds and of privatization of public services serve as important illustrations that have been consistently present in the relevant legal debates.

2.3.1 - Domestic Violence

180. Violence against persons belonging to vulnerable groups is an instance in which the State obligation to address violations against private parties is well identified. Specifically on the case of violence against women, the CEDAWCttee has emphasized that gender-based violence is a form of discrimination against women that "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[679] In addition to violence committed by government officials,[680] State responsibility may

[679]CEDAWCttee, *General Recommendation No. 19 – Violence against Women*, 11th session, 1992. UN Doc. A/47/38, § 1.

[680] Id., § 8. In addition, *General Recommendation No. 35* states: "a State party is responsible for acts and omissions by its organs and agents that constitute gender-based violence against women [including] acts or omissions of officials in its executive, legislative and judicial branches", requiring States to "refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with this obligation." § 22. (*General Recommendation on Gender-based Violence against Women, Updating General Recommendation No. 19*, 17 July 2017. UN Doc. CEDAW/C/GC/35).

also be triggerd if a State party fails "to act in due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[681] To illustrate its argument, the Committee goes on making the case violence within the family (a very private setting), which accordingly "is one of the most insidious forms of violence against women."[682]

General Recommendation No. 35 (2017) reinforces the understanding of State responsibility for non-State actors under the CEDAW. Accordingly, it covers in the first place "acts and omissions by non-state actors" empowered to perform elements of governmental authorities, such as private actors performing public services. In those cases, responsibility is attributed to the State itself.[683] In addition, under the CEDAW, the due diligence standard entails and obligation to "take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise."[684] Hence, States are held responsible internationally for a failure to prevent or redress "acts or omissions by non-State actors which result in gender-based violence against women."[685] This new recommendation by the CEDAWCttee is grounded on entrenched tenets of State responsibility for internationally wrongful acts, as the relevant ILC Draft Articles.[686]

This precedent of the CEDAWCttee through the previous *General Recommendation No. 19* was influential to regional case laws. On the part of the OAS, *Maria da Penha v. Brazil* (2001) by the IACHR inaugurated a period in which both the American Convention and the Declaration dealt with violence against women as such.[687] The Inter-American Convention on Violence against Women followed suit years later, containing a specific provision on due diligence. On the part of the ECHR, in *Opuz v. Turkey* (2009) the Strasbourg Court made ample reference to General Recommendation No. 19 and the

[681] Id., §9. The Committee suggests that private violence against women operates across the board under the CEDAW, as it performs an extensive article-by-article explanation on the matter.

[682] Id, § 23. See also § 18 on sexual harassment.

[683] CEDAWCttee, *General Recommendation No. 35*, § 22.

[684] Ibid.

[685] Id., footnote 30.

[686] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by UNGA Resolution A/56/10.

[687]IACHR, *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01. OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

Inter-American case law.[688] In 2003, the African Charter was supplemented by a Protocol on the Rights of Women in Africa, containing a regionally contextualized definition of violence against women.[689] Not many years later, the CoE's Member States adopted the Istanbul Convention on Violence against Women, a very comprehensive text, reflecting a firm commitment by these States to adopt a hard-law instrument based on the relevant *acquis*.[690]

2.3.2 - State Responsibility Arising out of Discrimination in Purely Private Deeds

181. Besides the serious cases of violence against vulnerable groups (as seen above), it appears that State responsibility may apply to discriminatory acts of a purely private nature. The Strasbourg judges have at least on one occasion held that States may have be under an obligation to protect an individual from discrimination even in the context of private deeds. In the ECtHR's case of *Pla and Puncernau v. Andorra* (2004), regarding a testatrix's will on the distribution of her assets among the heirs, the crux of the question for the Court was whether or not it was required to rule on disputes of a purely private nature.

The issue at stake was the exclusion of a child born out of wedlock from the distribution of the assets. The Court carefully explained that its role, in principle, is not to settle disputes of a purely private nature. Still, it held that in discharging its supervisory function, "it cannot remain passive where a national court's interpretation of a legal act" is "blatantly inconsistent with the prohibition of discrimination established by Article 14 [of the ECHR]" even if the act consists of a private deed.[691] This case demonstrates how far the Court can interpret positive obligations under the non-discrimination clause of the ECHR, beyond its hands-off original thrust.

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[688] ECtHR, *Opuz v. Turkey,* no. 33401/02, ECHR 2009, in particular § 200, referring to CEDAW's *General Recommendation 19*, and § 169, referring to the IACHR's *Maria da Penha.* Other important cases on domestic violence include *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007; *Rumor v. Italy*, no. 72964/10, 27 May 2014; and *M.G. v. Turkey,* no. 646/10, 22 March 2016. See further discussions in Chapter 6 (Section 1.1.1).

[689] Maputo Protocol, Article 1: "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

[690] CoE, Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS 210.

[691] ECtHR, *Pla and Puncernau v. Andorra,* no. 69498/01, § 59, ECHR 2004-VIII.

2.3.3 - Privatization, Delegated Public Services and Discrimination

182. In Chapter 1, it was seen that the State remains the guarantor for the enjoyment of rights in relation with the services which public authorities delegate to private actors through several forms. Though privatization is not forbidden by human rights law, it cannot be disregarded that this phenomenon may negative impacts on certain groups. It has been stated that privatization schemes have led to patterns of discrimination, for instance with respect to the right to education[692] and the right to water.[693]

One of the entry points in this discussion is the set of parameters set by the CESCR Committee, specifically accessibility (physical access) and affordability (economic access) as conditions to ensure equal the provision of goods, services, and opportunities relevant to the enjoyment of rights set forth in the ICESCR. As the Committee points out, these rights must be accessible "in law and in fact, [including] to the most vulnerable or marginalized sections of the population."[694] This necessary attention for populations that can be significantly large, also aims at preventing what can be called *elitization* in the realization of rights, restricting the enjoyment of rights to members of privileged groups who can afford to pay for the respective services.

183. Experts have regarded with concern the privatization of those services traditionally carried out by the public authorities, because of the risk of generating or deepening inequality. For the Special Rapporteur on the Right to Education,

> in many parts of the world inequalities in opportunities for education will be exacerbated by the growth of unregulated private providers of education, with

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[692] See, CEDAWCttee, *General Recommendation No. 36 on Girls' and Women's Right to Education* (2017): "[i]t has been established that privatization has specific negative consequences for girls and women and particularly girls from poorer families, excluding them from education." UN Doc. CEDAW/C/GC/36, 16 November 2017, § 38.

[693] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, adopted on 20 January 2003, UN Doc. E/C.12/2002/11, § 37 on the concern that this right is accessible to the most marginalized groups. See also Manfred Nowak's scepticism on how States will implement the relevant core obligations pertinent to this right, if they privatize water management services to corporations that have different goals and preferences. He criticizes the "neutral" approach to privatization in the area of discrimination. In *Human Rights or Global Capitalism – The Limits of Privatization*, (Philadelphia: University of Pennsylvania Press, 2017), 108.

[694] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, adopted on 12 May 1999. UN Doc. E/C.12/1999/5, § 12; *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, adopted on 20 January 2003, UN Doc. E/C.12/2002/11, § 12; *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, adopted on 8 December 1999. UN Doc. E/C.12/1999/10, § 6; *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, adopted on 6 February 2006, UN Doc. E/C.12/GC/18, § 13.

> wealth or economic status becoming the most important criterion to access a quality education[695]

184. But beyond the question of access to education itself, occurrences of ill-treatment in smaller settings, such as privately-run schools may take place if States do not properly regulate and monitor the private provision of the relevant service. *O'Keeffe v. Ireland* (2014) provided an occasion for the ECtHR's Grand Chamber to apply its previous understanding of the non-exclusion of State obligations in relation to privatized services to the protection of the child. The applicant suffered a series of sexual abuses by the school manager in the context of a private education model in Ireland. Rejecting the respondent State's argument that it could not be held responsible, given that that manager was not a government employee, the Court reaffirmed that States were not released from their human rights obligations when they delegated their duties to private bodies and individuals. The Court coated the case with *particular importance*, in view of the vulnerable situation of school children to sexual abuse in private settings, as the school in question.[696]

The extent to which States fulfil their obligation prevent direct or indirect discrimination while delegating public services to private actors will depend on the characteristics and scope of the regulatory and monitoring mechanisms put in place for that purpose, including public participation mechanisms. This issue will be dealt in detatil in Chapter 9 (Section 6), with a specific focus on racial discrimination.

2.4 - Structural or Systemic Discrimination

185. Another ramification of the concept of substantive equality is the attention to instances of discrimination beyond its individual context, beyond the classic concept of human rights. In this regard, structural discrimination is examined through a sectorial comparison between clusters of individuals in different circumstances (*e.g.* men and

[695] HRC, Report of the Special Rapporteur on the Right to Education to the UNGA (2013). UN Doc. A/68/294, § 26. See also, in general, Ian Macpherson, "Interrogating the Private-School 'Promise' of Low-Fee Private Schools," in *Education, Privatisation and Social Justice*, *Case Studies from Africa, South Asia and South East Asia,* eds. I. Macpherson et al (Oxford: Symposium Books, 2014). Likewise, see the Special Rapporteur on Torture's scepticism on privatization of prisons, UN Doc. A/HRC/31/57/Add.4, §§ 46-49.

[696] ECtHR, *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 145 and 150, ECHR 2014 (extracts), referring to the precedent of *Costello-Roberts v. the United Kingdom,* 25 March 1993, § 27, Series A no. 247-C. The Court, however, did not criticize the private nature of the schooling system, but rather the lack of sufficient mechanisms for protection of children by the State (§ 150).

women, nationals and foreigners, whites and blacks) instead of through a comparison between individuals in similar circumstances. This comparative method, in turn implies an idea of social transformation in view of the patterns existing in society, beyond the traditional individual justice paradigm.

Given the increased interest in the topic, a number of definitions have been proposed to characterize this phenomenon. A comprehensive one, elaborated by Najcevska, indicates that structural discrimination

> refers to rules, norms, routines, patterns of attitudes and behavior in institutions and other societal structures that represent obstacles to groups or individuals in achieving the same rights and opportunities that are available to the majority of the population[697]

Najcevska also points out the disparate impact on certain groups when this phenomenon takes place: "[i]t is also important to recognize that the consequences of rules, norms and behaviors are that some are affected negatively and others positively."[698] Accordingly, as the author suggests, the correspondent impacts are unequally perceived by different groups. Here too, an antagonism between overt or covert direct (or indirect discrimination) appears of lesser importance. Systemic discrimination can be well imposed through a specific and deliberate act or policy, directed against a given group. But can also originate from a non-intentional or face-value neutral rule with differentiated perceived impacts among groups.[699]

186. Systemic discrimination does not occur in a void. Instead, it is reinforced by and further reinforces prejudice, misconceptions and stereotyping[700] against certain groups, which spread throughout society, contaminating both public and private sectors. Lack of adequate participation of discriminated groups in various aspects of social life is indeed

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[697] Mirjana Najcevska, *Structural Discrimination – Definition, Approaches and Trends*. Executive Summary of Panelist at the 8th Session of the UN Working Group of Experts on People of African Descent, 18 October 2009, available, at [http://www.ohchr.org/EN/Issues/Racism/IntergovWG/Pages/Session8.aspx], accessed on 7 February 2019. See also: Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, noting a shift from a traditional individual to a structural discrimination approach, given the growing relevance of a perspective of social power imbalances, 735.

[698] Ibid.

[699] Ibid.

[700] See OHCHR, *Gender Stereotyping as a Human Rights Violation*, Commissioned Report (2013), 8-20. See also: ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts); *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016; and *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017.

one of the main causes of the perpetuation of these problems. These mistaken conceptions moreover enter into a mutually reinforcing chain of specific impunity, when judiciary organs dispense justice in a biased manner, as will be seen further in Chaper 5 (in particular § 244).

The UN treaty system, through its several mechanisms, has addressed this issue in a generous manner. The CEDAW is endowed with specific provisions designed to tackle systemic discrimination,[701] as its Art. 5(a) that obliges States parties to "modify the social and cultural patterns of conduct of men and women" so as to eliminate prejudices, customs, and practices based on the inferior role of women within stereotyped roles of men and women.[702]

For its part, the CRCCttee in *General Comment No. 5*, concerning the systemic consequences of economic adjustment programs on children, has alerted States that economic policies are never neutral in effect upon the rights of the child, particularly with regard to the negative impacts on children of structural adjustment programs and economic transition.[703] It has also pointed out to several traditional harmful practices against children as a result of systemic inequality, calling upon States to prevent this scourge that impairs the adolescents' enjoyment of the right to health development (Articles 13 and 17 of the CRC), including early marriages and forced mutilation.[704]

Turning now to the Inter-American system, one of its most remarkable transformations is the growing case law on persistent patterns of discrimination, given the regional inequality challenges. Such patterns are seen in cases involving street children,[705] violence against women,[706] prison overcrowding,[707] indigenous people,[708] and modern

[701] CEDAW Preamble: "Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women…"

[702] CEDAW, Article 5(a), from which the CEDAWCttee derives its orientation on violence against women; CEDAWCttee, *General Recommendation No. 19*, § 11. Likewise, HRCttee, *General Comment No. 18*, § 5. In *General Recommendation No. 35*, the CEDAWCttee emphasized that gender stereotyping in school curricula is an obstacle impeding women and girls to enjoy human rights, in comparison with men and boys (§ 4).

[703] CRCCttee, *General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child, adopted on 27 November 2003*. UN Doc. C/GC/2003/5, § 53.

[704] CRCCttee, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention of the Rights of the Child*, adopted on 01 July 2003. UN Doc. CRC/GC/2003/4, § 6(e).

[705] IACtHR, i.a., *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of September 11, 1997. Series C No. 63.

[706] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205.

slavery.[709] It is no wonder that both the Court and the Commission have thus used the *pattern of discrimination* approach, originating from the theory on patterns of gross and systematic violations[710] but disregarding the intent as a defining element of the discrimination at stake.[711]

The ECtHR, for its part, attaches greater importance to individual justice. But this fact has not hinderd it from entertaining at times instances of structural inequality, particularly since the past two decades. After initial hesitance,[712] some manifestations in this regard appeared in the 2000s. In *Hoogendijk v. The Netherlands*, engaging for the first time in the wording "indirect discrimination", it at least mentioned the disproportionate impact on a social sector (women), indicating its willingness to entertain instances of structural discrimination.[713]

187. In short, systemic or structural discrimination has proven an inseparable component of substantive equality, requiring a transformative approach of governments. However, it remains to be seen exactly how international court may entertain the relevant instances. An analysis of the approaches taken by the ECtHR and the ACHR is proposed in Chapter 6 (Section 6).

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[707] IACtHR, *Case of Pacheco Teruel et al v. Honduras*. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241.

[708] IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245.

[709] IACtHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318.

[710] Cecilia M. Quiroga, former judge at the IACtHR, has defended a seminal thesis on the matter: "The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System" (PhD diss., Utrecht University, 1985). 11.

[711] See Victor Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System," *Sur Journal of International Law* 6, no, 11 (2009): 19.

[712] ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94. In *Marckx v. Belgium* the Court had spoken of "measures whose object or result is to prejudice protected persons", § 40.

[713] ECtHR, *Hoogendijk v. the Netherlands* (dec.), 2005. See also, *Hugh Jordan v. the United Kingdom,* no. 24746/94, § 154, 4 May 2001. But compare e.g. with the cases relating to Roma schooling systems, in Part III, in which the Court's stance on structural discrimination appears salient.

3 - Substantive Equality and Economic, Social and Cultural Rights

188. The quest for substantive equality in international law indeed questions the artificial divide between CRPs on one side and ESCRs on the other side. In fact, along the development of the works of both ICCPR and ICESCR, as seen above, the HRCttee and the CESCR have elaborated similar principles as regards non-discrimination law. Positive obligations in this regard may apply regardless of the nature of the right at stake.

3.1 - Specialized Treaties

189. Unlike the fragmented manner by which the two UN Covenants were drafted, later Conventions dedicated to equality and non-discrimination were endowed with recognition of both CPRs and ESCRs.[714] Hence, States that ratify these conventions agree to ensure equal enjoyment of both civil and political, and economic, social, and cultural rights, as determined by the relevant treaty provisions.

3.2 - Civil and Political Rights Treaties

190. Noteworthy in addition to the specialized human rights treaties is that, as a result of the free-standing nature of equality clauses of some CPR treaties, the relevant monitoring bodies have accepted claims involving economic, social, and cultural rights.

3.2.1 - The ICCPR

191. An early example of this practice is embodied in *Broeks v. the Netherlands* (1987) before the HRCttee. This case involved the discontinuation of an unemployment payment that according to the author was discriminatory on the bases of sex and civil status. Given the nature of the claim, the respondent State recognized overlaps between Arts. 2 and 9 ICESCR and Art. 26 ICCPR. Yet, it enquired on whether the Committee could ascertain fulfillment of the States' obligations arisen out of the ICESCR, to which the Netherlands was a party, through interpretation of Art. 26 ICCPR. It was thus a plea to reject the claims proposed by the author for incompatibility *ratione materiae*.

The Committee rejected the State party's request with a complex reasoning. The first argument was that the ICCPR should still apply even if the issue at litigation is covered

[714] See, *e.g.* CEDAW, Article 7 (right to political participation) and Article 10 (right to education); CRPD, Article 14 (right to liberty and security), and Article 24 (right to education); CRC, Article 13 (right to freedom of expression), and Article 24 (right to health).

by other instruments like the ICERD, the CEDAW, or even the ICESCR. Hence, according to the Committee, overlaps between the two Covenants should not detract the HRCttee from entertaining the claim at stake under Art. 26 ICCPR in full.[715] In a second line of reasoning, the Committee evoked the respective preparatory works to note that the discussions on whether Art. 26 would extend to rights not enshrined by the Covenant were inconclusive.[716] Out of this lacuna in the ICCPR drafting process, the choice was open for for restraint by denying the application of Art. 26 to ESCRs, or for activism by accepting it with the Committee opting for the second. Accordingly, in the third line of reasoning, the Committee affirmed the free-standing character of Art. 26 by declaring:

> Article 26 does not merely duplicate the guarantees already provided for in Article 2. It derives from the principle of equal protection of the law without discrimination, as contained in Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.[717]

However, the Committee acknowledged the *ratione materiae* boundaries of the ICCPR by explaining that Art. 26 ICCPR does not impose an obligation to enact social-security legislation. Rather, when such a legislation is adopted, the respondent State must comply with the non-discrimination standards of the said article.[718]

3.2.2 - The ECHR

192. Art. 14 ECHR's field of application is limited to the rights enumerated in the Convention itself. Given the subsidiary nature of this Article ESCRs can in principle be entertained only to the extent that they are positively enshrined in the Convention, which is the case with Art. 2 P1 (right to education). At the same time, the Court has not strictly abided by this canon. Since the *Belgian Linguistic Case*, there has been an attempt to make this subsidiarity nature flexible, which the Court did in *Stec and Others v. the*

[715] HRCttee, *Broeks v. The Netherlands*, communication No. 172/1984. Views of 9 April 1987, U.N. Doc. CCPR/C/OP/2, § 12.1.

[716] Id., § 12.2, reminding that the preparatory works of the ICCPR are supplementary means of interpretation only, as per VCLT, Article 32.

[717] Id., § 12.3.

[718] Id., § 12.4.

United Kingdom (2005).[719] While still holding that a State is not obliged to perform any ESCR duty, it also held that if the State does so a duty not to discriminate applies.[720] Indeed, this stance is far-reaching, leading the Court to examine complaints on ESCRs as varied as the right to a parental leave allowance.[721]

3.2.3 - Protocol 12 to the ECHR

193. Aiming at creating a free-standing non-discrimination clause, the ECHR was amended by Protocol 12, establishing a general prohibition of discrimination. Its Article 1 secures equal treatment "set forth by the law" beyond the original subsidiarity of Art. 14.

While Protocol 12 does not add any new definition or concept on equality and non-discrimination, it has a broader scope of application than the equality clause of Art. 14.[722] Article 1 of this Protocol has an independent character, requiring States parties to ensure equality as to the rights signatory States have granted domestically. The hesitance of States parties in accepting with the ECHR other than CPRs may explain the low ratification status of this protocol.

3.3 - The "Capability" Theory in the Context of Equality and Non-Discrimination

194. Aside from the repetitive debates on whether or not case law relying on substantive equality principles would risk extrapolating to ESCRs, a more detailed and realistic view is presented by the theory of capability.[723] The core of this theory is that

[719] ECtHR, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.

[720] ECtHR, Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), § 25.

[721] ECtHR, *Petrovic v. Austria*, 27 March 1998, Reports of Judgments and Decisions 1998-II; *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts).

[722] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009. However, the Explanatory Report to Protocol 12 reinforces the original objectives of the ECHR, namely protecting "justiciable individual rights" (§ 25) also underscoring differences between the obligations arising out of this protocol and the specific obligations imposed by specialized treaties, such as the CEDAWCtteeand the CERD.

[723] The capability theory, created by Amartya Sen, transcends the limited rights-approach but many of his insights on the theory in fact speak about enjoyment of rights. For instance, he refuted the idea that: "poor people are interested, and have reason to be interested, in bread, not in democracy". Instead, he argues that "political rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualisation of economic needs themselves," in *Journal of Democracy* 10, no.3 (1999): 12.

injustice (as a form of inequality) is seen in function of different levels of capabilities among individuals, rather than resources or incomes.[724] Moreover, according to this theory, the "value of equality is most effective in the space of 'capabilities,' i.e. the freedom to be able to be or to do what one values."[725] In a more rights-oriented language, it has been stated that capabilities theory "cover[s] the terrain occupied by both the so-called first-generation rights (political and civil liberties) and the so-called second-generation rights (economic and social rights)".[726]

The capability theory then challenges the supposed antagonism between "freedom" and "bread",[727] as if both State assistance and State abstention were mutually excluding. Nussbaum further articulates both concepts of freedoms and entitlements within a human rights language. She imparts that the objective the capability theory "is not merely 'negative liberty' or absence of interfering state action". [728] Rather, for her, this objective also implies "the full ability of people to choose these very important things".[729] Accordingly, reading rights through the capability lens would require a dual approach, of recognizing both negative and positive obligations.[730] In this context, the value of welfare is downplayed, or even rejected[731], since, for this theory, resources are seen as a means to comply with a given right.[732]

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[724] Refuting Dworkin's theory based on resources, Martha C. Nussbaum criticizes this theory for not sufficiently diagnosing obstacles for an individual to realize her or his capacities, even when the necessary resources are "adequately spread around". For her, the criticized approach will frequently reinforce inequalities. *Women and Human Development – The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000), 68-69.

[725] Latika Vashist, "Rethinking Human Rights through the Language of Capabilities: An Introduction to Capabilities Approach," *Christ University Law Journal*, 1, no. 11 (2012): 2.

[726] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2005), 284.

[727] Upendra Baxi, "From Human Rights to the Right to Be Human: Some Heresies," in *The Right to be Human*, ed. Upendra Baxi et al. (New Dehli: Lancer International, 1987), 186.

[728] Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 211.

[729] Ibid.

[730] Polly Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* (Oxford: Oxford University Press, 2006), 41, referring to Pogge (2005), on the rejection of the validity of negative obligations only in human rights law.

[731] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2001), 122.

[732] Alicia Ely Yamin, "Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic Social Rights under International Law," *Georgetown Journal on Fighting Poverty* 4 (1997): 284-285.

195. Obviously, one of the advantages of this theory, applied to equality rights, is to better integrate a set of negative and positive obligations required to realize one's right. This advantage is clear in the case of the specialized non-discrimination treaties, such as the CEDAW and the CRPD. Besides combining both ESCRs and CPRs, these treaties perform a better integration of both positive and negative obligations. Taking the case of the CRPD, which adopts a rights (rather than medical) approach for disabilities, a capability perspective applied thereto would inquire what are the State obligations to articulate the conditions necessary to enable and maintain one's capability to make important choices in life – in opposition to a mere welfare debate.[733] Taking, for instance, the right to living independently and to being included in the community (Article 19), implies the right to choose one's place and means of residence (Article 19(a)), the provision by the State of support services and personal assistance (Article 19(b)), and the provision by the State of community services and facilities on an equal basis for the persons with disabilities (Article 19(c)). The CRPD Committee explains that

> Independent living and inclusive life in the community are ideas that historically stemmed from persons with disabilities *asserting control over the way they want to live* by creating empowering forms of support such as personal assistance and requesting that community facilities be in line with universal design principles.[734]

As regards CPR treaties, their limited material scope may pose difficulties in fully absorbing the underlying principles of the capability approach. While it is not here suggested that the relevant courts should extrapolate this scope, there is not a categorical demarcation between the different rights, as seen in the previous section. However, given that this lack of a categorical demarcation leaves overlapping areas between CPRs and ESCR, an over-cautious approach by Courts in this matter may hinder applicants to bring their "capability" claims, if concerns about resource allocation are at stake. At the same time, it is plausible to argue that such overlap creates a manageable scope for courts to entertain equality claims that may require resources to increase their autonomy to realize rights.

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[733] Gerard Quinn and Theresia Degener contend that "[m]uch of the exclusion [affecting persons with disabilities] was funded by welfare programmes that were more conducive to entrapment than to liberation". In "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform," *The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, eds. Gerard Quinn et al. (New York and Geneva: United Nations, 2002), 21.

[734] CRPDCttee*, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, adopted on 27 October 2017.* UN Doc. CRPD/C/GC/5, § 4 (italics added).

In *Airey* (1979), the ECtHR read an obligation under Article 6 ECHR to provide legal aid for impecunious litigants not only in criminal proceedings, but also in the context of "civil rights and obligations" – a decision with an important gender and capability component.[735] On the other hand, in a claim for accessibility measures for an applicant on a well-chair, the Court was overly prudent in "determin[ing] the limits to the applicability of Article 8 and the boundary between the rights set forth in the Convention and the social rights guaranteed by the European Social Charter".[736] It is true however, that, influenced by the CPRD, the ECtHR has now embraced disability rights, entertaining to some extent resource allocation, particularly by downplaying polycentricity arguments when vulnerable groups are at stake.[737]

Moreover, it is plausible to argue that the capability approach supports the efforts of substantive equality in articulating both positive and negative obligations, in view of the still entrenched idea of division between rights and obligations. This approach may also be a useful tool for civil and political rights courts to better nuance claims of State assistance in order to enable one's capability to enjoy rights, thus avoiding undue deference to domestic authorities.

4 – The Question of the Beneficiaries

196. Present-day non-discrimination law has undergone a process of increasingly focusing on specific groups instead of applying only a general non-discrimination clause. The question of minorities, since long an object of international law,[738] was also a main

[735] ECtHR, *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), §§ 24-28. The applicant, a woman, had no financial means to obtain a court decision to grant her separation from her violent husband.

[736] ECtHR, *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, p. 11, ECHR 2002-V. The Court added: "[t]he sphere of State intervention and the evolutive concept of private life do not always coincide with the more limited scope of the State's positive obligations (ibid.)

[737] See in Chapter 8 (Section 2.4), discussions on the case of *M.S.S. v. Belgium and Greece.* The Court has also imposed procedural safeguards to prevent severe impacts of a socio-economic nature, as in the case of *Yordanova v. Bulgaria*, in the contexts of Roma housing and evictions (Chapter 8. Section 2.4.2). A comprehensive work in this regard, focusing on poverty and claims at the ECHR: Laurens Lavrysen, "Strengthening the protection of human rights of Persons Living in Poverty under the ECHR," *Netherlands Quarterly of Human Rights*, 33, no. 3 (2015): 293-325.

[738] For instance, Francisco de Vitoria's concerns at the plight of Native Americans in the New World, see: Stephen Brett *Slavery and the Catholic Tradition* (New York: American University Studies, 1994), 110. Among these instruments, the Treaty of Westphalia, of 1648, protected the rights of Protestants in Germany; and the Treaty of Oliva, of 1660, granted protection to the Catholics in the territory of Livonia. The Congress of Vienna, held in 1815, brought a broader idea of equality, transcending the original question of religious minorities. Moreover, the Treaty of Berlin, of 1878, protected the Greeks, Romanians and Turks

concern of the League of the Nations through which treaties adopted focused on specific groups.[739] The former PCIJ's works on the matter, weak on adjudication,[740] had a major conciliatory role through advisory opinions.[741] For its part, the United Nations remarkably shifted its focus from collective to individual protection. Neither the UN Charter nor the UDHR afford protection for specific minorities.[742] Likewise, Article 2 of the ICCPR provides for a general protection against discrimination of individuals. Article 27 of the ICCPR is coined in terms of "persons belonging to minorities" rather than minorities as such.[743] At the same time, the grounds of discrimination enumerated in the non-discrimination clauses of treaties have been interpreted as non-exhaustive (*numerus apertus*).[744]

In Europe, the CoE's Framework Convention for the Protection of National Minorities protects minorities against discrimination (Article 4) and ensures the rights to maintain

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under the Bulgarian power. Finally, the International Convention of Constantinople, of 1881, granted rights to Muslims in territories ruled by the Greeks. Nathan Lerner, *Group Rights and Discrimination in International* Law (The Hague: Martinus Nijhoff, 2003), 7.

[739] Anthanasia S. Åkermark, *Justifications of Minority Protection in International Law* (The Hague: Kluwer Law International, 1997), 105. This minority "special status" could be seen as a compensation for not granting these groups self-determination, (ibid, 107).

[740] PCIJ: *Rights of Minorities in Upper Silesia*, judgment No. 12 of 1928. Series A. No. 15.

[741] PCIJ, *e.g. Settlers of German Origin in Poland*. Series B, No. 6, 1923; and Minority Schools in Albania. Series A/B, No. 64, 1935.

[742] See, for instance, ECOSOC, *Study of the Legal Validity of the Undertakings Concerning Minorities*. UN Doc. E/CN.4/Sub.2/384/Rev.1, which indicates that minorities were not anymore the only persons protected by international law, in the aftermath of the dissolution of the League of Nations. See further: *Yearbook of the International Law Commission*, 1966, Vol II.

[743] Article 27 ICCPR. See also: James Crawford, *The Rights of Peoples* (Oxford: Oxford University Press, 1982), 173. Currently, the HRCttee privileges the approach of individual rights of persons belonging to minorities, to be exercised within sovereign states, although some aspects of the enjoyment of these rights might be attached to the use of a territory's resources. See: *General Comment No. 23 - The Rights of Minorities*, adopted on 08 April 1994. UN. Doc. CCPR/C/21/Rev.1/Add.5, § 3.2. It is interesting to note that the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, has remained a soft-law instrument only, (G.A. res. 47/135, Annex, 47 U.N. GAOR Supp. (No. 49) at 210, UN Doc. A/47/49 (1993)), which was inspired by Article 27 ICCPR. See: Christian Tomuschat, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights," in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte - Festschrift für Hermann Mosler*, eds. Rudolf Bernhardt, et al. (Berlin/Heidelberg: Springer-Verlag, 1983), 960.

[744] The listings of grounds of discrimination differ only slightly among the several human rights treaties. The ICCPR, Article 26, and the ICESCR, Article 2.2, inspiring other treaties, enumerate "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The ACHPR, Article 2, speaks additionally of "ethnic group" and speaks of "fortune". The ACHR, Article 1.1., speaks of "any other social condition". The ECHR, Article 14 speaks of "association with a national minority" and "property". See, under the ECHR, Oddný Mjöll Arnardóttir: "Non-discrimination Under Article 14 ECHR: the Burden of Proof," *Scandinavian Studies In Law* 51 (2007): 25; under the ICESCR Mathew Craven, *Non-Discrimination and Equality, in the International Covenant on Economic, Social and Cultural Rights*: *A Perspective on Its Development* (Oxford: Clarendon Press, 1995), 168.

and develop one's culture and to preserve essential identity. However, States parties are vested with the right to determine which groups are to be afforded such protection.

197. Such individual thrust that dominated modern international law, however, has not barred the progressive adoption of treaties addressing specific categories,[745] including victims of racial discrimination children, women, persons with disabilities, and migrant workers.[746] Within the UN human rights system, several "mechanisms" have been created to address these social segments.[747] This trend is also observed in The Inter-American system.[748] The proliferation of these specific treaties may indicate the need for the international community to consider the specificities of some discriminated groups.

198. This does not mean that international treaty making is turning its focus back to the protection of minorities. Protection of minorities still holds its importance, as the *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979) proposed a cleared definition of minorities,[749] marked by the aspects of numeric

[745] Amont others, Convention on the Prevention and Punishment of the Crime of Genocide (1948), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), Convention relating to the Status of Stateless Persons (1954), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), Convention on the Reduction of Statelessness (1961). Also the ILO Conventions No. 16 Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (1921), No. 138 concerning Minimum Age for Admission to Employment (1973), and No. 168 Concerning Employment Promotion and Protection against Unemployment (1988).

[746] Respectively, ICERD (1965), CRC (1989), CMW (1990), CRPD (2006).

[747] Under the auspices of the UN HRC: Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (1990), Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (1993), Special Rapporteur on Violence against Women, its Causes and Consequences, Special Rapporteur on the Human Rights of Migrants (1999), Special Rapporteur on the Situation of Human Rights Defenders (2000), Special Rapporteur on the Rights of Indigenous Peoples (2001), Working Group on People of African Descent (2002), Special Rapporteur on Trafficking in Persons, Especially Women and Children (2004), Special Rapporteur on Minority Issues (2005), Special Rapporteur on the Human Rights of Internally Displaced Persons (2004), Working Group on the Issue of Discrimination against Women in Law and in Practice (2010), Independent Expert on the Enjoyment of all Human Rights by Older Persons (2013), Special Rapporteur on the Rights of Persons with Disabilities (2014), Independent Expert on the Enjoyment of Human Rights by Persons with Albinism (2015), Independent Expert on Sexual Orientation and Gender Identity (2016), and Special Rapporteur on the Elimination of Discrimination against Persons Affected by Leprosy and their Family Members (2017).

[748] Under the auspices of the IACHR, Rapporteurships on the Rights of: Indigenous Peoples (1990), Women (1994), Migrants (1996), Child (1998), Persons Deprived of Liberty (2004), Afrodescendants and Against Racial Discrimination (2005), Lesbian, Gay, Trans, Bisexual and Intersex Persons (2011).

[749] Francesco Capotorti, "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities", UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), § 28: "a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."

inferiority, non-dominant position, and specific characteristics that identify them.[750] Yet, one may wonder whether they can still represent the whole spectrum of persons discriminated. Some clusters, such as women, represent virtually half of the world's population. Structural discrimination can affect majorities in a State, as in the example of *apartheid*,[751] leading to a situation of *elitization* of enjoyment of rights.[752] As for the sense of solidarity as a distinctive identity,[753] it presents itself in a more diluted fashion than in the classical minority context with different forms of cohesion among several groups.[754]

199. In any event, there does not seem not to be a consensus on a consistent approach to "groups' rights" in international human rights law in terms of, *e.g.*, nomenclature, beneficiaries, and recognition under international law of certain categories.[755] Rigid classifications under traditional international law seem inadequate to meet the very objectives of substantive equality, thus necessitating new approaches in this regard. It is outside the scope of this study to make a comprehensive analysis and to derive solutions for this issue. At the same time, the concept of vulnerability has emerged emerging in international human rights litigation as an alternative to better articulate the needs of discriminated groups in the context of general human rgiths treaties, as will be seen in the next session.

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[750] See a structured analysis on these components, Neus T. Casals, *Groups Rights as Human Rights, A Liberal Approach to Multiculturalism* (Springer, 2006), 21-24.

[751] Joseph Raz, *Ethics in the Public Domain – Essays on the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), 174.

[752] The CESCR has devised standards for the enjoyment of the rights to adequate food, water, education and the highest attainable standard of health, namely availability, quality, accessibility (on physical, economic and equality grounds) and non-discrimination/equality. See also the report of the UN Special Rapporteur on The Rights of Minorities, recognizing the complexities of addressing discrimination against Dalits in the minority framework, but basing her report on a number of ethnic, religious and linguistic common characteristics of this group, coupled with its non-dominant and often marginalized position. UN Doc. A/HRC/31/56, 28 January 2016, § 21.

[753] Casals, *Groups Rights as Human Rights, A Liberal Approach to Multiculturalism*, 23.

[754] Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," *Canadian Journal of Law and Jurisprudence* 4, no. 2 (1991): 218; Tony Honoré, *Making Law Bind* (Oxford: Clarendon Press, 1987), 3-4.

[755] See a comprehensive recollection on the matter in Nathan Lerner, *Group Rights and Discrimination in International Law*, 34-39.

5 - The Emergence of Vulnerability in International Human Rights Law

200. With the growing expansion by the international monitoring bodies of the non-exhaustive listing of the grounds of discrimination and an intensified attention by these bodies on new forms of discrimination and inequality, relevant case law has adopted the so-called vulnerability approach as a means to express particular instances of discrimination. For instance, women,[756] children,[757] persons in custody,[758] peasants,[759] indigenous peoples,[760] undocumented migrants and asylum seekers,[761] internally displaced persons,[762] poor families,[763] Roma,[764] human rights defenders,[765] LGBTIs,[766] persons living with HIV/AIDS[767] refugees[768] foreign language speakers,[769] and persons

[756] ECtHR, *Opuz v. Turkey*, § 160.

[757] IACtHR, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No.17, §§ 53, 54 and 60; *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, § 134; ECtHR, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V; *O'Keeffe v. Ireland* [GC], ECHR 2014 (extracts).

[758] HRCttee, *General Comment No. 20, Article 7*, adopted on its Forty-fourth session, 1992. UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), § 11; *General Comment No. 21, Article 10*, adopted on its Forty-fourth session, 1992, UN Doc. HRI/GEN/1/Rev.1 at 33 (1994), § 3.

[759] IACtHR, *Case of Garibaldi v. Brazil.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203 § 141.

[760] IACtHR, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, § 250; AfCmHPR, *Center for Minority Rights Development v Kenya*, communication. 276/2003, 27th ACHPR, AAR Annex (2009); HRCttee, *Corey Brough v. Australia*, communication No. 1184/2003. Views of 17 March 2006, U.N. Doc. CCPR/C/86/D/1184/2003 (2006), § 8.9.

[761] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, § 108; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 263, ECHR 2011.

[762] ECtHR, *Salah Sheekh v. the Netherlands,* no. 1948/04, § 140, 11 January 2007.

[763] IACtHR, *Case of Uzcátegui et al. v. Venezuela*. Merits and Reparations. Judgment of September 3, 2012. Series C No. 249, § 204; *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series No. 259, § 273.

[764] ECtHR *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 182, ECHR 2007-IV.

[765] IACtHR, *Case of Valle Jaramillo et al. v. Colombia*. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of July 7, 2009. Series C No. 201, § 81.

[766] IACtHR, *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 23, § 278.

[767] ECtHR, *Kiyutin v. Russia,* no. 2700/10, § 63, ECHR 2011.

[768] AfrCmHPR, *Doebbler v. Sudan,* Communication 235/2000, 27th ACHPR AAR Annex (Jun 2009 – Nov 2009), § 128.

[769] HRCttee, *Ballantyne, Davidson, McIntyre v. Canada,* communications Nos. 359/1989 and 385/1989. Views of 31 March 1993. UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), § 11.4.

with disabilities,[770] among others, have been regarded as "vulnerable." It consists of a sectorial approach in individual complaints mechanisms in which case law has to some extent engaged in a more elaborate reasoning of substantive equality, in addition to the mere use of grounds of discrimination and a limited approach on "groups rights." For example, through this approach, an inter-group comparison became more evident.[771] As will be seen in this section, case law increasingly addresses non-intentional forms of discrimination, at times touching upon structural inequality and the asymmetry of powers between vulnerable and non-vulnerable groups.

Vulnerability as a general concept has been applied in social and environmental sciences to indicate the defenselessness experienced by individuals and groups from the impact of a traumatic socio-economic event and the means used to cope with the impact of those events.[772] Further, vulnerability may be determined by the likelihood of suffering a harm, the ability to withstand the consequences of the harm, and the ability to recover from the harm.[773] These concepts, derived through analytical or descriptive approaches, are not automatically transposable into law, a domain of a normative character.

At the same time, the field of discrimination in law is not a purely legal construct. On the contrary, law is also shaped by interactions with social and political considerations.[774] Substantive equality, embedded by legal realism, searches for factual reasons of unequal enjoyment of rights and the relevant legal solutions, which makes it somewhat permeable by concepts of other sciences. Hence, the notion of vulnerability is not totally incompatible with human rights law.

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[770] HRCttee, *Bozena Fijalkowska v. Poland*, communication No. 1061/2002. Views of 4 August 2005, UN Doc. CCPR/C/84/D/1061/2002 (2005), § 8.3; ECtHR, *Alajos Kiss v. Hungary,* no. 38832/06, § 42, 20 May 2010; AfCmHPR, *Purohit and Moore v. Gambia*, Communication, 241/2001, 16th ACHPR AAR Annex VII (2002-2003), § 40.

[771] See, e.g. *D.H. and Others v. the Czech Republic* [GC], § 190, comparing the difference in the allocation of Roma pupils in "special classes", in comparison with non-Roma pupils.

[772] Roberto Pizarro "La Vulnerabilidad Social y Sus Desafíos : Una Mirada desde América Latina," *Estudios Estadísticos y Prospectivos* (Santiago: CEPAL, 2001), 6. See also Michel G. Watts and Hans G. Bohle, "The Space of Vulnerability: The Causal Structure of Hunger and Famine," *Progress in Human Geography*, 17, no. 1 (1993): 43-67. Vulnerability in natural disasters is not a stranger to the works of the UN treaty bodies, see: CRCCttee, *General Recommendation No. 6 – Treatment of Unaccompanied and Separated Children outside Their Country of Origin*, adopted on 01/09/2005. UN Doc. *CRC/GC/2005/6*, § 36(b); and *the CESCR General Comment No.*, § 16.

[773] Roger E. Kasperson and Jeanne X. Kasperson, *Regions at Risk – UNU Studies on Critical Environmental Regions* (Tokyo: United Nations University Press, 1995), 2.

[774] Tijmen Koopmans, "Comparative Analysis," in *Constitutional Protection of Equality*, ed. Tijmen K. (Stijhof: Leiden, 1975), 248.

In any event, the mere indication that a given group is "vulnerable" does not suffice in order to contribute to a better understanding of practical consequences or added value of this relevant approach, particularly as regards the relevant normative consequences. It is important to better understand how this new concept can be better articulated with the overall context of substantive equality.

5.1 - Recent Legal Scholarly Writings on Vulnerability

201. A considerable amount of scholarly works has been written about the subject. In 2001, Chapham and Carbonetti elaborated a comprehensive study[775] on the approaches of the subject matter taken by the CESCR. In 2003, Morawa presented a formative work proposing vulnerability as a concept in international human rights law, pointing out a number of instances of inequality and examples on how international monitoring bodies identified "vulnerable" groups in a non-exhaustive fashion.[776] Fineman made use of the question of vulnerability as an appeal to the United States public on the inconsistencies and disadvantages of the narrow approach to equality. [777] Her article is rather inspirational, approaching the subject by "the *human* part, rather than the *rights* part."[778] On the European side, in 2013, Peroni and Timmer made a valuable contribution by making a thorough analysis of the ECtHR's case law on vulnerability.[779] These authors elaborate on various meanings of vulnerability so that it can be used as a heuristic tool to better understand equality and address the question on whether "human rights [are] so construed as to protect the most vulnerable people."[780] By assessing this question, the authors conclude that the ECtHR's growing recognition of vulnerability reflects a strength and also some risks. This scholarly article is indeed of invaluable contribution for the

[775] Audrey R. Chapman and Benjamin Carbonetti, "Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights," *Human Rights Quarterly* 33, no. 3 (2011): 682-732.

[776] Alexander E. Morawa, "Vulnerability as a Concept of International Human Rights Law," *Journal of International Relations and Development* 6, no. 2 (2003): 139-155.

[777] Martha A. Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal* 60 (2010): 251-275.

[778] Id., 255, italics from the original.

[779] Lourdes Peroni and Alexandra Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law* 11, no. 4 (2013): 1056–1085.

[780] Id., 1061. Italics from the original.

ECtHR's judges and practitioners. In an important book chapter, Timmer makes an in-depth analysis of the ECtHR practice on the matter.[781] In 2015, Truscan defended a comprehensive thesis on the notion of vulnerable groups in international law with a focus on the UN system and drawing important legal concepts and approaches on the topic.[782]

5.2 - A Sense of Prioritization

202. In order to explain why specific positive obligations protect some social categories but not the remainder of society, there must be some reflections on the conflicts underlying the matter. The issue of vulnerability and international human rights law lies at the core of the tensions between universality and multiculturalism and between uniform treatment and specific care, which are inherently paradoxical.[783] It has been argued by Grear that the liberal human envisaged by the UDHR was (semi)disembodied and that many other identities failed to fit in this archetype.[784] As a reaction to this problem, progressively and remarkably at the UN level, a set of specialized treaties and mechanisms dedicated to specific groups were created challenging this paradigm. These treaties aim at not granting privileges to certain groups but at ensuring an equal participation in society to them. A fine example thereof is the CRPDCttee's approach to legal capacity: a right to "have legal standing and legal agency simply by virtue of being human."[785] Putting it simply, the Committee asserts that no one can be denied exercising her or his legal capacity because she or he has some type of disability. By so asserting,

[781] Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in *Vulnerability – Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha A. Fineman and Anna Grear (Farnham: Ashgate, 2013): 147-170.

[782] Ivona Iuliana Truscan, "The Notion of Vulnerable Groups in International Human Rights Law" (PhD diss., Graduate Institute of International and Development Studies, 2015).

[783] Peroni and Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," 1058.

[784] Anna Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights," *Human Rights Law Review* 7, no. 3 (2007), 522-525. *Contra*: Marc Bossuyt, "Categorical Rights and Vulnerable Groups: Moving away from the Universal Human Being," *The George Washington International Law Review*, 24 (2016): 717-721.

[785] CRPDCttee, *General Comment No. 1 Article 12: Equal Recognition before the Law*, adopted on 19 May 2014. UN Doc. CRPD/C/GC/1, § 14, contrasting with the controversial concept of mental capacity. The Committee, importantly, adds: "Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others".

this Committee appears to re-affirm one of the multiple identities out the abstract human being pictured by the UDHR.

Beyond Fineman, for whom vulnerability is inherent to the human condition,[786] Peroni and Timmer argue that while all persons are vulnerable, some are *more vulnerable than others*.[787] The latter appears to evidentiate the problem substantive equality is meant to address: the factual existence and social discrepancies in the enjoyment of rights between different social categories.

In this regard, the IACtHR, in order to afford wider protection to some groups under Arts. 1.1 and 2 of the ACHR, reveals a variable character of the corresponding State responsibility:

> There are special obligations that derive from these obligations, which are determined in function of the particular needs for protection of the subject of law, either owing to his personal situation or to the specific situation in which he finds himself.[788]

Similarly, important expert considerations on ESCRs, as regards a duty to prioritize the rights of vulnerable groups, have also been proposed in order to implement the relevant obligations within the available resources.[789]

Hence, a preliminary explanation for requiring positive obligations in favor of specific groups is to correct such distortions by prioritizing the enjoyment of the rights of these groups.

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[786] Fineman, "The Vulnerable Subject and the Responsive State*"*, 260, according to whom "[a]utonomy is not an inherent human characteristic, but must be cultivated **by** a society that pays attention to the needs of its members, the operation of its institutions, and the implications of human fragility and vulnerability."

[787] Peroni and Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," 1060, when asking a Strasbourg judge about this very concept, as he explained: "[a]ll applicants are vulnerable, but some are more vulnerable than others". See also Truscan, "The Notion of Vulnerable Groups in International Human Rights Law", 306-308.

[788] IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, § 111. Similarly: ECtHR, *Muskhadzhiyeva and Others v. Belgium,* no. 41442/07, § 55, 19 January 2010; CRCCttee, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, adopted on 2 March 2007, UN Doc. CRC/C/GC/8 § 21, requiring special protection for children against different forms of violence.

[789] See e.g. the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, §, 28, establishing a duty to prioritize subsistence and provision of essential services in the use of the available resources. Published in *Human Rights Quarterly* 9 (1987): 122-135; UN Independent Expert on Human Rights and Extreme Poverty, Magdalena Sepúlveda, recommending prioritizing these groups in the States' long-term strategies, ensuring universal protection, including within their human rights machinery. HRC, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty. UN Doc. A/HRC/14/31 (31 March, 2010), § 65.

5.3 - A Basic Conceptual Framework

203. Having considered the above, a very basic framework is proposed to contribute to a better legal reasoning about vulnerability in the context of equality and non-discrimination. This framework is based on well-known doctrines and practices rather than constituting a novelty of difficult understanding or unmanageable complexities.

5.3.1 - Invisibility and Powerlessness in Political Deliberations

204. Democratic decision-making is a cornerstone of contemporary human rights law. A limitation of formal equality is exactly its failure to recognize inherent social asymmetries, leading to the exclusion of groups from the main political participation. Accordingly, rules, policies, and practices are frequently designed through the dominant social values with a consequent reinforcement and perpetuation of the dominant paradigms.[790]Hence, through poor representation of certain groups, participation deficit further perpetuates inequalities. Further, stereotyping, a noxious by-product of inequality, often impairs objective and reasoned arguments by those who have the powers to decide,[791] putting into question the quality of the decisions reached. While stereotyping in itself is not a decisive determinant of discrimination,[792] relevant instances denote that misconceptions based on ideas of inferiority on certain groups may be considered harmful, thus leading to discrimination.[793] In this context, the CEDAW pays particular attention to the question of women's equal participation in public life. Its preamble recognizes that discrimination against women "is an obstacle to the participation of women, on equal

[790] Manfred Nowak, *UN Covenant on Civil and Political Rights - ICCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005), 735.

[791] See, for instance, in the case of gender, a comprehensive work: Holning Lau, "Gender Scripting and Democracy," *Transcending the Boundaries of Law: Feminism and Legal Theory*, ed. Martha Fineman, (Abingdon: Routledge, 2011), 326-338. In *Bayev and Others v. Russia* (2017), the ECtHR noted that the legislation at stake, banning "gay propaganda" was tarnished by a predisposed bias, in that it condemned a social equivalence between traditional and non-traditional sexual relationships and that it attempted to draw parallels between homosexuality and paedophilia (§ 69). See in Part III, the Court's condemnation on the biased parliamentary debates that associated migration to criminality (*Biao v. Denmark*).

[792] For Eva Brems and Alexandra Timmer, "law is inevitably based on classifications and generalizations", "Introduction," in *Stereotypes and Human Rights Law*, eds. Eva Brems and Alexandra Timmer (Cambridge: Intersentia, 2016), 3.

[793] See, e.g. Lourdes Peroni and Alexandra Timmer, "Gender Stereotyping in Domestic Violence Cases – An Analysis of the European Court of Human Rights' Jurisprudence," in *Stereotypes and Human Rights Law*, 48 for instance, in cases when stereotyping is the underlying cause of violence.

terms with men, in the political, social, economic and cultural life of their countries."[794] Its Article 7, for instance, goes beyond the mere right to vote and to be elected, by ensuring a broad participation in social affairs.[795]

The CRPD likewise has been drafted in order to address the participation deficit experienced by persons with disabilities, specifically through Article 29 on the right to participation in public and political life, (similar to the CEDAW)[796] and through Article 30 on the right to participation in cultural life, recreation, leisure, and sport.[797] In this context, accessibility is a pre-condition for persons with disabilities to participate fully and equally in society[798] in view of the environmental barriers and social misconceptions that impair the enjoyment of their rights on equal footing. LGBTI persons alike are frequently excluded from the main decision-making process due to stigma and prejudice towards them.[799]

Further, the CRCCttee has expressed that children are often "politically voiceless and lack access to relevant information. They are reliant on governance systems, over which they have little influence to have their rights realized."[800]

Therefore, an effective legal framework that aims at addressing this type of vulnerability is one that seeks mechanisms to include disadvantaged groups in the formulation of the general political and social deliberations, particularly on matters that affect their lives.

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[794] CEDAW, Preamble.

[795] Political participation under Article 7 CEDAW has been conceived beyond the mere right to vote and to be elected, including also the right to participate in government policies and the activities in non-governmental instances. This idea is reinforced by the CEDAWCttee's *General Recommendation No. 23*, adopted on its sixteenth session (1997). UN Doc. A/52/38, § 5. Further details in Lars A. Rehof, *Guide to the* Travaux Préparatoires *of the United Nations Convention on the Elimination of All forms of Discrimination against Women* (The Hague: Martinus Nijhoff, 1993), 93-98.

[796] CRPD, Article 29.

[797] CRPD, Article 30.

[798] CRPDCttee, *General Comment No. 2 (2014). Art. 9: Accessibility*, adopted on 22 May 2014, UN Doc. CRPD/C/GC/2, § 1.

[799] HRC, Update of Report A/HRC/19/41 (on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity) - Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/29/23 (4 May 2015), § 19.

[800] CRCCttee, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, 17 April 2013, UN Doc CRC/C/GC/16, § 4(b). The CRCCttee also presents "additional justifications" for States to give special attention to children in their policies: children's developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments' response to human rights", in *General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, adopted on 15 November 2002. UN Doc. CRC/GC/2002/2, § 5.

5.3.2 - Vulnerability through the Disproportionate Impact Doctrine

205. The seminal disproportionate impact doctrine has considerable influenced contemporary international human rights law by the early case law of the US Supreme Court in the 1970s and of the CJEU[801]. Vulnerability in legal practice, it is submitted, cannot be understood outside this context, since a very tangible manner of perceiving and addressing instances of vulnerability is to recognize unequal practical outcomes.

206. The advantages of devising a conceptual and normative framework in connection with the disproportionate impact doctrine are several. Firstly, this doctrine is well known in discrimination litigation, making it easy for judges, law-makers, and policy-makers to operate thereby. Secondly, both the concept of vulnerability and the concept of disproportionate impact are solidly grounded in a notion of probability. A normative concept of vulnerability generally denotes a duty of special care for vulnerable groups, without pre-judging the outcomes of the analysis of a concrete case in terms of violation or non-violation of a treaty provision. Thirdly, as a consequence of the foregoing, it will be seen throughout Chapter 5 that a number of positive obligations require basically (a) the recognition of the existence of a group in vulnerability; (b) the prioritization of these groups in public policies; (c) the specific knowledge of the types and extent of risk the pertinent rights are subject to; and (d) the pertinent risk calculation to prevent or mitigate the impact of violations against these groups. Hence, vulnerability in normative terms should be articulated through a dynamic and flexible framework rather than a static and rigid one.

207. The first proposal in this regard is the question of the harm of an actionable parameter, giving rise to State responsibility.[802] A harm (physical, psychological, or otherwise) represents a negative event in someone's life which, by threatening or damaging a legitimate legal interest (a right), raises the question of violation of a right. This occurrence, under defined circumstances, requires a certain behavior (preventive or reactive) by the State. In Chapter 2 (Section 4), it was seen that the negative impact of an interference may give rise to State responsibility when it reaches a certain severity level.

[801] See, in this chapter Section 2.1.

[802] This study takes as a point of departure the important consideration of Peroni and Timmer on harm and vulnerability, in "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," 1064-1069.

Notwithstanding this basic framework, the issue of vulnerability invites to a further reflection. As seen in the previous section, *de facto* circumstances reveal inherent asymmetries in societies to the extent that a universal impact standard cannot be established. Instead differential perceptions of harm sustained apply to groups who perceive them differently. As a result, differentiated State responses apply if one aims at ensuring the same level of protection among different groups.

5.3.2.1 - Higher Propensity of Suffering Violations

208. The higher propensity for suffering human rights violations, firstly, may indicate *specific contexts* in which certain groups are at risk (whereas other groups do not face such risks). Taking the example of violence against women, the CEDAWCttee underscores that it "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men", as it is "directed against a woman because she is a woman or that affects women disproportionately."[803] In other words, the pervasive phenomenon of violence against women, including its legal, social, and economic implications, is an ambit of violation exclusively sustained by women.

According to a second perspective, some social sectors are more susceptible to sustain violations in comparison with the remainder of society. In a broader context, the existence of such propensity is indicated by a comparative demographical assessment.[804] In some other specific cases, the existence of a the higher propensity of harm can be indicated by experts or illustrated case law.

On the prohibition of torture, the CATCttee underscores an array of sectors that are "especially at risk of torture."[805] In 2016, the Special Rapporteur on Torture averred that

[803] CEDAWCttee, *General Recommendation No. 19*, updated and reaffirmed by CEDAWCttee, *General Recommendation No. 35*, § 1. See also the latter's §10: "this violence is a critical obstacle to achieving substantive equality between women and men as well as to women's enjoyment of human rights and fundamental freedoms enshrined in the Convention." CEDAWCttee underscores that laws that criminalize abortion or gay, lesbian, prostitution or transgender behaviour affect disproportionately women, id. § 31(a).

[804] For instance, according to the WHO, out 1 billion people having some kind of disability (15% of the world population), 80 percent of them live in poor countries, in communities already susceptible to crises, disasters and epidemics, disproportionately impacted by these negative events. Similarly, the UNAIDS has pointed out the fact that the majority of new HIV/AIDS infections have affected the youth, between 15 and 24 years old, and sometimes at younger ages, owing to the children's risk to be affected because of the viral infection by children or loss of parental caregiving, or severe community straining by the epidemics, among other causes. See: CRCCttee, *General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child*, adopted on 17 March 2003, UN Doc. CRC/GC/2003/3, § 2.

[805] CATCttee, *General Comment No. 2, Implementation of Article 2 by States Parties*, adopted on 24 January 2008, UN. Doc CAT/C/GC/2, § 21.

women, girls, and the LGBTI population "are at particular risk of torture and ill treatment when deprived of liberty, both within criminal justice systems and other non-penal settings," owing to the "structural and systemic shortcomings within criminal justice systems [that] have a particularly negative impact on marginalized groups."[806]

209. In litigation, a negative impact on a significantly higher number of persons of the same category has been object of concern, *e.g.* in *Hoogendijk v. the Netherlands* (2005). The applicant alleged the loss of a social benefit due to statutory modification. The ECtHR relied on a numeric discrepancy of men and women affected by an apparently neutral regulation.[807] Also, in *D.H. and Others* (2007), the fact that most Roma pupils were placed in separated classrooms of a lower level based only on their ethnicity raised concerns on the objectivity and reasonableness of that practice. Such suspected differentiation raised an instance of a rebuttable presumption of discrimination that was not addressed by the respondent State, leading to a violation of the ECHR.[808]

5.3.2.2 – Differentiated Severity of the Impact Sustained

210. Impact refers to the intensity of the harm sustained by an individual that can be used as a parameter to give rise to State responsibility. However, it is impossible to establish a universal standard for all human beings to measure how intensive an impact of a human right violation is. Instead, different individuals, given their particular conditions, experience impacts differently due to differentiated physical, psychological, or social circumstances.

A common entry point into this discussion is naturally the question of torture and other cruel, inhuman, and degrading treatment whose level varies according to the personal circumstances of the victim. The CRC's *General Comment No. 8* on corporal punishment makes the case of the specific situation of children,[809] as it defines "corporal" or "physical"

[806] HRC, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/HRC/31/57 (5 January 2016), §13. He adds that "intersectional identities can result in experiencing torture and ill-treatment in distinct ways", id., § 9.

[807] ECtHR, *Hoogendijk v. the Netherlands* (dec.), 2005. Compare with *Konstantin Markin*, in which the statistics presented by Russia, alleging that extension of parental leave would affect the army's fighting power, was deemed inconclusive by the Court, which in turn, reaffirmed gender stereotyping about the roles of men and women in family duties, § 144.

[808] ECtHR, *D.H. and Others v. Czech Republic* [GC], § 195.

[809] CRCCttee, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*,

punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light."[810] It adds that "corporal punishment [against children] is invariably degrading," suggesting a lower threshold of severity compared to adults.[811]

The physical or biological considerations of vulnerability do not represent the whole picture. Inequality is also a product of biased social concepts about an alleged superior position of certain social groups and the socio-economic position of the individuals at stake. In this context, the IACtHR has recognized the existence of greater impact in the context of the socio-economic status of the applicants in the case of *Uzcátegui and Others v. Venezuela* (2012). This case revolved around the invasion of a family house by the police forces without a search warrant and the subsequent damage to the relevant premises. By considering a violation of the right to property (Art. 21 ACHR), the Court concluded that the damages caused to a family under such conditions were of a greater magnitude than if they would occur to families under different ("normal") conditions.[812] On a more sectorial approach, empirical research has found, for instance, that austerity measures including cuts in social expenditure has had a more severe impact in a given LGBTI community than in the remainder of the society.[813]

5.3.2.3 - Hindered Avenues for Redress

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2 March 2007. UN Doc. CRC/C/GC/8, § 11: "the distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability..."

[810] Ibid., emphasis added.

[811] Compare with the case of the higher impact suffered by a woman raped in prison, regarding its intensity, her defencelessness and the deep scars on her body and psyche caused from the trauma, ECtHR *Aydın v. Turkey,* 25 September 1997, § 83, Reports of Judgments and Decisions 1997-VI (violation of Article 3 ECHR). On prisoner's rights, for Nowak, "the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned", in "Challenges to the Absolute Prohibition of Torture and Ill-Treatment," *Netherlands Quarterly of Human Rights*, no. 4 (2005): 678. See also Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights, 154.

[812] IACtHR, *Case of Uzcátegui et al. v. Venezuela.* Merits and Reparations. Judgment of September 3, 2012. Series C No. 249**,** § 204. This Court has also noted that institutional failures of the State may lead to increased vulnerability of children in relation with health and education. See also, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, § 87.

[813] See the study '"Staying Alive': The Impact of 'Austerity Cuts' on the LGBT Voluntary and Community Sector (VCS) in England and Wales", demonstrating that "[a]bout five years ago it was probably 50% of people who called us said that their housing problem was directly related to their sexual orientation or gender identity, that's now gone up to two thirds", at 65. Metropolitan University of London and TUC, available at [https://www.tuc.org.uk/sites/default/files/StayingAlive.pdf], accessed on 7 February 2019.

211. Besides powerless invisibility and the disproportionate impact itself, vulnerability in the enjoyment of rights may also be seen in the obstacles faced by certain groups in order to obtain redress for violations.

212. Preliminary, it is important to underscore that the question of access to justice is complex in itself. For instance access to a courta, an implied right within the ECHR system, is construed in view of general difficulties of ensuring fair trial in civil proceedings.

213. Added to that, the formal justice apparatus has been criticized for being reactive and mainstream,[814] thus failing to meet specific claims of marginalized sectors. Firstly, given that laws, norms, and practices are made to a considerable extent according to the predominant values of society, mechanisms for remedies that take into account discriminated individuals may be lacking, thus offering them inadequate redress. For instance, absence of specific criminal legislation to protect children against violence may represent a failure to deter attacks against this group.[815] Similarly, if no preventive procedural measures are put in place to safeguard women's life and integrity, such as restraining orders and shelters, the remedies available remain illusory.[816]

Further, even when such specific avenues exist, an unsound geographic distribution of law enforcement services can result in unequal access to justice, given logistic obstacles to reach courtrooms and public authorities that provide any form of remedy[817].

214. Another obstacle encountered is the little, if any, knowledge about the avenues for redress. In certain parts of the world, many victims such as children have hardly any

[814] Fiona Alison, "A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens," *Australian Indigenous Law Review* 17, No. 2 (2014): 12-14.

[815] In the case of sexual violence against children, see the ECtHR's seminal *X and Y v. the Netherlands,* 26 March 1985, Series A no. 91; also *Söderman v. Sweden* [GC], no. 5786/08, ECHR 2013; and *O'Keeffe v. Ireland* [GC].

[816] *E.g.* Istanbul Convention, Article 23 on the provision of shelters and Article 24 on the provision of telephone lines.

[817] See: Christophe Sidoti, *Rural People's Access to Human Rights*, Sixth Annual Assembly of the International Council on Human Rights Policy, Guadalajara (2003): Access to Human Rights: Improving Access to Groups at Risk, (digital file kept with author). See also on the case of human rights defenders: Protection International, *Remote Communities*, available at [https://www.protectioninternational.org/en/node/1161], accessed on 7 February 2019.

contact with basic State services, being unaware of their procedural rights.[818] Costs of litigation, even in civil proceedings, may pose challenges to the pursuance of remedies.[819] Likewise, language barriers can negatively affect the outcomes of proceedings.[820] Issues related to legal representation of persons with disabilities may also have a bearing on the right to equality before courts.[821]

But even when their claims reach courts, chances of success may be reduced by biased or stereotyped judgments. As Farida Shaheed imparts, "since the interpretation of law cannot be detached from the specific cultural context in which it is located, norms and accepted practices profoundly affect the application and the interpretation of law."[822] Some patriarchal values embedded in judicial practices may seriously compromise equal access to justice, as case law has well pointed out.[823]

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[818] For instance, CRCCttee, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, underscoring the challenges faced by children to seek remedies even more when violations are committed by business enterprises, (§ 4).

[819] ECtHR, *Airey v. Ireland,* 9 October 1979, Series A no. 32 on high costs to obtain a separation decision from a judge; and *Steel and Morris v. the United Kingdom,* no. 68416/01, ECHR 2005-II, on the high cost to litigate against a transnational company.

[820] HRCttee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial*, adopted on 23 August 2007, UN Doc. CCPR/C/GC/32, § 40.

[821] In the ECtHR's case of *J.T. v. the United Kingdom*, the applicant, with a mental disability and difficult relationship with her mother and guardian, felt difficulties with filing complaints about sexual abuse by her stepfather. In English law, mothers retain automatic guardianship rights. The case reached a friendly settlement at the Court, whereby the respondent state undertook to flexibilize the legislation in order to appoint the nearest relative (no. 26494/95, 30 March 2000). See, CoE Committee of Ministers Recommendation No. R(99)4, of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults,Principle 8(1), determining that the interests and welfare of the incapable adult should be paramount.

[822] Farida Shaheed, quoted by Ayesha M. Imam, "Gender Issues in the Challenge of Access to Human Rights" in Sixth Annual Assembly of the International Council on Human Rights Policy, Guadalajara, 2003: *Access to Human Rights: Improving Access to Groups at Risk*.

[823] CommHR, Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, UN Doc.E/CN.4/1999/39, § 74. In Pakistan, this practice is covered by the *qisas* and *diyat* laws, which interpret honour killings in connection with the principle of 'sudden and grave provocation'. In Turkey, honour killings were allowed provided that the aggressor committed the crime under 'heavy provocation', whereas in Brazil, it formed part of the exoneration of crimes under the criminal code, until 1991, under the 'legitimate defence of honor', which was held unconstitutional by the country's Superior Court same year; CEDAWCttee: Concluding Observations on Lebanon" UN Doc. A/60/3831 August 2005, § 103. Comments in: M. Perry: "Are Human Rights Universal? The Relativist Challenge and Related Matters," in *Human Rights Quarterly* 19, no. 3, (1997): 461-509. See also: ECtHR, *M.C. v. Bulgaria, no. 39272/98,* ECHR 2003-XII, the investigative authorities acquitted the accused of a "date rape" in the absence of physical violence; In *Bălşan v. Romania* (no. 49645/09, 23 May 2017), the ECtHR criticized the national prosecutor, who decided to discontinue the charges against a partner who beated repeatedly the victim, under the allegation that the acts of violence were provoked by the victim. In the IACtHR's *Case of Atala Riffo and Daughters v. Chile*, the Chilean Supreme Court discredited a lesbian couple in its capacity to exercise child custody, which was criticized by the IACtHR.

5.4 - Vulnerability and Substantive Equality - Turning Weakness into Strength

215. Legal writings have illustrated the risks involved in simply labeling a given group as "vulnerable." A first risk is to simply translate vulnerability into certain weaknesses that can be attributed to certain groups, implying that they deserve special measures from the State, in view of their innate incapacity of enjoying rights by themselves. Such risk would give rise to further stereotyping. This mistaken assertion runs counter the maxim that all human beings should enjoy rights on an equal footing. Vulnerability, and its manifestations, thus, do not refer to an individual or inner-group factor.[824] Instead, in a legal human rights language, it represents instances of rights-enjoyment deficit affecting disparately certain sectors in society.

216. Also at the core of the relevant risks is the phenomenon of *essentialism*, by which it is assumed that a given group as such relies on a number of fixed or immutable attributes. Such characterization may lead to recurring paternalism and re-stigmatization. Essentialism can occur as a result of policies that perpetuate by purpose or effect the existence of minorities, frequently causing intra-group conflicts.[825] For instance, Timmer and Peroni have noted that the ECtHR, in developing further the practice of recognizing vulnerable groups in its case law, tends to contribute to further discrimination.[826]

217. The question of essentialism has been revisited together with the concept of group rights itself. From the very rigid concept of minorities and the hard-boiled concepts of group rights[827] to the current stage of development, the crux of the debates has been the question of identity. A prevailing notion of identity nowadays surpasses the reductionism proposed by the essentialist approach. Coomaraswamy, for instance, argues that identity is not essentially immutable but composite and thus made up of different selves, "often

[824] E.g. CEDAWCttee, *General Recommendation No. 35*, noting that the phenomenon of violence against women is "a social - rather than an individual- problem", § 8.

[825] Aileen McColgan, *Discrimination, Equality and the Law* (Oxford: Hart Publishing, 2014), 194, citing Shachar, who calls it a "paradox of multicultural vulnerability".

[826] Peroni and Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," 1057.

[827] See, e.g. Lerner's concept of "spontaneous, natural and coherent aggregates of human beings, entitled to enjoy, individually and collectively, certain basic rights that are indispensable to ensure their preservation, development and effective equality within the general society". Nathan Lerner, *Group Rights and Discrimination in International* Law, 38.

contesting, contradicting, and transforming the other [and] therefore reconstitutes itself, reacting to and negotiating ideology and lived experience."[828]

218. Having seen the above, it is important now to analyze a few practical consequences of the risks of essentialism, as follows.

The development of substantive equality in the last decades has transcended the biological traits as grounds of discrimination, since such traits denote a notion of immutability,[829] thus ignoring the social considerations that are intrinsically related to stereotypes and stigmas, important causes of discrimination. The Beijing Declaration and Platform of Action (1995) represented a breakthrough in understanding at the political level that the causes of discrimination against women were beyond their roles in reproduction and baby caring.[830] Likewise, the CRPD defines that disability, *an evolving concept*, involves both "attitudinal and environmental barriers" hampering equal participation in society.[831] This concept evolves from the medical model of disabilities, focusing on specific impairments, to a social model[832], which also includes people's attitudes towards disabled persons, and their misconceptions about disability, or to a human rights model, building upon the latter, which is based on the inherent dignity of the person.[833] According to the latter:

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[828] Radhika Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women," *George Washington International Law Review* 1, no. 2 (2002): 483.

[829] See, Joel Balkin, "The Constitution of Status," *Yale Journal of International Law* 106 (1997): 2323 for whom focusing on immutability in the assessment of suspect discrimination confuses biological with sociological aspects. He contends that "the question is not whether a trait is immutable, but whether there has been a history of using this trait to create a system of social meanings, or to define a social hierarchy, that helps dominate and oppress people. Any conclusions about the importance of immutability already presupposes a view about background social structure."

[830] To the contrary, CEDAWCttee's *General Recommendation No. 35* defines that "gender-based violence against women is affected and often exacerbated by cultural, economic, ideological, technological, political, religious, social and environmental factors" (§ 14).

[831] CRPD, Preamble.

[832] Moreover, social model was inspired by the Union of the Physically Impaired against Segregation (UPIAS), which proclaims: "[w]hat we are interested in, are ways of changing our conditions of life, and thus overcoming the disabilities which are imposed on top our physical impairments by the way this society is organised to exclude us." (Available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-UPIAS.pdf, accessed on 12 November 2018).

[833] Gerard Quinn and Theresia Degener, "The moral authority for change: Human rights values and the worldwide process of disability reform", 14. Theresia Degener also imparts that the this model builds upon the social model, but goes beyond it by (a) vindicating that it does not require a certain health or body status, while the social model merely explains that disability is a social construct; (b) encompassing both CPRs and ESCRs, beyond the mere demand for non-discriminatory treatment; (c) embracing impairment as a human condition, which must be valued as part of human variation; (d) acknowledging intersectional discrimination; (e) clarifying that impairment prevention policies can be human rights sensitive; (f)

> The "problem" of disability under this model stems from a lack of responsiveness by the State and civil society to the difference that disability represents. It follows that the State has a responsibility to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons[834]

Another clear example of the rejection of essentialism is present Aricle 12 of the CRC, which recognizes the child's right to have her or his own views expressed according to the corresponding state of development. In other words, this article relies on a progressive autonomy of the child rather than on an immutable condition of children to form her or his own perceptions and to express own opinions.[835]

219. Another undesired consequence of falling into essentialism is to the view that a given social sector as uniformly fitting into certain characteristics, thus reducing them to a standardized socially accepted pattern. The works of the UN treaty bodies have paid special attention to this problem. For instance, the CEDAWCttee has recognized that women in conflict situations "are not a homogeneous group and their experiences of conflict and specific needs are diverse". Intersectionality[836] has been a centerpiece of these bodies,[837] which for the CEDAWCttee consists of a "basic concept for

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containing a roadmap for change the situation of 2/3 of the world's disabled people. In "Disability in a Human Rights Context," *Laws* 5, No. 35 (2016): 19.

[834] Ibid.

[835] CRC, Article 12. See CRCCttee, reinforcing the evolving capacity of the child, reminding that babies and very young children, though having lesser capacity to express themselves, have the same rights as adolescents, in *General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, § 1)*, adopted on 19 May 2013. UN Doc. CRC/C/GC/14, § 44.

[836] Floya Anthias, "Intersectional What? Social Divisions, Intersectionality and Levels of Analysis," *Ethnicities* 13, no. 1 (2012): 3, for whom intersectionality has been used as a tool to avoid essentialism, in that it exposes the inequalities within social clusters.

[837] For instance, CEDAW Article 6 on trafficking in women, exploitation and prostitution; Article 14 on rural women; CEDAWCttee, *General Recommendation No. 34 on the Rights of Rural Women* (CEDAW/C/GC/34); *General Recommendation 32, on the Gender-related Dimensions of Refugees* (CEDAW/C/GC/32*); General Recommendation 27 on Older Women* (CEDAW/C/GC/27*); General Recommendation 26 on Women Migrant Workers* (CEDAW/C/GC/26); *General Recommendation No. 15, on Women an AIDS* (CEDAW/C/GC/15). CRC, Article 22, on children seeking refugee status; Article 23 on children with disabilities; Article 30 on children belonging to minorities; CRC/*CEDAW Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices* CRC/C/GC/18; *General Comment No. 9 (2006): The Rights of Children with Disabilities* (CRC/C/GC/9/Corr.1); *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (CRC/GC/2005/6). See also, CRPD, Article 7, on children with disabilities, Article 11 on humanitarian emergencies.

understanding the scope of the general obligations of States [parties]."[838] A prominent approach thereon is also observed in the other Committees.[839]

220. Intersectionality, however, is not an approach without problems. In Chapter 7, where intersectionality is analyzed in detail in the context of racial discrimination, the shortcomings and complexities involved in this process become evident. As will be seen, there is a risk of simply adding grounds of discrimination instead of understanding specific circumstances perceived by certain individuals.

221. In short, persisting in the language of equal rights through the perspective of substantive equality is the key to overcoming the challenges involved in the use of vulnerability as an analytical tool to contemporary issues of equality and non-discrimination. Hence, *weaknesses*, in terms of equal rights enjoyment, should be shifted to the *strength* of legal and policy frameworks that takes into account the specificities of those groups, thus recognizing equal rights and enforcing them.

Concluding Remarks

The existence of positive obligations in the context of equality and non-discrimination, as in the general case, is by no means an exceptional but a long-standing practice from early international litigation. What makes positive obligations special in this context is arguably the contrast with the underlying liberal approach under CPR treaties, conceived to impose predominantly obligations of abstention from discrimination. However, recent treaty making of group-specific instruments has conceived a series of State obligations of a positive character that has significantly influenced the latter type of treaties.

The concept of discrimination on *purpose and on effect* in itself, present in treaties or implied through interpretation, entails a differentiated State responsibility of a guarantor in relation to discrimination by private actors and other situations requiring direct

[838] CEDAWCttee, *General Recommendation No 28: The Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, adopted on 16 December 2010. UN Doc. CEDAW/C/GC/28, §18.

[839] See, e.g., Report by the Secretary-General, *Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies* (14-18 September 1998), UN Doc. HRI/MC/1998/6, § 30: "In order to strengthen the knowledge base about the impact of gender on the conceptualization and implementation of human rights, treaty bodies could call on their secretariats to commission, and on NGOs and the academic community to undertake studies that would contribute to the clarification of the gender dimensions of rights. Such studies might, for example, explore the intersection of race and gender in the context of the [CEDAW]".

assistance, in order to address instances of inequality. The recognition of asymmetries among certain human clusters is indeed of an added value for a better understanding of substantive equality. The underlying rationales of the concept of substantive equality reinforce the claims for positive obligations in this regard. For instance, structural discrimination touches upon duties of genuine social transformations to a more enabling environmental for disadvantaged groups.

However, the legal issues related to the beneficiaries of the non-discrimination norms seem to have contradicting sources. On the one hand, the traditional concept of minorities still remains valid for a limited range of disadvantaged groups. On the other hand, the issue of group rights, given its very controversial character, has not offered to date a workable response to the burgeoning recognition of unprivileged sectors in contemporary human rights law. In addition, evolution of specialized case law has added to that proliferation, despite the individualist nature of the non-discrimination clause of CPR treaties.

At the same time, the concept of vulnerability, originating from social and environmental sciences, has emerged in human rights law in a rather ad hoc fashion. Firstly, mere importation of this concept may risk conflicting the analytic purpose of those sciences and the normative/deontological aspect of legal sciences. A related practical consequence is to introduce an idea of vulnerability as a merely descriptive weakness, thus reinforcing inequality. Therefore, an appropriate legal approach for vulnerability is to understand it through the meanders of substantive equality. Firstly, it is required to translate it into well-established tenets such as the doctrine of disproportional impact, as it is proposed.

Moreover, in legal practice the risks of further stigmatization and reinforced discrimination, such as the case of essentialism, should be taken into account by courts. The practice of the UN treaty bodies serve as a good example on how to deal with it. Nevertheless, vulnerability will remain a badge of weakness unless the language of equal rights is upheld to establish the adequate legal and policy frameworks to combat instances of discrimination and bring about the necessary social transformations that growingly recognize the equal value of every individual.

Chapter 5 - The Content of State Positive Obligations in The Context of Equality and Non-Discrimination

Introduction

222. Chapter 2 of Part I aimed to analyze the scope of the positive obligations in general. This Chapter aims to assess the States' positive obligations related to equality and non-discrimination within the framework of duties to protect and to fulfill.

The present chapter aims to examine the scope of positive obligations in the context of equality and non-discrimination. In order to take stock of the wide range of related obligations construed in general treaties or enshrined in specialized human rights treaties, it is necessary to conduct a survey through the different legal instruments and their application in concrete cases. In addition to identifying the different positive obligations, it is also necessary to examine the main implications of the obligations identified.

223. Moreover, equality and non-discrimination, as tenets of human rights law, whose clause is present in virtually all respective international human rights instruments, are applied in different human rights protection systems. A study through these different systems is thus necessary to identify if the obligations in this regard, through the several systems research can reveal areas of *jus commune* and of integration. By doing that, this chapter will also attempt to identify areas in which general (CPR) monitoring bodies seek authority from specialized group-specifc treaties (and relevant interpretation), in order to fill normative gaps existing in the general CPR treaties or to strengthen their own reasonings as a whole. This attempt is of particular relevance for this study, in view of the adoption of group-specific treaties that provide "special" positive obligations, which can serve as a source for interpretation of the general CPR treaties. Moreover, the EU non-discrimination law, which is regarded as an authoritative source for the ECtHR will be taken into account in this chapter.

In order to examine these questions, this chapter will conduct a survey of case law and of the relevant works of the international monitoring bodies on the content of positive obligations in respect with equality and non-discrimination. It will also examine scholarly writings dedicated to the topic. As in Chapter 2, this chapter will analyze positive obligations through the tripartite typology of duties, investigating the

obligations identified with the duty to protect in Section 1, and the duty to fulfill in Section 2, the latter bein subdivided in the duty to facilitate (Section 2.1), duty to provide (Section 2.2) and duty to promote (Section 2.3).

1 - The Duty to Protect

224. The duty to protect, within the context of equality and non-discrimination, comprises a series of obligations, either set forth in treaty-law or construed through judge-made law, that aims at preventing instances of discrimination to materialize or to redress such instances.

1.1 – The Obligation to Prevent Discrimination

225. A number of specific obligations oriented to the purpose to prevent acts of discrimination have been identified. These obligations assume different forms, according to the specific aim of the measure sought and the gravity of the discrimination at stake—including the adoption of an administrative framework, civil and criminal legislation, as it will be seen in the following sub-sections.

1.1.1 - The Adoption of Legislation and Regulation Prohibiting Discrimination

226. A basic obligation found in human rights treaties in order to prevent discrimination is the adoption of a legal domestic framework in order to prohibit it. This primordial duty is explicitly found in the specialized treaties, consisting of an *ex ante* obligation to set a basic normative framework.

Article 4.1[840] of the CRPD, as a general framework, contains a specific obligation to adopt legislation to prevent discrimination against persons with disabilities. Likewise, the CEDAW establishes the obligation to enshrine the principle of equality of men and women in States parties' constitutions or legislation (Article 2(a)), to prohibit discrimination bases on sex and relevant sanctions (Article 2(b)), to penalize trafficking and prostitution of women (Article 6), and to prohibit dismissal on the

[840] Art 4.1(b) of the CRPD reads as follows: "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake […] to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities." See also Articles 5.2, 15.2 and 16.5. CRPD.

grounds of pregnancy, maternity leave, or marital status (Article 11.2(a)).[841] For its part, the CRC requires legislation to protect children's ESCRs (Article 4) and to protect children from violence (physical and mental), injury, abuse or neglect, and exploitation from parents or individuals legally responsible for them (Article 19.1).

In some circumstances, it is clear that the vulnerability factor may give rise to specific obligations. This specific obligation is found, e.g. in Article 6(b) of the Maputo Protocol, mandating African member States to prohibit marriage of women under 18 years old (early marriage)[842]. This obligation was made evident in the case of *APDF and IHRDA v. Republic of Mali* (2018). The ACtHPR held that the civil code of the respondent State violated the Maputo protocol because it sets the minimum age for men to marry at 18 for men and 16 for women. That civil code also allows children from the age of 15 to marry conditional to parental consent. [843] In other words, code in question left unprotected girls and adolescent girls against early marriage, but also provided a discriminatory protection based on sex.

As for general human rights treaties, their equality clauses may imply legislative duties to prohibit (public or private) discrimination. For example, ICESCR's Article 3, as interpreted by CESCR's *General Comment No. 16*, requires States parties to prohibit by law discrimination between men and women in the enjoyment of ESCRs.[844]

[841] Compare with the OAS Belém do Pará Convention stipulating similar obligations under Article 7 (c), (d), and (e).

[842] Maputo Protocol, Article 6: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: […] (b) the minimum age of marriage for women shall be 18 years".

[843] ACtHRP, *APDF and IHRDA v. Republic of Mali*, application No. 046/2016, Judgment of 11 May 2018, §§ 76-78. This Court also found that such inequality of treatment of girls and adolescent girls was a form of harmful practice, in the context of Article 21 of the Maputo Protocol (§§ 78 and 135).

[844] CESCR, *General Comment No. 16 – The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights,* adopted on 11 August 2005. UN Doc. E/C.12/2005/4, §19. See also, CESCR, *General Comment No. 12 – The Right to Adequate Food*, adopted on 12 May 1999, UN Doc. E/C.12/1999/5, § 19; and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (January 22-26, 1997), emphasizing the prohibition of gender discrimination as complementary standard to the compliance with ESCRs (Article 12).

1.1.2 - The Degree of Legal Protection

227. A number of specialized treaties impose an obligation to enact criminal legislation to protect serious violations against vulnerable groups,[845] notably in the CoE's Istanbul Convention, by its contemporary architecture, such as sexual violence including rape, stalking, and forced marriage.[846] In Article 7 (c) of the Belém do Pará Convention, criminal legislation is among several legislative options for States parties.[847]

228. The ECHR, as a general treaty, may be construed to imply the imposition of criminal sanctions, particularly when the violations reach the threshold of Article 3. The leading case of *Opuz v. Turkey* (2009)[848] is a notable example. Similarly, slavery and servitude requires a heightened protection of criminal legislation, as evidentiated by the ECtHR's judgment in *C.N. and V. v. France* (2012) .[849] In *OMCT v. Belgium* (2002), the ECtteeSR has required the enactment of specific (and not general) legislation to protect children from violence.[850] The underlying rationale of this obligation is clear, namely to raise the costs of violation through criminal legislation in order to deter specific instances of violations against vulnerable groups. This

[845] Like in ILO Convention 182 on the worst forms of child labor, Article 3, and OP-CRC-SC, Article 3 (covering sexual exploitation, trafficking of organs, and engagement in child labor).

[846] Istanbul Convention, Articles 33 through 39. Compare with CEDAWCttee's *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, adopted on 16 December 2010. UN Doc. CEDAW/C/GC/28, § 34; and the case of *A.T. v. Hungary*, communication No. 2/2003, views of 10 October 2003, UN Doc. CEDAW/C/36/D/2/2003, § 9.3. In concluding observations, the Committee indeed recommends separate criminal legislation, see, e.g., on Belarus, CEDAW/C/BLR/CO/7 (2011); Burkina Faso, A/60/38 (SUPP), (2005); and Haiti, CEDAW/C/HTI/CO/7 (2009).

[847] But in *Maria da Penha v. Brazil*, the IACHR reinforced the role of criminal law to combat serious instances of violence women. Case 12.051. Report No. 54/01. OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

[848] ECtHR, *Opuz v. Turkey,* no. 33401/02, ECHR 2009, inspired by CoE Recommendation Rec (2002) 5 of the Committee of Ministers on the Protection of Women against Violence, § 101. See also, *M.G. v. Turkey,* § 79, no. 646/10, 22 March 2016. Both cases reinforce the specific contours of violence against women in the ambit of Article 3 ECHR. Other recent cases refer to ineffective criminal laws, as in *M.G.C. v. Romania*, no. 61495/11, § 63, 15 March 2016; and *V.K. v. Russia*, no. 68059/13, 7 March 2017.

[849] ECtHR, *C.N. and V. v. France*, no. 67724/09, § 284, 11 October 2012, following the precedents of *Siliadin v. France,* no. 73316/01, § 141, ECHR 2005-VII, and *Rantsev* § 284. See in the Americas: IACtHR, *Case of the Hacienda Brasil Verde Workers v. Brazil.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, §, 364 (regarding the enslavement of a vast number of rural workers, including many children and afrodescendants).

[850] ECtteeSR, Case of *OMCT v. Belgium* (merits), complaint 21/2003, § 44. See also: *OMCT v. Portuga*l, Complaint No. 34/2006, §§19-21; and *APPROACH Ltd v. Belgium,* Complaint No. 98/2013. Similarly: CRCCttee: *Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, § 2; and 37, inter alia)*, adopted on 2 March 2007. UN Doc. CRC/C/GC/8.

obligation is also justified by the high impact of the violations at stake, revealing a high presumption of severity.

1.1.3 - Criminal Legislation Required to Protect Vulnerable Groups outside the Scope of Articles 2 and 3 ECHR

229. The cases analyzed in the preceding section involved situations in which a violation against a member of a vulnerable group reached a severity level that justified an analysis of violations to the right to life or personal integrity. However, as it is clear from the case law of e.g. the ECtHR, a failure to protect vulnerable groups by criminal legislation such as children, even when only Article 8 is at stake, may lead to a violation breach of the ECtHR. For instance, in *Söderman v. Sweden* (2013), regarding sexual molestation of a girl by her stepfather at home, the Court found a breach of Article 8 ECHR due to the fact that the respondent State did not count on relevant criminal legislation to protect this specific abuse.[851]

Hence, the vulnerability factor plays a significant role in the type of legislation (administrative, civil, or criminal) to be put in place to protect certain groups, regardless of what specific right is at stake. In the above case, criminal legislation was required to protect the right to respect for private life.

230. However, one should note that in these cases a watertight division between the rights at stake is difficult to draw. The ECtHR probably followed its trend from previous cases in order to find a positive obligation to adopt criminal legislation under Article 8, when vulnerable groups are at stake. But depending on how far a court approaches the question of the psychological damages caused by sexual abuse (excluding rape) it would probably find also a violation of Article 3, given the children's particular experience in sustaining a negative impact of a violation.[852]

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[851] ECtHR, *Söderman v. Sweden* [GC], no. 5786/08, § 117, ECHR 2013. Other previous cases include *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A, No. 91, regarding sexual abuse of a disabled girl. More recently: *K.U. v. Finland*, no. 2872/02, §§ 48-49, ECHR 2008, regarding lack of specific criminal legislation to protect minors from sexual abuse via the Internet.

[852] See considerations in Chapter 4, (§ 210). At the same time, the concept of rape has been considerably enlarged, considering necessarily the relevant psychological harms. See, e.g. *Aydin v. Turkey* (25 September 1997, *Reports of Judgments and Decisions* 1997-VI): "rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence" (§ 83).

1.2 – The Obligation to Monitor and Regulate Private Activities in order to Prevent Discrimination

231. The obligation to monitor and regulate in the context of equality and non-discrimination takes specific contours. A main approach in this context is to adopt a regulatory framework aimed at preventing discrimination in general.[853] A second approach is to adopt specific regulations in favor for certain vulnerable sectors in view of the inherent obstacles these groups face, *e.g.* seek remedies for the violations occurred in private settings. This is the key component of ILO Convention 189 on domestic workers, extending the obligation to implement labor inspections in households, places of difficult access, where violations may occur unnoticed by the authorities (Article 17.2).[854]

Likewise, the CRPD establishes a specific obligation on States parties to monitor facilities in which persons with disabilities are cared for.[855] This obligation had been already imposed by the ECtHR in *Storck v. Germany* (2005), in which a woman with mental and physical disabilities was subject to abusive medication and non-consented internment in a hospital. In its core, the Court emphasized the need to constantly monitor and supervise health institutions in which a high degree of intimacy between the health professionals and the patients enhances the chances of abuse.[856]

The CRCCttee alike pays elevated attention, in *General Comment No. 16*, to obligation to monitor and regulate the impact of businesses activities on children,

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[853] For instance, the HRCttee has inquired States parties on the adoption of any "legal provisions and administrative measures directed at diminishing or eliminating discrimination in fact, which may be practised *inter alia* by private persons and bodies". *General Comment No. 18: Non-Discrimination,* adopted on 10 November 1989. UN Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), § 9.

[854] ILO Convention 189, Article 17.2. Similarly: CESCR, *General Comment no. 16 (2005) Article 3: the Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, underlining the need for States parties to establish labor inspectorates in order to ensure equal payment and other not less favorable conditions for women (adopted on 13 May 2005, UN Doc. E/C.12/2005/3 § 24).

[855] CRPD. Article 16.3.

[856] ECtHR, *Storck v. Germany*, no. 61603/00*,* § 103, ECHR 2005-V. See also *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 145 and 150, ECHR 2014 (extracts) (child abuse at a private school); and *Asiye Genç v. Turkey* (no. 24109/07, 27 January 2015), (failure to supervise the implementation of the protocols of the admission of new-born babies into emergency units). Similarly, IACtHR, *Ximenes Lopes v. Brazil (*Merits, Reparations and Costs), Judgment of 4/07/2006. Series C. No. 149. § 108. Regarding older persons: "Report of the Independent Expert on the Enjoyment of all Human Rights by Older Persons", UN Doc. A/HRC/30/43, § 83; children: Report of Special Rapporteur on Torture, observing the need to regulate privately run detention facilities for children with special needs, in order to curb abuse, § 52, and women: and CEDAWCttee *Maria de Lourdes da Silva Pimentel v. Brazil*, communication no. 17/2008, views of 25 July 2011, UN Doc. CEDAW/C/49/D/17/2008, violation of Article 12.2, by the failure to monitor a private hospital, publicly subsidized, running in appalling conditions, § 7.5.

having noted children's particular vulnerability to a series of risks, including child labor and consumer abuse.[857]

1.3 - The Obligation to Prevent Imminent Acts of Discrimination by State Agents

232. In the context of discrimination, the general element of knowledge, giving rise to State responsibility to take pre-emptive action, also applies—as in the ECtHR's *Z and Others v. the United Kingdom* (2001). The case deals with grave parental neglect, reaching the threshold of Article 3 ECHR. The Court noted that the local authorities were cognizant for years that the victim had been subject to parental abandon but did not take any action thereon.[858]

233. The above case may be considered to fall within a general standard of knowledge of a violation to materialize, as set forth int he *Osman* case, studied in Chapter 3 (Section 3). However, the State obligation to prevent imminent violations against persons in a vulnerable condition, through the "knew or ought to have known" paradigm, may assume different contours. In general, it requires differentiated risk assessments. For instance, timely action may be particularly decisive in cases of serious violations. Bridging this normative gap, recent specialized treaties, such as the CoE's Istanbul Convention,[859] provide a specific *ex ante* obligation to provide shelters, helplines, and other preventive avenues,[860] restricting the choices on the part of the States parties on the means of implement an obligation to prevent, in this context.

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[857] CRCCttee, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, adopted on 17 April 2013. UN Doc CRC/C/GC/16, § 76.

[858] ECtHR, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 74, ECHR 2001-V.

[859] Istanbul Convention, Arts. 23 (shelters); 24 (telephone helplines); and 25 (support for victims of sexual violence). See also CEDAWCttee's *General Recommendation No. 35*, § 40(c), specifying a series of protective and preventive measures (*General Recommendation on Gender-based Violence against Women, Updating General Recommendation No. 19*, 17 July 2017. UN Doc. CEDAW/C/GC/35). Compare with the OAS Belém do Pará Convention, Article 8, by which States parties are bound to implement those measures only *progressively*. The ECtHR's case law does not impose any of such prescriptive measures, but regards them as important actions to prevent imminent attacks, see, *Opuz v. Turkey* § 171. It however borrows the very concept of violence against women from that Convention, see *e.g. Halime Kılıç v. Turkey*, no. 63034/11, § 113, 28 June 2016.

[860] ComHR, "The Due Diligence Standard as a Tool for the Elimination of Violence against Women", Report of the UN Special Rapporteur on Violence against Women, UN Doc. E/CN.4/2006/1, 05; UNGA, Independent Expert for the United Nations Study on Violence against Children (2006), UN Doc. A/61/299, § 93(b): "All violence against children is preventable. States must invest in evidence-based policies and programmes to address factors that give rise to violence against children."

But for the State to act preemptively to protect groups that enjoy rights differently from the remainder of society, it is plausible to argue that the general standard of *knowledge* assumes different aspects in view of the specificities of the groups in question. Important case law has articulated on the different forms this standards apply in the context of equality and non-discrimination, as will be seen in Chapter 6 (Section 6.3).

1.4 - The Obligation to Redress Instances of Discrimination

234. As seen in Part I, the set of State obligations to redress violations, including the ones committed by non-State actors, has been conceived under the due diligence standard, through administrative, civil, or criminal avenues. This standard, based on the principle of effectiveness, has been steadily disseminated in the various areas of equality and non-discrimination. Recent equality treaties are endowed with such express clauses, such as in the regional Belém do Pará[861] and Istanbul[862] conventions. At the UN level, the OP-CRC-SC (though not explicitly) provides for a series of State obligations to redress the sale of children.[863] Other specialized treaties, providing a general clause of equal access to justice, have been interpreted to imply an obligation of due diligence, as in the case of the CRC,[864] the CEDAW,[865] the CRPD,[866] and the

[861] Belém do Pará Convention. Art 7(b).

[862] Istanbul Convention, Article 5.2. See: Explanatory Report, § 59.

[863] OP-CRC-SC, Article 8.1.

[864] See CRCCtee, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Article 3, § 1)*, adopted on 19 May 2013. UN Doc. CRC/C/GC/14, § 9; *General Comment 8 No. 8 - The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading forms of Punishment, adopted on 02/03/2007. UN Doc. CRC/C/GC/8, § 40; Report of the Independent Expert for the United Nations on Violence against Children*, adopted on 29 August 2006. UN Doc. A/61/299, § 112.

[865] CEDAW, Article 13, in connection wtih *General Recommendation No. 19*, § 9; and *General Recommendation No 28*, § 13. Case law: e.g. *A.T. v. Hungary*, communication No. 2/2003. Views of 26 January 2005, UN Doc. A/60/38, Part I, Annex III, p. 27-39, § 9.4; and *Angela González Carreño v. Spain*, communication no. 47/2012, views of 16 July 2014, UN Doc. CEDAW/C/58/D/47/2012, § 9.7. Likewise, the Special Rapporteur on Violence against Women considered that there is a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence" (UN Doc. E/CN.4/2006/61). See also the UN High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking – Principle 13, UN Doc. E/2002/68/Add.1. See further discussions: Ineke Boerefijn and Jenny Goldschmidt, "Combating Domestic Violence against Women – A Positive State Duty Beyond Sovereignty," in *Changing Perceptions of Sovereignty and Human Rights*, eds. Boerefijn et al. (Antwerp: Intersentia, 2008), 173-191.

[866] CRPD, Article 13.1, speaking of "effective access to justice".

AU's Protocol on Women's Rights,[867] implying a range of administrative, civil, and criminal measures.

235. General human rights treaties, besides upholding the general due diligence standard for all individuals, have been interpreted in specific contexts of vulnerability via case law. The ECtHR's *Opuz v. Turkey* (2009) case on violence against women is representative. In the absence of a specific provision in the ECHR, the Strasbourg Court interpreted its due diligence approach in accordance with the relevant standards on gender-based violence, according to developments within and outside the CoE.[868] More generally, the HRCttee underscores that access to justice encompasses a substantive rather than purely formal element by taking stock of both *de jure* and *de facto* obstacles encountered by several disadvantaged sectors in seeking remedies for their grievances.[869]

In Chapter 4, the obstacles sustained by persons in situation of vulnerability to seek redress may plausibly support the understanding that the general due diligence standard should be read in accordance with any relevant *lex specialis* in order to rend their rights effective. Hence, it is important to investigate the manner by which the pertinent international instruments and jurisprudence deal with such specificities, as well as to examine the level of convergence (if any), among the different systems.

1.4.1 – (Specific) Standards of the Equality Due Diligence Standard

236. This section will analyze the different ways in which treaty-law and case law related to equality and non-discrimination deal with the obligation to redress violations.

1.4.1.1 -Aggregate Remedies

237. International and regional humanrights laws accept the provision of aggregate remedies, depending on the type of discrimination to be redressed. For instance, in compliance with the EU anti-discrimination law to transpose the relevant directives,

[867] AU Charter's Women Protocol**,** Article 8.

[868] ECtHR, *Opuz v. Turkey,* no. 33401/02, §§ 169 and 200, and also other important cases judged by this Court, including *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XIII*; Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013; *Rumor v. Italy*, no. 72964/10, 27 May 2014; and *Bălşan v. Romania*, no. 49645/09, 23 May 2017.

[869] HRCttee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial*, adopted on 23 August 2007. UN Doc. CCPR/C/GC/32, § 9.

member States are obliged to establish national equality bodies.[870] Many of those bodies have a quasi-judicial function to initiate civil or administrative investigations into allegations of discrimination, issuing non-binding decisions. Their ombuds nature also enables them to perform advisory and promotional functions in the many areas of discrimination. Many of these bodies represent victims of discrimination before courts. Those bodies are set up nationally, and States enjoy a margin of appreciation as to the functions of these bodies. Outside Europe, the increasing role of National Human Rights Institutions (NHRIs) in addressing allegations of discrimination has performed its investigative duties in connection of mediation, advising, and representation of victims.

1.4.1.2 - Criminal Investigations and Proceedings

238. As regards criminal investigations, applicable to the most serious violations, international human rights law has established a set of specific standards, reinforcing the position of groups in situation of vulnerability. Given the rigid procedural requirements in view of the gravity of the violations at stake, criminal procedures in the context of redressing instances of discrimination must follow detailed standards, in comparison with the more general requirements of civil procedures.[871]

239. The IACtHR, for instance, has affirmed that in cases of violence against women, for investigations to be effective they must include a gender perspective.[872]

240. The general standard of *investigations at the authorities' own motion* in this area has been even more justified by the inability of victims to file a complaint

[870] Directive 2010/41/EU, of 7 July 2010 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast); Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal treatment Between persons Irrespective of Racial or Ethnic Origin.

[871] For instance in the IACtHR, *Case of Atala Riffo and Daughters v. Chile* the IACtHR followed a general non-discrimination requirement by the judicial authorities in preventing gender bias. (Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239) Compare with Chapter 2 (§ 61).

[872] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, § 455. But since 1997, in *Aydın v. Turkey*, the ECtHR has imposed a duty of investigation, beyond the mere payment of compensation, in a case involving rape of an adolescent girl (25 September 1997, § 103, Reports of Judgments and Decisions 1997-VI).

themselves, in view of the relevant obstacles they face.[873] An illustration in this regard is the frequent absence of legal defense in prison facilities, especially at unusual hours when torture is perpetrated, which may render the filing a complaint of torture virtually impossible.

241. The *promptness* standard has gained prominence by the IACtHR in cases of widespread femicide, in which the Court articulates on a sense of prioritization on the part of authorities to cases of sexual violence.[874] Also, the ECtHR has been particularly attentive to procrastination of criminal, who may instill frustration[875] and at times serious mental distress[876] on the part of the victims seeking redress. Similarly, in *Eremia and Others v. The Republic of Moldova* (2013), this Court held that the delays in investigating domestic violence consisted as an attitude condoning violence against women, hence an instance of discrimination.[877]

242. Specialized medical and psychological care and examinations and a series of actions, such as taking the statement of the victim privately, in the presence of female medical staff as necessary have been required by case law.[878] Prevention of further victimization is a recognized international standard, such as in the ICC Rules of Procedure.[879] In *Y v. Slovenia* (2015), the ECtHR held that a criminal judicial hearing that leads to further traumatization of a woman victim of rape, caused by both excessive length of the proceedings and by the accused aggressive behavior towards

[873] IACtHR, *e.g. Case of Bueno Alves v. Argentina.* Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, § 109.

[874] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205*,* § 196. The authorities took days to start necessary actions, apart from some merely formal investigative steps taken, thus forgoing the chance of a meaningful discovery of key components of the crimes investigated.

[875] ECtHR, *Angelova and Iliev v. Bulgaria,* no. 55523/00, §§ 101-103, 26 July 2007; In *P.M. v. Bulgaria,* no. 49669/07, 24 January 2012, the prosecution service took fifteen years to carry on the criminal investigations, though having established the facts and the identity of the offenders of a rape against a 13-year old girl. A violation of Article 3 ECHR, in its procedural limb, was found by the ECtHR, given the prosecution's incapability of punishing the perpetrators and rendering justice.

[876] ECtHR, *W. v. Slovenia*, no. 24125/06, § 77, 23 January 2014.

[877] ECtHR, *Eremia v. the Republic of Moldova*, § 89.

[878] IACtHR, *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215, § 194. In Europe: ECtHR, *Aydın v. Turkey,* 25 September 1997, § 103. *Reports of Judgments and Decisions* 1997-VI.

[879] ICC Rules of Procedure. Rule 88, 1 and 5.

her during the proceedings, amounted to a violation of Article 8 ECHR.[880] This is all the more important when such distress leads to a power unbalance between the parties.[881]

243. The analysis of an extended hypothesis of the *victim's consent* in the investigation of cases involving sexual violence is indeed a well-recognized standard. [882] In *M.C. v. Bulgaria* (2003), the ECtHR held that a violation of Article 3 ECHR (procedural limb) occurred inasmuch as the prosecutor dropped charges against the accused of a rape without the infliction of physical force. For the ECtHR, the investigations should have considered other surrounding circumstances beyond the mere absence of physical violence and have explored seriously the hypothesis of the victim's consent.[883]

244. Another important standard is the one of *objectivity and non-bias* by the authorities investigating or in charge of the judicial proceedings.[884] Investigations that deviate from the main lines of investigation by inquiring on the previous conduct of the victim[885], due to pressures on the victim to drop her complaint[886] or in which the victim is said to have provoked the relevant violations[887] are deemed discriminatory,

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[880] ECtHR, *Y. v. Slovenia,* no. 41107/10, § 107, ECHR 2015 (extracts), recalling the precedents in *Saïdi v. France*, (§ 43) and *A.M. v. Italy*, (§ 25), whereby, as a matter of principle, Article 6 §§ 1 and 3 (d) affords the defense the right to challenge and question a witness". Similarly, IACtHR, in *Case of Favela Nova Brasília v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 16, 2017. Series C No. 333**,** § 196, on the risk of revictimization of slum-residents who were victims/survivors of police executions.

[881] *Id*. The Court recalled the precedent in *Aigner v. Austria* (§ 37), by which criminal proceedings can be considered as an ordeal by the witness or the victim, especially if the latter is fearful of being confronted with the aggressor, and particularly grave if the victim is a minor.

[882] See. *e.g.* ICC Rule of Procedure 70, establishing the victim's consent, determining, *i.a.*, that consent cannot be inferred by the victims' words or conduct when violence inflicted diminished the capacity of giving voluntary and free consent, or by the absence of resistance.

[883] ECtHR, *M.C. v. Bulgaria*, §§ 181-182. In this vein, ICC Rule of Procedure 70 establishes that consent cannot be inferred in circumstances where the victim was probably forced, threatened or coerced, thus influencing her or his ability to give a genuine consent. Nor can it be deduced by the words or conduct where the victim was incapable of doing so, neither by the victim's silence nor lack of resistance. In the Inter-American practice: *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2006, § 310.

[884] ICC Rule of Procedure 70. In ECtHR's *Aydin v. Turkey*, § 103, the ECtHR noted that the medical examinations were more concerned with establishing the victim's virginity than with ascertaining whether or not she was a victim of rape.

[885] *E.g.* HRCttee, *L.N.P. v. Argentina*, communication 1610/200. Views of 18 July 2011. U.N. Doc. CCPR/C/102/D/1610/2007, §13.3, violation of Article 26 ICCPR given the Argentinean criminal chamber's acquittal of the accused based on the victim's sexual life and the questioning of her integrity.

[886] ECtHR, *Eremia v. The Republic of Moldova*, § 87.

[887] ECtHR, *Bălşan v. Romania*, § 81.

thus ineffective.[888] *Vertido v. The Philippines* (2008*)* is a leading case in which the CEDAWCttee held that gender stereotyping in criminal proceedings of rape of a businesswoman was deemed discriminatory. The key finding of this Committee was the judicial stereotyping by the domestic court, establishing gender-biased expectations on what a woman should have done when confronted with a situation of rape, impairs a woman's right to fair trial.[889] This Committee also noted that her statement was discredited[890] during the proceedings. A violation of Articles 2(f) and 5(a) of CEDAW was found, in view of the failure by the domestic court to appraise the case in "the light of the level of gender sensitivity applied in the judicial handling of the author's case."[891]

1.4.2 - Obligation of Means

245. Even though the due diligence standard in the context of equality and non-discrimination may have different contours in view of the particularities of the victims at stake, it implies, in fact, an overall an obligation of means, and not one of result.[892] Hence, States are exonerated from the relevant responsibility if they can demonstrate a *reasonable* level of diligence owing to the particular conditions of the case at stake. The different set of standards applicable in this field does not modify the general threshold of reasonableness of the authorities in discharging their due diligence duties in international human rights law.[893]

The ECtHR provided an occasion to test the scope of the due diligence in a case of domestic violence. In *Rumor v. Italy* (2014)*,* involving violence and threats against a woman and kidnapping of her child by her former partner and partner, it was

[888] Such biases need not be intentional, see: ECtHR, *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 57, 28 January 2014, and *Bălşan v. Romania*, § 78.

[889] CEDAWCttee, *Vertido v. the Philippines*, communication no. 18/2008, views of 16 July 2010. UN Doc. CEDAW/C/46/D/18/2008, § 8.4, i.a., by imposing on the victims certain pre-established behaviors that would qualify them as victims.

[890] Ibid., The national courts apparently suggested that the victim had somewhat acquiesced of the sexual act.

[891] Id. This standard is also applicable to civil cases, as it was highlighted in *Atalla Riffo v. Chile*. The IACtHR noted that the Chilean Supreme Court argument to refuse the guardianship to a lesbian mother was based on a prejudice against women such as the applicant.

[892] See the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. ETC No. 210, § 59.

[893] See reflections in Chapter 3 (§ 77 above).

interesting that the ECtHR noted that the general attitude of the police and prosecutor was not passive. Elements of compliance with the positive obligation under Article 3 ECHR (according to the Court's relevant *acquis*) included the prompt arrest of the aggressor, adequate criminal charging and sentencing, expeditious proceedings, and forfeiture of his parental rights. As per the domestic court's decision to transform his penalty into house arrest, the ECtHR paid certain deference to the respondent State in analyzing only the reasonableness of the outcomes reached by the domestic court, in view of the overall proactive behavior of the investigative and judicial authrorities.[894]

1.5 - The Obligation to Provide Reparations

246. The international obligation of States to provide reparations for violations of human rights indeed applies to the context of equality and non-discrimination. Article 25 of the Principles and Guidelines on Reparations (2005), in general, affirms that reparations must be afforded without discrimination "on any ground."[895] If these Principles are to be read through a substantive equality perspective, which is plausible to submit, reparations should also be also construed through the prism of vulnerability, considering the particular means by which these groups experience the damages caused by a given violation. The UN non-discrimination treaty-bodies, more prominently the CEDAW,[896] have affirmed the State obligation to provide reparations through their complaint procedures. These relevant measures, among with the recommendations of other protection systems, are demonstrated below.

From the survey that follows, international human rights monitoring bodies have attached greater importance on reparations of a systemic nature in comparison with the individual measures.

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[894] ECtHR, *Rumor v. Italy*, § 64-77. Compare with CEDAWCttee, *Fatma Yildirim v. Austria*, (communication no. 6/2005. Views of 1 October 2007, UN Doc. CEDAW/C/39/D/6/2005, § 12.3 (a) and (c)), in which discoordination between the several local authorities led to the escaping of the aggressor who killed the victim.

[895] Basic Principles on the Right to a Remedy and Reparation, Article 25: "The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception".

[896] See: CEDAWCttee, *General Recommendation No. 28*, § 32, implying an obligation to provide reparation under Art 2 (b). See also, Andrew Byrnes, "Article 2," in *The UN Convention on the Elimination of all Forms of Discrimination against Women - A Commentary*, eds. M. A. Freeman et al. (Oxford: Oxford University Press, 2012), 83. The CRPDCttee, for its part, has extended the wording of Article 13 CRPD (access to justice), to imply a consequential obligation to address any breach of the CRPD.

1.5.1 - Individual Measures

247. As part of individual reparation measures, as a consequence of finding a violation for any type of discrimination, the following measures have awarded.

1.5.1.1 - Compensation

248. Pecuniary damage awards by the IACtHR have been granted when discriminatory facts lead to losses established in a concrete case, including costs incurred in psychological and medical fees for the distress suffered by victims of discrimination on the basis of sexual orientation.[897] Non-pecuniary damages may compensate for the deprivation of joint family life, humiliation and stigma originated by a judicial bias during guardianship procedures required by a lesbian mother.[898] The IACtHR has awarded in those ceases higher amounts as compared to cases not related to discrimination issues.[899]

The CRPD has recommended compensation as a result of the losses arisen from the deprivation of a person with disability of the right to vote.[900] It has also requested the reimbursement of the litigation costs related to the relevant proceedings.[901]For its part, the CEDAWCttee has recommended the payment of monetary compensation proportionate to the seriousness of the violation,[902] considering the extent of distress, loss of earnings, harm to the victims' dignity, and reputation as a consequence of a discriminatory act.[903]

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[897] IACtHR, *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs, § 294.

[898] Id., §§ 295-299. Regarding violence against women the ECtHR also awards compensation in view of the anguish and distress arisen out of the authorities' passivity in redressing the harm, as in *Opuz v. Turkey*, § 210; and *Bălşan v. Romania*, § 93.

[899] IACtHR, *Case of Atala Riffo and Daughters v. Chile* (Merits, Reparations and Costs), US$ 10,000.00 for pecuniary damages, and US$ 50,000.00 for non-pecuniary damages.

[900] CRPDCttee, *Zsolt Bujdosó and Others v. Hungary*, communication No. 4/2011, views of 9 September 2013. UN Doc. CRPD/C/10/D/4/2011, §10 (a).

[901] CRPDCttee, *Szilvia Nyusti and Others v. Hungary*, communication no. 1/2010, views of 16 April 2013. UN Doc. CRPD/C/9/D/1/2010 §10.1.

[902] CEDAWCttee, *R.P.B. v. the Philippines*, communication no. 34/2011. Views of 12 March 2014, UN Doc. CEDAW/C/57/D/34/2011**,** § 9.1; *Vertido v. the Philippines*, § 8.8 (a); CRPDCttee, *Szilvia Nyusti and others v Hungary,* § 10.1; *Zsolt Bujdosó and Others v. Hungary,* §10 (a).

[903] CEDAWCttee, *General Recommendation No. 19 – Violence against Women*, § 24(i).

1.5.1.2 - Rehabilitation

249. Rehabilitative measures take particular contours in this context, given the frequent traumatic occurrences sustained by the victims of discrimination.[904] The CRPD contains a specific obligation to provide rehabilitation aimed at "physical, cognitive and psychological recovery" for victims of "exploitation, violence or abuse."[905]

Through measures including therapy and counseling, psychological rehabilitation has been recommended by the CEDAW in order to cope with the psychological impacts caused by gender-based violence.[906] Psychological treatment for long-lasting anxiety and stigmatization given the family separation after a biased judicial ruling[907] is among the measures ordered by the IACtHR. In instances of gross violations, this Court has also ordered personalized care by specialized institutions and supply of medication for the relevant treatment.[908]

1.5.2 - Measures Aimed at Systemic Changes

250. As seen in Chapter 3 that the *restitutio in integrum* principle consists of a theoretical construct. Within the context of of equality and non-discrimination this principle takes a genuinie transformative perspective. Accordingly, to simply offer victims the previous unequal structural pattern they faced before the violations at stake goes counter a key aim of substantive equality, *viz.* bringing about structural changes,[909] as provided by the CEDAW[910] and the CRPD.[911] Embracing this

[904] IACtHR, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Preliminary Objections. Judgment of September 11, 1997. Series C No. 32, § 84.

[905] CRPD Article 16.4.

[906] CEDAWCttee, *R.P.B. v. the Philippines*, § 9(a)(ii).

[907] IACtHR *Case of Atala Riffo and Daughters v. Chile* (Merits, Reparations and Costs), § 254, see also *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 289, § 314.

[908] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, § 549.

[909] But indeed, ordinary restitution requests may well be requested, e.g., in *Cecilia Kell v. Canada,* related to the reinstatement of housing for a female victim of violence, who was deprived of her original one (communication no.. 19/2008. Views of 28 February 2012. UN Doc. CEDAW/C/51/D/19/2008; or CRPD *Zsolt Bujdosó and Others v. Hungary*, to reinstate the victim's name to the electoral listing, unduly removed by victim's mental status.

[910] CEDAW, Article 5(a): "States Parties shall take all appropriate measures […] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

perspective in general treaties, the IACtHR in *Cotton Fields*, which regarded a pattern of disappearances and gender violence, rejected the mere "re-establishment of the same structural of violence and discrimination."[912] Years later in *Atala Riffo and Daughters*, a specific formulation of the transformative perspective was specifically applied to the case of stereotypes and harmful practices that perpetuated discrimination against LGBTIs.[913]

Adoption of specific legislation is one of the measures with a transformative character. In order to raise the costs of violations against certain groups, criminal legislation, supported a set of long-term policies to prevent relevant recurrence (as ordered in the case of *Cotton Fields*),[914] may include the enactment of the crime of femicide. Similarly, the CEDAWCttee has recommended *e.g.* a constitutional amendment with respect to the compatibility between customary laws and women's rights[915] and the implementation of labor legislation ensuring protection of women in the workplace.[916] The CRPD Committee, in turn, has recommended the respondent State to enact legislation to recognize the right for all persons with disabilities to vote, without and "capacity assessment".[917]

Satisfaction measures in this area concentrate on the symbolic actions to raise awareness on the specific forms of violations, as ordered by the IACtHR—for instance, to erect a monument of the victims of gender-based murders.[918]

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[911] CRPD, Art. 4.1(b): " States Parties undertake […] to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities".

[912] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, § 450. At the same time, this Court held that it has no competence to attribute State responsibility for the discriminatory context, alone (§ 463).

[913] IACtHR, *Case of Atala Riffo and Daughters v. Chile* (Merits, Reparations and Costs), § 267: "some discriminatory acts analyzed in the previous chapters relate to the perpetuation of stereotypes that are associated with the structural and historical discrimination suffered by sexual minorities […], particularly in matters concerning access to justice and the application of domestic law. Therefore, some reparations must have a transformative purpose, in order to produce both a restorative and corrective effect and promote structural changes, dismantling certain stereotypes and practices that perpetuate discrimination against LGBT groups."

[914] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, §§ 747-793.

[915] CEDAWCttee, *E.S. and S.C. v. Tanzania*, communication No. 48/2013. Views of 2 March 2015, UN Doc. CEDAW/C/60/D/48/2013, § 9(b)(ii).

[916] CEDAWCttee, *R.K.B. v. Turkey*, communication No. 28/2010. Views of 24 February 2012. UN Doc. CEDAW/C/51/D/28/2010, § 8.10 (a)(i).

[917] CRPDCttee, *Zsolt Bujdosó and Others v. Hungary*, § 10.b(ii).

[918] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, §§ 471 and 172.

Moreover, these measures may be in the form of training of legal professionals on non-discrimination law. Relevant actions include regular training for judges and legal professionals on the CEDAW,[919] on decision-making, on stereotypical prejudices,[920] and on violence against women.[921] Training should build the "capacity to recognize the discrimination that women suffer in their daily life."[922] The CRPD Committee has recommended regular training on the relevant convention on how to create skills to handle judicial cases in a disability-sensitive manner.[923]

2 – The Duty to Fulfill

251. The Duty to fulfill can be disaggregated into the duties to facilitate, to provide, and to promote. As will be seen in this section, in the context of equality and non-discrimination, this duty gains prominence, in view of the purpose itself of this duty, one of supporting, through different means, individuals who are unable to enjoy rights from themselves. Given the wide variety of obligations that may fall within the scope of this type of State duty, a number of obligations that are remarkably identified, either via treaty provision or through judge made law, are analysed, as guise of illustration, in detail in this section.

2.1 – Duty to Facilitate

252. In the context of equality and non-discrimination, the duty to facilitate entails overall building institutional machinery in order to realize human rights, particularly by the establishment of programs, laws, policies, and actions aimed at supporting members of vulnerable groups to enjoy rights on an equal footing.

2.1.1 - General Measures

253. The duty to facilitate has been identified by monitoring bodies, through a variety of forms.

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[919] CEDAWCttee, *Vertido v. The Philippines*, § 8.9(b)(ii).

[920] CEDAWCttee, *R.K.B. v. Turkey,* § 8.10(b)(ii). Similarly, IACtHR, *Case of González et al. ("Cotton Field") v. Mexic*o, § 540.

[921] CEDAWCttee, *R.P.B v. Philippines*, § 9(b)(iv).

[922] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, § 540.

[923] CRPDCttee, *Szilvia Nyusti and Others v. Hungary*, §10.2(b).

They include plans of action and programs, strategies[924] or targeted measures, the establishment of special equality bodies[925] and commissions, and the adoption of specific measures. Those actions aim to ensure access by women to political posts and employment,[926] allocation of necessary resources,[927] implementation of specific legislation, and facilitation of access to remedies. For instance, gender mainstreaming legislation and regulation may be required to comply with certain provisions of human rights treaties.

In general, States, according to their own domestic contexts, enjoy certain discretion in choosing the best means of implementation.

At the same time, several of these measures have been specified in specific human rights treaties or construed through case law.

2.1.2 – Temporary Special Measures

254. The set of measures named *temporary special measures* (TSMs) in UN law, consists of several actions[928] aimed at advancing the status of disadvantaged groups in society. The variety of those actions were classified by Bossuyt in a seminal study as: (a) *affirmative mobilization*: outreaching or skills building to targeted segments in order to apply for services goods or opportunities; (b) *affirmative fairness*: assessment on whether a given group or member has been fairly treated in the access to opportunities, including by identifying any bias, profiling, or prejudice on any ground; and (c) *affirmative preference*: allocation of percentages (quotas or reservation) for

[924] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant),* adopted on 12 May 1999. UN Doc. E/C.12/1999/5: "in order to ensure women equal access to economic resources, such as land ownership, credit, technology, and natural resources, and measures to respect and protect self-employment", § 26.

[925] E.g. the European Equality Bodies, required by EU Directives (2000/43/EC) 2010/41, 2006/54 and 2004/113.

[926] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005), 218.

[927] Id., 219.

[928] According to Oliver De Schutter, they consist of "a legal technique variously described in international human rights law as including measures at accelerating *de facto* equality", "Chapter Seven – Positive Action," in *Cases, Materials and Text on National, Supranational and International Non-discrimination Law,* eds. Dagmar Schiek et al, (Oxford: Hart, 2007), 757. Compare with CEDAWCttee, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures* (2004), § 22.

disadvantaged groups for equally qualified candidates previously selected ("savings clause") or even when other candidates are better qualified or by prohibiting these candidates to apply for the good, service, and opportunity at stake.[929] Their common feature, however, is the acceleration of the equalization process of one or more social groups in relation to the enjoyment of rights.

2.1.2.1 - TSMs as Positive Obligations

255. Treaty provisions usually treat TSMs as permissive policy options,[930] as in Article 23 of the Charter of Fundamental Rights the European Union, which was drafted based on the the relevant normative[931] and judicial[932] *acquis*. Likewise, both the HRCttee[933] and the CESCR[934] simply recognize these measures as non-discriminatory.

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[929] HRComm, "The Concept and Practice of Affirmative Action": Final Report submitted by Marc Bossuyt, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, on 17/06/2002. UN Doc. A/CN.4/Sub.2/2002/21 ("Bossuyt Report").

[930] Such as in Article 4.1 of the CEDAW, and Article 5.4 of the CRPD.

[931] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJEU, L 039, 14/02/1976*;* Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, 21.12.2004, p. 37–43; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006. TFEU, Article 157.4 (ex Article 141 TEC).

[932] Seminal cases include: CJEU, *Eckahd Kalanke v. Freie Hansestadt Bremen*, judgment of 17/10/1995, C-450/93, § 14. The CJEU held that the Bremen Equal Treatment Act (LGG), which provided for a flexible gender quota system, was compatible with Directive 76/207. This Court held that "the traditional assignment of certain tasks to women and the concentration of women at the lower end of the scale are contrary to the equal rights criteria applicable today". In *Marschall v. Land Nordrhein-Westfalen*, judgment of 11/11/1997, C-404/95, § 24, the CJEU held: "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances". *George Badek and Others*, C-158/97, Judgment of 28 March 2000, the Court held that the outreach system in the form of interviews to increase the participation of women in academic positions, together with strict quotas for PhD., training and committee participation positions at a public university are not contrary to Directive 76/207/EC; *Serge Briheche v. Ministère de 'inteireur, de la Sécurité Intérieure ed des Libertés Locales*, Judgment of 30/09/2004, C-319/03, § 32, where an exemption of the general age-limit of 45 years old set for public examinations, applicable for mothers with three or more children, widowed or not re-married or unmarried with at least one dependent child, was held in consonance with Directive 76/20/7/EEC; *Katarina Abrahamson, Leif Anderson and Elisabeth Fogelqvist*, Case C-407-98 (6 July 2000), regarding Swedish legislation to increase equal employment in academic institutions, to hire sufficiently qualified and less qualified candidates. The Court held that such a scheme was not in contradiction with Directive 76/207, as long as the difference in the qualifications "is not so great that the application of the rule would be contrary to the requirement of objectivity in the making of the appointments". See Chapter 8, on the proportionality analysis for affirmative action measures (§ 431).

[933] HRCttee, *General Comment No. 18 – Non-Discrimination*, § 10. In *Jacobs v. Belgium*, the applicant, a male candidate for the appointment of a judge at a national high court, alleged violation of Article 26 ICCPR, inasmuch as the gender quota scheme put in place disqualified him for the post. The Ctee

Within EU law, TSMs represent only policy options[935] composed of *e.g.* voluntary commitments target periodically for companies.[936] This contrasts with many laws of member States stipulating an array of similar measures for persons with disabilities.[937] It has been argued that the faster pace of member States than the EU itself in adopting these measures, coupled with the obligatory nature of positive action in international human rights, could "implicitly and occasionally even explicitly" influence EU law.[938]

For its part, the ECtHR was confronted in its first Advisory Opinion with the question of whether the nomination list of candidates for election of a judge to this Court (submitted by Malta) should be refused in the absence of a suitable female candidate. By answering this question (in the negative) and considering Article 4.1 of CEDAW (permissibility of TSMs), the Court held that in principle such measures do not violate the ECHR. In the particulars of the case, The Court decided that in case of not finding a suitable female candidate in the country it had no obligation to seek one in another country.[939] The Court, however, did not make an assertive pronouncement on whether TSMs consist of an obligation under the ECHR. This vague approach by the ECtHR differs from the guidance taken since *Thlimmenos*, implying an obligation to treaty differently those individuals inherently different.[940] Likewise, *D.H. and Others v. the*

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rejected his claim, reasoning that the said Article encompasses cases such as this one, aimed at increasing the gender representation in many high bodies, where women's percentage is very low. (Communication 943/2000, views of 17 August 2004. UN Doc. CCPR/C/81/D/943/2000).

[934] CESCR, *General Comment No. 20 - Non-discrimination in economic, social and cultural rights* (Article 2, §. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, § 38.

[935] Marc De Vos, *Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/EC*, Directorate-General for Employment, Social Affairs, and Equal Opportunities (2007), 58.

[936] For instance, the "Women on the Board Pledge for Europe" voluntary pledge for companies listed in Europe, aimed at incrementally increasing female participation on corporate boards to 30% by 2015 and to 40% by 2020.

[937] Marco Fasciglione, "Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism", *Protecting the Rights of People with Autism in the Fields of Education and Employment International, European and National Perspectives*, eds. Valentina D. F, et al. (Dordrecht: Springer, 2015), 152.

[938] Marc de Vos, *Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/EC,* European Commission Report (2007), §§ 70-81.

[939] ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights* [GC], § 52, 12 February 2008.

[940] ECtHR, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44 ECHR 2000-IV. See discussions in Chapter 4 (§175).

Czech Republic (2007), the Court held that "in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article [14]."[941] Protocol No. 12 does not impose such a far-reaching obligation[942] for signatory States, unless a given State has already implemented any TSM scheme domestically, in which case the Court would rule on any deficiencies of this scheme.

256. Given the absence of an express treaty obligation, such as in Article 2.2 of the ICERD, scholars have dedicated efforts to identify on other treaties whether TSMs may be required, such as in Article 4.1 CEDAW. Notably, an important collective work[943] has shown that, through a teleological and systemic interpretation, the CEDAW's object and purpose[944] reinforce the understanding that TSMs may be required to comply with the in that Convention.[945] As a whole, that work also explains that the obligation to take such measures is supported by the "combined reading of the Articles 1-5 and 24 of CEDAW."[946] Such an understanding was influential for the CEDAWCttee in the General Recommendation No. 25 to reaffirm that TSMs under Article 4.1 CEDAW consist of a "necessary strategy" to achieve substantive equality."[947] This interpretative effort can be regarded as an example of integration between two specialized discrimination treaties, by which a normative force of one

[941] ECtHR, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV.

[942] CoE, Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, § 16, reinforcing an individual rights approach of the ECHR.

[943] Ineke Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Antwerp: Intersentia, 2003).

[944] To combat discrimination in public administration and in the law, to improve women's factual position, and to bring about structural changes on the diversity of gender roles.

[945] Rebecca Cook, "Obligations to Adopt Temporary Special Measures under The Convention on the Elimination of All Forms of Discrimination against Women," in Ineke Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, 130. See also Anne Bayefsky, "The Principle of Equality and Non-Discrimination in International Law", *Human Rights Law Journal* 11, no. 1 (1991): 24, for whom the obligatory nature Article 1.4 is read in conjunction with Articles 2(a); 2(e), 3 and 5(a) of CEDAW.

[946] Rikka Holtmaat (rapporteur) "Building Blocks for a General Recommendation on Article 4(1) of the CEDAW Convention, Report of the Expert Meeting in Maastricht (Valkenburg) 10-12 October 2002", Boerefijn et al. (ed.), *Temporary Special Measures*, 226. See also, Hanna Beate Schöpp-Schilling, "Reflections on a General Recommendation on Article 4(1) of the Convention on Elimination of All Forms of Discrimination Against Women", *ibid.*, 27.

[947] CEDAWCttee, *General Recommendation No. 25*, § 18. See also: Carole Nivard, "La Convention, un Outil pour l'Egalité," in *La Convention pour l'Elimination des Discriminations à l'Egard des Femmes*, ed. Diane R. (Paris: Pedone, 2014), 131.

treaty in a given provision (Art. 2 ICERD) lends support to read a positive obligation in the other treaty (Article 4.1 CEDAW).

257. As regards to the CRPD's Article 5.4[948] on TSMs, while recognizing the differences between this convention and the CEDAW, similar provisions in both instruments may also indicate its obligatory nature under the former. Teleologically, the CRPD aims to ensure the full equal enjoyment of all persons with disabilities (Article 1) and to materialize "full and effective participation and inclusion in society" (Article 3). General obligations that include putting in place measures to eliminate private sector discrimination (Article 4.1(e)) in areas such as employment opportunities and career advancement (Article 27), access to public housing programs (Article 28), and full and effective participation in public and political life by either voting or being elected (Article 29) also may lend support to such an interpretation.

2.1.2.2 - The TSMs' Programmatic Character

258. The programmatic character of TSMs may not underplay the fact that they consist of obligations and not policy options.[949] *Mutatis mutandis*, programmatic obligations in respect with ESCRs refer to the obligatory *results* sought—results secured through sets of concrete obligations of *conduct* of immediate effect.[950] However, the nature of the obligation (whether of means or result) does not diminish its normative power.[951] The effectiveness of short-term TSM actions (e.g. consultations, benchmarks, choice of measures and beneficiaries, and initial timeframe)[952] are monitored and evaluated vis-à-vis the specific goals sought.[953] On the other hand, TSMs can only be regarded as a complement to the traditional efforts

[948] CRPD, Article 5.4: "Specific measures which are necessary to *accelerate* or *achieve* de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention" (italics added).

[949] Hanna Beate Schöpp-Schilling, "Reflections on a General Recommendation on Article 4(1) of the Convention on Elimination of All Forms of Discrimination against Women" 27, quoting M. Bossuyt. See also: CEDAWCttee, *General Recommendation No. 25*, § 9:"Equality of results is the logical corollary of de facto or substantive equality."

[950] Magdalena Sepúlveda, *The Nature of International Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 195. See a complete analysis at 174-196, in respect with the ICESCR.

[951] Id., 196. But compare with Explanatory Note to Protocol 12 ECHR, rejecting that the ECHR regime entails far-reaching programmatic duties, § 16.

[952] Id., § 36.

[953] Id.: "disaggregate data is instrumental in achieving equality", § 35.

to address inequalities.[954] The many actions and parameters involved in their design and conduction rely on State discretion.[955]

In any event, assessing whether TSMs are theoretically obligatory or not and explaining the meanders of programmatic schemes represent only an initial part of the questions involving positive obligations in this context. Though nowadays framed in complex terms,[956] the temporal nature of TSMs is a first limitation of this obligation, reinforcing its exceptional character. Moreover, the adoption of these measures should be deemed necessary,[957] implying that justifications by a State party should be advanced. Further the respect for the "rights of others," the non-discriminated groups, is a central piece for the legal validity of TSMs, as well reminded by Bossuyt in his seminal report. In this context, such measures should be designed and carried out under a strict proportionality control. Chapter 8 (Section 2.1.3) will further delve into these specific parameters, applying the theoretical background of this section to the realm of racial discrimination.

2.1.3 - Civil Registration and Civil Status

259. In Chapter 2 (Section 2.1.2.2), it was seen that a civil registry (*i.a*. registry of birth and civil status) is key for the enjoyment of a series of rights. It is likewise important to consider a civil registry within the context of equality and non-discrimination and to identify the relevant State duties. Three scenarios in this regard will be analyzed, namely the obligation to register children at birth, the obligation to modify an individual's newly perceived gender in the national civil registry systems, and the obligation to recognize same-sex civil statuses, in the form of civil union or marriage.

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[954] Nathan Glazer, "The Future of Preferential Affirmative Action," in *Eliminating Racism, Profiles in Controversy*, eds. Phyllis A. Katz et al. (New York: Plenum Press, 1988), 329.

[955] CEDAWCttee, *General Recommendation No. 25*, § 33.

[956] E.g. that the temporal nature should be determined by its *functional result* in relation to the goals sought, instead by a simple passage of time (CEDAWCttee*General Recommendation No. 25*, § 20). See also Cook "Obligations to Adopt Temporary Special Measures", 29. The CRPD does not contain this conditionality, but it is likely that the CRPDCttee takes stock of the developments from other treaty-bodies, such as the CEDAW, when dealing with this conditionality. According to *General Recommendation No. 25*, TSMs should be also sustainable, thus not be abruptly interrupted in order to preserve the objectives already reached (§ 20).

[957] See, CEDAWCttee, *General Recommendation No. 25,* § 24.

In the first scenario, in order to safeguard the most important rights of the child, the CRC stipulates an obligation to register a child immediately after birth, including the attribution of a name, a nationality, and if possible the identity of the parents who will care for the child. This provision is of utmost importance to prevent a situation of statelessness, which would expose the child to a wide range of difficulties in enjoying rights.[958]

On the second scenario, an obligation to provide a civil registry takes specific contours when it comes to a person's sexual orientation or gender identity. The leading case of *Christine Goodwin v. the United Kingdom* (2002), by which the ECtHR's Grand Chamber departed from a series of earlier cases, shows that the State may be under a positive obligation to modify the applicant's sex in the civil registry after undergoing a sex reassignment surgery. In this case, the applicant sustained several burdens and anxiety by having her former sex still mentioned in the national registry, which, for the Court, amounted to a violation of Article 8 ECHR.[959] The IACtHR took a step in the same direction in its *Advisory Opinion OC-24* (2017). This Court based its reasoning on the right to an identity itself both as an independent right and as a means for an individual to exercise other rights.[960] Further, for this Court, the lack of access to the recognition of gender identity in the public registry system is a determinant factor for the continuation of discrimination against LGBTI persons, consisting of an obstacle to the full exercise of one's rights.[961]

260. Regarding the obligation to recognize civil unions of same-sex couples (third scenario), the ECtHR, in *Schalk and Kopf v. Austria* (2011) extended the scope of family life (Article 8 ECHR) to homosexual couples, implying an obligation on the authorities to register civil partnerships under those circumstances. It considered that "it [is] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."[962] The

[958] CRC, Article 7. ACHR's Article 18 speaks of a right to a name.

[959] ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 93, ECHR 2002-VI.

[960] IACtHR, *Gender Identity, and Equality and Non-Discrimination with Regard to Same-sex Couples. State Obligations in Relation to Change of name, Gender Identity, and Rights Deriving from a Relationship between Came-sex Couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, §§ 102-111.

[961] Id., § 114.

[962] ECtHR, *Schalk and Kopf v. Austria,* no. 30141/04, § 94, ECHR 2010.

IACtHR followed suit by engaging in an evolutive interpretation of the concept of family under Article 17 ACHR. Since the ACHR does not define family restrictively, States are under an obligation to recognize the civil unions of different types, including that of same-sex couples and of a monoparental type.[963]

261. On the other hand, a full-fledged right to marry for same-sex couples has received different approaches among different protection systems. The IACtHR has simply affirmed that to establish a legal status that grants the same rights as marriage (but that does not carry this name) reinforces a stereotyped heteronormativity by offering different levels of protection for different types of couples.[964] The ECtHR, for its part, has not recognized a full-fledged obligation to recognize same-sex marriages in *Schalk and Kopf*, grounded on a lack of consensus among CoE members in this regard. The Court, however, held that States have obligation to offer any similar civil registry for same sex-couples.[965] Confirming this approach, in *Orlandi and Others v. Italy* (2017) this Court was satisfied with States that provided legal any status "equal or similar to marriage."[966]

While the IACtHR had in early cases (e.g. *Atalla Riffo*) hinted its willingness to impose a positive obligation to recognize same-sex marriage, the Strasbourg sister has in the same topic demonstrated significant recalcitrance. The latter case is an example on how the pace of recognition of new positive obligations in a general human rights treaty can be protrected, particularly in the absence of a specialized treaty to rely upon. It is important understand the underlying reasons for this hesitance by the ECtHR, as analyzed in Chapter 6, (Section 1.2).

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[963] IACtHR, *Gender Identity, and Equality and Non-Discrimination with Regard to Same-sex Couples. State Obligations in Relation to Change of name, Gender Identity, and Rights Deriving from a Relationship between Came-sex Couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, §§ 179-181.

[964] Id., § 224.

[965] E.g, *Vallianatos and Others v. Greece* [GC], ECHR 2013 extracts (refusal to recognize, by any form, same-sex relationships); *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014 (refusal of maintenance of a marriage after a new gender assignment by one of the spouses); *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015 (impossibility to recognize, by any form, same-sex relationships); *Chapin and Charpentier v. France,* no. 40183/07, 9 June 2016 (provision of a "pacte civil de solidarité", instead of marriage).

[966] ECtHR, *Orlandi and Others v. Italy*, § 194.

2.1.4 - Reasonable Accommodation

262. International human rights law has progressively accepted a State duty to accommodate particular conditions of individuals belonging to disadvantaged groups.[967] Obligations in this regard entail the creation of adjustments in facilities, norms, and practices in order to allow participation and inclusion[968] involving a variety of sectors, such as governments, healthcare and educational institutions, employers, and goods and services providers.[969] These measures include religious practices in the workplace,[970] flexible working hours for the sick and disabled,[971] and specific arrangements for detainees.[972] Their aim is to address instances of indirect

[967] The so-called *reasonable accommodation measures* stem from the US Equal Employment Opportunity Act (1972), under which employers were obliged to accommodate their employees' religious practices in the work place, unless this would impose a disproportionate burden on the former. Subsequently, the Americans with Disability Act (1990) codified in a statute the permissibility of these measures. Americans with Disabilities Act, Section 101 (9), provides that reasonable accommodation may include adjustment in existing facilities, re-structuring of working hours and schedules, modification of equipment, devices, training materials or policies, provisions of readers and interpreters. With respect to other jurisdictions, the Flemish Decree on Proportionate Participation in the Labor Market, of 2002, Article 5.4, imposes a duty of reasonable accommodation for a number of *kansengroepen* ("risk groups"); the Canadian Charter of Rights and Freedoms, section 15, gives room for ample application in the country's provinces and by courts, such as in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, the *Grismer* case, [1999] 3 S.C.R. 868; in Brazil the *adaptação razoável* for persons with disabilities is part of Article 4.1 of Law 13.146 of 2015; in South Africa, the Employment Equity Act, 1998, Article 15.2(c) provides for reasonable accommodation for a number of *designated groups*.

[968] Anne Lawson, Disability and Equality Law in Britain: The Role of Reasonable Adjustment, (Portland: Hart Publishing, 2008), 32.

[969] Janeth Lord and Rebecca Brown, "The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities," in *Critical Perspectives on Human Rights and Disability Law*, ed. M. Rioux, Lee A. Basser et al. (Leiden: Martinus Nijhoff, 2011), 5. See also, Gérard Bouchard and Charles Taylor, *Building the Future – A Time for Reconciliation*, Abridged Report. (Quebec, 2008), 7: "This notion, which stems from jurisprudence in the realm of labour, indicates a form of arrangement or relaxation aimed at ensuring respect for the right to equality, in particular in combating so-called indirect discrimination, which, following the strict application of an institutional standard, infringes an individual's right to equality." Last seen 15 February 2016, available at http://red.pucp.edu.pe/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardycharlestaylor.pdf

[970] US Supreme Court, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), holding that families belonging to Amish communities who refused to send their children to the compulsory universal high school system until 16 years of age were not in breach of the respective State law. This Court thus made an exceptional accommodation between the interests at stake, having regarded the religious convictions of that community; ACmHPR, *Prince v. South Africa*, regarding the rejection of a Rastafari believer to join the bar given his criminal records for marijuana possession, Communication 255/2002, 18th ACHPR AAR Annex III (2004-2005); HRCttee, *Karnel Singh Bhinder v. Canada*, on the imposition of wearing a hard hat on a Sikh believer working in civil construction, (communication No. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 (1989)).

[971] CJEU, *Chacón Navás v Eurest Colectividades SA* (2006), regarding the inflexible working schedule for a sick and disabled person, C-13/05.

[972] ECtHR, *Price v. the United Kingdom,* no. 33394/96, ECHR 2001-VII.

discrimination that may arise out of norms and practices designed for the dominant values of society.

2.1.4.1 –Reasonable Accommodation as a Positive Obligation

A highly authoritative source of reasonable accommodation as a legal obligation in the area of disabilities takes place under Article 2 CRPD, which defines reasonable accommodation as the

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms[973]

In fact, this obligation resonates throughout the UN treaty system, specifically due to the intersectional approach of a number of relevant committees,[974] embracing substantive equality. Notably, the CESCR Committee asserts that the denial of reasonable accommodation constitutes a violation of the non-discrimination clause of the ICESCR in itself.[975]

263. For its part, the EU has restricted these measures to disabilities through Directive 2000/78/EC (2000), stipulating the obligation upon employers to enable persons with disabilities in the workplace to have access, participate, advance, or pursue training, provided that these measures do not a disproportionate burden for the employers.[976] The CJEU today interprets this Directive in accordance with a number CRPD provisions, to which the EU itself is a Party, thus forming an integral part of

[973] CRPD Article 2. Under the CRPD, this provision is interpreted in conjunction with Arts. 5.2 (equal and effective legal protection), 5.3 (obligation to offer reasonable accommodation), and 14.2 (right to liberty in equal basis). See, Rosemary Kayess and Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities," *Human Rights Law Review* 8, No.1 (2008): 10. Compare with the text of the Inter-American Convention on Disabilities, Article 3.1 (b), and (c), restricting the scope of reasonable accommodation to physical accessibility and communication.

[974] CEDAWCttee, Concluding Observations on Hungary (reasonable accommodation for women with disabilities in the private sector) UN Doc. CEDAW/C/HUN/CO/7-8, § 28; CRC, Concluding Observations on Hungary, (reasonable accommodation for children with disabilities in schools), UN Doc, CRC/C/HUN/CO/3-5 and on Panama, (adoption of comprehensive policy on children with disabilities), UN Doc CRC/C/PAN/CO/3-4.

[975] CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, adopted on 2 July 2009, UN Doc. E/C.12/GC/20, § 28, recommending States to introduce the obligation to adopt reasonable accommodation actions in the national legislation of States parties, and to consider such denial as a prohibited form of discrimination.

[976] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**,** OJ 2000 L 303, p. 16.

the EU legal order.[977] Legally speaking, however, there is no obstacle for the EU to recognize other grounds in its policy.[978] There exists no hierarchy between discriminated groups. Instead, intersectionality is encouraged. The case of disability remains appealing and distinctive only through the restricted physical, medical, or architectural models. However, an integral human rights model of disability makes the differences between this form and other forms of discrimination much less significant.

264. The ECtHR, for its part, based on the precedent of *Glor v. Switzerland*[979] has similarly recognized breaches for a failure of the State to offer specific adjustments for certain groups for prisoners' disability[980] or religious beliefs.[981] Already in *Eweida and Others v. the UK* (2013), a violation of Article 14 in conjunction with Article 9 was found by the Court. The Court found a failure by the national authorities to find a suitable solution to the conflict between the desire of the first applicant (a stewardess) to wear a crucifix at work and the airline's corporate image.[982] After over a decade, since the Court reinforced its case law on failure to adapt particular circumstances, *Çam v. Turkey* (2016) demonstrated an emphatic stance by the Court. The applicant was refused access to a music educational institution, given the condition imposed by that institution, by requesting a physical fitness certificate after the applicant had

[977] See further discussions in Chapter 6 (Section 1.1.2).

[978] There is currently an EU's Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2.7.2008, establishing reasonable accommodation for all these grounds.

[979] ECtHR, *Glor v. Switzerland,* no. 13444/04, ECHR 2009, violation of Arts. 8 and 14 ECHR, given the refusal to provide an alternative service for the applicant, who was discharged by the army, given his illness, rather than imposing an exoneration tax.

[980] ECtHR, *Semikhvostov v. Russia,* no. 2689/12, § 85, 6 February 2014 (with a special attention to Article 3 ECHR). Similarly, in the CRPD's jurisprudence, *Mr. X v. Argentina,* communication 8/2014, views of 11 April 2014.. UN Doc. CRPD/C/11/D/8/2012. For a comprehensive analysis, see Anna Lawson, "Disability Equality, Reasonable Accommodation and the Avoidance of Ill-treatment in Places of Detention: the Role of Supranational Monitoring and Inspection Bodies," *The International Journal of Human Rights* 16, no. 2 (2012): 845-864.

[981] ECtHR, *Jakóbski v. Poland,* no. 18429/06, 7 December 2010.

[982] ECtHR, *Eweida and Others v. the United Kingdom,* nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 94 ECHR 2013 (extracts). The three other claims did not succeed, as the Court conferred a wide margin of appreciation, in issues related to public health (Ms. Chaplin), and same-sex relations (Ms. Ladele and Mr. Farlane). The second applicant had refused to refrain from wearing a cross while working as a nurse in a public hospital. The third applicant, a public registrar had refused to register same-sex partnerships due to his strong religious feelings. The fourth applicant, a sex therapist, had been dismissed after having demonstrated problems in advising same-sex couples. Compare with *Ebrahimian v. France*, in which no violation of Article 9 was found, in which a worker in a public hospital was fired because of wearing a Muslim veil (no. 64846/11, ECHR 2015).

passed all other relevant entrance tests. The Court, literally recognizing that Article 14 ECHR should be read in the context of reasonable accommodation, which "helps to correct factual inequalities which are unjustified and therefore amount to discrimination."[983] A violation was found mainly in that the educational institution took no attempt to identify the applicant's needs or to justify how her blindness could impede her access to a musical education.[984]

2.1.4.2 – Stages of the Obligation to Offer Reasonable Accommodation

265. A positive obligation to offer reasonable accommodation, hardly contested nowadays,[985] can be divided into two stages. The first stage implies a duty (of means) to engage with the applicant in order to find an acceptable solution.[986] The second stage implies a relative duty on the relevant outcome, checked against the test of reasonableness: a combination between a measure that is effective for the victim, as a minimum threshold, and the extent to which the claim does not impose a disproportionate burden on the provider.

For this reason, it can be said that the practice of the ECtHR of entertaining complete reasonable accommodation obligations is rather recent, after a number of encouragements by the Court's own judges.[987] A new important development is finding of a violation of the ECHR for the refusal of offering any accommodation (first stage) alone, as seen in *Çam*.[988] Further, the assessment of the reasonableness of

[983] ECtHR, *Çam v. Turkey*, no. 51500/08, § 65, 23 February 2016.

[984] Id., § 68.

[985] But, for instance, it has been contended that Article 9 CRPD does not provide specific guidance on construction standards, accessibility on buildings, and that Article has no means to measure progress on the respective compliance. See: Tracy R. Justesen and Troy R. Justesen, "Perspectives on the UN Convention on the Rights of Persons with Disabilities: An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention," 14 *Human Rights Brief* 14, no. 2(2007): 3. See discussions in Chapter 5 (§ 258) on the programmatic character of some obligations.

[986] See, CRPD Article 5.3, and 27.1(i) and CESCR, *General Comment No. 20 - Non-Discrimination in Economic, Social and Cultural Rights*, § 28.

[987] For instance, in *Francesco Sessa v. Italy, no. 28790/08,* ECHR 2012 (extracts*)*, revolving around the denial of a judge to reschedule a court hearing for a lawyer of Jewish credo, Judges Tulkens, Popovic and Keller, suggested that reaching a reasonable accommodation might represent a less restrictive means of achieving the aims pursued (§§ 9-11). In *Ebrahimian v. France,* no. 64846/11, ECHR 2015, Judge O'Leary regretted that the path towards a reasonable accommodation approach by the Court, present in *Eweida and Others*, was "somewhat lost".

[988] This obligation had been addressed only indirectly, *e.g.*, in *Glor v. Switzerland*, where no alternative was put at the disposal of the disabled applicant. In *Eweida*, the Court held that an option for the employee to resign was disproportionate, departing from the understanding in the former case *Konttinen v. Finland*, (1996).

the measures requested is done during the ordinary proportionality stage, as the Court did in *Eweida*. In the latter case, the Court supervised the balance struck of the competing interests at stake and found that overly importance was attached to the airline's corporate image.

2.1.5 - Accessibility Measures

266. A specific type of positive obligation in the context of disabilities has been clearly articulated under Article 9 CRPD, through which States are bound to

> […] take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.[989]

Transposing this obligation to general treaties, the ECtHR recently approached it in *Guberina v. Croatia* (2016). A violation was found because the authorities did not consider disability as a justification for a tax exemption for a family with a disabled child to buy an accessible house. The Court noted that the authorities applied it too strictly, failing to consider that basic infrastructure had to include accessible facilities for a child's disability needs.[990] The Court showed readiness to consider disability as discrimination based on "other status"[991]; to deem that the authorities failed to take into account the applicant's accessibility needs;[992] and to reject the authorities justification for not acting, namely the protection of financially disadvantaged groups.[993] In a more recent case, *Enver Şahin v. Turkey* (2018), the Court dealt with the failure of a Turkish university to offer the applicant, who was suffering from a

[989] CRPD, Article 9. Accessibility is a key component of the CRPD, as per the CRPDCttee, *General Comment No. 2 (2014) Article 9: Accessibility,* 11th Session. UN Doc. CRPD/C/GC/2 § 12. This Committee goes further, stating that "[w]ithout access to information and communication, enjoyment of freedom of thought and expression and many other basic rights and freedoms for persons with disabilities may be seriously undermined and restricted" (§ 21).

[990] ECtHR, *Guberina v. Croatia,* no. 23682/13, § 86, 22 March 2016. See also: *Kacper Nowakowski v. Poland,* (no. 32407/13, §§ 94-95, 10 January 2017), on the failure of the authorities to find a solution for a father with a hearing impairment to have contact with his son out of a broken relationship through the child care authorities.

[991] Id., §, 76, following the precedent of *Glor*, § 80.

[992] Id., § 86.

[993] Id., § 97.

physical impairment, accessible facilities for him to attend the classes at the third floor of the relevant building. The majority of the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 2 of the ECHR.[994] Though an obligation to arrange accessibility was not explicit in these judgments, the Court has shown again the ample potential of the *Thlimmenos* principle.

2.1.5.1 - Mandatory Nature of Accessibility Measures

267. The CRPD Committee refuses to state that accessibility consists of an isolated claim of rights. Rather, the Committee derives it from the principle of human dignity in human rights law[995], whereby accessibility allows for differentiated compliance for specific sectors, all enjoying universal rights.[996] At the same time, it affirms that accessibility measures consist of treaty obligations, measured by minimum standards,[997] rather than alleviatory policy choices. Hence, the denial of offer accessibility is an instance of discrimination, and is thus a violation of that Convention.[998]

2.1.5.2 - Differentiation between Accessibility and Reasonable Accommodation

268. The CRPD Committee attempted to establish key differences between accessibility and reasonable accommodation. Accordingly, the obligation to provide for accessibility is imposed as a general measures for a certain group[999] as soon as a State ratifies the CRPD. Reasonable accommodation, in turn, has an *ex nunc* character, being triggered upon a specific request, in order to ensure an individual's inherent dignity when facing an impairment.[1000] The latter seeks to address an applicant's particular difficulty, which is not normally taken into account into a general

[994] ECtHR, *Enver Şahin v. Turkey,* no. 23065/12, 30 January 2018, see further comments in the subsequent section 2.1.5.2.

[995] CRPDCttee, *General Comment No. 2 (2014) Article 9: Accessibility*. Eleventh Session, UN Doc. CRPD/C/GC/2, § 3: "Thus, a precedent has been established in the international human rights legal framework for viewing the right to access as a right per se."

[996] Ibid.

[997] Id., § 28. This obligation also implies review of legislation that is incompatible with the CRPD. See, for instance, in *Nyusti and Takács v. Hungary,* regarding minimum standards for the accessibility of banking for persons with visual and other types of impairments (communication No. 1/2010, views of 31 May 2013. UN Doc. CRPD/C/9/D/1/2010)

[998] Id., § 39.

[999] CRPDCttee, *General Comment No. 2*, § 25.

[1000] Id., § 26

accessibility assessment, and it thus avoids an essentialist approach.[1001] The CRPD case law makes such distinctions. *F. v. Austria* (2015), which concerned the non-installation of a digital audio system in the expansion of a tramway line, concerned a denial of accessibility.[1002] Conversely, in *H.M. v. Sweden* (2012), the refusal to grant a building permit for a hydrotherapy pool for a person with a severe physical disability concerned a denial of reasonable accommodation.[1003]

Accessibility includes a set of structural obligations with measures of compliance including specific legislation, planning, regulation, and setting of standards and penalties for those incompliant.[1004] Consisting of an obligation of a programmatic manner and of progressive realization, States should demonstrate at least the steps already taken in order to achieve the ends of a given accessibility measure or policy. Indeed, the related measures assume a much wider scope than attempts to make individual adjustments, as in reasonable accommodation. Obviously, in concrete cases, it can be difficult to make a clear-cut distinction on exactly which obligation is at stake. For instance, in the above mentioned *Enver Şahin v. Turkey*, the majority of the ECtHR framed the case as one of reasonable accommodation, while dissenting judge Lemmens exposed well-grounded arguments otherwise, re-framing the case as one of accessibility.[1005] From the details of the case, it appears a clear stance of accessibility, particularly given the very general claim for physical access to the university building without any other specificity in the applicant's personal claim.

2.1.6 - Elaboration of Equality Data

269. A primordial means for a State to bring about changes in instances of inequality is indeed to actively acquire information on the extent and nature of those instances, in terms of *e.g.* relevant percentages, main groups affected, regional disparities, and means by which these groups are discriminated. Substantive equality cannot deliver its promise of tackling the challenges of marginalized groups if

[1001] In relation with the risks of essentialism, discussed in Chapter 4 (§ 216 above).

[1002] CRPDCttee, *F. v. Austria*, communication no. 21/2014. Views of 21 August 2015, UN Doc. CRPD/C/14/D/21/2014, § 8.7,

[1003] CRPDCttee, *H.M. v. Sweden,* communication no. 3/2011. Views of 21 May 2012 CRPD/C/7/D/3/2011, § 9.

[1004] CRPDCttee, *General Comment No. 2*, § 28.

[1005] ECtHR, *Enver Şahin v. Turkey,* dissenting opinion of Judge Lemmens, §§ 4-5.

pertinent public policies are not guided by specific (qualitative and quantitative) data. Such information may reveal patterns of discrimination, consisting of relevant *knowledge* of violations and potentially triggering State responsibility. Among the different forms of data, in this context, the statistical data disaggregated into one or more grounds of discrimination is commonly used by authorities. Measuring discrimination is a key tool to develop relevant indicators[1006], in order to monitor the implementation of human rights treaties.

The importance of elaborating equality (disaggregated) data was recognized in the 2030 agenda under Target 17.18,[1007] and by the UN OHCHR[1008]. However, a positive obligation to collect, elaborate and disseminate disaggregated data is not found in a uniform manner through the different international systems.

The CRPD introduces an explicit obligation to collect appropriate information, including research and statistical data, so as to enable States parties to formulate and implement policies in order to comply with the provisions of that Convention (Article 31.1). The breaking down of the data collected serves the purpose of identifying and tackling the relevant barriers faced by persons with disabilities in realizing their human rights (Art. 31.2). This obligation is also construed by the HRCttee[1009] and the CESCR[1010], and is given emphasis emphasis by the non-discrimination counterparts. The CEDAWCttee considers the collection of disaggregated data as a main obligation to implement the CEDAW[1011], as underscored throughout this Committee's works[1012].

[1006] Gauthier De Beco, "Human Rights Indicators: From Theoretical Debate to Practical Application," *Journal of Human Rights Practice* 5 no. 2 (2013): 386.

[1007] UNGA Resolution 70/1 - Ttransforming our World: The 2030 Agenda for Sustainable Development, Target 17.18, referring to data disaggregated into income, gender, age, race, ethnicity, migratory status, disability, geographic location and other relevant characteristics, according to national contexts.

[1008] OHCHR, A Human Rights-Based Approach to Data – Leaving no One Behind in the 2030 Agenda for Sustainable Development (2018), available at [https://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf], accessed on 7 February 2019.

[1009] HRCttee, e.g. Concluding Observations on Switzerland (collect and update disaggregated data on police brutality), UN Doc. CCPR/C/CHE/CO/4 (2017), § 29; and on Uruguay (data on human trafficking broken down in sex, age, ethnic origin and country of origin) UN Doc. CCPR/C/URY/CO/5 (2013), § 16.

[1010] CESCR, e.g. Concluding Observations on Tunisia (set up a comprehensive data system, disaggregated by age, sex, region, urban or rural location) UN Doc. E/C.12/TUN/CO/3 (2016), § 46; and on Gambia (collect data on the enjoyment of rights protected by the ICESCR disaggregated by age, sex and urban/rural population), UN Doc. E/C.12/GMB/CO/1, § 8.

[1011] CEDAWCttee, *General Recommendation No. 9: Statistical Data Concerning the Situation of Women* (1989).

The CRCCttee likewise has regarded this measure as a main obligation to implement the CRC[1013], *i.a.* in order to allocate the necessary resources and to monitor the implementation of the pertinent programs and actions.[1014] Regarding intersectionality, the CEDAWCttee has paid particular attention to sectors such as women with disabilities,[1015] and rural women[1016], whereas the CRCCttee has reinforced this very obligations related to children with disabilities[1017], to adolescents[1018] and to children in street situation.[1019]

270. In Europe, an emerging practice towards a clear establishment of this duty is only developing. The ECtHR, though frequently interpreting the ECHR in line with the CRPD and the CEDAW, and relying on statistical data in order to establish prima-facie discrimination[1020], has not to date read such an obligation under the ECHR. The main concern in the region is that processing of data may conflict with rules of data protection and privacy. In this regard, Article 8.2 ECHR only permits interference with this right under the requirements legality, legitimacy and necessity. While it has been argued that these exceptions have to be interpreted narrowly, particularly under the latter requirement[1021], the Court's recent approach of attributing similar value to the justifications of the these requirement for negative and positive obligations[1022] may open room for greater acceptance of this matter. Processing equality data can be

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[1012] CEDAWCttee, e.g. *General Recommendation No. 37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, adopted on 7 February 2018, among many other general recommendations.

[1013] CRCCttee, *General Comment No. 5 (2003) - General measures of implementation of the Convention on the Rights of the Child, (arts. 4, 42 and 44, para. 6),* adopted in its thirty-fourth session. UN Doc. CRC/GC/2003/527, at 4.

[1014] CRCCttee, i.a. *General Comment No. 21 (2017) on Children in Street Situations*, adopted on 21 June 2017. UN Doc. CRC/C/GC/21, § 23

[1015] See, CEDAWCttee, e.g. Concluding Observations on India CEDAW/C/IND/CO/4-5 (2014), § 36.

[1016] CEDAWCttee, *General Recommendation No. 34 (2016) on the Rights of Rural Women*, adopted on 7 March 2016. UN Doc. CEDAW/C/GC/34, § 94.

[1017] CRCCttee*, General Comment No. 9 (2006) The Rights of Children with Disabilities, 27 February 2007*, UN Doc. CRC/C/GC/9, § 19.

[1018] CRCCttee, *General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, adopted on 6 December 2016. UN Doc. CRC/C/GC/20, § 37 (c).

[1019] CRCCttee, *General Comment No. 21 (2017) on Children in Street Situations*, § 26.

[1020] ECtHR *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 188, ECHR 2007-IV. See further discussions in Chapter 9 (§ 487).

[1021] EC, Directorate-General for Justice and Consumers, European Handbook on Equality Data - 2016 Revision Written by Timo Makkonen, 24.

[1022] See Chapter 3 (§ 151 above).

seen as a legitimate aim, if coupled with safeguards put in place to prevent, as much as possible infringements with the privacy of the individuals in question.[1023] Given a notable development regarding this obligation in other systems, the is room for the ECtHR to further elaborate on an obligation to produce equality data, although regionally this matter is by no means settled, particularly regarding EU law, creating a zone of regional particularlism with less opportunity for integration.

European legislation, notably the General Regulation on Data Protection (GRPD)[1024], does not prohibit expressly collection of equality data, though it does set principles[1025] and conditions to be observed in data collection and processing. The GRPD provides that the right to privacy, of a non-absolute nature, should be balanced against other rights, "in accordance with the principle of proportionality".[1026] But critically, this Regulation prohibits the processing of personal data that relates to a number of grounds of discrimination ("special categories"),[1027] in connection with a complex list of exceptions, *i.a.* the need to process information in the fields of employment and social security (item "b"), legal proceedings (item "f"), and statistical research (item " j"), which could serve as justifications to collect and process equality data. But overall, although privacy remains a concern in gathering equality data (e.g. in disclosing one's identity in interviews or surveys while manipulating this data), quantitative data for a large part is anonymous, making privacy concerns less relevant.

In addition to the complexities involving the permissiveness of collecting and elaborating disaggregated data in Europe, the relevant State practice has been scarce. The regulation of this type of data has been based on data protection and (formal) non-discrimination legislation,[1028] with the exception of data on employees with

[1023] European Handbook on Equality Data – 2016 (ibid.), referring to HRCttee *General Comment No. 16* (Article 17 ICCPR), § 10.

[1024] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Pepealing Directive 95/46/EC.

[1025] Id., Article 5.1 establishes the principles of (a) lawfulness, fairness and transparency; (b) purpose limitation, (c) data minimisation, (d) accuracy, (e) storage limitation, and (f) 'integrity and confidentiality'. Article 5.2 imposes a duty of accountability upon the data controller, be it a public body or private actor.

[1026] Id., Recital 6.

[1027] Id., in *numerus clausus*, (a) the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and (b) the processing of genetic, biometric or health data "for the purpose of uniquely identifying" a person's sex life or sexual orientation.

[1028] European Handbook on Equality Data – 2016, 29.

disabilities, in order to monitor the several quotas imposed individually by many EU Member States. National practices, all together, have demonstrated a number of inconsistences and incompatibilities, added to a misunderstanding of the data protection legislation, limiting the production of equality data to a lesser extent than actually permitted.[1029] A frequent misunderstanding is that privacy rules apply to identified or identifiable individuals, but not to data that is collected anonymously. Important scholarly and policy works were devoted not only to address such misunderstandings, but also to reinforce the necessity of producing disaggregate data,[1030] in order to support better (equality) policy making.

2.2 - Duty to Provide

271. The obligation to provide has been understood in Part I as the one mandating States to assist individuals who are not able to enjoy rights by themselves. As seen in Chapter 3 (Section 2.2), this specific obligation of direct provision of goods and services is exceptional even under ESCRs. When it comes to the effective enjoyment of rights by vulnerable groups, however, this type of obligation takes different contours and has a somewhat widened scope. Yet, the scope of application of the obligation to provide is circumscribed to certain areas. Some areas of international human rights law, either in treaty law or judicial interpretation, can be identified and will be examined in the following subsections.

2.2.1 - Legal Aid in Civil Cases

272. CPR treaties establish an obligation on States parties to provide legal aid for the defendant in criminal cases. Departing from that, the scope of this obligation extends to civil cases, when equality of arms between the parties is at stake. The case of *Airey v. Ireland* (1979) remains illustrative. The applicant was a woman who had

[1029] Id., 13.

[1030] For instance, *European Handbook on Equality Data: Why and How to Build a National Knowledge Base on Equality and Discrimination on the Grounds of Racial and Ethnic Origin, Religion and Belief, Disability, Age and Sexual Orientation* (Luxembourg: Office of Official Publications of the EC, 2007); Olivier De Schutter and Julie Ringelheim, *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights* (Brussels: Bruylant, 2010); Patrick Simon, "Collecting ethnic statistics in Europe: a Review," *Ethnic and Racial Studies* 35, no. 8 (2012): 1366-1391; Timo Makkonen, *Equal in Law, Unequal in Fact – Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Leiden/Boston: Brill, 2012), 301-342.

filed a petition for separation due to persistent physical abuse by her husband.[1031] She was unable to obtain a relevant judicial order, owing to the absence of legal aid and to her limited financial means to retain a solicitor. Given the impossibility of self-representation in court and the complex procedures at the Irish High Court necessitating legal aid, the Court found Ireland in breach of Article 6.1 ECHR.[1032] Overall, whenever the Court finds that the disparity between the parties can impair an effective enjoyment of the right to fair trail, even implicitly, the lack of civil aid to an impecunious party may imply an obligation for the State to provide proper assistance to this party.[1033] According to the Court's *acquis*, the provision of legal aid depends *i.a.* on the importance of the applicant's interest in the case,[1034] the complexity of the law and procedure at issue,[1035] the capacity of the applicant's self-representation,[1036] and the existence of a statutory requirement providing for legal representation.[1037] This standard is tempered by the Court's assessment of the reasons underlying the refusal of such aid.[1038] Hence, an obligation of direct provision of legal aid is reliant on the effectiveness of the right to a fair trail, according to a specific test that operates in a proportionality assessment.

[1031] ECtHR, *Airey v. Ireland,* 9 October 1979, Series A no. 32. This case reveals an important gender component, mainly given the financial inequality between the applicant and her husband, who was aggressive to her, manifested by the difficulties in pursuing her case in the court.

[1032] ECtHR, *Airey v. Ireland*, § 26, i*n fine*: "despite the absence of a similar clause for civil litigation, Article 6 §. 1 (Article 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

[1033] ECtHR, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 69, ECHR 2005-II, with the important nuance: "it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary" (§ 62).

[1034] Id., § 100. The Court explains later in *Bakan v. Turkey* (no. 50939/99, §§ 75076, 12 June 2007) that what is at stake in such obligation is the impairment of the essence of the right to a Court.

[1035] ECtHR, *Airey v. Ireland*, § 24.

[1036] ECtHR, *McVicar v. the United Kingdom*, no. 46311/99, §§ 48-62, ECHR 2002-III.

[1037] ECtHR, *Gnahoré v. France*, no. 40031/98, § 41 *in fine*, ECHR 2000-IX.

[1038] ECtHR, *Tabor v. Poland*, no. 12825/02, §§ 45-46, 27 June 2006.

2.2.2 - Prison Conditions

273. Beyond early concerns with intentional inhumane treatment,[1039] international case law extended its concern to the inability of prisoners to enjoy rights for themselves, thus relying on the State's assistance for such purpose. Notably, in the Inter-American practice in *Tibi v. Ecuador* (2004), the IACtHR consolidated its approach from previous cases, by which Article 5.2 ACHR may be violated without any intent of the penitentiary authorities. An obligation of provision of minimal conditions of living, owing to the prisoners' inability to provide these conditions for themselves, is a manifestation of this obligation to provide. The Court held:

> […] keeping a detainee in overcrowded conditions, lacking natural light and ventilation, without a bed to rest on or adequate hygiene conditions [among other violations] constitutes a violation of that person's right to humane treatment. Since the State is responsible for the detention centers, it must guarantee the inmates conditions that safeguard their rights[1040]

In 2015, the updating of the UN United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs) – now named "The Mandela Rules"[1041] – reaffirmed the existence of an obligation to provide in this area. In particular, these Rules contain

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[1039] HRCttee, *Cámpora Schweizer v. Uruguay*, 1982, UN Doc. CCPR/17/D/66/1980, § 19; ECmHR, *The Greek Case* (1969); IACtHR, *Case of Suárez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, § 91.

[1040] IACtHR, *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, § 150. See also ECtHR, *Kudla v. Poland* [GC], in which cumulative factors reached the threshold of Article 3 ECHR; ACtHPR, *Institute for Human Rights and Development in Africa v. Republic of Angola*, involving prison conditions prior to deportation, such as overcrowding, irregular food provisions, and not readily available medical assistance, communication no. 292/2004, 24th Report, African Commission, 2007/2008, EC.CL/446(XII), 86-87. The case law has dealt with lack of medical assistance for diseases developed before arrest (*Yunusova and Yunusov v. Azerbaijan*, no. 59620/14, 2 June 2016) or during detention (*Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012), and with particular attention to inmates living with HIV/AIDS (*Salakhov and Islyamova v. Ukraine*, no. 28005/08, 14 March 2013). Case law has also held that the lack of accessibility or reasonable accommodation provisions for prisoners with disabilities may be considered inhumane treatment. See, *e.g.* lack of provision of basic infrastructure (*Price v. the United Kingdom*, no. 33394/96, ECHR 2001-VII), or the inability of using sign language as a means of communication (*Z.H. v. Hungary*, no. 28973/11, 8 November 2012). In *Ābele v. Latvia, (*nos. 60429/12 and 72760/12, 5 October 2017) the insufficient aid with the applicant's hearing impairment, added with other bad prison conditions, cumulatively, amounted to a violation of Article 3 ECHR. In fact, a humane treatment of prisoner, including the provision of personal hygiene materials, clothing and bedding, food, and medical service is part of early efforts of codification of the laws of war. See Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, 3rd ed. (Oxford: Oxford University Press, 2009), 381.

[1041] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), UN Doc. E/CN.15/2015/L.6/Rev.1, Annex.

specific provisions for accommodations,[1042] personal hygiene,[1043] clothing and bedding,[1044] and food.[1045] Provision of healthcare to a detainee is also considered a State obligation.[1046] Though not binding, the high degree of consensus gathered during the five-year negotiation process of this instrument confirms its authoritative value.

2.2.3 – Cases Related to Article 8 and 1 of Protocol No. 1 ECHR

274. As seen previously, the ECtHR rejects claims for full-fledged ESCRs under the ECHR but accepts a manageable content only, within the fine-tuning border control.

275. In a number of cases declared inadmissible, the issue of vulnerability is dealt with indirectly through vague passages suggesting that an obligation to provide may apply. Among these cases, *Sentges v. the Netherlands* (2003) is demonstrative in that the ECtHR rejected the applicant's claim for the respondent State to provide the applicant with a robotic arm prosthetics.[1047] Owing that this decision was handed down before the entry into force of the CRPD on which the ECtHR now has relied upon, as a means of gap-filling, one wonders whether the outcome would nowadays be the same. This case reveals an instance of hasty recourse to judicial restraint, supported by a polycentricity approach, as "the [relevant] issues involve an assessment of priorities in the allocation of limited State resources."[1048] Accordingly, an "even wider" margin of appreciation was afforded to the domestic authorities already at the admissibility stage.

276. While attempting to re-write a judgment handed down at an early stage may appear unfair, it is plausible that the Court nowadays has other convincing elements to further articulate claims of such nature. As seen in Chapter 3, issues related to public policies and resource allocation are not totally injusticiable, but they also undergo a

[1042] Id., Rules 12-17.

[1043] Id., Rule 18.

[1044] Id., Rules 19-21.

[1045] Id., Rule 22.

[1046] Id., Rules 24-35.

[1047] ECtHR, *Sentges v the Netherlands*. Appl. No. 27677/02, 8 July 2003 (inadmissibility decision).

[1048] Id.

minimum procedural review by supranational human rights organs. Instead of reaching straightforward an inadmissibility decision, the Court, in similar cases, could first clarify the compatibility of a claim of such nature with the material scope of the ECHR. Cases of positive obligations in the field of disability in the Court's recent jurisprudence involve matters of public policy such as tax exemption (*Guberina*) and architectural modifications (*Enver Şahin*), all referring to the CRPD. Thus, important precedents nowadays allow the Court to analyze cases similar to *Sentges* beyond the admissibility stage, instead of rejecting it based on polycentricy. From a theological viewpoint, the provision of a limb prosthesis under Article 8 could be regarded as a manifestation of the right to independent living, as in *mutatis mutandis* in the ambit of Article 19 CRPD.[1049] From that perspective, it remains clear that such a claim, far from being of a purely welfare nature, implies direct provision of a good as a means for an individual to gain autonomy, so as to enjoy human rights *in equal footing* in relation with others. It is submitted that, a firmer approach towards the capability theory by the ECtHR would enhance its potential to correctly entertain similar claims (within a manageable scope of social concerns[1050] allowed by the ECHR).

Further, a proportionality assessment in similar cases would not require any exceptional consideration of the competing rights and interests in question: (a) what is specifically at stake for the applicant, *i.e.* the magnitude of the hindrances sustained by the applicant to enjoy a right to respect for private life for not having a limb prosthetics and (b) the burden on the public resources as a consequence of complying with such a positive obligation.[1051] Probably, a robotic arm, as required in *Sentges*, would impose a disproportional financial burden on the public funds, in view of the number of potential similar claims. But a more nuanced analysis could *e.g.* inquire the scope of alternatives offered by the authorities to an applicant to enhance her or his autonomy, such as more affordable prostheses, rehabilitation services, or any other specific public policy.

[1049] See, CRPD*, General Comment No. 5 (2017) on Living Independently and Being Included in the Community,* adopted on 27 October 2017. UN Doc. CRPD/C/GC/5**,** § 16 (a) "[i]ndependent living is an essential part of the individual's autonomy and freedom and does not necessarily mean living alone." Autonomy, after all, is a central rather than a peripheral component of Article 8 ECHR.

[1050] See discussions in Chapter 3, Section 1.5.3.

[1051] *Mutatis mutandis*, in *Christine Goodwin,* the ECtHR noted that the obstacles to modify the national registry system in order to change the applicant's newly assigned gender were "far from insuperable" (§ 91).

While this Court has not had as yet the occasion to examine a similar case as the above, it has engaged on a more complex reasoning in cases related to *mutatis mutandis* the obligations of direct provisions to asylum seekers, which is analyzed in Chapter 8 (Section 2.2) and can have an influence in future cases of comparable profiles.

2.3 - Duty to Promote

277. In Chapter 2 (Section 2.3), the duty to promote was understood as a set of measures to raise the awareness of State agents and the population at large about human rights. In the context of equality and non-discrimination, this obligation overall involves removing societal misconceptions based on the idea of superiority of certain groups and promoting a culture of tolerance and equality. Such a broad scope implies a transformative character of equality law.[1052] At the same time, this duty complements the shortcomings of civil procedures in that, instead of giving rise to an individual right to compensation, positive actions promote proactive models of institutional restructuring of inequality patterns in society.[1053]

In its Article 5, the UNDHRET establishes that the actions embodied in that instrument should embrace the principles of equality (especially between boys and girls and men and women), of inclusion, and of non-discrimination. These actions should also be made accessible and should take into account the different obstacles and challenges faced by disadvantaged groups.[1054]

The duty to promote has been clearly articulated within Article 5 CEDAW, by which States parties agree to "modify the social and cultural patterns of conduct of men and women" with a view to eliminate prejudices and practices based on the superiority of sexes and stereotyped roles for men and women, including on the notion of maternity and common responsibilities of men and women with regard to the family. This

[1052] Rikki Holmaat, "The CEDAW: Holistic Approach to Women's Equality," *Women's Human Rights*, eds. Anne Hellum et al. (Cambridge: Cambridge University Press: 2013), 111, explaining that "transformative equality […] aims at changing society in such a way that those features of existing cultures that obstruct the equality and human dignity of women are subjected to fundamental change".

[1053] Sandra Fredman, *Discrimination Law*, 2nd ed. (Oxford: Oxford University Press, 2011), 230.

[1054] UNDHRET, Article 5.

applies to both public and private sectors,[1055] such as in cases of violence against women.[1056] Such a comprehensive article resonates clearly on the reparations recommended by the CEDAWCttee with a promotional purpose.[1057] Article 5 CEDAW, combined with Article 2(f), implies an obligation to modify practices that are the root cause of discrimination against women. In fact, "many pervasive forms of discrimination against women rest not on law as such but on legally tolerated customs and practices of national institutions."[1058]

278. The CRPD, for its part, is considerably prescriptive under Article 8, as it establishes an obligation upon States parties to promote awareness-raising within their jurisdictions (a) "throughout society, including at the family level, regarding persons with disabilities;" (b) by combating "stereotypes, prejudices and harmful practices relating to persons with disabilities;" and (c) by the promotion of "awareness of the capabilities and contributions of persons with disabilities"[1059] through initiating and maintaining public awareness campaigns, fostering in the education system an attitude for the respect of persons with disabilities, encouraging media to portray persons with disabilities adequately, and promoting corresponding training programs.[1060]

Also in the context of disabilities, the limits of legislation and traditional methods of combatting discrimination through the obligations identified in the duty to protect[1061] have been evidenced.

[1055] CEDAWCttee, *General Recommendation No. 28,* § 17.

[1056] CEDAWCttee, *General Recommendation No. 19,* § 24(f). The CoE Istanbul Convention has a comprehensive section on the matter, including promotional measures (Article 12), Awareness-raising (Article 13), education (Article 14), and training of professionals (Article 15).

[1057] See: Chapter 5 (§ 250 above).

[1058] Rebecca Cook, "State Accountability Under the Convention on the Elimination of All Forms of Discrimination against Women," in *Human Rights of Women - National and International Perspectives* ed. Rebecca Cook (Philadelphia: University of Pennsylvania Press, 1994), 239-240.

[1059] CRPD, Article 8.

[1060] Id. Also, in *General Comment No. 2*, the CRPDCttee underscores the importance of capacity building for local authorities in charge of monitoring accessibility standards, § 33. See also the recommendations given by the CRPD in contentious cases, such as in , *Szilvia Nyusti and Others v. Hungary*, §10.2(b).

[1061] See, Eilionóir Flynn, "Introduction and Methodology," in *From Rhetoric to Action – Implementing the UN Convention on the Rights of Persons with Disabilities,* ed. Eilionóir Flynn (Cambridge: Cambridge University Press, 2011), 21; David Ruebain, "What is Prejudice as it Relates to Disability Anti-Discrimination Law?," in *Disability Rights and Policy – International and National Perspectives*, ed. Mary Lou Breslin et al. (Ardsley: Transnational Publishers, 2002), 370-374, for whom, since "discrimination is rarely obvious", [civil] law alone will not address the challenges of discrimination on the ground of disability.

Besides, the duty to promote in the context of equality and non-discrimination can be said to be construed within the object and purpose of general treaties. For instance, in *General Comment No. 20*, the CESCR Committee recommends that States should *e.g.* organize awareness-raising programs,[1062] training programs for public officials, and teaching on the principles of equality and non-discrimination[1063] in order to combat systemic discrimination. The HRCttee has emphasized promotional measures as means of compliance with the ICCPR in the areas of domestic violence,[1064] female genital mutilation,[1065] human trafficking,[1066] birth registration,[1067] and training of public officials on the question of marital rape.[1068]In *General Comment No. 10*, the CRCCttee has recommended campaigns to raise the awareness on the protection of children and training of justice professionals[1069] in order to combatting stereotyping against children and adolescents in conflict with criminal law.

It remains clear from the above considerations that the duty to promote, particularly in view of the specific provisions of non-discrimination treaties, cannot be sees as merely ancillary. Rather, it has a binding and independent character.

279. At times, contentious cases touch upon the issue of stereotyped roles.[1070] In the ECtHR's case of *Konstantin Markin v. Russia* (2010), the applicant, a member of the armed forces, had been refused parental leave since he belonged to the male sex. The respondent State alleged that such refusal was based on the country's traditional distribution of the roles between men and women. The Grand Chamber upheld the chamber's reasoning that:

> gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in

[1062] CESCR, *General Comment No. 20*, § 39.

[1063] Id., § 38.

[1064] HRCttee, Concluding Observations on Indonesia (2013), CCPR/C/IDN/CO/1.

[1065] HRCttee, Concluding Observations on Kenya (2005), CCPR/CO/83/KEN.

[1066] HRCttee, Concluding Observations on Costa Rica (2007), CCPR/C/CRI/CO/5.

[1067] HRCttee, Concluding Observations on Belize (2013), CCPR/C/BLZ/CO/1.

[1068] HRCttee, Concluding Observations on Ethiopia (2011), CCPR/C/ETH/CO/1.

[1069] CRCCttee, *General Comment No. 10: Children's Rights in Juvenile Justice*, adopted on 18 April 2011. UN Doc CRC/C/GC/10, §§ 32-33.

[1070] The ECtHR had refused differentiated treatments of sexes based on unequal roles between man and woman in *Ünal Tekeli v. Turkey,* no. 29865/96, § 63, ECHR 2004-X (extracts).

> treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.[1071]

The Court did not go as far as reading into the ECtHR a positive duty to promote a change in those stereotyped roles, as it does in cases when it holds that the State has an obligation to train police forces for the prevention of torture.[1072] However, indirectly, it remains clear that misconceptions lying at the root-causes of discriminatory practices by national authorities, as in in *Konstantin Markin*, are not validated by the Court. This Court's understanding may pave the road for it to also declare a positive duty to promote in the field of equality and non-discrimination in the near future.

Concluding Remarks

280. The first main conclusion reached in this chapter is that positive obligations indeed assume different forms, both in scope and in extent, in the specific context of equality and non-discrimination, compared with the overall context.

The set of obligations identified within the duty to protect reveals instances of higher State proactive engagement. For instance, even when a certain harm does not reach the severity of degrading treatment, the obligation to criminalize acts (or to apply criminal sanctions) committed by third parties against vulnerable groups may be required. The obligations to monitor and regulate private acts also assume specific forms. The obligation to prevent imminent serious violations involving discriminatory acts also explore the limits of the *ought to have known* paradigm.

This differentiated scope of positive obligations is clearly identified in the obligations to redress and access to justice—or what can be called the *equality due diligence* standard. This implies preliminarily equal access to justice and its ramifications in order to ensure access to vulnerable groups. This is also the case of the obligations of investigation, which entails a series of specific standards related to the vulnerability of

[1071] ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 143, ECHR 2012 (extracts). See also *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 69, 20 June 2017, regarding a law banning public activities for the promotion of homosexuality among minors, which had a predisposed bias associating homosexuality with paedophilia.

[1072] See Chapter 2, Section 2.3.

the victim in question in order to be deemed effective. The obligation for judicial authorities to analyze cases on open or covert discrimination without biases and prejudices represents an important substantive equality component. This obligation and the duty to fulfill/promote are mutually reinforcing. For its part, the duty to provide reparations assumes a similar scope as in the general case. However, a prominent element within reparations is the transformative nature of the reparation measures of systemic correction, which is translated into rather extensive and long-term actions by the authorities.

With regards to the obligations related to the duty to fulfill, while they assume a modest content in general, their scope is substantially enhanced in this specific matter. The obligation to provide, for instance, may explore the boundaries of ESCRs in CPR treaties in order to support vulnerable individuals who cannot enjoy rights for themselves. Within the duty to fulfill/facilitate, differentiated obligations were identified, such as the ones related to civil statuses. Moreover, a number of additional obligations were identified, like reasonable accommodation, accessibility, and temporary special measures (given that they are specific to the framework of equality and non-discrimination). The duty to fulfill/promote is designed to raise awareness and capacity building on the question of equality, but it was found to be present to a larger extent than the general counterpart, including in specific treaty provisions, such as the CEDAW and CRPD.

Among the different protection systems analyzed, it cannot be said that there is a uniform approach. A main consideration in this regard is the visible difference in the texts of the human rights treaties. The obligations related to the duty to protect have presented a growing patter of *jus commune* and a positive cross-polinization among the different treaties, especially seen in the recent approach of the ECtHR towards its counterparts. At the same time, very specific obligations, such as accessibility and reasonable accommodation, have not been fully embraced by general human rights mechanisms. Possible reasons are the limits of a general non-discrimination clause and the structure of the judgments themselves. The Strasbourg Court has made the most of reasonable accommodation duties, engaging all the complexities of its proportionality assessment. Accessibility measures have been only recently accepted within the scope of the ECHR after decades of hesitance by the Court. Yet, in a future case specifically claiming an obligation of this type, it remains to be seen whether the

ECtHR will reason on the large related policy and financial implications, though this has not been an issue at the CRPD Committee.

However, the whole picture as regards integration level between general systems and group-specific systems can be considered positive. Indeed, some identifiable areas demonstrate hesitance. Other areas demonstrate slow progress but willingness by the general systems to adopt concepts (or even obligations) emanating from the specialized counterparts. However, these shortcomings demonstrate, after all, work in progress. The most recent cases (except those in the areas of marked hesitance) demonstrate that integration is not only possible, but also benefical, in the sense that this method can enhance the potential of the general non-discrimination clauses with the support of the provisions of specialized treaties (and relevant concepts).

Chapter 6 – Delimiting the Scope of Positive Obligations in Equality and Non-Discrimination

Introduction

281. After having studied the different types of positive obligations in the context of equality and non-discrimination, this Chapter has the purpose of analyzing the extent to which positive obligations in this specific area can be claimed. By proceeding in this manner, it aims to shed further light into this emerging issue, particularly by adding elements of legal certainty in legal interpretation and application to the concrete case.

This Chapter will firstly apply the theories and general examples examined in Chapter 3 to concrete cases in which evolutive interpretation led to the recognition of new positive obligations, especially in civil and political treaties. Two types of evolution that follow different dynamics will be compared: reliance on external treaties and reliance on internal consensus. Accordingly, Section 1 will concentrate on specific judgments that were regarded as paradigmatic either due to their notable contribution to "updating" the content of a treaty, or due to undue delay in recognizing present-time conditions, or no recognition at all. Further critical comments will be made on those cases by both proposing new approaches and recognizing inherent limitations of a human rights protection system in recognizing new obligations.

Moreover, Section 2 will deal with the ongoing debates and tensions around a growin recognition of vulnerable groups in international human rights law and practice, which allegedly may risk legal certainty and generating insustainability in the relevant case law.

It has been claimed that substantive equality requires differentiated obligations so as to ensure vulnerable groups enjoy rights of equal footing. Thus, concrete actionable thresholds will be considered in the light of the claimed specificities of equality and non-discrimination. The knowledge parameter will be re-visited in this specific context in order to ascertain whether specific conditions apply (Section 3). Likewise, it is necessary to consider the parameter of the severity of the impact on vulnerable groups (Section 4).

The doctrine of margin of appreciation will be also surveyed within the specificities of vulnerable groups. Emerging practice has reduced the relevant margin of scope, but

the pertinent justification has not totally been comprehended, thus requiring further analysis and suggestions, such as the inclusion of vulnerable groups in the context of the "proceduralization movement" debate at the ECtHR. These issues are dealt in Section 5.

Further, positive obligations in the ambit of non-discrimination cannot be fully understood without the corresponding structural or systemic dimensions. Such dimensions, though highly desirable, find concrete limitations in a coherent justiciability scheme through the traditional adjudicatory mechanisms designed to primordially render individual justice. This Chapter will consider alternative approaches for enhancing the potential of dealing with these dimensions within the petitions mechanisms (Section 6).

This Chapter will also consider the procedural practices of establishing instances of indirect discrimination. Human rights case law inaugurated a new phase of equality and non-discrimination litigation by adopting the approach of shifting the burden of proof and by accepting statistics as means of evidence, thus enlarging its capacity to deal with covert instances of discrimination (Section 7).

1 – The Extent of Positive Obligations Through Evolutive Interpretation

282. The breadth of evolutive interpretation in human rights law has had a non-negligible influence of emerging social phenomena from which new claims for equality and identity protection emerged. Indeed, several specific human rights treaties have been adopted in order to protect equal rights for a number of categories, as seen in Chapter 5. Regarding general human rights treaties, new positive obligations have been implied in order to recognized new forms of discrimination, including the recognition of specific identities in society.

In Chapter 3, it was concluded that the main question in this context is the pace at which the law evolves through the recognition of new positive obligations in the texts of general human rights treaties. These texts contain mostly general non-discrimination clauses, prohibiting arbitrary differentiation. They also enlist a number of protected grounds of discrimination. Along the course of extensive interpretation of those treaties, new protection grounds naturally formed the growing *acquis* of social sectors protected by these treaties. However, the extent to (and the pace by) which

general monitoring bodies can read "special" positive obligations into their relevant treaties may vary considerably. It is submitted that the reliance on external treaties (section 1.1) represents a less problematic scenario for reading new equality obligations into a general treaty, given the existence of precise specialized treaty provisions to rely upon, than the reliance on State consensus (section 1.2). Yet, even in the first case, where are there are clear treaty provisions to be relied upon, some hesitance and incompatibility between the systems at stake hindering integration efforts may exist, as seen as follows.

1.1 - Reliance on External Treaties – A Less Problematic Approach, but With Variable Development

283. In the wake of the Grand Chamber's judgment of *Demir and Baykara*, by which the ECtHR set an important precedent by attaching lesser importance to member States' internal consensus and by visibly relying more on other treaties, a number of new positive obligations with respect to equality and non-discrimination were increasingly read with references to external treaty sources. Likewise, the CJEU, in the area of disability, has during the last decade absorbed obligations and concepts that are defined in the CRPD. Though it can be said that reliance on external treaty law is less problematic than the reliance on States' internal consensus, the transposition of positive obligaitons from group-specific treaties to general CPR treaties is not straightforward. In what follows, this sub-section will attempt to demonstrate that there are variances within this modality, depending on the type of monitoring body, on the function of the international system itself and on the tradition of a given monitoring body in seeking other sources. This sub-section will analyze the cases concerning positive obligations in relation with violence against women (Sub-section 1.1.1) and in relation with disabilities (Sub-section 1.1.2).

1.1.1 – Violence against Women – a Successful Experience at the ECHR – *Opuz v. Turkey*

284. A much-awaited firm stance by the ECtHR on violence against women was taken in *Opuz v. Turkey* (2009), an application alleging violation of Articles 3, 8, and 14 ECHR. In the absence of a precedent of its own from which it could derive

adequate standards, the ECtHR evoked *Demir and Baykara*,[1073] in order to seek developments in the area of violence against women in the CEDAW and in the OAS' Convention of Belém do Pará. An important element incorporated in the Court's *acquis* was the very concept of violence against women, originating from Article 2 CEDAW[1074] and further elaborated in *General Recommendation No. 19* of the CEDAWCttee.[1075] The ECtHR incorporated the well-established concept of violence against women, one of the worst forms of gender discrimination, into the generic scope of Articles 8 and 14 ECHR. The Court also took stock of the specific contours of the due diligence standard on violence against women, as yielded by the IACHR's *Maria da Penha v. Brazil*.[1076] Currently, the CoE system is endowed with the robust Istanbul Convention, encapsulating the due diligence standard in its Article 5.

This case, an important precedent in the ECtHR's docket, demonstrates that integration efforts are not only possible, but also useful to "update" and to enhance the scope of the generic protection afforded by Article 14. By filling a normative gap, in view of the absence in the ECHR's of specific provisions on gender-based violence, including relevant positive obligations, this Court indeed provides ampler possibilities for women to resort to a treaty that protects in its text common humanity values, and that is also interpreted as to take into consideration the particularities of women, as a discriminated group.

1.1.2 – Disability Rights - Variable Levels of Integration by the ECtHR and the CJEU

285. This sub-session aims at demonstrating that, even when courts monitoring general treaties refer to specialized sources, the integration of the concepts of the latter may enhance the reasoning of those courts, but also finds institutional and conceptual hindrances. The practices of the ECtHR and the CJEU will be examined in order to illustrate the different patterns of integration.

[1073] ECtHR, *Opuz v. Turkey,* § 164 no. 33401/02, ECHR 2009.

[1074] Id., § 73.

[1075] Id., § 75.

[1076] ECtHR, *Opuz v. Turkey*, § 169: "it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance" referring to the IACHR's *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01. OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000). See repercussion in *M.G. v. Turkey,* no. 646/10, 22 March 2016.

Regarding the ECtHR, *Guberina v. Croatia* (2016) is a case in which the Court considerably advanced on the applicability of accessibility and reasonable accommodation in favor of persons with a disability under the semantics of the ECHR, after a long time rejecting claims of this type.[1077] The Court addressed an obligation of accessibility only indirectly, though making important point about the lack of such arrangements, which impacted on the life of the applicant and his family.[1078] However, this judgment, in general terms, drew the respondent State's attention to the obligations arisen out of the ratification of the CRPD, including reasonable accommodation, accessibility, and non-discrimination.[1079]

In the same year, *Çam v. Turkey* addressed more specifically the denial by the respondent State of reasonable accommodation for a sight-impaired music student in an education institution,[1080] with specific referencea to the CRPD and the ESC, noting the need to take into account other sources in order to conciliate the ECHR provisions and other the international law applicable to the relations between the State parties [1081]. Firstly, the Court clearly stated that the denial of reasonable accommodation might amount to discrimination, in the context of Article 14 ECHR.[1082] Next, the Court infered that Article 14 does not only imply a negative obligation, but rather it may be required from States to provide reasonable accommodation, integrating this concept from Article 2 CRPD.[1083]

Following this trend, in *Enver Sahin v. Turkey* (2018), the Court held the respondent State accountable for the lack of accessibility for a paraplegic student in of a technical university. The Court not only referred to the CRPD, but also relied on the principle of individual autonomy (Article 3(a) CRPD) in conjunction with the principles of dignity and the freedom of an individual to make her or his own choices, from its own

[1077] In *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V, the Court found the obligation to build accessible public facilities incompatible with the scope of Article 8 (inadmissibility decision of 14/05/2002). In *Farcaş and Others v. Romania,* no. 67020/01, 10 November 2005), the Court dismissed a claim for accessibility equipment in a post office and courthouse.

[1078] ECtHR, *Guberina v. Croatia,* no. 23682/13, § 86, 22 March 2016.

[1079] *Id.,* § 92.

[1080] ECtHR, *Çam v. Turkey*, no. 51500/08, § 69, 23 February 2016.

[1081] Id. § 53.

[1082] Id., § 65.

[1083] Ibid.

acquis.[1084] A clear trend of the ECtHR to evolve on disability rights, taking guidance from the CRPD, is noted in the above cases.

At the same time, an integration of the CRPD's principles and obligations into other systems may fall short in grasping essential elements of this convention. The gradual influence of this convention in the case law of the CJEU represents an important illustration. This Court has indeed interpreted the obligation to provide reasonable accommodation, according to the very meaning of disability of the CRPD, in the context of Council Directive 2000/78/EC (adopted before the CRPD) that deals with discrimination in employment and occupation. Yet, this Court is often criticized by restricting itself to the medical model of disability, instead of a social model or a human rights model[1085], even in recent cases. In the early case of *Chacón Navas* v. *Eurest Colectividades SA* (2006)*,* before the entry into force of the CRPD, this Court dealt with disability within the medical model.[1086] After the entry into force of the CRPD and the accession of the EU itself thereto[1087], this Court, in *HK Danmark (Ring and Skouboe Werge)* [1088] imposed an obligation on the employers to provide reasonable accommodation for persons with disabilities, guided by the relevant concept of Article 1 of the CRPD, which can be seen as a positive development. It has been pointed out that this court somewhat flexibilized its concern about maintaining

[1084] ECtHR, *Enver Şahin v. Turkey,* no. 23065/12, § 70, 30 January 2018, referring to the cases of *Pretty*, *Mółka*, and *McDonald*.

[1085] See the definitions of these three models of disability in § 218 above.

[1086] CJEU, *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05, Judgment of 11 July 2006, about the dismissal of a catering provider based on long absences on illness grounds, held that "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" (§ 43). See comments: Lisa Waddington, "Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006," *Common Market Law Review*, 44, no. 2 (2007): 487-499. For Gauthier De Beco, this ruling went "[c]ontrary to the social model, [since] it located disability within the individual and not within the environment", in: "Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law," *Columbia Journal of European Law*, 22 No. 2 (2016): 385.

[1087] Although the ratification of the CRPD by the EU itself affects only the acts and omissions of this international organization, and not the Member States' internal matters regarding disability, this Convention is undoubtedly an authoritative source of interpretation of the EU anti-discrimination law.

[1088] CJEU, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) v HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11) (Joined Cases C-335/11 and C-337/11). This case concerns the request by two secretaries for work-related relief (part-time work) and a height adjustable desk, as means of reasonable accommodation due to illnesses resulting in chronic back pain.

the autonomy of EU law.[1089] Yet, regarding a more comprehensive model of disability, as inspired by the CRPD, this Court refrained from expanding beyond what it had held in *Chacón*,[1090] although, at least rhetorically, Advocate General Kokott declared that a social model is also embedded in the CRPD.[1091]

A subsequent case, *FOA Kaltoft* (2014) regarded the dismissal of a childminder who had been classed as obese by his employer, a Danish municipality, after having failed to lose weight at the recommendation of they employer. This Court's Grand Chamber was mindful of the entry into force of the CRPD with respect to the EU. [1092] Moreover, Advocate General Jääskinen argued that the Court had departed from a medical model to a social model of disability.[1093] However, in fact, the Advocate General's analysis and the Court's reasoning focused too much on the physical impairments of an obese person[1094], instead of *e.g.* engaging in the question whether the refusal by the employer to continue the employment of a person on the grounds of weight could represent a (social) barrier leading to discrimination. In any event, striking in this case is that the applicant did not allege any impairment in his working environment due to his weight, which could give rise to an obligation to offer reasonable accommodation. Instead, his main contention is that he was dismissed only because of his obese

[1089] De Beco, "Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law," 395, also commenting that the CJEU was mindful of this autonomy in the previous *Chacón Navas* case.

[1090] Dagmar Schiek rightly points out that this ruling does not make clear whether the relevant social barriers were the cause of the disability at stake, see: "Intersectionality and the Notion of Disability in EU Discrimination Law," *Common Market Law Review,* 53 No 1 (2016): 55. In fact, the CJEU only added to the original formulation held in *Chacón* that "various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (§ 47).

[1091] CJEU, *HK Danmark*, Opinion of Advocate General Kokott, 6 December 2012, stating that the CRPD "attaches relevance not only to physical but also in particular to social barriers" (§ 57).

[1092] CJEU, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* Case C-354/13, § 53, adding that "the concept of 'disability' must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers", referring to *HK Danmark* and other similar cases.

[1093] CJEU, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft,* Opinion of Advocate General Jääskinen, § 41: "[i]n my view this means that the case-law, like the pertinent EU legislation, has adopted, following the approach of the UN Convention, a social and not a (purely) medical model of disability".

[1094] Id., using the WHO's relevant parameter in order to consider only a higher level of normal weight deviance (level III) as a threshold categorizing disability (§ 60). Even in the later case *of Mohamed Daouidi v Bootes*, Case C-395/15, the CJEU gave preference to an "objective evidence" that consisted of "documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data" (§ 57).

condition. Hence, it appears that this case revealed after all an instance of stigmatization against an employee, which could have invited the Court for a broader analysis on an obligation on the employer to take actions against such stigmatization, to which the Advocate General had also referred in his opinion.[1095]

In principle, there appears no obstacle for the CJEU to integrate in its *acquis* a social model of disability, given that the policy guidance of the EC itself enshrines this model.[1096] But a full integration of the CRPD into EU law poses other challenges. Compared with the ECtHR, which works under a similar "international human rights law" system as the CRPD, the CJEU works under a "EU anti-discrimination law".[1097] A main limitation is that the former system has an "open justification system"[1098], dealing with any discrimination in the enjoyment of all rights, whereas the latter, through Directive 2000/78/EC, has a restricted scope of eliminating discrimination in the areas of occupation and employment (including disability), with a "closed justification system". [1099] The CRPD has an overall goal to tackle structural discrimination, through sensitization, inclusive measures, training, special recruitment, and inclusion of persons with disabilities in the labor market.[1100] The Directive, in turn, limited in scope, compels the CJEU to seek guidance from the CRPD only on matters related to labour and occupation. Hence, it would require this Court to elaborate a specific definition of disability, which includes the identification of any impairment, enabling the Court to ascertain whether an applicant was discriminated against due to his or her condition of disability.[1101]

Those inherent differences however, should not hinder a better complementarity between these two systems, where there would be room for the CJEU to adopt a more comprehensive concept of disability, beyond a medical model.

[1095] Id., accepting that prejudices in the work place related to disability themselves could be considered discriminatory (§ 41).

[1096] See the Equal Opportunities for People with Disabilities: A European Action Plan (2004-2010), stating that disability is regarded by the EU as a social construct, including the "environmental barriers in society which prevent the full participation of people with disabilities in society." Commission of the European Communities, 30.10.2003 COM(2003) 650 final (at 4).

[1097] De Beco, "Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law," 387.

[1098] Id., 390.

[1099] Ibid.

[1100] Id., 397-398.

[1101] Id., 402.

Bringing EU discrimination law closer to the CRPD has had some gains, for instance in a firmer stance on reasonable accommodation. However, *Kaltoft*, among other shortcomings[1102], did not provide any guidance on whether there would be room for other measures, such as sensitization campaigns against stigmatization (in line with the CRPD), which is an important component in a social (or human rights) model of disability. Those measures would not likely be construed by the CJEU, in view of a considerable overstretch from the original purpose of Directive 2000/78/EC. At the same time, stigmatization and stereotyping are not totally strangers to the CJEU. In *Feryn* it held that the public statement of an employer rejecting candidates from a given ethnic or racial origin was in violation of Directive 2000/43, since this statement could be regarded as a sufficient presumption of a discriminatory practice.[1103] Hence, it is submitted that there is room for Directive 2000/78/EC, even in its limited scope, to be interpreted beyond a restricted model of disability, within its institutional and thematic limitations.

1.2 - Reliance on States' Internal Consensus – A More Problematic Approach

286. The LGBTI community has benefited from the practice of evolutive interpretation of the ECHR to a certain extent only. To date, there is no specific treaty dealing with this group on which a general treaty can rely upon externally. Moreover, the ECtHR attaches great importance to internal consensus among CoE member States and direct inferences from the Court when taking stock of new social developmens in this area.

A broad interpretation given by the former ECmHR in 1976[1104] cannot be said to exclude non-heterosexual relations from the scope of Article 8 ECHR. In 1981, the ECtHR prohibited consensual homosexual acts between adults from being

[1102] The issue at stake, the hypothetical question: whether obesity falls within the scope of disability, so that a dismissal of an obese person could be regarded as a form of discrimination under EU anti-discrimination law, did not after all allow the CJEU to establish relevant concrete guidance.

[1103] CJEU, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07.

[1104] ECtHR, *X v. Iceland,* (1976) 5 DR 86: "to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality".

criminalized.[1105] A few years later, homosexual relationships were included into the ambit of "private life" of Article 8 ECHR.[1106] In 1999, *Salgueiro da Mouta v. Portugal* incorporated homosexuality in the "other status" under Article 14 ECHR in a case on interference with the applicant's right on the part of the national authorities to deny him parental guardianship due to his homosexuality. Persons with homosexual status were also protected from expulsion from the armed forces.[1107]

287. Despite the steadily growing recognition of this group in the specificity of the ECHR context, the recognition of relevant positive obligations took significantly longer. In the section below, the *transgender cases* by the ECtHR illustrate how protracted such evolution can be.

1.2.1 - The *Transgender Cases* – Protracted Process of Recognition of Positive Obligations

288. Recognizing positive obligations through an evolutive interpretation, as seen in Chapter 3, involves the risks of either anticipating social events, or of losing pace with social evolution. In this regard, the ECtHR could be criticized for incurring the latter through a series of the so-called *transgender cases*. Simultaneous to a proactive decade on LGBTI rights in the ECHR, in a series of cases applicants sought in Strasbourg to remedy the non-recognition by the national authorities of their newly assumed gender identity after undergoing sex-change surgery. While the surgeries were allowed, authorities refused to grant the applicants corrected civil registration, thus impairing them from equally exercising a number of acts of civil life, including marriage. It took the Court sixteen years along the sequence of the cases of *Rees*,[1108] *Cossey*,[1109] and *Sheffield*[1110] until it was ascertained in *Christine Goodwin* (2002)[1111]

[1105] ECtHR, *Dudgeon v. the United Kingdom*, *Dudgeon v. the United Kingdom,* 22 October 1981, § 54 Series A no. 45.

[1106] ECmHR *X and Y v the United Kingdom*, § 220, Application 9369/81, 32 DR 220.

[1107]ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 97, 27 September 1999; and *Smith and Grady v. the United Kingdom,* nos. 33985/96 and 33986/96*,* § 104*,* ECHR 1999-VI

[1108] ECtHR, *Rees v. the United Kingdom,* 17 October 1986, § 37, Series A no. 106.

[1109] ECtHR, *Cossey v. the United Kingdom,* 27 September 1990, § 40, Series A no. 184.

[1110] ECtHR, *Sheffield and Horsham v. the United Kingdom,* 30 July 1998, § 57, Reports of Judgments and Decisions 1998-V.

[1111] ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

that changes in society were compelling enough to impose a positive obligation to register the applicant's newly assigned gender.

This excessively prudent approach by the Court was based exclusively on domestic consensus among the CoE Members,[1112] followed by a laconic reasoning as to the non-applicability of a positive obligation.[1113] In the Grand Chamber judgment of *Christine Goodwin v. the United Kingdom* (2002), which departed from this decade-long deadlock, the Court observed that there was a "continuing international trend towards legal recognition" of transsexuals, but it was not sufficient for it to develop a positive obligation under Article 8 ECHR.[1114] Yet, the key factor for this departure was the lesser attachment to domestic consensus,[1115] balancing with the relevant international developments on the issue. For the Court, the applicant's interest at stake was central, rather than merely peripheral to the protection under the ECHR, thus restricting the margin of appreciation.[1116] The Court then embraced a constructivist approach, translating into legal language new gender identities, especially given that this case concerned civil registration of the newly assigned gender.[1117]

289. Nevertheless, the standard set in *Christine Goodwin* was not directly replicated in other cases related to homosexuality, in particular same sex-relationships. Admittedly, the ECtHR has not acted in a radical originalism on the matter. Yet, as it is hereafter argued, the Court has shown unreasoned hesitance in applying a progressive approach to Article 12 ECHR, still relying greatly on regional consensus rather than having a more balanced approach, as in *Christine Goodwin* and in accordance with its general standards.

[1112] ECtHR, *e.g. Sheffield and Horsham*, § 55.

[1113] George Letsas, commenting on this issue, calls it "piecemeal evolution", as he notes: "[i]f Europeans have the right to marry their homosexual partner or practice their sexual preference without criminal prosecution, the applicants in *Ress*, *Cossey*, and *Sheffield* also had the right to have their birth certificates changed so that they can get married", in *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press: 2007), 124.

[1114] ECtHR, *Christine Goodwin v. the United Kingdom*, [GC], § 85. See comments in: Beate Rudolf: "European Court of Human Rights: Legal Status of Postoperative Transsexuals," *International Journal of Constitutional Law*, 1, no. 4 (2003): 706-721.

[1115] Id., § 74.

[1116] Id, § 90.

[1117] Ibid. The Court downplayed the medical considerations on gender (§§ 81-83). Further discussions: Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject," *European Journal of International Law* 14, no 5, (2003): 1023–1044.

1.2.2 - A Pace-Control Mechanism

290. Despite such protraction, the Court was not totally unaware of the developments on transgender issues, specifically on the registration of transgender individuals according to their new gender identities. The Court, although at a slow pace until *Christine Goodwin*'s lesser reliance on European a common ground, drew and still draws the attention of the national authorities to maintain the issue at stake under consideration. It underscored

> [t]he need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal development[1118]

This pronouncement serves as a warning not only to the respondent State, but also to the community of States parties that the ECtHR may depart from its case law in the near future. This is what it actually did in *Christine Goodwin*. In a similar fashion, in *Orlandi and Others v. Italy* (2017), the Court took a closer look at the recent progress in the relevant national law regarding registration of same-sex unions.[1119] Since it found a violation of Article 8 in *Oliari and Others v. Italy* (2015) on the same grounds, the Court circumscribed its analysis to any "legal vaccum" prior to 2016-2017.[1120]

1.2.3 - Same-Sex Marriage – The Dead-End of the Literal Limits of the ECHR?

291. It would have appeared that in the wake of the *Christine Goodwin* precedent, reinforced by the clear openness to external sources affirmed in *Demir and Baykara* (2008), the Court could have a progressive and consistent stance to analyze future cases related to the LGBTI community. *Schalk and Kopf v. Austria*[1121] (2010) gave

[1118] ECtHR*, Rees v. the United Kingdon*, § 47; *Cossey v. the United Kingdom*, § 42; *Sheffield and Horsham v. the United Kingdom*, § 60; *Christine Goodwin v. the United Kingdom*, § 74. More recently, *S.H. and Others v. Austria,* no. 57813/00, § 118, 1 April 2010; *Y.Y. v. Turkey*, no. 14793/08, § 102, ECHR 2015 (extracts), and reminded in Dissenting Opinion of Judge Ranzoni in *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017 (extracts), § 18. Such a pace of evolution does not rely on a "super-majority" of States, but the Court has some discretion acknowledging the relevant trends. See, dissenting opinion of Judges Sajó, Keller and Lemmens, in *Hämäläinen v Finland*, § 5, [GC], no. 37359/09, ECHR 2014, (referring to *Vallianatos and Others v. Greece* [GC], § 91).

[1119] ECtHR, *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, §§ 89-96, 14 December 2017. See also § 204, noting the fast development of the recognition of civil unions for same-sex couples, compared to subsequent § 205, noting the slow development of the recognition of marriages for same-sex couples, among CoE member States.

[1120] Id., § 196.

the Court another occasion to delve into the extent to which positive obligations in favor of same-sex couples can be read into the ECHR.[1122] The applicants, forming a homosexual couple, applied to the national authorities for a marriage registration (which was denied), because at that time neither legal recognition for same-sex marriage, nor equivalent same-sex partnership was available in Austria. This case can be divided into three main parts. In the first part, the applicants claimed a violation of Article 12 ECHR in Strasbourg, inasmuch as national legislation did not provide for a right to marry in that context. In the second part, they pleaded a violation of Article 8 in conjunction with Article 14, given the absence of any similar arrangement that would protect the applicants' interests as a couple. In the third part, they argued a violation of Article 1-P1, given the absence of a domestic framework to protect the applicants' assets amassed by virtue of their relationship.

The Court found no violation of any of the articles invoked. However, the Court held for the first time that homosexual relationships may be construed in the context of *family life* beyond merely *private life* (as seen in previous rulings),[1123] implying a positive obligation to give legal recognition of same-sex couples.[1124] By contrast, the expectations of the applicants could not be met under Article 12 ECHR, since the Court held that thereunder States were not under a positive obligation to grant access to same-sex marriage.[1125] In contrast with the rigidity of Article 12, this half-deadlocked solution, by relying on the elasticity of Article 8, exposes the ambiguity of the Court in taking a decisive stance on the matter.

[1121] ECtHR, *Schalk and Kopf v. Austria,* no. 30141/04, ECHR 2010.

[1122] The hesitance in reading via treaty interpretation an obligation to recognize same-sex marriage can be also viewed through the perspective of the HRCttee. See a comprehensive work thereon: Malcolm Langford, " Same-Sex Marriage in Polarized Times: Revisiting *Joslin v. New Zealand* (HRC)", in *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, eds. Eva Brems and Ellen Desmet (Cheltenham, Northampton: Edward Elgar Publishing 2017), 119-143.

[1123] ECtHR, *Schalk and Kopf v. Austria*, § 94. See: Emmanuelle Bribosia, Isabelle Rorive and Laura van den Eynde, "Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience," *Berkeley Journal of International Law* 32, no 1, (2013): 10, for whom this Court's pronouncement suggests a move, though ambiguous, towards gender neutrality on the right to marry, like in US Supreme Court's *Perry v. Schwarzenegger* 704 (F. Supp. 2d 921, 993 (N.D. Cal. 2010)). The ECtHR confirmed this approach in *X and Others v. Austria* [GC], no. 19010/07, §§ 27-30, ECHR 2013.

[1124] See Sarah Lucy Cooper, "Marriage, Family Discrimination and Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights," *German Law Journal*, 12, no. 10 (2011): 1754.

[1125] ECtHR, *Schalk and Kopf v. Austria*, § 63.

292. Article 12 was at stake again in *Hämäläinen v Finland* (2014). The applicant, by having been denied a modification in the civil registry, was given the option to either remain registered as a male - which would allow her to keep her marriage - or to have her civil registry modified to being a woman - which would oblige her to divorce and to reunite again as a mere civil partnership. The Court was confronted with a new factual situation: the right to ensure the continuation of the marriage versus the mere right to enter into a marriage. The majority of the Court (14-3) apparently applied the same rationale to the analyses of the alleged violation of both Article 12 and Article 8 without considering the fact that there was a new situation for the Court to analyze. Once more, State consensus was the main source of reasoning by the Court. Relevant to Article 12 is Principle 3 of the Yogyakarta Principles, which establishes that

> No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity.[1126]

Moreover, under the analysis of Article 12 in conjunction with Article 14, though the general principles related to substantive equality were brought to the case, the Court limited itself to assess the "difference in treatment of persons in relevantly similar."[1127] The case could be better framed as one of failure to take measures to consider the applicant's particular attribute (*mutatis mutandis*, *Thlimmenos v. Greece*), as a manifestation of substantive equality. This led the Court to simply find that the applicant's situation was not sufficiently similar to that of the cissexuals. Given that discrimination on the grounds of homosexuality is regarded as a "suspect differentiation"—hence, subject to a narrow margin of appreciation—one wonders whether the Court left unchecked the protection of an important category it considers as vulnerable.

In view of that condition, the Court's decision did not to delve sufficiently in the matter and, once more, provided no guidance for States' parties and the international community on exactly what is the extent of the States obligations related to an issue

[1126] Yogyakarta Principle – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Principle 3. This argument was raised by the three dissenting judges, § 16. Interesting is their argument that the divorce alternative for the applicant would be unsuitable, given the couple's religious convictions, which is an important element overlooked by the majority. See also, the Yogyakarta Principles Plus 10 (2017) Principle 31.

[1127] ECtHR, *Hämäläinen v. Finland*, § 108. The dissenting judges, however, did not make an objection to this point of the judgment.

that is in clear evolution and has many reforms underway. At a minimum, a pace-control note would have been welcome.

1.2.3.1 - An Originalist Approach

293. In *Schalk and Kopf*, the ECtHR, noting that "marriage has deep-rooted social and cultural connotations" in the region (which may differ largely among the CoE member States), kept unchanged the heteronormative meaning of Article 12 ECHR.[1128] Such an originalism was reinforced by the opinion of Judges Malinverni and Kovler, who revisited the *Johnston* judgment that refused a right to divorce under this article, a case that had also been criticized for its originalist character. The Court had been object of criticism since early cases,[1129] which had been revisited by *Christine Goodwin* pointing out at many social changes to the conception of marriage since 1950.[1130]

It has been argued that this hardline stance by the Court, in the absence of any concrete indication in the preparatory works of the ECHR to the contrary,[1131] Article 12 could ordinarily be read as giving rise to same-sex marriage.[1132] It literally

[1128] ECtHR, *Schalk and Kopf v. Austria*, § 62. In § 55, the Court emphasized: "In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex". In the later case *Orlandi and Others v. Italy*, the Court held that, by protecting the interests of the community at large, it is legitimate for the Italian authorities to prevent its own nationals to recourse to other States to the institution of the marriage and to have it recognized domestically, in such a way as to circumvent the national legislation (§ 207). Compare with the (non-binding) Opinion of the CJEU's Advocate-General in the Case C 673/16 *Coman and Others*, stating that EU States may not impede freedom of residence of an EU citizen, by refusing the relevant non-EU same-sex spouse a residence permit in a EU country (11 January 2018). See also: Holning Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Defence," in *Diversity and European Human Rights*, ed. Eva Brems (Cambridge: Cambridge University Press, 2013), 244, criticizing the historical approach in this very context.

[1129] E.g. ECmHR, *Van Oosterwijk* (1979) 1 March 1979, B.36, followed by ECtHR *Cossey v. the United Kingdom*, § 43. However, four Judges were dissenting already in 1990. On the detachment of procreation as a necessary element from the right to marry: Frédéric Sudre, *Droit Européen et International des Droits de l'Homme*, 6th ed. (Paris: PUF, 2003), 389; Alain Carillon (commenting on *Christine Goodwin*), "l'Influence des Arrêts Christine Goodwin et I sur le Consentement au Marriage en Droit Français," *Revue Trimestrielle des Droits de l'Homme* 62 (2005): 349-361. On the departure from the relevant Court's case law: Katia Lucas-Alberni, *Le Revirement de Jurisprudence de la Cour Européene des Droits de l'Homme* (Brussels: Bruylant, 2008), 330 and ss.

[1130] ECtHR, *Christine Goodwin*, stressing the following arguments: "the inability of any couple to conceive or parent a child could not be regarded *per se*, removing the right to marry", (§ 98); the sole biological criteria could no longer be a determinant factor, in the view of the social major changes (§ 100); the unsatisfactory situation in which same sex couples were found (§ 91); and the dignity and worthiness owed to everyone irrespective of the chosen sex identity (§ 85).

[1131] CoE, *Travaux Préparatoires to the Convention*, Article 12, available at [http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf], accessed on 7 February 2019.

[1132] Cooper, "Marriage, Family Discrimination and Contradiction", 1754.

indicates that "[m]en and women of marriageable age have the right to marry […],"[1133] instead of marriage being an act recognized *between men and women.*

It can be suggested that in the 1950's the drafters merely presumed the heteronormative nature of Article 12[1134] rather than made a special point on this matter. Accordingly, the Court had considerable room to depart from a forty-year debate on the right to marry.[1135] On the other hand, it can be inferred in *Christine Goodwin*, even if indirectly, that the Court abandoned a rigid notion that marriage under the ECHR would be reserved for persons of the same sex, as traditionally understood.[1136] The Yogyakarta Principles could be an important source of interpretation. Seen from that perspective, *Hämäläinen* represented a missed opportunity.[1137] This debate seems to be settled by the Court in following cases. In *Orlandi and Others v. Italy* (2017), the Court simply accepted that States give "the opportunity to obtain a legal status legal or similar to marriage in many respects."[1138] On that occasion, the Court affirmed: "the State is not obliged to recognize [same-sex marriage] from a Convention perspective."[1139] The Court appears to have once again missed the *Zeitgeist* of social and family relations in the beginning of a new century.

1.2.3.2 - Straightforward Reliance on Regional Consensus

294. In addition to the reliance on internal consensus itself, the line of reasoning presented in *Schalk and Kopf* might raise issues of inconsistency. The Strasbourg Court, despite having at hand precedents that enable it to rely on external contexts, as the applicants pleaded as in *e.g. Christine Goodwin*, appears to have instead opted for an evolution based solely on internal consensus.[1140] Indeed, in *Goodwin*, the Court

[1133] Article 12 ECHR, as it has been similarly argued by the applicants, § 55.

[1134] Cooper, "Marriage, Family Discrimination and Contradiction", 1749.

[1135] Id., 1748.

[1136] ECtHR, *Schalk and Kopf v. Austria*, § 52.

[1137] Overall, *Hämäläinen* confirmed the heteronormativity of Article 12 ECHR. See: Damian A Gonzalez Salzberg, "Confirming (the Illusion of) Heterosexual Marriage", *Journal of International and Comparative Law* 2-1(2005), 183. See also: Peter Dune, "Marriage Dissolution as a Pre-Requisite for Legal Gender Recognition", *The Cambridge Law Journal*, 73-3 (2014).

[1138] ECtHR, *Orlandi and Others v. Italy*, § 194.

[1139] Id. § 207.

[1140] ECtHR, *Schalk and Kopf v. Austria*, §§ 57-58. In 2010, as the judgment accounted for six (Belgium, the Netherlands, Norway, Portugal and Sweden) out of forty-seven CoE Member States, and fourteen other States that have established same-sex partnerships. (§§. 27 and 28). Nowadays, already fifteen European countries recognize equal marriage. See ILGA-Europe, Rainbow map, available at

had inaugurated a balanced approach by considering jointly both internal consensus and external sources in order to establish the need to depart from a previous understanding. *Hämäläinen*, likewise, demonstrated an exaggerated reliance on consensus in disarray with the Court's contemporary comparative methods.

1.2.3.3 - The Same Issue Outside Strasbourg

295. Given the recent openness of the ECtHR to considering external materials, it is opportunte to examine how the issue of same-sex relationships is seen in other systems. Outside Strasbourg, different scenarios appear that could invite the Court to a different reasoning.

296. In 1990, the HRCttee interpreted Article 23 ICCPR by stating that "[t]he right to found a family implies, in principle, the possibility to procreate and live together."[1141] To date, this Committee has not read the ICCPR to impose an obligation to allow same-sex marriage. This could be explained by an even wider diversity of signatory States to the ICCPR compared to the ECHR. At the political level, all EU member States and the vast majority of CoE member States voted against Resolution 29/22 on the protection of the family of 3 July 2015 at the HRC, which implies the protection of the family within its heterosexual traditional meaning but does not imply a right to same-sex marriage itself.[1142]

297. For its part, the IACtHR in *Atala Riffo v. Chile* (2012) had already reaffirmed a broader concept of family life under the ACHR (Articles 11.2 and 17.1). In *Advisory Opinion OC 24/17*, the Court emphatically recognized an obligation to recognize same-sex marriage. The overall reasoning of the Court is interesting in that it clearly

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[https://rainbow-europe.org/#0/8682/0], interactive map and downloadable data, accessed on 7 August 2018.

[1141] HRCttee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, § 5. Repercussion in *Joslin v. New Zealand*, communication no. 902/1999, views of 17 July 2002, UN Doc. CCPR/C/75/D/902/1999. Comments thereon: S. Ghandi "Family and Child Rights," in *The International Covenant on Civil and Political Rights and United Kingdom Law*, eds. David H. et al. (Oxford: Oxford University Press, 1995), 507. Interestingly, the Yogyakarta Principles, reflecting the right to found a family (Principle 24) is silent on the right to marry itself. Available at [http://www.yogyakartaprinciples.org], accessed on 7 February 2017.

[1142] HRC, Resolution 29/22 - Protection of the Family: Contribution of the Family to the Realization of the Right to an Adequate Standard of Living for its Members, Particularly through its Role in Poverty Eradication and Achieving Sustainable Development (2015). UN Doc. A/HRC/RES/29/22. CoE Member Russia voted in favor of the resolution and CoE Member FYROM abstained. It is clear in the relevant explanation of vote by the EU that the block defended a diversity of the many types of family, while not asserting an obligation of the State to offer a full-fledged same-sex marriage. Available at [https://extranet.ohchr.org/], digital copy kept by the author.

exposes its *pro persona* interpretation principle,[1143] but that is supported by a list of OAS member States that have recognized any form of same-sex union.[1144] The Court reaffirms the diversity of types of families[1145] in the context of the clear social evolution perceived since the adoption of the ACHR. [1146] At the same time, the Court underplays the lack of a regional consensus on the matter.[1147] The IACtHR seems not to accept the *equivalency* approach taken by the ECtHR, as it regards it as a means to reinforce a stereotyped view on the institution of marriage.[1148] The Court well notes the existence of the terms "man and woman" under Article 17.1 ACHR. Yet, it states that this Convention, read in the light of current developments, does not protect solely such traditional form of marriage,[1149] inferring that both sexes reflect only a traditional example of a type of family. On the other hand, it makes difficult to compare a general advisory opinion like *OC-24* with of the relevant contentious cases of the ECtHR. It is true that in another contentious case *(Atala Riffo*) the IACtHR underplayed the value of regional consensus. However, in pragmatic terms, it remains to be seen how this advisory opinion will compel States unwilling to grant same-sex marriage in the region.

298. National jurisdictions outside Europe have found their way in interpreting same-sex marriage despite textual prescription of a norm provision. For instance, South Africa's Constitutional Court relied on the free-standing nature of Article 26 ICCPR to read into the country's Basic Law a fully-fledged equal right to marry.[1150] In that spirit, Judge Sachs opined that the reference to men and women is a

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[1143] IACtHR, *Gender identity, and Equality and Non-discrimination with Regard to Same-sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, § 218. In § 225, the Court States that it flows from the principle of human dignity the freedom of choice an individual is entitled to form a permanent and marital bond, either by naturally (de facto union) or solemnly (marriage).

[1144] Id., §§ 206-213.

[1145] Id., § 178, referring to the case monoparental families or families formed by grandparents and grand-children.

[1146] Id., § 177.

[1147] Id., § 219, reaffirming the stance taken in *Atala Riffo*, § 92, and in *Duque v. Colombia*, § 124.

[1148] Id., § 224.

[1149] Id., § 182.

[1150] E.g. South-African Constitutional Court*, Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), § 99.

description of an assumed reality rather than a structural normative prescription of a perennial nature.[1151] The Brazilian Supreme Court likewise held that, despite the expressed mentioning of man and woman as forming a family entity under Article 226 of the country's Constitution, the State for the sake of dignity and privacy cannot exclude families formed by same-sex couples, including regarding the right to marry.[1152]

1.2.3.4 - Not Conservatism, but Excessive Legal Rigor

299. From the analysis of *Schalk and Kopf* and *Hämäläinen*, it can be concluded that the ECtHR did not act in sheer conservatism with regard to the general understanding under the ECHR of the diverse forms of families. The Court has more recently taken remarkable stances on the matter. In 2013 in *X and others v. Austria* (2013), it held a violation of Article 8 in conjunction with Article 14 inasmuch as the national authorities had refused to grant adoption of a biological child of one of the partners of a lesbian couple by the other partner.[1153] At the case's core, the Court found that the civil legislation led to a distinction between unmarried different-sex and same-sex couples on adoption matters.[1154] The unjustifiable differentiation for the Court resulted from the fact that the applicants formed a same-sex couple, while domestic law excluded such couples from the possibility to adopt.[1155] The firm approach in *A.P., Garçon and Nicot* leaves no doubt about the aptness of the Court to read the ECHR according to present-time conditions as regards LGBTI rights.[1156] However, the excessive legal rigor by which the ECtHR reads Article 12 puts in question the Court's role as a catalyst of relevant societal changes. Instead, the Court seems to place itself in a position of merely recognizing at a slow-pace evolution through regional consensus, as was the case with the right to divorce decades ago.

[1151] Ibid.

[1152] Brazilian Supreme Court, ADI 4277, judgment of 05 May 2011. The US Supreme Court, in the well-known *Hollingsworth v Perry* case, held that the lack of federal recognition of same-sex couples may lead to humiliation against thousands of children raised under this family type.

[1153] ECtHR, *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

[1154] Id., § 116.

[1155] Id., § 130.

[1156] ECtHR, *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 124-125, noting the trend of abolishing sterility as condition for gender reassignment.

1.2.3.5 - Institutional Limits of Supranational Courts

300. Despite the reproaches to *Schalk and Kopf* on its legal arguments exposed above, the pragmatic meandering in every supranational judicial review is non-negligible. Institutionally, the ECtHR is placed as a subsidiary body vis-à-vis national organs. It is not endowed with a strong compliance mechanism of itself. Institutionally, it can do little more than set standards in order to bring about such evolutions. H. Lau, though criticizing the strict originalist fashion of the *Schalk and Kopf* judgment and its deference to domestic consensus, acknowledges that equal marriage cannot be implemented overnight.[1157] Instead, it requires an incremental approach in order to pave a stable path into meaningful evolution.[1158]

This complex and delicate catalyst role of a supranational court to dialogue with domestic courts and authorities requires further elaboration. A number of different approaches have been developed by these courts, mainly dealing with instances of structural discrimination, including that by the ECtHR. These approaches are analyzed in Section 6 of this Chapter.

1.3 - A Critical Appraisal of Article 8 ECHR: Fatigue of the Pro-Active Interpretation Model?

301. Almost sixty years have passed and the ECHR remains one of the fundamental human rights treaties under a multilateral scheme supervised by a supranational court. The ECHR represents a Convention that not only succeeded over the decades, but also that continually renews its significance according to present-day conditions in order to uphold contemporary claims of human rights. Though at times criticized, the careful approach of the Court to keep the Convention as living as possible without

[1157] Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Defence," 242. Even the IACtHR, in *Advisory Opinion OC-24/17* has acknowledged the institutional difficulties for OAS Member States to extend the right to marry to homosexual couples (§ 226), while pointing out that those States who have not yet made the necessary legislative reforms are not allowed to violate the rights of those couples to fully enjoy the right of family life (§ 227).

[1158] Robert Wintemute, commenting on *Schalk and Kopf*, states that: "'[E]uropean consensus' serves to anchor the court in legal, political and social reality on the ground. By contrast, United Nations human rights law often loses all contact with Earth, and floats off into the stratosphere. Laudable pronouncements about human rights are made, but they are not binding on governments, and there are no sanctions for non-compliance, especially not expulsion from the UN." In *Consensus is the Right Approach for the European court of Human Rights*, The Guardian, 12 August 2010, available at [http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus], accessed on 7 February 2019.

losing grounds of legal certainty and credibility constitutes a hallmark of modern human rights litigation.

At the same time, one must acknowledge that an extensive interpretative work, which the ECtHR has performed through the last decades, may find its fatigue at a certain stage.

302. Certainly, Article 8 ECHR, simply containing the wording "right to respect for his private and family life, his home and his correspondence," has championed the ever-evolving nature of the Convention on recognizing new social identities. As seen throughout this work, an enormous range of positive obligations has been read into this article so as to give visibility to vulnerable individuals and to uphold their rights. In the past decades, marked by proactive interpretation when there were a few other international specific treaties to protect the rights of these groups,[1159] Article 8 operated as a genuine *salvage buoy* for disadvantaged groups.

303. At the same time, the gradual acceptance by States of a number of equality standards elaborated throughout the very general wording of Article 8 EHCR - vis-à-vis several specific provisions this article is meant to emulate - gives rise to reflection on whether this model has accomplished its mission. In clear words, one must ask if such a proactive interpretation thrust on Article 8 ECHR (at times in conjunction with Article 14 ECHR) has reached and a phase of interpretation fatigue.

304. A few arguments are submitted to support this statement. To start, the latitude of (positive) obligations frequently surrounding equality and non-discrimination has become overly wide and complex to be literally supported by a simple and general convention text, such as Article 8. The Court's judges may find themselves in growing strain to maintain legal certainty while avoiding obsolescence of the ECHR. The pace of evolution of equality and non-discrimination should not be disregarded by judges. However, this is a shared task as it involves the multitude of social actors not excluding States themselves.

[1159] It was only in the last decade that UN treaty-bodies specialized in discrimination are endowed with communications procedures, enabling litigation in important treaty provisions, such as the CRPD's reasonable accommodation provision under Article 5.3; and the CEDAW's obligation to modify social and cultural patterns that perpetuate discrimination against women, under Article 5 (a).

As seen in Section 1.1, a number of new positive obligations under Article 8, resonating within the UN and other regional systems, were incorporated into the ECHR's *acquis* with a relative ease.

At the same time, the adoption of the CoE's Istanbul Convention on violence against women represents a successful experience of translating the case law accrued across decades into regional treaty-law.[1160] Its comprehensive text encompasses several clear positive obligations. The breadth of the obligations established therein surpasses the OAS' Belém do Pará Convention.

305. The assertion that the current human rights era is one of implementation rather than of elaboration has become dogmatic. Though it is certain that rights and obligations cannot proliferate unjustifiably, general human rights texts, adopted in the 1950s, cannot strive on overstretched judicial interpretation, no matter how progressive human rights interpretation would be. Learning from the experience of the transgender cases and later from *Schalk and Kopf* and subsequent cases, one may wonder whether inferring equality rights from the general provision of Article 8 ECHR, regarded as a *salvage buoy* as per past decades, would appear as a *consolation prize* nowadays, as it frustrates applicants in their expectations for relief.

306. On the other hand, evolution of human rights law cannot operate by judicial interpretation alone. It requires also active participation of States in further treaty elaboration. This debate becomes critical in the area of recognition of homosexual relations, given the absence of a specific treaty to rely upon. However, at least at the UN level, treaty-law obliging States to recognize a full-fledged right to marry is unfeasible in the foreseeable future.

2 - The Growing Recognition of Vulnerable Groups

307. Another important matter within the study of positive obligations, in relation to equality and non-discrimination, is the progressive recognition of vulnerable groups through the texts of conventions on civil and political rights. Such a burgeoning recognition within the ECHR is not without criticism. Bossuyt makes a

[1160] See in the Explanatory Report of the Istanbul Convention (Council of Europe Treaty Series No. 210), the richness of both European and external sources used to build consensus in its negotiation and adoption.

relevant warning on this Court's practice.[1161] Referring to groups such as asylum seekers,[1162] children, and women, he asks, "[i]f the Court succeeded in the last two years in identifying five vulnerable categories, how many more may be expected?"[1163] His concerns are pointed out to a possible unsustainability of the relevant case law by the proliferation of such groups in view of the original purpose of the ECHR, which was based on "individuals" and not particularly focused on groups in need of protection.

308. Firstly, the ECtHR, permeable to other sources, has borrowed many new concepts not exclusively from the context of non-discrimination.[1164] Secondly, as it can be seen, the recognition of new "groups" is in line with the *suspect classification* doctrine, well entrenched in the ECHR's practice and abroad. As will be seen in Section 5.1, the Court has as a whole used the vulnerability approach as a stricter filtering of prioritizing groups facing historic and systemic exclusion. Moreover, the evolving recognition of such groups relies considerably on the adoption of treaty law within the CoE or outside the CoE. For instance, at a time when the CRPD had not entered into force yet, Barlett and others noted that the ECtHR's acted in a "cautious incrementalism"[1165] by gradually recognizing persons with disability as vulnerable. This comment should be compared with the current and stronger approach by the Court—for example, in the recent case of *Guberina v. Croatia*. Even after the entry into force of the CRPD, the Court has maintained a cautious approach[1166] in reading new obligations under the ECHR. In the area of LGBT rights, a full-fledged recognition of their rights has not been accomplished, though a considerable evolution has is perceived. Thus, from a legal perspective it appears that the ECtHR

[1161] Marc Bossuyt, "Is the European Court of Human Rights on a Slippery Slope?," in *The European Court of Human Rights and its Discontents – Turning Criticism into Strength*, eds. Tom Zwart et al. (Cheltham: Edward Elgar, 2013), 29-31.

[1162] See, dissenting opinion of Jugde Sajó, in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011. An in-depth analysis on this particular segment, in view of the GC's *M.S.S. V. Belgium and Greece* is made in Part III.

[1163] Bossuyt, "Is the European Court of Human Rights on a Slippery Slope?", 31.

[1164] The concept of torture itself has been lent from the CAT to the ECHR.

[1165] Peter Bartlett, Oliver Lewis, Oliver Thorold, *Mental Disability And the European Convention on Human Rights***,** vol. 10 (Leiden: Martinus Nijhoff, 2007), 256.

[1166] Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in *Vulnerability – Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha A. Fineman, (Farnham: Ashgate, 2013), 169. The first cases substantively dealing with disability have appeared only in the last two years, such as *Çam v. Turkey,* no. 51500/08, 23 February 2016 and *Enver Sahin,* no. 23065/12, 30 January 2018.

progressively updates its substantive equality *acquis*, mainly in view of the treaties adopted outside the CoE, while still resorting to internal consensus in the absence of other treaties to rely upon.

Bossuyt's main concern relates to the risk of the ECtHR increasingly entertain welfare obligations in favor of certain groups within the scope of the ECHR. This concern is in principle plausible, given that CPR treaties, such as the ECHR, cannot be said to have as object and purpose the protection of ESCRs. Recapitulating from the overall conclusion from Chapter 5, when vulnerable groups are at stake effective protection requires at times differentiated positive obligations. At the same time, Bossuyt's concern deserves some nuancing. Positive obligations in the context of equality and non-discrimination are diverse and do not focus primarily in forcing ESCRs into CPR treaties. In fact, a main objective of understanding positive obligations through the tripartite typology of duties was to demystify an alleged polarization between obligations of abstention and obligations of provision. For instance, the obligations identified within the duty to facilitate aim at improving one's autonomy, equal participation, and enjoyment of equal rights of certain groups in liberal societies, such as reasonable accommodation, recognition of social name after new gender assignment, and temporary special measures.

Admittedly, the duty to provide is more relevant in the context of equality and non-discrimination than in general. However, international courts have applied this obligation emphatically on right to personal integrity (Article 3 ECHR, Article 5 ACHR) while acting with caution beyond that scope, granting a wide margin of appreciation to domestic authorities. As it was also seen, though ECtHR affirms that that there is not a water-tight division between both types of rights, it was argued that it does not explore the full potential of dealing with the duty to provide in the context of vulnerability. At the same time, the ECtHR was considerably careful of not advancing into ESCRs. Hence, Bossuyt's relevant concern has not significantly materialized.[1167]

309. Leaving aside strictly legal considerations, much of this criticism also has implications for the Court's institutional role. The issue of the subsidiary nature of the Court has reemerged, particularly in the aftermath of the Brighton Declaration when

[1167] See, in this regard, *e.g.* dissenting opinion of Judge Lemmens in *Enver Şahin v. Turkey* (2018), making a careful point on the budgetary constraints on the part of the university at stake to provide accessibility to the applicant, even if it consists of an *ex ante* obligation.

the Court was subject to criticism.[1168] Political and economic turmoil has considerably put in check the human rights discourse, including the revitalization of the "you and us" discourse[1169] in detriment of greater solidarity. As a result, skepticism about "unpopular" categories, many associated to the vulnerability component, has mounted.[1170] Also overseas, judicial recognition of new groups has been restricted by the US Supreme Court in a phenomenon named "pluralism anxiety,"[1171] which reflects the relevant society sentiments on an alleged privileged position of vulnerable groups in society.

310. In times of austerity and uncertainty, the imposition of increasing public spending by orders of subsidiary supranational organs through positive obligations tends to further inflate the debate. This, in principle, tends to incline the spirit of the ECHR to its original liberal project, grounded on obligations to individuals instead of creating a set of additional State duties for "special groups." In reality, the ECtHR seems to be aware of the relevant challenges and responded accordingly. It has rightly calibrated its subsidiary approach with a strengthened dialogue with national courts and authorities. This careful calibration, for instance, was key for the Court to correctly rule on cases related to austerity measures by protecting the applicants' essential interests and at the same time affording a leeway for States' structured and temporary reduction of resources in uncertain times.[1172]

The limits of public spending have appeared in the context of positive obligations to vulnerable groups. Xenos proposes a liberal view, suggesting that the scope of obligations by the ECtHR should take into account the limited resources of

[1168] Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," 168.

[1169] Id., 169.

[1170] Jean-Paul Costa, "Current Challenges for the European Court of Human Rights," A Raymond and Beverly Sackler Distinguished Lecture in Human Rights, Leiden (2011), 12, available at [http://media.leidenuniv.nl/legacy/current-challenges-for-the-european-court-of-human-rights--sackler-lecture-by-costa-doc.pdf], last visited 4 March 2018. See also David Cameron's criticism to the *Hirst (No. 2*) judgment: "No-one should be under any doubt – prisoners are not getting the vote under this government", available at [http://www.bbc.com/news/uk-politics-20053244], accessed on 7 February 2019.

[1171] Kenji Yoshino, "The New Equal Protection," *Harvard Law Review* 124 (2011): 747, listing a large amount of cases in which the US Supreme Court refused to recognize new classifications or to heighten the scrutiny on already recognized ones.

[1172] See footnote 524, above.

democratic societies.[1173] Peroni and Timmer propose another, which in times of difficulties the vulnerability paradigm should orient priorities in public spending.[1174] The latter line of thought seems more grounded. Limiting resources to the most vulnerable leads to threats to the integrity of the entire social tissue. The claims about excessive costs in those sectors, in any case, appear to have a certain degree of exaggeration without rational basis. Expert studies, to the contrary, tend to indicate that investing in vulnerable groups leads to financial return of a country instead of a economic losses.[1175] In other words, such investment tends to increase the overall resilience of a given society.

3 - The Issue of Knowledge in the Context of Equality and Non-Discrimination

311. In Chapter 3 the several forms of knowledge engaging State responsibility on positive obligations were examined. Specific considerations take place in the perspective of equality and non-discrimination, as seen in this section.

3.1 - Knowledge of the Risk v. Specific Awareness

312. In Chapter 3, the *knowledge*, as a triggering element to claim State responsibility, is assessed in general terms only: i.e. the mere receiving of a complaint or otherwise a cognizance that the occurrence or the imminence of a violation. However, given the frequent invisibility sustained by vulnerable groups, in view of the unfamiliarity by the authorities with the specificities of the relevant violations, it is plausible to recognize possible protection gaps generated in the protection of vulnerable groups.

[1173] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Oxon: Routledge, 2012), 164, speaking of the resource limits of democratic societies, ignoring the specificities of vulnerable groups.

[1174] Lourdes Peroni and Alexandra Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law,* 11, no. 4, (2013): 1084.

[1175] A study elaborated by the European Commission concluded that more inclusion of women in the digital economy may represent an annual increase in the EU GDP of EUR 9 billion. See: Women Active in the ICT Sector (2013)". Likewise, a comparative ILO study shows that, in developing countries, exclusion of persons with disabilities from the labour market causes losses between 3 and 7 percent in the GPD, in Sebastian Buckup, "The Price of Exclusion: The Economic Consequences of Excluding People with Disabilities from the World of Work," *Employment Working Paper No.43* (2009). See also, Nicholas Rees, Jingqing Chai and David Anthony, "Right in Principle and in Practice: A Review of the Social and Economic Returns to Investing in Children" (UNICEF, 2012), 32.

To the extent that, in several contexts, States are obliged to promote training and awareness-raising for their own agents on the various areas of vulnerability, arguably the cognitive element entailing responsibility to protect these individuals has to be a qualified one. If a public authority, through learning of a violation or its risk of materializing, fails to recognize and address the vulnerability perspective at stake, the protection required, according to the particular conditions of the individual at stake, may be ineffective.

This obstacle is clearly illustrated by the duty to prevent imminent harm, in the context of domestic violence. In *Jessica Lenahan (Gonzalez) et al. v. The United States* (2011)[1176], decided by the IACHR, the applicant, in possession of a restraining order against her former husband and aiming to protect herself and her daughters, called the police station to report that her former husband had broken into her house and taken their daughters. A first police dispatch was sent to her house, but the agent, though reading the restraining order, told the applicant that nothing could be done. Moved by despair, the applicant kept contacting the police eight times the same evening. At the third attempt, the officer asked her to contact a non-emergency line by judging her plea ridiculous. The Commission, in assessing the set of reasonable measures taken to protect the lives at risk, noted the ignorance by the police of the urgency and seriousness of the situation in a situation of vulnerability. It was then concluded that the due diligence standard at stake included a component of specific awareness to treat the case as an instance of domestic violence *as such*, which the authorities disregarded. Hence, the Commission found a violation of the right to equal protection before the law (Article II) in relation to all the victims and a violation of the right to life (Article I) in conjunction with the special protection of the girl-child (Article VII) of the American Declaration on Human Rights.

313. The lack of *specific awareness* of the authorities to deal with cases involving vulnerable sectors may also reflect the prejudices and stigmas within the investigative and judicial authorities already condemned by the ECtHR in *Opuz* (2009). Given this lack of specific awareness, the risk calculation in those particular circumstances remains compromised. As the issue of knowledge in this context evolves in human

[1176] IACHR, *Jessica Lenahan et al. v The United States*, Case 12.626. Report No. 80/11 (Merits), 12 July, 2011. In the European system, a sense of specific knowledge required is at times mentioned as the Court mentions that the authorities "should have looked into the applicant's situation more thoroughly" (see, *e.g. T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 60, 28 January 2014).

rights litigation, international Courts increasingly analyze whether the authorities made a specific risk assessment. For instance, in *Halime Kılıç v. Turkey* (2016), the Court noted that the investigations into the killing of a woman by her husband had denoted his dangerous behaviour and the existence of a clear risk of an assassination. The national court, however, refused to issue a detention order against the aggressor and did not afford any other precautionary measure, leading to the actual killing of the victim woman. It was stressed in the judgment that the domestic court did not perform any risk assessment, and was thus in discord with a sound due diligence obligation applicable to the concrete case. [1177]

3.2 - Knowledge Obtained by Disaggregate Statistical Data

314. It was seen in Chapter 3 that indicators and statistical data enable governments to better channel their resources in order to address specific human rights concerns. Under some specific treaty regimes, States are obliged to produce disaggregated statistical data. Moreover, a growing number of governments produce statistical data disaggregated into several factors such as sex, age, ethnic origin, region, and health even in the absence of a specific treaty obligation. The importance of statistical data of this form is to reveal information on how how certain social strata enjoy rights or sustain certain forms of discrimination.

The consolidated practice by international human rights courts to accept statistical evidence, particularly disaggregated data[1178] has indeed introduced a component of state liability in relation with the disproportional impact revealed by these data. The concrete determination of a violation will rely upon the justifications advanced by the authorities on the objectiveness of such differentiation. But in a conceptual framework of positive obligations that favors prevention in contrast to mere reaction, it is plausible to argue that the occurrence of a disparate impact represents a cognitive element triggering the State responsibility. In concrete cases, information obtained in statistics relevant to an individual circumstance has, at least, contributed to a finding that the State *ought to have known* of the risk of a violation to materialize.

[1177] ECtHR, *Halime Kılıç v. Turkey*, no. 63034/11, § 92, 28 June 2016.

[1178] See Chapter 5 (Section 2.1.6) and Chapter 8 (Section 2.1.2).

This extended requirement of knowledge is explicit in *O'Keeffe v. Ireland* (2014), revolving around sexual abuse of school pupils in a private school. The ECtHR held that the statistics revealing a high level of incidence and prosecution of cases of sexual abuse against children by adults were compelling enough for the State to establish mechanisms to protect the children of the school at stake. Instead, the government delegated primary education to non-state actors without the necessary safeguards, leading to a violation of the obligation to put in place a protective framework to prevent the personal integrity of the victims under Article 3 ECHR.[1179]

4 - The Threshold of the Severity of The Impact

315. Recapitulating from Chapter 3 (§ 143 above), the threshold of the severity of the impact of a given interference by the State or by non-State actors also constitutes a triggering element, raising international responsibility of the State. Naturally, an abstract threshold applicable to all human beings cannot be established. Instead, specific thresholds, according to a specific vulnerable group in question, giving rise to State responsibility, are found in a number of contexts, some of which are explained as follows.

4.1 - Persons in Detention

316. In the case of persons in custody, the ECtHR has understood that Article 3 ECHR may be violated without any intent on the part of the authorities to commit torture. Instead, there is a State obligation to ensure the detainees minimum conditions of dignity, avoiding (to the extent possible) distress and hardship beyond the normal and unavoidable level of suffering inherent to detention.[1180] In this context, the severity threshold has been assessed on the basis of the cumulative effects of the poor prison conditions, according to the claims brought by the applicants.[1181] In *Insanov v. Azerbaijan* (2013), the Court made it clear that none of the claims, considered alone (overcrowded cells, poor sanitary conditions, and the lack of heating)

[1179] ECtHR, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 162, ECHR 2014 (extracts). See also: *Halime Kılıç v. Turkey*, § 118, referring to statistics evidencing the persistence of domestic violence in the Turkish society.

[1180] ECtHR, *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; and *Paladi v. Moldova* [GC], no. 39806/05, § 71, 10 March 2009. See comments in: Nigel R. Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, 3rd edition (Oxford University Press: Oxford, 2011), 395.

[1181] ECtHR, *Dougoz v. Greece,* no. 40907/98, § 46, ECHR 2001-II.

was sufficient to trigger the relevant threshold. The threshold was, however, attained by the aggregation of those hardships, leading the Court to find a violation of Article 3 ECHR.[1182]

4.2 - Corporal Punishment of Children

317. In the early 1990s, *Costello-Roberts v. the United Kingdom* concerned a case where a seven-year old boy alleged a violation of Article 3 ECHR after having sustained corporal punishment as a disciplinary measure by his schoolmaster. The Court made an analysis of the severity of the impact by stating that it should attain a minimum level and "be other than that usual element of humiliation inherent in every punishment."[1183] It noted the precedent of *Soering* to consider also "the applicant's subjective perceptions"[1184] and the health, sex, and age of the victim.[1185] The Court's reasoning, however, did apply those principles to the central question of a child's experience of the impacts arising of such a a punishment suffered.

The absolute prohibition of corporal punishment against children, however, gained international attention at a later stage, especially by the adoption of a specific General Comment by the CRC,[1186] by the handing down of series of decisions by the European Committee on Social Rights[1187] and by political action at the European level.[1188] The ECtHR had the occasion of revisiting the matter in *A v. the United Kingdom* (1998), which concerned parental punishment. A boy was beaten by his stepfather, causing him several bruises. The aggressor was eventually acquitted on the basis of the existence of only a "reasonable chastisement." The Court, considering

[1182] ECtHR, *Insanov v. Azerbaijan,* no. 16133/08, § 127, 14 March 2013.

[1183] ECtHR, *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C.

[1184] Ibid.

[1185] Ibid.

[1186] CRCCttee, *General Comment No. 8, on the Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment*, adopted on 2 June 2006, UN Doc. CRC/C/GC/8, 2. The Committee is emphatic in defining: ""corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light" (§ 11, underline added).

[1187] ECSR, collective complaints No. 17/2003; *OMCT vs. Greece*, No. 18/2003 *OMCT vs. Ireland*; and No. 21/2003 *OMCT vs. Belgium*, analyzed in Chapter 5.

[1188] CoE, Parliamentary Assembly Recommendation 1666 (2004), on a Europe-wide ban on corporal punishment of children.

children as a vulnerable group, held that they are entitled to deterrent protection against breaches of personal integrity.[1189]

318. In any event, setting specific thresholds in concrete cases may be challenging, including in cases involving acts by State agents. In the case of *Bouyid v. Belgium* (2015), the Grand Chamber was called to re-consider a ruling on police excess. The applicants (one of them a minor) were slapped in the face by agents in a police station. The Grand Chamber overruled the Chamber decision that did not find that those slaps reach the severity threshold of Article 3 ECHR. In the specific circumstances involving the age of one applicant, 17 years at the time, the Grand Chamber accepted that ill-treatment may have a high impact on children and adolescents, requiring that law-enforcement officers discharge their duties with due account of the inherent vulnerability because of his age.[1190] Three dissenting judges, however, disagreed on the substantive aspect of the said article, finding the majority's approach on the age of the minor applicant "overly theoretical." For those judges, there was a risk of trivializing the protection afforded by Article 3 by considering that a slap on a child would not reach a sufficiently severe. However, this understanding deviates substantively from the body of law developed elsewhere, as exposed above, in particular the strict stipulation of the age of a child under Article 1 of the CRC, ratified by all CoE member States.

5 – The Margin of Appreciation in the Context of Equality and Non-Discrimination

319. It is important to examine the various issues surrounding the application of the margin of appreciation doctrine in the specific realm of equality and non-discrimination in order to understand the extent of positive obligations in this regard.

5.1 – Preliminary Considerations

320. It has been seen in Chapter 3 that the latitude of the margin of appreciation afforded to States relies, *i.a.*, on the right at stake. The prohibition of non-discrimination, for its part, is one of the cornerstones of human rights treaties,

[1189] ECtHR, *A. v. the United Kingdom,* 23 September 1998, § 22, Reports of Judgments and Decisions 1998-VI.

[1190] ECtHR, *Bouyid v. Belgium* [GC]*,* no. 23380/09, § 110, ECHR 2015.

deserving special attention from supranational organs. In this vein, the decision reached by the ECtHR in *Pla and Puncernau v. Andorra* (2004), dealt with elsewhere, is illustrative. Though cautious not to rule over private disputes, the Court held that it could not remain silent at a discrimination that was "blatantly inconsistent with the fundamental principles of the Convention."[1191] In the Americas, the IACtHR has elevated the principles of equality and non-discrimination to the ambit of *jus cogens* norms, entailing *erga omnes* obligations.[1192]

But obviously, an equality clause of a human rights treaty in itself is not determinant to heighten the stringency of the review by a court in a concrete case.[1193] Firstly, it does not have an independent nature in all treaties. Under the ICCPR and ICESCR, this principle is indeed self-standing, whereas Article 14 ECHR remains accessory to a substantive right. An independent provision on equality is provided in Protocol No. 12 for States that have ratified it. At the same time, the level of stringency to be applied differs substantively according to what is at stake for the applicant.

The US "suspect classification" doctrine, for instance, is based on the higher probability that certain social clusters are prone to suffer discrimination,[1194] thus heightening the stringency of review of a given law or policy under litigation. The ECtHR has for decades applied different levels of scrutiny in a very similar fashion as the US Supreme Court by requiring "very weighty reasons" for some categories, entailing elaborated reasoning on the part of the authorities for differences based on

[1191] ECtHR, *Pla and Puncernau v. Andorra,* no. 69498/01, § 46, ECHR 2004-VIII.

[1192] IACtHR, *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, § 110. See criticism by Andrea Bianchi, "Human Rights and the Magic of Jus Cogens," *European Journal of International Law,* 19, no. 33 (2008): 506, calling the Court's conclusion "axiomatic", on an issue that requires rigorous examination in order to persuade skeptics. Compare with Antônio A. Cançado Trindade: "*Jus Cogens*: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law," *Proceeds of the XXXV Course of International*, OAS Inter-American Juridical Committee, Rio de Janeiro (2008).

[1193] See Jeroen Schokkenbroek, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," *Human Rights Law Journal* 19, no. 1 (1998): 34, noting the importance of the State consensus in determining the width of the margin under Article 14 ECHR.

[1194] The practical result of a strict scrutiny in US law is the complexity of explanations to be provided by a Court, *viz.* the justification of a compelling interest; a narrowly tailor policy; and the use of the least-restrictive means to achieve the State interest. In general terms, groups are protected on the basis of historical unequal treatment (*San Antonio Independent School District v. Rodriguez* (No. 71-1332)); mental disability (*Cleburne v. Cleburne Living* Ctr., 473 U.S. 432 (1985)); parental marital status (*Clark v. Jeter*, 486 U.S. 456 (1988); and sex (*J.E.B. v. Alabama* ex rel. T. B. (92-1239), 511 U.S. 127 (1994). Besides, US courts may apply intermediate scrutiny or only "rational basis" scrutiny, in respectively lower levels of stringency.

the ground of *e.g.* sex,[1195] sexual orientation,[1196] birth out of wedlock,[1197] disability,[1198] or racial discrimination.[1199] One sees a gradual growth of the "other status" listings in the relevant clauses reflecting an *active* evolutive interpretation of equality cases.[1200]

Although a clear pattern cannot be identified in this *ad hoc* selection of "vulnerable groups" by the Court, it is clear that the Court prioritizes cases involving essential components of one's personality or core choices that impact significantly a person's identity.[1201] This prioritization is in fact an effort of the Court to retain greater control on issues that it deems central to the ECHR, in contrast with other issues that are peripheral only. The Court thus adjusts the stringency level accordingly. Of course, there are situations in which it might be argued that the Court showed recalcitrance in its filtering, as in *Garib v. the Netherlands* (2017). In a case related to gentrification against a single mother, the Court did not consider the applicant as vulnerable, although the national authorities placed her in special programs for the vulnerable groups.[1202]

5.2 - The Precedent of *Alajos Kiss v. Hungary*

321. *Alajos Kiss v. Hungary* (2010), revolving around disenfranchising of persons with disabilities, appears in this very context of streamlining the methodologies of

[1195] ECtHR, *Konstantin Markin v Russia*, § 127.

[1196] ECtHR, *X and Others v. Austria* [GC] § 99*; Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 89, 20 June 2017.

[1197] ECtHR, *Pla and Puncernau v. Andorra*, no. 69498/01, § 61, ECHR 2004-VIII.

[1198] ECtHR, *Glor v. Switzerland*, no. 13444/04, § 64, ECHR 2009.

[1199] In *D.H. and Others v. the Czech Republic* [GC], the Court held that racial discrimination "is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction, § 76.

[1200] Oddny M. Arnardóttir, "The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights," *Human Rights Law Review*, 2014, 14 (2014): 652–653, referring to *D.H. and Others v. the Czech Republic* [GC].

[1201] Id, 655. The author demonstrates a group of cases in which the Court applies a wider margin of appreciation, *i.e.* "the lower end" of the chain".

[1202] ECtHR, *Garib v. the Netherlands* [GC], no. 43494/09, 6 November 2017. See the Joint Dissenting Opinion of judges Tsotsoria and de Gaetano, criticizing the majority for not having grasped the unfair burden sustained by the applicant, which would have narrowed the margin of appreciation (§ 3). The Court goes on filtering even cases revealing some aspect of a person's identity, judging whether the issues at stake are "central" or "peripheric" to the ECHR, under Article 14, such as in *Carson and Others v. the United Kindgom,* in respect with one's place of residence ([GC], no. 42184/05, § 71, ECHR 2010).

stringency. The applicants alleged a violation of Art 3 Protocol 1 ECHR, criticizing the legislation in force that barred mentally disabled individuals under partial guardianship from the right to vote. The Court, synthesizing the understanding that exclusion of vulnerable sectors might require a higher standard of justification, held:

> In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.[1203]

Accordingly*:*

> […] the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.[1204]

322. Such a pronouncement by the Court represents a positive evolution towards a more balanced scrutiny when vulnerabilities are at stake, thought not reflecting an automatic factor to narrow the margin of appreciation.[1205] Instead, this precedent operates as general guidance to take into account the vulnerable condition of the applicant, among other criteria, to define the width of the margin to be applied in a concrete case.

323. At the same time, the notion of vulnerability has a significant contextual component. For the ECtHR, a general treaty, some social sectors may be deemed "vulnerable." This is not a general assumption, for instance, under the CPRD, whose Committee does not consider persons with disability as vulnerable as such. In fact, in *Jungelin v. Sweden* (2011), the Committee applied a *certain* margin of appreciation on the Labour Court decision refusing to accommodate the applicant's needs of an

[1203] ECtHR, *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010, referring to cases on gender discrimination (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*), sexual orientation (*E.B. v. France*), and racial discrimination (*D.H. v. The Czech Republic*), the latter being analyzed in detail in Chapter 9. See the same approach applied in *Guberina v. Croatia,* § 73.

[1204] Id., § 44.

[1205] Peroni and Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention", 1084. This is also due to the inconsistencies surrounding the setting of the right stringency, for instance, when the question of consensus is raised (*Schalk and Kopf v. Austria*), or when the case is about socio-economic policies, such as urban planning (*Chapman v. the UK*).

adapted computer system.[1206] The rationale underlying the margin applied was straightforward: the reasonableness of the steps taken by the employer added to the correct review by the domestic court of the applicant's claims. Hence, the width of the margin applied was not a matter of further elaboration.

324. Comparing the issue of vulnerability between these two conventions implies having also two different perspectives. The ECHR, a general human rights treaty, is interpreted by attributing "vulnerability" to a person with disability as a form of materializing substantive equality, by recognizing that persons in different circumstances are to be treated differently (including through a differentiated margin of appreciation). In the case of the CRPD, persons with disabilities are simply treated as right-holders. And given the existence of precise positive obligations provided in this Convention, the CRPD Committee did not find the need to self-proclaim persons with disabilities as a vulnerable group, in order to further reinforce the value of these obligations. Hence, differentiating the width of the margin of appreciation in *Jungelin* did not appear of any added value for this Committee.

5.3 - The Vulnerability Argument within the Scope of the Margin of Appreciation

325. The margin of appreciation presupposes a reasoned and participatory decision process, which is the cornerstone of democratic institutions. Yet, this doctrine, only generally framed, raises the issue of substantive equal protection of disadvantaged sectors. Paying deference to democratic regimes – via a plain margin of appreciation doctrine - could leave unnoticed distortions in the majority-minority relations. The ECtHR has recognized the inherent asymmetric nature of societies by embracing the very principle of substantive equality. However, the fact that little attention is sometimes paid to the majority/minority relations in societies has been attributed to the operation of the margin of appreciation.[1207] Ensuring equal rights for minorities

[1206] CRPDCttee, *Jungelin v. Sweden*, communication No. 5/2011. Views of September 2013. UN Doc. CRPD/C/12/D/5/2011, § 10.5.

[1207] Steven Wheatley, "Minorities under the ECHR and the Construction of a 'Democratic Society," *Public Law* (2007), 791. The author adds that "The Court has recognised the legitimacy of claims by minorities to distinctiveness in the face of cultural homogeneity but abrogated any responsibility to intervene in majority/minority disputes", at 771. See also Stephanie E. Berry, "A Tale of Two Instruments, Religious Minorities and the Council of Europe's Rights Regime," *Netherlands Quarterly of Human Rights*, 30-1 (2012): 11-40. See also: Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards," *NYU Journal of International Law and Politics*, 31 (1999). Yutaka Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry", eds. Birgit P. et al. *Constituting Europe – The European Court of Human Rights in a*

and vulnerable groups requires a shift from "difference blindness" to "difference awareness" [1208] in protecting their rights and recognizing their existence. The assurance of equal participation of a vulnerable group should not simply be affirmed by international monitoring bodies in the statement of the applicable law at stake. When applying the applicable law, these bodies should also concretely assess the level and quality of participation and negotiation leverage, if any, of the concerned groups.

326. The *intuitu personae* reasoning in ascertaining the width of any margin of discretion is not a novelty in judicial practice, as seen by the "suspected classification" doctrine above. However, an added value of considering vulnerability in this context is to better elaborate on substantive equality and to pay attention to issues such as the question of asymmetry, historic disadvantages, and stereotyping sustained by certain groups.[1209] Indeed, this is an improvement of the ECtHR's practice in that it makes the general formulation of vulnerability more practical by considering this factor in its stringency test. For Arnardóttir, the merits of this method also "make the previously implied *ratio legis* behind the suspect discrimination grounds explicit."[1210] Still, for this author, this new "social–contextual approach" supports the strict review of discrimination and increases clarity and consistency the ECtHR's case law.[1211]

327. As an entry point to the vulnerability argument, the Court has invoked the "historic discrimination" argument by examining the processes by which public policies and legislation were discussed. The Court has made the case that vulnerable groups deserve greater attention in public policies.[1212] Further, the Court underscored that biases underlying flawed decisions cannot be legitimately advanced to treat

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European, National and Global Context (Cambridge: Cambridge University Press, 2013), 96: "political or social minority members would be divested of means to redress injustices through democratic political procedures".

[1208] Yuka Akai-Takahashi, "Rationalizing the Difference between 'New and 'Old' Minorities? The Role of Margin of Appreciation in Determining the Scope of the Protection of Minority Rights", *Double Standards Pertaining to Minority Protection,* ed. Kristin H. (Leiden, Brill 2010), 231.

[1209] Peroni and Timmer, "Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law", 1081.

[1210] Oddny M. Arnardóttir "The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights", 664.

[1211] Ibid.

[1212] See the ECtHR's clear approach on the matter: *Yordanova and Others v. Bulgaria,* no. 25446/06, §§ 128-129, 24 April 2012 (analyzed in Chapter 8, Section 2.4.2).

someone differently.[1213] The Court also noted that some legislative provisions contain biases against certain sectors.[1214] This ECtHR's overall approach implies two latent types of inquiry for the national authorities: the quality of the explanation advanced about the participation process and the actual leverage of the group at stake into that participation process. These two types, however, have not been sufficiently developed in the Court's judgments.

5.4 - Adding Inclusive Deliberation to the Proceduralization Movement

328. The proceduralization movement, emphasized by the ECtHR in *Hatton and Others*, has increased the quality of the Court's reasoning in assessing the extent of the margin of appreciation to be afforded to States. At the same time, it has enabled States parties to earn such leeway by attesting the soundness of their decision processes.[1215] It represents an added value on the dialogue between a State and the Court. Yet, in the context of equality and non-discrimination, there is a potential for the Court to add further quality to its reasoning beyond the mere measuring the width of margin in a concrete case.

329. This approach, it is submitted, could help transforming the criticism that the margin of appreciation practice overrides values of disadvantaged groups into a strength. Thus, where applicable, the idea of proceduralization can add participative elements, bearing in mind the intrinsic failure of involvement in deliberations on the part of vulnerable groups. In assessing the measures taken by a State to identify and balance the competing issues and interests, the Court could inquire whether and to what extent the concerned sectors were consulted and had a meaningful say on matters that directly affect them.

330. Some elements of the deliberation process are put forward here. The first component is the quality of the outreach prior to consultations. The adequacy of the processes of consulting the concerned categories may require translation of documents in languages that the affected communities understand, including sign

[1213] E.g. *Kostantin Markin* [GC], §§ 65-75; see also *Kiyutin v. Russia,* no. 2700/10, § 64, ECHR 2011, noting the stigma and exclusion faced by persons living with HIV/AIDS.

[1214] E.g. in *Bayev and Others v. Russia*, § 91. In *Biao v. Denmark*, the debates in Parliament that pictured "negatively […] the lifestyle of Danish nationals of non-Danish ethnic extraction" were rejected as a justification", § 126.

[1215] See discussions in Chapter 3 (Section 4.3.6).

language or Braille, where needed. Gender representation is paramount. The best interests of the child, including considering her or his views in policies that affect them, are also key.[1216] In this assessment, it is fundamental to ascertain that the relevant groups have been able to express their views. A direct contact between the affected groups and the decision-makers attests that these groups are visible during consultations. The hearing of experts, who can explain what is at stake by pointing to the impact on the rights of the people belonging to an affected group, also improves the quality of decision-making.

5.5 - Does it Make a Difference for Positive Obligations?

331. The identification of vulnerable groups as such, matched with the narrowing of a margin of appreciation, does not impact exclusively positive obligations in the ambit of equality and non-discrimination. It consists of an emerging practice of prioritizing the attention of a court to cases revealing consistent patterns of discrimination. As seen in Chapter 3 (§ 151 above), the boundaries between both positive and negative obligations are not precisely defined and the ECtHR refuses to set clearly those boundaries. In other doctrinal debates, whether the width of the margin of appreciation varies according to "qualitative" or "quantitative" arguments,[1217] the Court, in fact has defined the scope of this margin based on both arguments, with little practical results.

332. It seems that it may make a difference whether a case is dealt with either through the prism of a positive obligation to take measures to ensure substantive equality, or through a negative obligation not to make unjustifiable differentiations. This issue has given rise to doctrinal divergences, including in concrete cases. One of many examples of such doctrinal debate is reflected in *Hämäläinen v. Finland* (2014), in which a concurring judge supported the majority in finding that the examination of the denial of recognition of the newly assigned gender of the applicant entails an analysis of a positive obligation, concentrating on the alleged failure to take into account the applicant's special situation.[1218] Conversely, three dissenting judges found that the case should be seen as a potential breach of a negative obligation, since for them it did neither require major actions by the authorities, nor entailed socio-

[1216] Already considered in *Guberina v. Croatia* (2016), § 73.

[1217] See discussions in Chapter 3 (Section 4.3.4).

[1218] ECtHR, *Hämäläinen*, concurring opinion Judge Ziemele § 1, emphasizing the need to clarify this very matter by the Court.

economic implications.[1219] However, notwithstanding the disagreement between the judges of the Grand Chamber, what is important is that in practice the application of a narrow margin of appreciation was an uncontested matter in the case. It appears from the facts of the case that, should the majority have examined the case from the point of view of a negative obligation, the latitude afforded to the national authorities would have remained unchanged.

333. Admittedly, when a concrete case deals with public policing and considerable public expenditure, the choices of the democratically elected authorities have to be respected by an international human rights monitoring body with a subsidiary supervisory role only. At the same time, this cannot be the sole argument to be considered by an international body in order to ascertain the width of the margin of appreciation. As seen in the previous sections, the choices of democratic societies should be after all inclusive. Hence, instead of hastily paying deference to national authorities and risking acting in undue polycentric arguments, a more balanced dialogue between international and national courts should include a democratic-inclusive item: whether a given vulnerable group had the opportunity to discuss the priorities of public resource allocation which affect its rights.

6 - Structural Discrimination and the Related Procedural Aspects

334. Structural discrimination is an important phenomenon in the study of equality and non-discrimination, involving the necessity of positive obligations beyond the victim's individual scope. At the same time, the extent to which a positive obligation of a structural nature can in practice be claimed will depend on the procedural possibilities at the international level.

The majority of the international human rights adjudicatory systems are of an individual nature, ascertaining individual rights. It should be understood in which ways those mechanisms delimit the extent of positive obligations of a structural nature.

Given the predominant individual character of the various international complaint mechanisms, it should be analyzed if, and to what extent, those mechanisms can properly entertain instances of structural discrimination.

[1219] Id., dissenting opinion of Judges Sajó, Keller and Lemmens, § 4.

6.1 - The Individual Petition Mechanisms

335. Most human rights petition mechanisms restrict the standing to individuals[1220], with some flexibility by the ACHR.[1221] The ACHPR's petition mechanism, for its part, also a notable structural component.[1222] Exceptionally, a few collective or structural avenues of an *actio popularis* type exist—for example, the CoE's ESCtee, which has competence to receive collective complaints arising out of implementation of the ESC. [1223] Despite this shortcoming, the traditional individual petition mechanisms can play an important role in addressing instances of systemic discrimination by (at least through individual cases) providing guidance for a better observance by the States' compliance with their obligations. Furthermore, both the ECtHR[1224] and the IACtHR[1225] indirectly speak of structural effect of their rulings.

In addition, some interesting practices of both Courts have been developed to address more specifically and more tangibly the structural dimensions of obligations at stake. Notable examples care the "pattern of discrimination" practice in the Inter-American system and the "pilot-judgment" procedure by the ECtHR.

[1220] Optional Protocol to the ICCPR, Article 1; Optional Protocol to the ICESCR, Article 2; The UN non-discrimination treaties: ICERD, Article 14.1; CEDAW Optional Protocol, Article 2; CMW, Article 77; CRPD Optional Protocol, Article 1.1; CRC Third Optional Protocol, Article 5.1; Article 34 of the ECHR. The Brighton Declaration reaffirmed the individual nature of the ECtHR's adjudication mechanism. See also the Explanatory Report Protocol 12, para 16: "[t]he nature of Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable";

[1221] This is enhanced by the practice of admitting cases related to unidentified - but identifiable – clusters of persons, predominantly vulnerable groups. However, this practice was somewhat restricted by the reform of Article 28 (petition system) of the Rules of Procedure of the IACHR. See, Resolution 1/2013 of the IACHR.

[1222] See, *e.g*. AfCtHRP, *APDF and IHRDA v. Republic of Mali*, application No. 046/2016, Judgment of 11 May 2018, in which this Court performed a general policy compliance of the respondent State's civil code to the prohibition of child marriage of Article 6 of the Maputo Protocol.

[1223] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, adopted on 9 November 1995, ETS - No.158. See. e.g. *Mental Disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014. Published on 29 March 2018, relating to the denial of inclusive education for children with disability in the Flemish education system.

[1224] See particularly a case related to discrimination on the ground of sexual orientation, ECtHR, *Karner v. Austria,* no. 40016/98, § 26, ECHR 2003-IX, including in cases related to sex discrimination in paternal leave, such as in *Konstantin Markin v. Russia* [GC], § 89, ECHR 2012 (extracts).

[1225] IACtHR, by the "conventionality control" doctrine, in *e.g. Case of Almonacid Arellano et al. v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, § 124. In the Brazilian experience: Antonio C. Ramos, "Supremo Tribunal Federal Brasileiro e o Controle de Conventionalidade: Levando a Sério os Tratados de Direitos Humanos," *Revista da Faculdade de Direito da Universidade de São Paulo*, 104 (2009): 241-286.

6.2 - The Pattern of Discrimination Approach in Individual Cases

336. The Inter-American system has developed a proactive practice in this context. It consists of identifying an underlying structural problem by an individual case that is caused or tolerated by the States and the public at large, beyond the victim's perspective.[1226] The IACHR's case *Maria da Penha v. Brazil* is one of the most representative.[1227] The Commission implied a pattern of discrimination in the context of domestic violence due to the general failure of the State to adopt specific legislation to combat this type of violation and to the lack of sensitiveness on the part of judiciary to combat this violence.[1228]

This pronouncement led the Commission to recommend a number of reparatory measures of a structural nature, including the training of public officials, optimization of the criminal proceedings, implementation of alternative conflict resolution methods, and an increase in the number of specialized women police departments.[1229]

337. But as seen in Chapter 5 (§ 250 above), some UN treaty bodies have adopted a structural approach through the recommendation of reparations without even calling it such. This is particularly true for treaties like the CEDAW and CRPD that are endowed with provisions obliging States to take measures of that magnitude instead of the general non-discrimination clause of the general human rights treaties. Hence, the bold stance of the Commission is laudable in this regard. The recognition of a pattern of discrimination has important bearing on the reparation measures to be awarded to the victims and to benefit the relevant group in a view of transforming the current discriminatory pattern found in an individual case.

[1226] See, Victor Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tension in the Inter-American Rights System," *Sur International Human Rights Law Journal* 6, no. 11 (2009): 19.

[1227] Other cases, IACtHR, *Cotton Fields* (on violence against women including femicide), IACHR, *Sebastião Camargo Filho v. Brasil* (attacks against landless populations in a poor region in the country).

[1228] IACHR, *Maria da Penha v. Brazil*, § 55: "[it] has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women".

[1229] Id, § 61. See, Similarly, ECtHR, *Mudric v. the Republic of Moldova,* no. 74839/10, § 63, 16 July 2013: "the combination of the above factors clearly demonstrates that the authorities' actions were not a simple failure or delay in dealing with violence against the applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman."

6.3 - The ECtHR's Pilot-Judgment Procedure

338. Although not designed with this specific objective[1230], the pilot-judgment procedure's potential in addressing systemic inequality cases cannot be neglected, especially when the ECtHR has accepted a wider use of statistics as means of evidence and deals frequently with legislative review through this procedure.[1231] When applied to vulnerable groups, the pilot-judgment procedure has the potential of reaching individuals that face inherent obstacles to obtain (procedural and substantive) domestic remedies.

The Court took a bold stance in *W.D. v. Belgium* (2016) by addressing a systemic practice in that country of keeping in custody persons with mental disabilities. The Court relied on reports by the CATCttee, the CoE's CPT, several NGOs, and its own case law in order to adopt a comprehensive package, thereby proving such a pattern. A period of two years was granted to the domestic authorities to take measures of multiple forms, such as legislative reform, and remedies to the applicants whose petitions had been already declared admissible by the Court.[1232] Interestingly, Court was less attached to the number of potential applicants than to the real structural problem it was called to decide upon, demonstrating that the pilot-judgment procedure can be used as a tool to address systemic discrimination. From that judgment, one also notes that the Court departed from its original limited practice of ordering measures for systemic failures of civil proceedings, as in *Broniowski*, to address systemic violations of substantive Articles, as *W.D.* underscores a systemic violation of Articles 3 and 5 ECHR.[1233]

Moreover, the pilot-judgment procedure could also strengthen the Court's role of catalysing national processes by also assisting Member States in solving their structural problems domestically. This action by the Court could also help it

[1230] But rather to provide a general remedial solution for prolongued procedures, see: Chapter 3 (§ 76 above).

[1231] ECtHR, *Rutkowski and Others v. Poland,* nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, where the Court requested large-scale legislative and administrative review on cases revealing excessive lengthy procedures.

[1232] ECtHR, *W.D. v. Belgium,* no. 73548/13, § 173, 6 September 2016.

[1233] Id., § 165.

addressing its institutional limitations and allow it other possibilities to evolve its case law beyond relying on internal consensus.[1234]

Should the Court be willing to act as a catalyst rather than an observer of important reforms to address systemic discrimination, a well-structured scheme with tools and practices already familiar to the Court could be proposed. Depending on the willingness of the parties, this Court could exercise restraint whenever a *prima facie* instance of discrimination is established with an important systemic component and propose an interim period for the State parties to put in place the necessary measures. By seeking the views of the parties[1235] on the identification of the underlying structural causes and the best path of action,[1236] the root cause of a given systemic discrimination could be addressed. Either via a friendly settlement or via an adjournment of the proceedings, actions in this interim period could include the conclusion of legislative debates on a pertinent bill, with the participation of the discriminated group. This could also include the collection of disaggregate data in order to ascertain the magnitude of the structural discrimination and number of persons affected or the compensations for those affected.[1237] This scheme is feasible within the procedural conditions of the pilot-judgment procedure and the pertinent practice of the ECtHR.

7 - Evidentiary Challenges before Complaint Mechanisms

339. In order to address indirect and structural discriminations, which mostly entail a number of positive obligations, monitoring bodies have been to some extent reluctant to accept new elements and approaches in evidence that could enable victims of discrimination enhance their chances to obtain redress. In this regard, two issues deserve a further look: (a) the types of evidence accepted by these bodies; and (b) the question of burden of proof in situations of indirect and structural discrimination.

[1234] See discussions there on in Chapter 6 (Section 1.2.3.5)

[1235] Rule 61.2(a) of the ECtHR.

[1236] Rule 61.3 of the ECtHR.

[1237] See, Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Defence", proposing deference in order to establish a pilot judgment procedure in order to address the underlying structural issues on same-sex marriages, 259-264.

7.1 - Acceptance of Statistics as Evidence of *Prima Facie* Discrimination

340. Since indirect and structural discrimination entail complex means of detection and evidence, the means enabling establishing a detrimental treatment may be rather challenging in litigation. Statistical reports, elaborated by State organs, international organizations, academic institutions, or independent entities are an important tool to map the patterns of discrimination over space and time.[1238]

There is an increasing recognition of a State obligation to produce a statistical analysis, disaggregated in several discrimination grounds, as seen in Section (§ 269 above). It is at the EU level where the use of statistical evidence enjoys the longest-standing practice. The Equal Pay Directive of 2000 has opened the possibility for national courts and competent bodies to appreciate the facts from which direct or indirect discrimination may be found "by any means, including on the basis of statistical evidence."[1239]

The ECtHR's practice lagged behind until about a decade ago.[1240] In *Hoogendijk v. the Netherlands* (2005) regarding gender disparity in the claims for social benefits, the Court accepted the use of statistical data in order to demonstrate that women were numerically impacted by the statutory modification at stake. It held:

> Although statistics in themselves are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention […] the Court cannot ignore that, according to the results of the research carried out […] a group of about 5,100 persons lost their entitlement to AAW [Algemene Arbeidsongeschiktheidswet] benefits on account of failure to meet the income requirement and that this group consisted of about 3,300 women and 1,800 men[1241]

[1238] Todd Landman, "Measuring Human Rights: Principle, Practice and Policy," *Human Rights Quarterly* 26, no 4 (2004): 909.

[1239] Council Directive 2000/78/EC of 27 November 2000, Official Journal L 303, 02/12/2000 P. 0016 – 0022, building upon the CJEU's case law, e.g., cases *Enderby and Others v Frenchay Health Authority and Anor* [1993] IRLR 591 (unequal payment between male and female speech therapists, under same working conditions); Danfoss, Case 109/88, *Handels-og Kontorfunktionaernes Forbund I Danmark v. Dansk Arbejdsiverforening acting on behalf of Danfoss*. [1989] ECR 3199 (considerable gender disparity and lack of transparency in payroll system).

[1240] ECtHR, *Hugh Jordan v. the United Kingdom,* no. 24746/94, § 154, 4 May 2001, rejecting the use of statistical data.

[1241] ECtHR, *Hoogendijk v. the Netherlands*, no. 58641/00, 6 January 1995.

In the following year in *Zarb Adami v. Malta* (2006), the ECtHR relied on the statistical data brought by an applicant in order to prove a gender imbalance in the calls to serve as a court juror.[1242] This openness of the Strasbourg court led to an important turning point on Roma rights, as the Grand Chamber overruled the earlier Chamber judgment in *D.H. v. Czech Republic*, thereby accepting statistical data to establish an instance of racial segregation.[1243]

The establishment of a *prima facie* instance of discrimination, however, does not forthright amount to a violation. It etnails procedural consequences, in order to re-balance the burden of the proof, which are examined in the next section.

7.2 - Burden of Proof to Establish Indirect Discrimination

341. In practice, international courts do not abide strictly to the principle *affirmanti incumbit probatio*.[1244] Yet, this principle, plainly applied, makes the task of establishing cases of discrimination difficult for applicants. Governments hold much of the knowledge that can serve as evidence, placing them in a stronger procedural position vis-à-vis the applicants. This is the reason why the *onus probandi* in international human rights procedure has a necessary compensatory component by redistributing the burden of proof among the parties, thus improving equality of arms. In the field of equality and non-discrimination, it can be particularly difficult to prove that a given norm that is neutral at a face-value has a disparate effect before a court. The pertinent facts proving inequality are rather more diffuse than concrete. Information or data capable of proving inequality are frequently either in the control of or elaborated by the States.

Given the aforementioned difficulties of proving indirect discrimination, courts worldwide have established a reasonable body of law in this regard. When applicants are able to establish instances of *prima facie* discrimination, demonstrating the factual

[1242] ECtHR, *Zarb Adami v. Malta,* no. 17209/02, § 55, ECHR 2006-VIII.

[1243] Further analysis of this case is made in Part III.

[1244] E.g. ECtHR, *Aktaş v. Turkey,* no. 24351/94, § 272, ECHR 2003-V (extracts). For instance the IACtHR, has held that international courts should not have rigid rules governing the *onus probandi*, as in *Five Pensioners" v. Peru*. Merits, Reparations and Costs, Judgment of 28 February 2003, § 65. Further reading: Alberto Bovino, "Evidentiary Issues before the Inter-American Court of Human Rights," *Sur Journal of International Law* 2, no. 3 (2005): 57-79.

difference in treatment, international courts then may shift the burden of proof to the State, which has to justify that this treatment had an objective purpose.

Since the early 1990s, the CJEU has pioneered in this regard with cases related to gender inequality.[1245] In 1998, the EU consolidated the case law approach in the so-called EU "Burden of Proof Directive," which established that in cases related to indirect discrimination, the burden should be shifted to the responding authority should the applicant bring reasonable evidence of being discriminated. According to its Article 4.1:

> Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. [1246]

The scope of this directive, however, covers only civil procedures unless otherwise provided by the EU member States, as the directive's Article 3.1 provides.

In the wake of these developments in Europe, the ECtHR gradually acknowledged the need to review its approach on the issue. [1247] The Court has reconsidered the burden of proof for states in cases related to individuals under custody, who find themselves in a situation of vulnerability[1248] and in cases on differential treatment between small and large landowners.[1249] Once more, in *Hoogendijk v. the Netherlands*, it recognized the

[1245] CJEU, *Enderby*, shifting the burden of proof towards the employer to demonstrate the objectiveness of the difference in pay between sexes. *Enderby and Others v. Frenchay Health Authority and Anor*, Case C-127/92, judgment of 17/10/1993, ECR I-5535, § 18.

[1246] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex**,** Official Journal L 014, 20/01/1998 P. 0006 – 0008. The "EU Race Directive", which also enshrines a clause on burden of proof, is addressed in Part III, as appropriate.

[1247] For Isabelle Rorive, the ECtHR, first reluctant, saw the need to adapt the rules governing evidence in its practice, in order to facilitate the case for the victims establishing cases of discrimination, which is often extremely difficult, see: *Proving Discrimination Cases. The Role of Situation Testing*, Centre for Equal Rights and Migration Policy Group (2009).

[1248] ECtHR, *Salman v. Turkey* [GC]*,* no. 21986/93, § 100 ECHR 2000-VII (regarding the death of a person in custody); and *Ribitsch v. Austria,* 4 December 1995, §§ 32-34, Series A no. 33, (regarding physical injuries in police custody).

[1249] ECtHR, *Chassagnou and Others v. France* [GC]*,* nos. 25088/94, 28331/95 and 28443/95, § 92, ECHR 1999-III.

difficulty for the applicant to make her case without shifting the burden of proof to establish a *prima facie* inequality.[1250]

342. In sum, the adoption of the practice of shifting the burden of proof by human rights adjudicatory mechanisms has opened a new phase for human rights monitoring bodies. This had an undeniably positive result of enabling further possibilities of dealing with covert instances of discrimination that were difficult to establish through the traditional means. After some hesitance, this practice has been consolidated and led the ECtHR to embark on a much-desired variegated profile of cases, such as racial segregation, further analyzed in Part III.

Concluding Remarks

343. The extent to which new positive obligations can be recognized in general human rights treaties are clearly conceived in two different tracks. Within the first, the ECtHR derives new duties clearly established in external treaties and case law. This has not posed greater difficulties and has enabled the ECHR to be read in light of emerging obligations elsewhere, such as violence against women and disability rights. However, even in this easier track, general monitoring systems may not fully capture essencial principles underlying the group-specific treaties, given probably some hesitance in absorbing concepts or obligations that are beyond a general treaty's objective and purpose, or the inherent differences between a specific and a general system when integrated.

Within the second, in the absence of treaty-law to borrow support, the ECtHR has shown hesitance in recognizing new obligations. A thematic focus in this regard, LGBTI rights, lacking treaty law to be relied upon, has taken decades in order to recognize positive obligations in comparison with the negative counterparts. The obligation to change the civil registry according to the new gender has undergone an unnecessarily protracted process. This was seen in the recognition of same-sex civil partnerships and during the denial of the existence of obligation to register same-sex marriage under Article 12 ECHR, which is a historic focus of originalism. In the wake of the new interpretative possibilities enabled by *Demir and Baykara*, the ECtHR

[1250] ECtHR, *Hoogendijk v. the Netherlands*: "If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent government, it will be in practice extremely difficult for applicants to prove indirect discrimination."

could have made better use of an external comparison. However, some institutional considerations on the part of the Court may have played play a role in this general restraint.

This shortcoming reinforces the importance of further elaboration of specialized non-discrimination treaties, especially when the overstretching of Article 8 ECHR is showing signs of fatigue. If this article has been seen historically as salvage buoy, its current role of consolation prize does not honour its importance in the European system. Indeed, some specific issues such as LGBTI rights, deserve be better dealt with nowadays by a strong treaty, rather than by an elastic Article 8 or by a static Article 12.

Criticism has been voiced on the burgeoning recognition of vulnerable groups through general human rights treaties. Such criticism, while serving as a useful alert, can be checked against the fact that several disadvantaged sectors have been already protected by the open-ended grounds of discrimination enshrined in general treaties. The difference in approaching non-discrimination through the vulnerability language has more of an effect of being in line with the substantive equality tenets than of promoting an arbitrary proliferation of groups. The ECtHR in fact has used this language with a sense of prioritization of cases deserving special attention than in a sense of proliferation of vulnerable groups.

Turning to the parameter of knowledge as triggering State responsibility to positive action, the specificities of potential or materialized violations against vulnerable groups assumes particular overtones. Decisive action to prevent imminent violations does not solely rely on the *ought to have known* paradigm in its neutral conception. Rather, this cognitive element, in order to render State action effective, is to be conjugated with a qualitative of awareness. In other words, the standard required could read *ought to be aware*.

Likewise, vulnerable sectors experience negative impacts differently from the remainder of the population, which explains different actionable thresholds raising State responsibility. This is displayed particularly in the case of children, justifying, for instance, an obligation to impose an absolute ban on corporal punishment.

The different widths of margin of appreciation, influencing the extent of positive obligations in this very context, have been influenced by the analysis of traits of the applicant. Vulnerability is not a novelty in this regard, but its consideration in

connection with the margin of appreciation has added a qualitative value in helping to better operationalize substantive equality in concrete cases. Hence, though not consisting of an automatic trigger, the practice of restricting the margin of appreciation when vulnerable groups are at stake has the effect of reinforcing equality obligations of a positive aspect. A dialogue between court and respondent State on the participation level of such sectors in the policies objective of a given case has been proposed. This may contribute to a more tailored reasoning by courts on the specificities required by each disadvantaged group.

Instances of indirect and systemic discrimination have been significantly better dealt with in contentious cases by the use of broad freedom on the evaluation of evidence by international courts, including statistics, which can demonstrate unequal patterns in the enjoyment of rights. Consequently, *prima facie* discrimination may be established, reversing the burden of proof on the objectiveness of the different treatment by the domestic authorities. This development, in the context of equality and non-discrimination in general, has also had important an impact in racial discrimination, analysed in the subsequent chapters.

PART III – Positive Obligations, with Special Attention for Racial Discrimination

Part III of this study further refines the research of Parts I and II, through the application of the results of these previous parts to a more concrete research, dedicated to the phenomenon of racial discrimination.

The maxim of substantive equality, considerably forged by the legal studies on racial discrimination through the last decades, will be discussed through international case law, advisory opinions and doctrine on racial discrimination, in Chapter 7. This Chapter will also bring the discussions on vulnerability (from Chapter 4) to this specific area, refining the contours of vulnerability, and its legal consequences, by considering racially vulnerable groups in specific. In order to complement and reinforce the relevant arguments, this study will also make an in-depth consideration in the intersectionalities that also imply racial discrimination.

Chapter 8, building on Chapter 5, will conduct a survey of the case law and docrtrine related to the various positive obligations, with a special attention to racial discrimination, through the tripartite typology of duties.

Some specific contexts that deserve a more detailed attention in the area of racial discrimination were chosen to provide the reader with more concrete application of the theories of positive obligations and substantive equality, in Chapter 9. These contexts serve to apply the theoretical background analysed in Chapter 6 to the relevant concrete instances thereby analysed.

Chapter 7 – Assessing the Justifications of Obligations in the Context of Racial Discrimination

Introduction

344. Chapter 4 of Part II analyzed the justifications of the claims for positive obligations in discrimination generally. The current Chapter aims to assess those claims within the specific context of racial discrimination. It will start by assessing instances in which States may be held responsible for a failure to act in order to prevent discrimination, which does not require intent on the part of the authorities (Section 1).

From the more general concepts studied in Chapter 4, this chapter will then make a specific analysis of the ramifications of substantive equality that may entail positive obligations within the context of racial discrimination, namely indirect racial discrimination, *de facto* discrimination, structural racial discrimination, and racial discrimination by non-State actors (Section 2).

A third section will address the question of the evolving interpretation of human rights treaties and the related expansion of positive obligations of States in the ambit of racial discrimination, including by the recognition of certain protected groups (Section 3).

A fourth will be dedicated to the issue of vulnerability in this very context and to the question of intersectionality in the context of substantive equality.

1 – Racial Discrimination in the Absence of State Intent

345. It has been seen in Part I of this work that general human rights instruments impose, textually or through interpretation, sets of positive obligations for States. Part II, studying international instruments related to discrimination in general, also identified an even larger amount of treaty provisions imposing positive obligations, particularly in the specialized treaties. The plausibility of claims for positive obligations in the specific case of racial discrimination (as in general discrimination) can be initially inferred as a consequence of the definition of racial discrimination in international human rights law, from the very authoritative wording by ICERD. The definition of racial discrimination of the pertinent Article 1.1 opens the possibility that

States are held liable for a failure to act in specific circumstances regardless of a proof of State intent:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[1251]

346. Hence, the above article contains two basic conditions for triggering State responsibility: (a) *purpose*, presupposing the intention (subjective element) of any public agent to violate these provisions,[1252] which implies a general prohibition of discriminatory acts by the State itself; and (b) *effect* (objective element), further requiring from the State actions to prevent and otherwise address breaches of the ICERD for acts the authorities did not deliberately give cause. This second normative element is akin to the concept of strict liability. Although a single normative framework cannot be derived from this Convention's text, Thornberry imparts that the ICERD indeed goes beyond formal equality.[1253] The CERD's practice has affirmed that the definition of discrimination of the ICERD can be read through a formal perspective, as well as through as a substantive perspective.[1254] Hence, the ample

[1251] Underline added. The Inter-American Convention on Racial Discrimination, Art. 1.1, contains similar wording: "Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties" (underline added).

[1252] In extreme circumstances, the case of genocide, as defined by Article 6 of the Rome Statute, A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[1253] Patrick Thornberry, "Confronting Racial Discrimination: A CERD Perspective," *Human Rights Law Review* 5, no 2 (2005): 255. Makkonen criticizes this definition for being "broad, complex and imbued with illusory precision", in *Equal in Law, Unequal in Fact – Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*, (Leiden: Martinus Nijhof, 2012), 131. However, the Preparatory Works of the ICERD do not reveal any difficulty on the part of the drafters and negotiations to agree on this formula. See: UN Doc. A/C.3/SR.1304, p. 5; Nathan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination*. (Dordrecht: Stijhof & Noordhof, Doordrecht, 1980), 31.

[1254] CERD, *General Recommendation No. 24 on Article 1, Paragraph 1, of the Convention***,** adopted at its Forty-second session (1993), § 53; *General recommendation No. 32 – The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*: "to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same." UN Doc. CERD/C/GC/32, §§ 6 and 8.

scope of the definition of discrimination under the ICERD requires more than a passive attitude by signatory States.

In line with this comprehensive definition of racial discrimination, nearly all normative articles of the ICERD textually impose obligations of a positive nature.[1255] Article 2.1 of ICERD, besides a general negative obligation under subsections "a" and "b," [1256] mandates States parties to review governmental policies, laws, and regulations (subsection (c))[1257]; to prohibit racial discrimination, (subsection (d))[1258]; and to encourage integrationist movements, (subsections (e))[1259]. Paragraph 2 defines temporary special measures (TSMs) as obligatory.[1260] Under Article 3,[1261] State parties are obliged to actively condemn racial segregation and prevent and eradicate those practices. Article 4 focuses on the duty to prohibit and punish propaganda that disseminates ideas of racial superiority.[1262] Article 6 stipulates an obligation to offer

[1255] A more detailed analysis of the several types of positive obligations will be made in Chapter 8.

[1256] ICERD, Article 2.1(a): "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation"; (b) "Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations."

[1257] Id., Article 2.1(c) "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

[1258] Id., Article 2.1 (d) "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."

[1259] Id., Article 2.1 (e): "Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

[1260] Id., Article 2.2: "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

[1261] Id., Article 3: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

[1262] Id., Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination […] inter alia:(a) [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) [s]hall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law."

victims of racial discrimination an effective remedy.[1263] Article 7 emphasizes obligations to promote racial equality, to raise awareness, and to train public officials and private groups.

347. In the regional practice, two cases illustrate situations in which States may be held accountable for racial discrimination *by effect*, regardless of the establishment of intent. The ECHR, albeit having only a general discrimination clause (Article 14), has been capable of covering this type of racial discrimination. The ECHR's Grand Chamber, applying the long-standing principle of disproportionate effect of a policy or measure on a given group, gave a landmark pronouncement in *D.H. and Others v. Czech Republic* (2007).[1264] The facts disclose an instance of discrimination in the schooling system in which Roma children were frequently assigned to "special classes"—classes for children with learning difficulties and disabilities. Most of the children in the "special classes" were Roma, which led the applicants to claim for a true instance of segregation despite the apparent absence of State intent to such policy. The Grand Chamber took abreast of its newly established practice on indirect discrimination in other contexts of discrimination.[1265] The Court took a cautious stance since that case did not claim a failure by the authorities to take special measures.[1266] In any case, simply, for the Court:

> … all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.[1267]

The Court observed that the impugned differential treatment in detriment of the applicants was not a result of the national rules of regulations on placements in

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[1263] Id., Article 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

[1264] ECtHR, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, referring to *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005: ("a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group") and to the early *Case relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)*, judgment of 23 July 1968, Series A no. 6, § 10.

[1265] Ibid.

[1266] Id., § 183.

[1267] Ibid.

special schools.[1268] Neither could any intent by the authorities to discriminate the children could be established. To the contrary, the aim of this legislation and relevant policy was to find a solution for children in special needs. However, the Court noted that the placement tests frequently associated learning deficiencies to the ethnic and cultural backgrounds of these children, resulting in a quasi-automatic assignment of Roma children to these "special classes." Through this biased assignment process, the Court could establish that a disproportional impact was felt by these children without any objective and reasonable justification. Hence, the Court found a violation of Article in conjunction with Article 2, Protocol 1 ECHR.[1269] The Court did not specify what specific measures could have been taken in order to remedy the discrimination at stake. However, it remained clearly established that a detrimental effect on the Roma children materialized through a failure by the authorities to recognize the specificities of this ethnicity in primary education.

348. In the Americas, the IACHR's *Wallace de Almeida v. Brazil* (2009) illustrates another aspect of discrimination *by effect*. The victim was an African-descendant adolescent living in a slum area, who was shot dead by the police during a routine raid. The Commission did not entertain an elaborate reasoning on the racial motivation of the police. Neither applicant advanced arguments in that direction. Rather, the Commission noted appalling rates of killings of young African-descendants in slums in Brazil. Accordingly, the IACHR held that any police intervention in those areas should be accompanied by a positive duty of care (though not specifying which one)[1270] in view of the "distinctions based on de facto inequities for the protection of those who must be protected."[1271] Thus, it was not intent on the part of the agents or policy makers, but the high probability of a black adolescent being killed in a slum area that triggered State responsibility.

The above examples demonstrate in general terms the plausibility of claims for positive obligations beyond the mere abstention from discrimination. In other words, the acceptance of the concept of substantive equality by monitoring bodies of general human rights treaties may lead to an enlargement of State responsibility. Hence,

[1268] Id., § 185.

[1269] Id., §§ 196-204.

[1270] IACHR, *Wallace de Almeida v. Brazil*, Report Nº 26/09[1]. Admissibility and Merits. March 20, 2009, §§ 145-146.

[1271] Ibid.

States are required to do more than refraining from directly discriminating individuals in order to *effectively* comply with human rights treaty obligations in this context. In line with Chapter 4, it is seen also in this Chapter that an enlarged State responsibility keeps relations with legal constructs, such as indirect discrimination and structural discrimination in the context of racial discrimination. A more detail analysis of these instances will be carried out in the following sections.

2 – Qualifiers Applied to Substantive Racial Discrimination

349. The very concept of racial discrimination, as seen above, disregards specific State intent, as seen in the above section. In this context, and in line with the general theory of equality and non-discrimination, positive obligations are justified in order to address phenomena such as indirect racial discrimination, de facto racial discrimination, and structural racial discrimination.

2.1 - Indirect Racial Discrimination

350. In Chapter 4, it was seen that instances of indirect discrimination in general might occur when a norm or practice is *at face value* neutral but that has a disproportionate effect on certain groups of society. Similarly, in the context of indirect racial discrimination, *face value* neutral practices it may also cause adverse effects on groups that are traditionally discriminated against on the basis of race or other similar grounds.

This legal concept is not new. In fact, it emerged in regard to matters such as racial discrimination itself instead of discrimination in general. It finds its traces already in the *German Settlers in Poland* (1923) by the PCIJ.[1272] Litigation on racial equality matters has strengthened this legal concept, especially the US Supreme Court's *Griggs v. Duke Power Co*. The defendant company shifted from a segregation policy to assign blacks only to the labor department that was the lowest-paying at the company to a policy that required high-school diplomas to accede to positions of better remuneration. The applicant held that, although the new policy did not directly prohibit blacks from accede to those positions, the policy in itself posed material obstacles to blacks since most of them did not have such qualification. The Court held that, if the pertinent requirement had a disparate impact on a given group, the

[1272] PCIJ, *German Settlers in Poland*, Advisory Opinion of 10 September 1923 (Series B, No. 6).

corporation should demonstrate that this requirement is "reasonably related" to the position at stake.[1273]

351. The above understanding substantially influenced European continental law, and was equallyfollowed by EU law[1274] leading to the adoption by the European Council of the Directive 2000/43/EC (the "Racial Equality Directive"), covering the fields of social welfare benefits, training, education, employment, health, and social advantages. Its Article 13 defines "indirect discrimination" as follows:

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[1275]

352. Soon after, in 2002, the ECRI adopted General Policy Recommendation No. 7 to combat racism and racial discrimination with a very similar wording as the above-mentioned Directive. This recommendation also takes stock of the then evolving case law of the ECtHR.[1276]

353. As regards the UN system, the ample definition of racial discrimination under the ICERD's Article 1.1 lent support for CERD to apply the concept of indirect discrimination to its practice. This Committee has operated more intensively on indirect discrimination in the last decades, be it in the examination of States-parties' reports[1277] or in contentious cases. *L.R. and Others v. Slovakia* (2003), related to

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[1273] US Supreme Court, *Griggs v. Duke Power Co*, 401 US 424. The US Supreme Court then held that the Civil Rights Act (1964) prohibited indirect discrimination, even in the absence of a relevant textual provision. A famous passage of Chief Justice Burger specifies that: "The objective of Congress [...] was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favour an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests, neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices."

[1274] For Dagmar Schiek, it was one of the rare cases of "legal transplant" from Anglo-American to European law. In "Chapter Three – Indirect Discrimination," in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, eds. Dagmar Schiek et al. (Oxford: Hart Publishing, 2007), 324.

[1275] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Official Journal L 180, 19 July 2000), Article 2. By excluding nationality, the Directive's scope of application is narrower than the ICERD.*

[1276] ECRI, General Policy Recommendation No. 7, National Legislation to Combat Racism and Racial Discrimination, Adopted on 13 December 2002. CRI(2003)8, see, the recommendation on the definition of indirect racial discrimination, at 5.

[1277] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodie*s (Antwerp: Intersentia, 2005), 41.

inequality in the right to housing for Roma people, is illustrative of this focus. The applicants alleged a violation of ICERD's several articles, since a resolution of the local City Council to build low-cost housing for Roma individuals was revoked after a petition opposing its construction was signed by 2,700 local residents. Taking a substantive rather than a formalistic stance,[1278] the CERD held that the ICERD's definition of discrimination extends beyond measures that are overtly discriminatory.[1279] It found that in the specific context, that the petition at stake was the primary basis for the revocation of the resolution, which had based on the applicants' ethnicity. Hence, for the CERD, even if the revoked resolution did not mention the Roma, it indirectly established a distinction, exclusion, or restriction of their right based on their ethnicity. Hence, a violation of Articles 2.1(a), 5.d(iii), and 6 of the Convention was found by this Committee.[1280]

354. Regarding the ECtHR's case law, state responsibility in the context of indirect discrimination was considered in cases related to racial discrimination only after a certain hesitance by the Court.[1281] *D.H. and Others*, seen above, was inspired in the relevant external developments in the last decade. A clear substantive approach was taken by firstly disregarding the State intent to discriminate. Furthermore, a violation of Article 1 of Protocol 1 in conjunction with Article 14 ECHR was found because of the unreasonable and non-objective quasi-automatic allocation of Roma pupils to "special classes" through a series of biased tests.[1282] In subsequent similar cases, which together with *D.H.* can be called *The Roma Schooling Cases*, the Court has implied positive duties *i.a.* to put in place measures to assist the applicants in their difficulties to follow the school curriculum.[1283] This Court strengthened its approach

[1278] CERD, *L.R. and Others v. Slovakia*, communication No. 31/2003. Opinion of 7 March 2006, U.N. Doc. CERD/C/66/D/31/2003, § 10.7.

[1279] Id., § 10.5. The CERD, in § 10.4, rejected the State party's comparison of this case with the *Koptova v. Slovakia* (2000) case, in which similar resolutions were openly discriminatory (communication No 13/1998, UN Doc. CERD/C/57/D/13/1998).

[1280] CERD, *L.R. and Others. v. Slovakia*, § 10.4

[1281] While the judgment delivered by the Second Section (2006) had not addressed the concept of indirect discrimination at all, despite comments from third-party interveners (at § 43), the Grand Chamber judgment made a thorough analysis of the correspondent legal developments at the time in Europe and abroad (§§ 82-91).

[1282] ECtHR, *D.H. and Others v. Czech Republic* [GC], § 107.

[1283] *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 177 ECHR 2010; and *Horváth and Kiss v. Hungary*, no. 11146/11, § 104, 29 January 2013. Other similar cases include *Sampanis and Others v. Greece*, no. 32526/05, 5 June 2008; *Sampani and Others v. Greece,* no. 59608/09, 11 December 2012; and *Lavida and Others v. Greece*, no. 7973/10, 30 May 2013.

by recalling past discrimination and structural deficiencies of the national education systems of the relevant States to address the segregation against this social sector.

This notion of indirect discrimination was further elaborated in the case of *Biao v. Denmark* (2016) in the areas of immigration and citizenship. The applicant (an expatriate naturalized Danish citizen) alleged that the legal period of 28 years after naturalization to enable a Danish citizen to reunite with his spouse in the territory of the respondent State amounted to discrimination in the sense of Article 14 ECHR. The ECtHR found that no case of discrimination could be found on the grounds of citizenship alone, given that that rule had similar effects on all Danish nationals. However, it inquired on whether an instance of indirect discrimination on the bases of race or ethnic origin applied to the case, given the possible detrimental impact of that rule to foreigners acquiring Danish citizenship on a later stage in life. If so, the 28-years rule would pose obstacles for those foreigners.[1284] In examining the relevant legislation, the Court was not persuaded that this rule, which apparently aimed at requiring stronger attachment to the Danish culture, was based only on citizenship grounds.[1285] To the contrary, it seemed to differently affect persons of foreign origin that acquired citizenship on a later stage, who—according to that rule—would be virtually unable to request spouse reunion.[1286] The Court then deduced that, even if the national legislation did not strictly require that a naturalized citizen fulfilled the 28-years period, the vast majority the citizens under the applicant's category would be of a foreign ethnic origin.[1287] Hence, naturalized citizens suffered a disproportional detrimental effect from a apparently neutral legislation, amounting to a violation of the above mentioned articles.

355. Likewise, the CoE's ECRI adopted General Policy Recommendation No. 7 (2002) focused in combating racism and racial discrimination. In this document's definitions, indirect discrimination appears as:

> where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This

[1284] ECtHR, *Biao v. Denmark* [GC], no. 38590/10, § 96, 24 May 2016.

[1285] Id., § 101.

[1286] Id., § 102.

[1287] Id., § 112.

> latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[1288]

In the area of racial discrimination, the examples above underline that indirect discrimination may occur when a face-value neutral rule or practice, which is not aimed at discriminating any specific group, has disproportional effect on that given group. This disproportional effect may well be caused by factors such as legislation and policies elaborated through racially biased processes, prejudice, stigmatization, or misconceptions by the public authorities or by the population at large, which perpetuate pockets of inequality in society.

2.2 - De Facto Racial Discrimination

356. The CERD practice at times refers to *de facto* discrimination, contrasting with *de jure* discrimination, to extend its jurisdiction to inequalities observed in the social matrix in the ambit of public life,[1289] as an attempt to underscore persistent instances of discrimination against usually marginalized groups.[1290] In *Murat Er v. Denmark* (2007), this Committee classified as a *de facto* discrimination against a foreigner applying for a scholarship the mark on his curriculum vitae of a sign identifying him as of non-Danish origin, representing a general practice among teachers and employers that impeded this very group from accessing opportunities for professional training.[1291]

General Recommendation No. 32 on temporary special measures touches upon the issue. The Committee equates *de facto equality* to the very meaning of substantive equality,[1292] denoting practices or circumstances of social life that lead to the unequal enjoyment of rights or that perpetuate inequality in society through norms and

[1288] ECRI, General Policy Recommendation N° 11: Combating Racism and Racial Discrimination in Policing. CRI(2007)39, § 5 (b).

[1289] Patrick Thornberry, *The International Convention on the Elimination of All Forms against Racial Discrimination, A Commentary* (Oxford: OUP, 2016), 114.

[1290] See, Concluding Observations on India, referring to the segregation of Dalits, CERD/C/IND/CO/19 (CERD, 2007); on Slovakia, referring to *de facto* segregation of Roma children, CERD/C/SVK/CO/6-8 (CERD, 2010); on Nicaragua, referring to de facto discrimination against indigenous peoples and communities of African descent, CERD/C/NIC/CO/14 (CERD, 2008); and on China, referring to *de facto* discrimination against internal migrants, CERD/C/CHN/CO/10-13 (CERD, 2009).

[1291] CERD, *Murat Er v. Denmark*, communication No. 40/2007, opinion of 8 August 2007, UN Doc. CERD/C/71/D/40/2007, § 7.3.

[1292] CERD, *General Recommendation No. 32 - The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, adopted on 24 September 2009. UN Doc. CERD/C/GC/32, § 6.

practices by the authorities according that reinforce the values of the dominant groups in society. As seen in Chapter 4, the instances of the *de facto* discrimination denote situations in which unjustified differentiation is not a result of laws explicitly discriminating certain groups. Rather, these instances result that such laws do not take into account inherent social differences.

2.3 - Structural Racial Discrimination

357. Discriminatory occurrences, either direct or indirect, may produce structural effects in society that result in an unequal enjoyment of rights, as seen in Chapter 4. The study of racial discrimination represents a specific niche of such a concern, involving racial stratification,[1293] patterns of exclusion, and perpetuation of "racially" dominant values.

358. Occurrences of structural racial discrimination also pose challenges to the formal concept of discrimination, mainly with respect to the traditional individual concept of (civil and political) rights. The concept of structural discrimination involves considerations on barriers to equal participation in society by certain racially discriminated groups in a number of instances in life. At the same time, structural discrimination may be strongly ingrained in the State machinery itself, leading the victims to sustain obstacles to carry on several obstacles of civil life. A scholar explains these obstacles by stating:

> [these victims] did not think so much about their problems in terms of being victims of racism by other people. It was much more that their daily lives were affected by the administrative regulations, restrictive rules and laws that they felt were the source of structural discrimination.[1294]

Structural discrimination has been a subject of concern for international monitoring bodies. CERD's *General Recommendation No. 19* on racial segregation and apartheid put emphasis on segregation as a State policy by exemplifying the apartheid regime in South Africa. Yet, the CERD transcends the issue of an enforced racial segregation

[1293] For a comprehensive study on social stratification and exclusion, see International Council for Human Rights Policy, *Racial and Economic Exclusion, Policy Implications*, 2001, available at [https://www.yumpu.com/en/document/view/22460521/racial-and-economic-exclusion-policy-implications-the-ichrp], accessed on 7 February 2019.

[1294] Reetta Toivanen, "Contextualising Struggles over Culture and Equality: An Anthropological Perspective," *apud* Patrick Thornberry, "Confronting Racial Discrimination: A CERD Perspective", 256 (exposing the limitations of a categorical differentiation between direct and indirect discrimination).

regime by reminding States parties that conditions of segregation may be the result of actions by non-state actors,[1295] "without any initiative or direct involvement by the public authorities."[1296]

One appalling instance of structural racial discrimination is the caste system, a form of inherited social stratification based on religion that permeates other social areas, including work[1297] and economic status.[1298] The CERD, alarmed by this phenomenon of discrimination on the grounds on descent of ICERD's Article 1,[1299] dedicated *General Recommendation No. 29* to address the issue by taking a firm stance:

> [s]trongly reaffirming that discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights.[1300]

The extent to which structural racial discrimination is pervasive in societies is shown by the case of India. After India's independence in 1947, the country officially abolished its caste system and prohibited it through the adoption of a new constitution (1950). However, the scourge was not eradicated and caste based discrimination continued throughout the nation. The mere discontinuation of a segregation system by law, though signifying an indispensable step, was not enough to eradicate it. Together with society at large, State and other civil institutions still imbued with misconceptions and stigmas of the ancient official segregation regime contribute to its

[1295] CERD, *The Prevention, Prohibition and Eradication of Racial Segregation and Apartheid*, adopted at its forty-seventh session, U.N. Doc. A/50/18, p. 140 (1995), § 3.

[1296] Id., § 4.

[1297] Caste discrimination is also couched in the terms of "work-and-descent". See Clifford Bob, "Dalit Rights Are Human Rights: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue," *Human Rights Quarterly,* 29, no 1 (2007): 167.

[1298] See, José L. Alves, "Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination," *University of San Francisco Law Review* 42 (2008): 965.

[1299] In the preparatory works of the ICERD the addition of term "descent" was a proposition of India, very much willing at the time to raise a domestic issue internationally. This term is understood by the inheritance of attributes that are reputed positive or negative by society. See, Mr. Rodriguez, CERD member: *Thematic Discussion on Discrimination Based on Descent*, 16 August 2002, CERD/C/SR.1532, § 18; and David Keane, "Descent-Based Discrimination in International Law: A Legal History, *International Journal on Minority and Group Rights* 12, no. 1 (2005): 96.

[1300] CERD, *General Recommendation No. 29, Discrimination Based on Descent*, adopted at its sixty-first session*,* U.N. Doc. HRI/GEN/1/Rev.6 at 223 (2003), 7.

perpetuation.[1301] Addressing caste discrimination, as a form or *de facto* segregation may entail a set of actions and policies, such as reservation policies (affirmative action), wide sensitization campaigns for the State staff and the public at large, and even direct provision of goods and services for this sector.

359. Structural racial discrimination has also been framed into supranational litigation. In the late 2000s in the wake of the *Roma Schooling Cases*, the ECtHR has produced remarkable developments. In *D.H and Others*, the Grand Chamber set an interesting precedent by admitting an instance of indirect indiscrimination. Firstly, the Court relied upon general statistics rather than individually reviewing the case of the 18 applicants to find a prima-facie instance of racial discrimination. Given that it was established that the legislation under review, as applied, had a disproportionate effect upon members of the Roma community, the Court held that the latter undeniably suffered prejudicial treatment.[1302] Secondly, as this Court developed its reasoning on both indirect and structural discrimination against Roma pupils, it went as far as stating that:

> The State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in alleged neutral tests.[1303]

Hence, for the Court, those "alleged neutral tests" indicated the existence of ingrained discrimination in that society which cannot be addressed only by prohibiting discrimination against Roma pupils. Instead, a set of measures to fix the *de facto* racial discrimination at stake (*e.g.* review of the test methodology, integration of Roma pupils into the mainstream classes) could imposable on the respondent State.

Admittedly, human rights courts cannot remain passive when hearing allegations of structural racism. Yet, a proactive and courageous stance, particularly on the plight of

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[1301] Similar example of *de facto* segregation could be drawn from the situation of the black persons living in slums of major cities in Brazil. Like India, Brazil is an emerging democracy in which patterns of segregation are not a result of any government action. See, João H.C. Vargas, "Apartheid Brasileiro: Raça e Segregação Residencial no Rio de Janeiro," *Revista de Antropologia* 48 no. 1 (2005): 75-131.

[1302] ECtHR, *D.H. and Others v. the Czech Republic* [GC], § 209. See, Huber Smekal and Katarina Šipulová, "DH v Czech Republic Six Years Later," *Netherlands Quarterly of Human Rights*, 32 no. 3 (2014): 300; Olivier de Schutter and Annelies Verstichel, "The Role of the Union in Integrating the Roma: Present and Possible Future," *European Diversity and Autonomy Papers - EDAP 2/2005* (2005), 28l. On the role of the Racial Directive; Roberta Medda-Windischer, "Dismantling Segregating Education and the ECtHR. D.H. and others vs. Czech Republic: Towards an Inclusive Education?," *European Yearbook of Minority Issues* 7 (2007): 40-42, commenting on the Grand Chamber judgment.

[1303] ECtHR, *Horváth and Kiss v. Hungary*, no. 11146/11, § 116, 29 January 2013.

Roma pupils, comes at the cost of important considerations. Firstly, the Court's pronouncement above implies duties of a broad and unclear scope. It tackles the question of long-term discrimination without at least hinting on exactly which measures are to be taken. Secondly, as the ECtHR itself has not for instance endorsed the mandatory nature of affirmative action,[1304] it becomes difficult for the parties at stake to know what are the specific obligations at stake in order to address structural racial discrimination. In such matters, States have a margin of discretion to choose a reange of measures and to set set specific goals and timeframes, as will be seen in Chapter 8.

360. With regard to the institutional role of supranational mechanisms, the ECtHR inevitably touches upon policy matters (like in the above-mentioned cases) through broad statements. But, as seen in Chapters 6 (§ 300 above), these mechanisms, subsidiary in nature, face institutional limitations in order to entertain structural discrimination. Moreover, depending on the powers a given court is endowed with to award reparations, the chances of implementation on the ground–especially implementation in favor of the people that matter—will vary substantively. Despite that international courts have to a large extent settled the issue of statistics as means of proof of discrimination, many countries remain hesitant to disaggregate data into race or ethnicity or are still in the process of developing a relevant methodology. These shortcomings deserve specific analysis within the particularities of racial discrimination, which are addressed in the following chapters (in particular Chapter 9 Section 4.2).

2.4 – Racial Discrimination by Non-State Actors

361. The so-called indirect *Drittwirkung* of human rights law, as studied in Chapters 1 and 4, is naturally also manifest in the case of racial discrimination. The ICERD's definition of discrimination *by effect* under Article 1 is construed as holding States responsible for acts committed by others than their own agents.[1305] Its Article 4

[1304] See Chapter 6, § 255.

[1305] See, e.g. *L.K. v. The Netherlands*, related to harassment of a foreigner by neighbours who refused him to settle in the same area*; General Recommendation No. 32*, § 23, explaining the "protect" limb of State obligations under the ICERD.

(a) and (b), dedicated to (racial) hate and discriminatory speech, refers also to violations committed by both State and non-state actors[1306].

For instance, the IACtHR, in *Advisory Opinion OC-18/2003*, derives from its own case law and other sources the principle of State international responsibility for acts committed by private actors to reach the conclusion that:

> […] States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination[1307]

362. In similar vein, the ECtHR was confronted with violations perpetrated by non-state actors when ruling on cases of violence against Roma, which implies an obligation to unveil the racist motives in each incident. In *Beganović v. Croatia* (2009), revolving around the beating of a Roma man by a group of seven friends, this Court built upon the above understanding to underscore:

> The Court considers the foregoing to be necessarily true also in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals[1308]

363. Here too, an *a priori* responsibility imposed by treaties or case law deserves detailed consideration. Although it can be said that the third-party effect can be applied to every single case of racial discrimination, as any form of human rights violation, the operationalization of such a bold statement requires a better examination. As will be evidenced in Chapter 8, the obligation to prevent or redress instances of racial discrimination cannot be understood in neutral terms. Instead, it should also tackle the inherent obstacles some racially discriminated groups face it obtaining redress for the discrimination sustained. Hence, the duty to protect takes specific contours in this context.

364. As concluded in Chapter 6 (Section 3.1), the knowledge of a violation, as a parameter to delimit the scope of a positive obligation concretely, has differentiated

[1306] In Chapter 9 (section 5), this study will elaborate further on the extent of positive obligations in relation to this phenomenon.

[1307] IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, § 153.

[1308] ECtHR, *Beganović v. Croatia,* no. 46423/06, § 94, 25 June 2009. Similarly: *Rantsev v. Cyprus and Russia*, no. 25965/04, § 232, ECHR 2010 (extracts); *Fedorchenko and Lozenko v. Ukraine*, no. 387/03, § 41, 20 September 2012; and *Škorjanec v. Croatia*, no. 25536/14, 28 March 2017 (generally).

contours in the field of discrimination. In similar vein, this parameter has to be considered in the context of racial discrimination, which also differs from the general standard, as will be seen in Chapter 8 (Section 1.5).

365. Likewise, the severity of the impact sustained by a victim of racial discrimination cannot be a straightforward replication of the general theory of positive obligations. Instead, in a similar vein with the conclusions reached in Chapter 6 (Section 4), the severity of the impact is to be assessed according to the specificities of the experiences sustained by a given individual suffering racial discrimination. Further analyses thereof, in specific contexts, are made in Chapter 9 (Section 2).

3 – The Evolving Law on Racial Discrimination and the Question of Different Lifestyles

366. Naturally, international human rights law in relation to racial discrimination has evolved, as have other areas of law and discrimination. The ICERD, though more descriptive in terms of State obligations, can by no means be regarded as a perennial and detailed code of rights and obligations.[1309] The somewhat amorphous definition of racial discrimination has required interpretation efforts in order to increase its legal precision and to keep it significant in light of the present-day conditions. After all, "race" (the subject matter of this Convention) is marked by a non-definition.[1310] The ICERD drafters deliberately did not elaborate a categorical definition thereof,[1311] despite delineating respective grounds of discrimination under Article 1. Racism, a main toxic manifestation of discrimination, is social construct,[1312] and biological or "scientific" arguments to justify racism are today devoid of any credibility. Pseudoscience that explained racial superiority through science[1313] has been fully

[1309] To the contrary, the CERD has constantly reaffirmed that the ICERD is a living instrument, and "must be interpreted and applied taking into account the circumstances of contemporary society", as in *General Recommendation No. 32*, § 5.

[1310] Compare with the fluid and evolving concept of disability under the CRPD and the concept of gender, as applied by the CEDAWCttee.

[1311] Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial* Discrimination (Leiden: Brill Nijhoff 1980), 49.

[1312] See similar discussions in Chapter 4 on the irrelevance of physical or biological considerations in discrimination, in general social model of disability (§ 218 above), but on the focus on the social factors leading to discrimination, such as biases and prejudices.

[1313] Throughout history, race has been a rather fluid and circumstantial concept, adjusted according to political, scientific and economic drivers of society along time. See a convincing historical account by

discredited by the recent advancement of biogenetics.[1314] Therefore, as in other fields of discrimination, racial discrimination has gained new contours by different forms according to evolving social concepts, most notably by the recognition of a number of identities internationally.

3.1 - Indigenous Peoples

367. Driving away from an international political scenario marked by anti-colonialism, integrationist[1315] and biological racism[1316] during the 1960s the ICERD worked to answer new societal demands. These demands included the recognition of particular ways of life of given social groups, implying a substantive approach to treat differently those groups that are intrinsically different. In this vein, the CERD expanded the relevant Convention's initial objectives by paying increased attention to marginalized minorities through the works under its institutional mandate. The attention to indigenous peoples within the CERD jurisdiction represents a fine example of the CERD's original objectives.[1317] The CERD has asserted in this regard that "the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration," [1318] shifting from an integrationist to a pluralist approach.

368. Not only the CERD, but also the IACtHR derives expansive obligations from the ACHR, which emphatically recognizes the protection of indigenous peoples in

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Ali Rattansi, *Racism, A Very Short Introduction* (Oxford: OUP, 2007), 20-44. Phrenology, an influential pseudo-science during the 19th century in Europe, served as a justification for "race" and gender superiority and had a notable impact in laws and policies in that region.

[1314] See the ground-breaking article of Mark D. Adams et al., "The Sequence of the Human Genome", *Science* 291, no. 5507 (2001): 1304-1350, demonstrating that the (little) difference among human beings do not warrant, in genetic terms, the classification of our species by "races", let alone to deduce any idea of superiority among human beings.

[1315] See this philosophy enshrined in ICERD's Article 2.1(e).

[1316] The CERD has since its inception interpreted the ICERD as capturing incidences of racism based on cultural differences and on nationality, for example on the question of the refusal of a bank to offer credit to a foreigner (*Ziad Ben Ahmed Abassi v. Denmark*, communication no. 10/1997. UN Doc. CERD/C/390,. 61-68). See further comments: Ion Diaconu, *Racial Discrimination* (The Hague: Eleven International Publishing, 2011), 57-60.

[1317] See, CERD *General Recommendation No. 23 on the Rights of Indigenous Peoples*, adopted at its 51st session (1997): "[i]n many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized" (§ 3).

[1318] Id., § 8.

light of their particular relationship with the land and nature. This unique relationship impacts the ways indigenous peoples enjoy fundamental rights. By means of evolving interpretation[1319] of the right to property (ACHR Art. 21), the IACtHR has embraced the concept of "communal use" of land, essential to the enjoyment of indigenous culture and a means to secure food and clean water[1320] for present and future generations.[1321] From such expansive interpretation follow new obligations flowing from Article 21 ACHR (right to property), such as the demarcation of indigenous lands, the conduct of prior consultations and the protection of the lands originally occupied by indigenous peoples, as seen in detail in Chapter 8, Section 1.3.

3.2 - Roma/Gipsies/Travelers

369. On the part of the ECtHR, the recognition of customary lifestyles of Roma/Gipsies/Travelers, in relation with their (semi)nomadic tradition, has added a new meaning to Article 8 ECHR. The landmark *Chapman v. the UK* (2001) still retains its importance within this Court's docket as one more example of the elasticity of that article in favor of discriminated groups. In view of the ECtHR's meticulous approach in departure from its precedents, it is all the more important to revisit this case in order to firmly recognize such a new identity within the scope of the ECHR. The applicant challenged the domestic court's judgment that denied a Roma family authorization to a caravan site on the land owned by the applicants.[1322] The Grand Chamber's majority, on the question of whether the lifestyle of the Gypsies raised an issue within the scope of private and family life under the ECHR, held:

> The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravans therefore

[1319] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, § 148.

[1320] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, § 167, referring to the CERD's jurisprudence.

[1321] Id., § 149.

[1322] A very similar case had been lodged earlier before the ECtHR, *Buckley v. the United Kingdom*, 25 September 1996, *Reports of Judgments and Decisions* 1996-IV.

> have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.[1323]

As a result, the Court held that in principle there exists "a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life"[1324] in line with the general principle held in *Thlimmenos*.[1325] The Court, however, did not find a violation of Article 8 ECHR, as it afforded a wide margin of appreciation to the domestic authorities.[1326] During the recent decades, the cases related to Roma rights developed considerably, together with a wider acceptation of the obligation to consider inherent differences of certain groups. The cases related to discrimination of Roma children in schools reinforced the impetus of the Court to review its methodology, such as the stringency of the review and the acceptance of statistics to prove indirect discrimination. Accordingly, the methodology by which positive obligations are construed by the Court in relation to Roma cases has developed considerably. [1327] Those obligations include the consultation with the affected communities, the designation of areas in which Romas may camp, and in certain cases the provision of sanitary facilities and protection of Roma families' home in case of evictions. Those several obligations are dealt with in detail in Chapter 8.

4 - Vulnerability in the Context of Racial Discrimination

370. In Chapter 4 it was made apparent that the debates on the emerging concept vulnerability within doctrine and practice of equality and non-discrimination indicate a need for a more principled legal approach in order to justify special legal obligations for vulnerable groups. From such a concept, originated from non legal fields, but that is progressively incorporated in human rights practice, a further step to better grasp the normative justifications and consequences of considering a group vulnerable was

[1323] ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 73, ECHR 2001-I.

[1324] Id., § 96, ECHR 2001-I; *Connors v. the United Kingdom*, no. 66746/01, § 84 27 May 2004.

[1325] ECtHR, *Chapman v. the United Kingdom* [GC], § 126.

[1326] See further discussions in Chapter 8 (Section 2.1.1.1).

[1327] E.g. ECtHR, *Connors v. the United Kingdom*; *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012; *Winterstein and Others v. France*, no. 27013/07, 17 October 2013; and *Bagdonavicius and Others v. Russia*, no. 19841/06, 11 October 2016, all of them attaching great attention to the Roma appalling housing situation Europe-wide.

attempted in Section 5.3. The theoretical outcomes of that session will be applied herein to the specific context of racial discrimination.

4.1 – Groups in Question

371. An array of case law and relevant international works has pointed out that certain social clusters are considerable "vulnerable" due to traits associated with their nationality, ethnicity, and "race"—*e.g.* the Roma/Gipsy/Travelers,[1328] indigenous peoples,[1329] Dalits,[1330] migrants and asylum seekers,[1331] Afro descendants,[1332] stateless persons,[1333] and persons with albinism.[1334]

The process of *qualifying* a "vulnerable group" is a result of the perception of inequalities sustained by these clusters by courts and monitoring bodies. This process is driven by pressure groups or political decisions that influence human rights standards. This qualification is an improvement of the "suspect classification" approach, indicating broadly that the individual or group in question has been historically victim of discrimination.

This qualification is also contextual, varying considerably among countries and regions according to the different situations of enjoyment of rights by these groups and the correspondent level of protection afforded by the State. Not surprisingly, for instance, indigenous people are emphasized more in this context by the Inter-American system than the ECtHR. Another valid regional comparison is the European

[1328] ECtHR, *D.H. and others v. the Czech Republic (GC)* cited above; CERD, Concluding Observations on Russia, CERD/C/RUS/CO/20-22 (2013).

[1329] IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, § 189.

[1330] HRCttee, Concluding Observations on India, CCPR/C/79/Add.81 (2000), § 15; CESCR Concluding Observations on Nepal, E/C.12/NPL/CO/2, (2008) § 42.

[1331] ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 251, ECHR 2011 (asylum seekers); IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, §§ 112-115; IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251 (irregular migrants); CERD, Concluding Observations on Japan, CERD/C/JPN/CO/7-9 (2014).

[1332] CERD, Concluding Observations on Paraguay, CERD/C/PRY/CO/4-6 2016.

[1333] IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, § 179.

[1334] See: UN HRC Resolution A/HRC/RES/28/6 (2015), "Independent Expert on the Enjoyment of Human Rights by Persons with Albinism", establishing the respective special procedure mandate.

focus on the Roma, while the Inter-American system has consistently focused on the disturbing situation of afrodescendants.

While it would be impossible (even inappropriate) to establish a rigid "vulnerability test," it is important to recognize common approaches from the several human rights monitoring bodies in this regard in order to provide elements to courts and policy makers, which may improve coherence in their decision making processes. As seen in Chapter 6, this very issue lies at the center of tensions between the so-called inflation of rights and the risk of courts and policies deny special attention to groups that actually in need thereof.

4.2 – The Dynamics of Vulnerability in the Context of Racial Discrimination

372. In Chapter 4 (Section 5.4), a very basic conceptual framework for the issue of vulnerability in international human rights law was proposed. This subsection will apply the same general componets thereof to the ambit of racial discrimination.

4.2.1 - Racial Discrimination as a Specific Violation Affecting Specific Groups

373. Racial discrimination - both direct and indirect - in itself produces disparate effects on ethnic minorities and foreigners in that the discrimination is a form of violation that targets specific groups and not others. Whether racial discrimination occurs by an intentional act of the State by private parties or is of a structural nature, an unavoidable result is the unequal enjoyment of rights of certain racially disadvantaged groups vis-à-vis the remainder of society. For instance, ethnic-racial profiling compromises freedom of movement and the presumption of innocence of blacks or foreigners but not of whites or nationals. Likewise, (racial) hate speech is aimed specifically at specific social sectors under the wrong assumption that they are a social evil. Moreover, the former apartheid regime, which established by law unjustifiable differences (discrimination), inherently imposed different rights-layers between white and black South Africans. Hence, racial discrimination, regardless of the form it assumes, may render certain groups *more vulnerable* than others.

4.2.2 - Propensity to Sustain Violations

374. The disparate impact doctrine, commonly used litigation, emerged from the US legal practice. Approaches related to this doctrine range significantly from the plain *intent-based theory*[1335] through a spectrum[1336] that finds the *effects-based theory*[1337] on the opposite edge.[1338] When identifying an instance of racial discrimination, a court's focus is at the demographics at stake in order to assess any unequal enjoyment of rights based on race or similar grounds. Hence, when a given adverse impact affects proportionally more members of certain racial-ethnically group than the non-concerned counterparts, state responsibility may be engaged.

In this regard, the ECtHR's *D.H. v. the Czech Republic* (2007) is particularly telling. The Court noted that most of the Roma pupils enrolled in that school were allocated in the so-called "special classes" assigned to children with learning disabilities. At the same time, the majority of students in these classes (as proven by statistics) were of Roma origin. Thus, it was decisive for the Court to look into the disparate effects of the schooling policy and, specifically, to the *representation rates* of Roma pupils in the "special classes" vis-à-vis the non-Roma counterparts.[1339] Beyond a mere declaration that Roma are a vulnerable group, a logical conclusion of such qualification is that, in demographic terms, a larger proportion of this group in comparison to non-members of this group was more likely to be (mistakenly) assigned to inferior classes, showing a suspect differential treatment that required a better explanation from the respondent State.

[1335] As held in the case International Brotherhood of Teamsters v. United States, 431 U.S. 329 (1977).

[1336] Including the "fault theory", as applied in *Washington v. Davis*, 426 US 229 (1976).

[1337] As espoused by *Griggs v. Duke Power Co*., 401 US 424 (1971), whose aim is to challenge the face-value discrimination. Compare with ICERD Art. 1, on the definition of racial discrimination and Art. 13 of the EU Racial Directive.

[1338] For thorough analyses of the relevant US case law, Pamela L. Perry, "Two Faces of Disparate Impact Discrimination," *Fordham Law Review* 59, no. 4 (1991): 523-595; and Michael J. Perry, "The Disproportionate Impact Theory of Racial Discrimination," *University of Pennsylvania Law Review* 125, no. 540 (1977): 540-589.

[1339] ECtHR, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §190, showing that only 1.8% of non-Roma pupils were placed in special schools, whereas Roma pupils in Ostrava assigned to special schools was 50.3%. See also *Wallace de Almeida v. Brazil,* in which the IACHR detected statistically larger propensity of blacks being murdered in slums, which reflected an obligation of specific due care on the police when operating in those areas.

4.2.3 - The Severity of the Impact

375. When a society as a whole sustains a negative impact of an economic, environmental, or other nature, this impact may be more intense for certain marginalized communities.

Indeed, a first intuitive scenario is of a natural disaster. There may be negative circumstances in this event that given ethnicities experience in a higher severity in comparison with the remainder of society in terms of *e.g.* physical hardship,[1340] property loss and damage,[1341] and mental health deterioration.[1342]

376. In addition from this initial scenario, other circumstances too may demonstrate that racially discriminated groups sustain disproportionate effects of negative social events. For example, the recent economic downturn that impacted to a certain extent the whole of the population produced harsher effects on migrant workers. The ILO has alerted that in such times, though a given country may not perceive substantive unemployment, members of this sector may be constrained to accept worse labor conditions, including insufficient wages in order to maintain their jobs and ensure any sort of income.[1343] Their hardship is further deteriorated when times of economic recession are accompanied by waves of discrimination and xenophobia, worsening the perception towards them within societies.[1344]

[1340] Julia L. Perilla et al., "Ethnicity, Culture, and Disaster Response: Identifying and Explaining Ethnic differences in PTSD 6 months after Hurricane Andrew," *Journal of Social and Clinical Psychology* 21, no. 1 (2002): 20–45.

[1341] Alice Fothergill et al., "Race, Ethnicity, and Disasters in the United States: A review of the Literature," *Disasters* 23 (1999): 156–173.

[1342] Tatiana Davidson et al., "Disaster Impact Across Cultural Groups: Comparison of Whites, African Americans, and Latinos," *American Journal of Community Psycholo*gy 52 (2013): 97–105.

[1343] ILO, The Impact of the Financial Crisis on Migrant Workers, - Migration management and its linkages with economic, social and environmental policies to the benefit of stability and security in the OSCE region" Second Preparatory Conference, Tirana, March 2009, in particular, pp. 2-3.

[1344] Ibid.; UN HRComm, "Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination – Political Platforms which Promote or Incite Racial Discrimination." Updated study by the Special Rapporteur on contemporary forms of racism, racial intolerance, racial discrimination, xenophobia and related intolerance, Doudou Diène. Adopted on 13/01/2006. UN Doc. E/CN.4/2006/54, p. 4; Paulo T. L. Arantes, "The Conflicts Between Freedom of Expression and the Prohibition of Discrimination: The Sophistication of the Discourse and Re-thinking of the Current Standards," *DEHIDELA* 18 (2008): 26.

4.2.4 - Hindered Avenues of Redress

377. The extent to which a certain group may be (racially) vulnerable, relies also on the realistic opportunities this group has to *effectivelly* access avenues of redress for the violations sustained. It was seen in Chapter 4 (Section 5.4.2.1 C) that obstacles to remedies have a non-negligible discriminatory component and are a cause of vulnerability, which is naturally also present in the specific case of racial discrimination.

As a general principle, the ECtHR stated in *M.S.S. v Belgium and Greece* (2011) that "accessibility of a remedy in practice is decisive when assessing its effectiveness."[1345] Effectiveness (resulting in such accessibility) is not a monolithic construct. Instead, it relies on several variables, including the position of the victims.[1346] An appropriate survey on the matter should not only be victim-oriented, but also consider the victims' obstacles to obtaining redress in view of any racial motive for such obstacles.

In practice, these obstacles may appear already at stage of seeking the State justice apparatus, given the prominent individual character of a number of civil and criminal procedures that at times fail to capture the collective or perspectives of claims of certain groups, such as indigenous peoples.[1347] Connected to this failure, essential cultural aspects of these groups[1348] or traditional means of dispute settlement may be disregarded.[1349]

Further, by contrasting low rates of complaints with the compelling information from other sources on instances of racial discrimination,[1350] it becomes apparent that many

[1345] ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 318, ECHR.

[1346] Kevin Boyle and Annelise Baldaccini, "A Critical Evaluation of International Human Rights Approaches to Racism," in *Discrimination and Human Rights: The Case of Racism*, ed. Sandra Fredman (OUP: Oxford, 2001), 63. The IACtHR speaks of a duty of adaptability of procedures in order to consider the socio-economic and cultural conditions of indigenous peoples, in e.g. *Yakye Axa v. Paraguay*, § 63. See also Art. 40 of the UN Declaration on the Rights of Indigenous Peoples; and CESCR *General Comment No. 16*, speaking of inclusive venues of redress for the most disadvantaged men and women, § 21.

[1347] Ministerio Publico de la Defensa Argentina, *Acceso a la Justica de los Pueblos Indígenas* (2010), 12. Available at: [www.mpd.gov.ar], accessed on 7 February 2019.

[1348] OHCHR, UN Guiding Principles, Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011), 29.

[1349] Id., 44.

[1350] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies*, 200; and CERD, Concluding Observations on *e.g.* Morocco CERD/C/MAR/CO/17-18 (2010); and Estonia CERD/C/EST/CO/10-11 (2014); IACHR, The Situation of People of African Descent in the Americas (2011), OEA/Ser.L/V/II.Doc.6, §§ 120-122.

victims of racial discrimination are invisible to the justice apparatus. Such invisibility is even more palpable in the case of "the most destitute and marginalized groups of society."[1351] This invisibility may be compounded by language barriers[1352] and low literacy, which often go hand-in-hand with racial exclusion and ignorance about the justice system.[1353] In this regard, the ECtHR in *M.S.S. v. Belgium and Greece* (2011) made a clear point about the quality of the information provided to the victim on a *non-refoulement* procedure. The information offered was rather ambiguous[1354] and the appointed to assist the applicant had not advised the letter of an upcoming interview with the authorities, which the applicant eventually missed.[1355]

The complexities of the procedures for redress, which can disproportionately impact victims of racial discrimination in obtaining redress, represent a further obstacle. Therefore, the simplification of procedures,[1356] the broadening of the respective avenues of redress,[1357] and conciliation in minor cases[1358] are options to remove obstacles to remedies. Legal assistance[1359] in civil and criminal cases is often essential to victims identify the appropriate avenues and to enhance prospects of success.

Given their legal statuses, marginalized segments of society may be discouraged from seeking redress by fears of suffering persecution and reprisals.[1360] For instance, when irregular migration is considered a criminal offense[1361] or is subject to detention,[1362] migrants may fear appearing before the authorities even in serious circumstances. In

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[1351] Theo Van Boven, Report on Seminar Expert (2000), p. 2; IACHR, The Situation of the People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, 5 December 2011, § 120, *fine*.

[1352] See e.g. UN Doc. A/HRC/17/30/Add.3, §§ 80–81.

[1353] See e.g. HRC, Expert Mechanism on the Rights of Indigenous Peoples Report: Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples (2013), UN Doc. A/HRC/24/50, § 4.

[1354] ECtHR, *M.S.S. v Belgium and Greece* [GC], §§ 112 and 308.

[1355] Id. § 311.

[1356] CERD, Expert Seminar, 1978, item 7.

[1357] Id., item 6.

[1358] Ibid.

[1359] Id., item 9. See also the UN Trafficking Protocol. Art. 6.2 (a).

[1360] IACHR: "The Situation of People of African Descent in the Americas," § 123.

[1361] See, HRC, Report of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/20/24 (2012), §§ 13 and 14, stating that irregular entry and stay of aliens can never be per se considered a criminal offense.

[1362] Directive 2008/115/EC has been substantially criticized in this regard, like in Anneliese Baldaccini, "The EU Directive on Return: Principles and Protests," *Refugee Survey Quarterly* 28, no. 4 (2009): 114-138.

Rantsev v. Cyprus and Russia (2010), the ECtHR demonstrated a circumstance where turning over to the police a non-national (victim of sex slavery) posed a serious threat to that victim's safety.[1363] It transpired from the facts that her trafficker threatened the victim if she filed a complaint about her trafficker. The police returned her back to her trafficker and she was found murdered hours later.[1364]

At times, the personnel handling initial complaints may manifest structural racism by downplaying a victim's claims or by stigmatizing victims, thus compromising the chances of success from the outset. In the Americas, it has been said that "[i]t is very difficult [for Afro-descendants] to have access to effective judicial protection because they are stigmatized and discriminated against."[1365] As the ECtHR has stressed, dealing with complaints seriously is essential to maintain public confidence in the State's justice organs.[1366]

Moreover, equality of arms may be seriously compromised in litigation against powerful actors, such as transnational corporations, particularly if relevant litigation involves complex matters such as (extra)territorial and multiple jurisdictions, procedural standing, corporate law, and international cooperation.[1367]

4.2.5 – Unequal Participation in Decision-Making Processes

378. Apparently neutral laws and policies that cause racial discrimination *in effect* lie on the core of the deficiencies of the political decisional processes, even within democratic societies. A main cause of such distortion can be attributed to the inadequate participation of racially marginalized groups who are unable to imprint their own perspectives in mainstream decision-making processes. Making matters worse, there is a risk that, when the concerned groups are not properly heard, laws

[1363] See, Jean Allain, underscoring the systematic sex industry involving trafficking and slavery of alien women from former Soviet countries, "Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery," *Human Rights Law Quarterly* 10, no. 3 (2010): 546-557, explaining on how the foreign sex industry in Cyprus came out of the shadows on the wake of this case.

[1364] ECtHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 20-25, ECHR 2010.

[1365] IACHR, "The Situation of People of African Descent in the Americas", § 240.

[1366] ECtHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII: "in order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing."

[1367] OHCHR, UN Guiding Principles, Implementing the United Nations "Protect, Respect and Remedy" Framework, 29.

and rules affecting them are based on prejudices and misconceptions that aggravate the discrimination at stake.[1368]

It was not without purpose that Article 5(c) ICERD ensures equal rights "in the conduct of public affairs at any level," which was reinforced by the Durban Declaration and Programme of Action (DDPA).[1369] In the same sense, the UN Rapporteur on contemporary forms of racism noted the importance of political participation of ethnic, cultural, and religious minorities in the mainstream policy-making of social, economic, and cultural affairs of societies in order to heighten their leverages.[1370]

In Europe, ensuring equal representation has been an object of litigation before the ECtHR in its first judgment on Protocol 12 ECHR. In *Sejdić and Finci v. Bosnia and Herzegovina* (2009), the Court held that the term "Constituent Peoples" in the Constitution and electoral legislation *de facto* excluded the applicants' Bosnian Jew and an ethnic Roma origin by neglecting a wider ethnic composition of the country,[1371] even if this term aimed at appeasing the ethnic conflict the country experienced. Through its reasoning, the Court implied that a democratic society should substantively participative by allowing that *de facto* that marginalized groups have voice and vote in the national political institutions. If this Court, *mutatis mutandis* has implied a general obligation of participation in public decision-making processes,[1372] substantive participation should also imply that participation of these groups are heard in public affairs.

The motto "nothing about us without us" in the context of racial equality gains considerable importance in the area of indigenous rights. The ILO Convention 169 on Indigenous Peoples and Tribal Groups ensures that indigenous peoples have the right to define their own priorities in the formulation and implementation of programs and policies that may affect them directly.[1373] Likewise the UNDRIP proclaims the right

[1368] See, similarly, in Chapter 8 the discussions around the ECtHR *Biao v. Denmark* case.

[1369] DDPA, §§ 99, 115, 210 and 213.

[1370] HRC, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (20 February 2008). UN Doc. A/HRC/7/19, § 50.

[1371] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 46, ECHR 2009. Compare with IACtHR's *Yatama v. Nicaragua* (2005), regarding the refusal of a traditional indigenous movement, by the government, to stand in elections, since the new electoral law required it to form a political party and imposed strict requirements.

[1372] See Chapter 2 (Section 1.2.2) and Chapter 4 (Section 4.3.6).

[1373] ILO Convention 169, Art. 7.1

of effective political participation, particularly in its overarching Article 19.[1374] During the last decade, the free, prior, and informed consent (FPIC)[1375] standard has reaffirmed the need to ensure that decisions that affect them are taken in conjunction with them in view of their distinctive cultural patterns and the deficiencies of the traditional democratic processes in involving marginalized sectors.[1376]

4.2.6 – Lack of Specific Data

379. In addition to the inadequate political participation that racially marginalized groups may face, invisibility is also present in policies (either group-targeted or for the public at large) designed without appropriate information that diagnose the precise status of enjoyment of rights of these groups. Accurate data, such as disaggregated statistics or qualitative data, increase the chances of allocating resources to the scarcest areas of groups in need and improve the chances of effective policies and strategies of inequality reduction. Yet, as will be seen in Chapter 8 (Section 2.1.2), an obligation to elaborate equality data in international human rights law has not been fully developed to date.

4.3 – Vulnerability and Intersectionality in the "Racial" Context

380. Understanding and applying the concept of intersectionality within the context of vulnerability may serve as a useful tool for judges and policy-makers to prevent common risks inherent to the mere "vulnerability badging," such as essentialization, stigmatization, and paternalism. The analysis of the intersections between racial and other forms of discrimination was mainly initiated by black feminists, when

[1374] Article 19 reads as follows: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

[1375] See, for instance, HRCttee *General Comment No. 23: The Rights of Minorities (Art. 27),* noting that the enjoyment of cultural rights of minorities "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them", adopted on 26 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5, § 7. See also *Apirana Mahuika et al. v. New Zealand*, communication No. 547/1993. Views of 27 October 2000, U.N. Doc. CCPR/C/70/D/547/1993 (2000), § 9.5; CERD's *General Recommendation No. 23*, § 4(d).

[1376] HRC, Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, UN Doc. A/HRC/12/34 (2009), § 42. See an analysis of the relevant obligation in Chapter 8, Section 1.3.

comparing the impacts of discrimination in black men and black women. In a seminal work, Kimberle Crenshaw imparts that:

> Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.[1377]

381. The author subsequently refutes the simple sum of the relevant factors, denoting a failure of public polices that, instead of considering the perspectives of black wome,n simply consider a "women's experience" or a "black experience."[1378] This *synergy* between multiple factors experienced by a single individual,[1379] according to De Beco, contrasts with a mere compound discrimination by which "the various grounds of discrimination can be neatly disaggregated" and considered individually and which would also be experienced by those people who are discriminated against on the basis of only one of these grounds."[1380]

Intersectionality has appeared as a response to the single-ground approach, which had its initial importance for political activism and for legal pragmatism in that it provided a simple approach to provide a remedy in law for some well defined categories.[1381] However, as seen above, this single-ground approach has to a certain extent contributed to a "static understanding of human rights" by assuming that all victims experience violations the same way,[1382] leading to essentialism.[1383] This criticism to

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[1377] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracial Polities," *The University of Chigago Legal Forum* 1 (1989): 140. See further discussion from the same author, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review*, 43 (1991): 1241-1299.

[1378] Kimberle Crenshaw, "Demarginalizing the Intersection of race and sex", ibid. See also Sandra Fredman and Erika Szyszak, "The Interaction of Race and Gender," in *Discrimination: The Limits of Law - Studies in Labour and Social Law*, eds. Bob Hepple and Erika M. Szyszczak (London: Mansell Publishing, 1993): 221.

[1379] Iyiola Solanke, "Putting Race and Gender Together: A New Approach to Intersectionality," *Modern Law Review* 73 (2009): 731.

[1380] Gauthier de Beco, "Protecting the Invisible: an Intersectional Approach to International Human Rights Law," *Human Rights Law Review* 17, no. 4 (2017): 636 (given that those concepts are interchangeable and overlap, ibid.).

[1381] Solanke, "Putting Race and Gender Together: A New Approach to Intersectionality", 724.

[1382] Johanna E. Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations," *Emory Law Journal* 52 (2003): 80.

[1383] See, in general, Trina Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master 's House," *Berkeley Journal of Gender, Law & Justice* 10, no. 1 (1995): 1-30.

human rights came along the new approaches in social sciences, particularly the poststructuralist and postmodernists schools that questioned the static and unitary nature of the Self.[1384] After all, reading intersectionality in international human rights law is a manifestation of evolutive interpretation of human rights treaties in view of the current social and intellectual debates on equality that permeate law. Intersectionality is arguably nowadays a main component of the principle of substantive equality.

382. However, transposing this synergy into the existing international human rights law system, in particular the UN treaty-body system, has shown a key challenge of capturing intersectionality into a set of separate treaties dealing mainly with one type of discrimination. Accordingly, emphasis is given to general categories (e.g. women, children, etc.), in detriment of groups who would also fall within the personal scope of other treaties.[1385] As a matter of fact, the discrimination language itself may lead to a reductionist approach. For Makkonen, discrimination "refers primarily to the making of an unjustified distinction."[1386] He contends, for example, that trafficking in women (in connection with all its negative impacts) is not only an issue of discrimination, but also one of violations of the right to life, security, and dignity.[1387]

It is true that intersectionality has received special attention by the UN system,[1388] in particular by the treaty bodies. A wealth of practice thereby produced, too large to be demonstrated in the present study, shows that the CEDAWCttee has been most

[1384] See, e.g. Angela P. Harris, "Foreword: The Unbearable Lightness of Identity," *Berkeley Journal of Gender, Law & Justice* 11, no. 1 (1996): 207-221.

[1385] De Beco, "Protecting the Invisible: an Intersectional Approach to International Human Rights Law", 637. Johanna E. Bond speaks of a "fractured understanding", referring to times when intersectionality was an incipient practice at the treaty bodies, in "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations," 93.

[1386] Timo Makkonen, "Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore," Institute for Human Rights Åbo Akademi University, 2002, 12.

[1387] Makkonen adds that "[b]ut both in every-day language, as well as in law, one does not necessarily label something as 'discrimination' even if there is an element of discrimination involved.", ibid.

[1388] See, the Report of the UN Special Rapporteur on Violence against Women, which underscores racist attitudes and perceptions involved in trafficked girls and women of ethnic or racial backgrounds (UN Doc. A/CONF.189/PC.3/5), § 17. The UN High Commissioner for Human Rights has recognized that "[t]he United Nations, governments, intergovernmental and non-governmental organizations have often addressed racial and gender discrimination as two separate problems, leaving women faced by multiple forms of discrimination unsure of where to turn for redress", in OHCHR, "Gender Dimensions of Racial Discrimination" (2001) 10.

consistent in this approach.[1389] Already in 1992, regarding violence against women,[1390] CEDAWCttee had taken stock of the pertinent ethnic factors, including forced marriages, polygamy,[1391] and son preference.[1392] On women and health, this Committee underscores the specific needs of women in several situations.[1393] Noteworthy is the CERD's *General Recommendation No. 25*, specifying that "certain forms of racial discrimination may be directed towards women specifically because of their gender"[1394] and that "some forms of racial discrimination have a unique and specific impact on women."[1395]

383. Both CEDAW and CERD embraced an intersectional perspective in actions and policies related to temporary special measures (TSMs).[1396] The CESCR has dealt with racial and gender discrimination in the recent *General Comment No. 20* beyond a mere compounded fashion.[1397] With a sizeable potential, the new ICRPD contains in its Article 7 and in its preamble (*viz.* multiple and aggravated forms) an intersectionality approach.[1398] The CRPD's practice reveals a true development of this potential, expanding to areas like indigenous origin,[1399] migratory status, [1400] and rural

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[1389] See, Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies*, (at 77) noting also that the CERD was the first Committee to entertain this issue on states periodic reports, (id., 42).

[1390] CEDAWCttee, *General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003), §11.

[1391] Id., §14.

[1392] Id., § 20.

[1393] CEDAWCttee, *General Recommendation No. 24, Women and Health*, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003), § 6.

[1394] CERD, *General Recommendation No. 25 on Gender-Related Dimensions of Racial Discrimination*, U.N. Doc. HRI/GEN/1/Rev.6 at 214 (2003), § 2, citing coerced sterilization of indigenous women, abuse of domestic workers abroad, sexual violence against women belonging to particular ethnic groups in detention or during armed conflicts, among others.

[1395] Id., § 3.

[1396] CEDAWCttee, *General Recommendation No. 25* § 12; CERD, *General Recommendation No. 32*, § 7. Note, however, the different languages used by the CEDAWCttee("compound negative impact"), and by the CERD ("intersectionality" between *e.g.* race, gender and religion).

[1397] CESCR, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, § 2), U.N. Doc. E/C.12/GC/20 (2009), § 17.

[1398] See for further discussions: Theresia Degener, "Intersections between Disability, Race and Gender in Discrimination Law," in European Union Non-Discrimination Law and Intersectionality, Investigating the Triangle of Racial, Gender and Disability Discrimination, eds. Dagmar Schiek et al. (London: Routledge, 2016), 36. Compare with the Inter-American Convention Violence against Women, Article 9, imposing the obligation to take special account of the vulnerability of women belonging to ethnic or racial groups, as well as other status (migrant, refugee and displaced).

[1399] CRPDCttee, Concluding Observations on Mexico, CRPD/C/MEX/CO/1, 2014.

areas.[1401] However, procedural issues, such as limited competence *ratione personae* of the non-discrimination bodies, present some challenges for that system[1402] to better deal with intersecting discriminations.

384. On the other hand, courts and monitoring bodies of general human rights treaties have lesser procedural hurdles to deal with intersectionality, including through litigation. There seems to be no obstacle for these bodies to entertain the synergies among the different grounds of discrimination or vulnerability factors, through their general non-discrimination clauses. For instance, a single court may profit from the *acquis* from more than one specialized discrimination treaty and evaluate how the victim at stake experiences several types of discrimination. However, the relevant practice is somehow incipient. Some commentators criticize the ECtHR for having missed an opportunity of addressing ethnicity and disability in the *D.H. and Others* judgment.[1403] In the Americas in the case *Simone Diniz v. Brazil*, the IACHR could have had a better assessment of the situation of black women who are particularly discriminated in the context of working as maids.[1404] A finer example in the Americas is probably *Rosendo Cantú v. Mexico* (2011), in which it was noted critical obstacles represented by the "combined discrimination" faced by poor and indigenous women to seek redress for gender-based violence.[1405]

[1400] CRPDCtee, Concluding Observations on Qatar, CRPD/C/QAT/CO/1, 2015.

[1401] CRPDCttee, Concluding Observations on Kenya, CRPD/C/KEN/CO/1, 2015.

[1402] See: De Beco, "Protecting the Invisible: an Intersectional Approach to International Human Rights Law", 658, proposing fostered collegial work among the treaty bodies, joint general comments/recommendations and even joint cases. States and civil society should also be encouraged to report on specific intersectional discrimination issues that occur domestically, in order to have a more precise understanding of more diverse contexts. States should also be required to report on those occurrences in their common core documents.

[1403] Anna Lawson, "Disadvantage at the Intersection between Race and Disability: Key Challenges for EU Non-Discrimination Law," in *European Union Non-Discrimination Law and Intersectionality*, ed. Dagmar Schiek et al, (London: Routeledge, 2016). In *Garib v. The Netherlands* (2017), two dissenting judges underscored the need for the Court to take a stronger stance in this regard (no. 43494/09, § 34-39, 6 November 2017). In *S.A.S v. France* (2014), the Human Rights Centre of the University of Ghent, as a third-party intervener, proposed that the veil ban at stake generated indirect and intersectional discrimination on the grounds of sex and religion. In the CEDAW's *Ms A. S v. Hungary* (views of 29 August 2006, UN Doc. CEDAW/C/36/D/4/2004), on forced sterilization of a Roma woman, the CEDAWCttee also missed an opportunity to apply its practice in intersectionality to a contentious case.

[1404] See, Paulo L. Arantes, "O Caso Simone André Diniz e a Luta contra o Racismo Estrutural no Brasil," *Direito, Estado e Sociedade* 31 (2007): 149. Compare with *Wallace de Almeida*, where the victim's condition was considered particularly vulnerable (woman of African descent, poor, living in a slum) § 150.

[1405] IACtHR, *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, § 169, explaining the particular obstacles for an indigenous woman to report sexual violence and obtaining pertinent support services.

385. Further, in EU law, different levels of protection may pose difficulties for applicants to benefit from an intersectional perspective in their discrimination claims, which may lead to de facto hierarchies among discriminated groups. Directive 2000/43 (Racial Directive) covers vast areas of social life, whereas Directive 2004/113 fails to deal with access to goods and services and education, creating a higher scope for racial discrimination in detriment of sex equality.[1406]

386. Far from theoretical exercising, such lack of an intersectional perspective may lead to ineffective policies, such as positive obligations involving reasonable accommodation. The Dutch Equal Treatment Commission dealt with the case of a blind woman of Turkish origin who was requested by her employer to take a skill test, normally in written form. Given her visual impairment, the employer agreed to apply the test orally but refused to offer it in Braille. She refused because Dutch was not her mother tongue. This Commission reached an interesting outcome, refusing the causation relation between her origin and the provision of an oral test alone. Yet, given her difficulties in taking the test in oral Dutch (concurring with the visual impairment), the Commission held that the test results would be less reliable. Hence, both reduced language skill and visual impairment were reasons for holding the employer in discrimination on the grounds of ethnic origin and disability.[1407]

The persistent *conceptual disorganization* of the subject matter,[1408] (marked by exhaustive theoretical exemplification and little policy insights), may still lead to essentialism and further stigmatization. Some new approaches, such as triangular gender-race-disability study organized by Dagmar Schiek and Anna Lawson[1409] offer new paths for uniting theory and practice in this matter. Since vulnerability and intersectionality are dynamic and contextual concepts, dialogues between

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See also CEDAW, *Alyne da Silva Pimentel Teixeira v. Brazil*, views of 25 July 2011, UN Doc CEDAW/C/49/D/17/2008, emphasizing the special vulnerability of women of African descent exacerbated by regional, economic and social disparities, in the case of a black women who had inadequate prenatal emergency care in a hospital based in a poor area, § 7.7.

[1406] Dagmar Schiek, "Organizing the EU Law around the Nodes Race, Gender and Disability, in *European Union Non-Discrimination Law and Intersectionality*, 15 and 16.

[1407] Dutch Equal Treatment Commission, cited by Susanne Burri, "Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission's Case Law, in *European Union Non-Discrimination Law and Intersectionality*, pp. 104-105.

[1408] Timo Makkonen, "Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore," 55.

[1409] *European Union Non-Discrimination Law and Intersectionality, Investigating the Triangle of Racial, Gender and Disability Discrimination*, ed. Dagmar S. et al (London: Routledge, 2016).

international and local courts, governments, and institutions should also be fostered rather than using pre-fixed intersectional formulas.

Intersectionality, being a component of substantive equality, may require active State actions in order to *really* not leave anyone behind. As will be seen in the next Chapter 8, however, intersectionality has only incipiently been integrated into the case law on (racial) equality and non-discrimination, particularly when it comes to positive obligations. The following Chapter 8, throughout its sections, will seek to identify instances in which case law implies positive obligations in this specific regard.

Concluding Remarks

387. The international legal framework established to combat and eradicate racial discrimination in the 1960s, namely the ICERD regime, is endowed with express State positive obligations in treaty law. Obligations to prevent and address racial discrimination, even in relations between private parties, are part of the express treaty law. The concept of racial discrimination itself sculpted in ICERD Article 1, including discrimination by effect, implies duties of State beyond the mere prohibition for its agents. Rather, encompassing obligations of both individual and structural characters co-exist in this convention text. One such obligation is the expressly mandatory affirmative action clause, under Article 4. The concepts of indirect discrimination and de *facto discrimination* are inherent to the ICERD system, as the relevant Committee has affirmed since its very incipience. From its initial integrationist thrust and limited scope, the CERD has interpreted the relevant Convention far beyond the drafters' intention. Complex issues such as nationality, religion, ethnicity, and a broad range of minorities—including indigenous peoples—form part of the CERD's rich docket. The CERD has developed a comprehensive approach to multiple forms of discrimination.

The substance of the variables of indirect, de facto and structural discrimination had its origins in discrimination law litigation, led to early judgments of the US Supreme Court. Those variables have influenced significantly European courts, including the ECtHR, in a later stage. As a result, for example, the ECtHR took a stronger stance in cases related to the Roma in the late 2000s, mainly through *D.H. and Others*.

In this context, the issue of vulnerability serves as the major justification for the acceptation of differentiated state obligations for specific social strata that do not

enjoy rights on equal footing. Unequal participation in social and political deliberation processes and the disproportionate impact of laws, policies and practices that do not take into consideration the diversity of societies reinforce inequality in rights to the detriment of racially disadvantaged groups. Such strain is worsened by the lack of disaggregated data, which renders these groups invisible in public policies.

Chapter 8 - The Content of Positive Obligations in the Context of Racial Discrimination

Introduction

388. The objective of this Chapter is to provide the reader with a better understanding of the scope of positive obligations in the context of racial discrimination through the texts of international instruments, interpretation of supranational human rights courts and UN monitoring bodies, and the scholarly works devoted to this very topic.

389. As seen in Chapters 2 and 5, this Chapter will present the several types of positive obligations divided into (a) the duty to protect and (b) the duty to fulfill, which is sub-divided into the obligations to facilitate, promote, and provide.

The duty to protect (Section 1), through this chapter will include the obligation to prevent racial discrimination through the enactment of legislation (Section 1.1) and through monitoring and regulations inclusing in specific cases, such as the demarcation of indigenous lands (Section 1.2.1), the elaboration of impact assessment studies to protect ethnically sensitive groups (Section 1.2.2), and the necessary care to prevent racial discrimination in privatization processes (Section 1.2.3). Further, this Chapter will shed light into the obligations to prevent acts racial discrimination directly by the authorities (Section 1.4). Thereafter it will assess the obligation to redress acts of racial discrimination (Section 1.5), viz. the obligation to investigate such acts (Section 1.5.1), the obligation to prosecute such acts (Section 1.5.2) and the obligation to afford reparations to victims of racial discrimination (1.5.3). Throughout this survey, this Chapter will highlight the specificities of the due diligence standard to the very context of this Part III.

The survey on the duty to fulfill, in this Chapter, will provide a deeper understanding of the specificities of the relevant obligations in the case of racial discrimination. For instance, within the duty to facilitate (Section 2.1), it will shed light into the obligation to recognize particular lifestyles (Section 2.1.1) illustrating with the cases of the Roma and of indigenous peoples. The state of the law on the obligation to elaborate racial equality data will be analyzed in Section (2.1.2). The question of affirmative action programs, generally discussed in Chapter 5, will be deepened in this Chapter, assessing advanced proportionality tests to the relevant obligation

(Section 2.1.3). The duty to facilitate documentation and registration will touch upon emerging debates on more defined obligations, particularly on the issue of immigration (Section 2.1.4 The duty to promote racial equality will provide the reader with a better understanding of the relevant standards in racial discrimination (Section 2.3). The duty to provide will focus on interpretation of courts proceedings and on the issue of housing for the Roma (Section 2.4).

This Chapter will also attempt to identify areas in which general (CPR) monitoring bodies seek authority from specialized (thematic) treaties (and relevant interpretation), in order to fill normative gaps existing in the general CPR treaties or to strengthen their own reasonings as a whole. Not only the ICERD, which may be regarded as an authoritative specialized source, but also the EU (racial) anti-discrimination law and the works of the ECRI are important sources in this regard.

1 – The Duty to Protect

390. The duty to protect, as seen in the homologous Chapter 2 (Part I), encompasses a series of State obligations to prevent or alternatively redress human rights violations. Chapter 5 (Part II) examined several instances of States' failure to prevent or redress inequality and discrimination, according to the specificities of the relevant types of violations. This section will build upon the previous chapters and will apply the general principles to the specific context of racial discrimination.

1.1 - Enactment of Legislation to Prohibit Discrimination

391. In spite of the specificity of several international instruments, there is a shared understanding of the existence and of an obligation to enact legislation prohibiting racial discrimination. This obligation is evident—either through specific treaty provisions, or praetorian interpretation. Unlike with violations in general (and to a certain extent general discrimination), the type of norm required to prohibit racial discrimination is indeed legislation (approved by the competent legislative branch), including criminal legislation in certain cases.

1.1.1 – Enactment of Legislation for Specific Crimes

392. The most concrete example of an obligation to enact legislation in this context is enshrined in the UN Genocide Convention, requiring States parties to enact criminal legislation to prevent and redress genocide under Article V (at least in relation to the acts enumerated in Article III of that Convention).[1410] The ICJ reaffirmed that duty in the *Bosnia v. Serbia* case (2007)[1411] in that the Genocide convention imposes a State obligation to penalize acts committed by private individuals[1412] besides those individuals acting in any official capacity. [1413]

393. For its part, the ICERD under Art. 2.1(d) stipulates a minimum obligation upon States parties to enact legislation prohibiting racial discrimination, including by enacting legislation:

> Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.[1414]

The CERD affirmed that the expression "as required by circumstances," implies a discretion on the means to implement the obligation[1415] to enact discrimination instead of an option for States Parties to prohibit or not racial discrimination.[1416] Hence, this positive obligation is certain under that Convention.

In conjunction therewith, Article 4 ICERD imposes a set of three basic obligations: (a) to declare the dissemination (and relevant assistance) of ideas based on racial superiority, as well as acts of violence, hatred or incitement to racial discrimination an

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[1410] Namely genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.

[1411] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43*, § 144.

[1412] UN Genocide Convention, Article IV: "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

[1413] Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?," *European Journal of International Law*, 18, no. 4 (2007): 640, for whom, a positive duty of diligence under this Convention is certain, although she criticizes that the ICJ did not articulate sufficiently on a negative obligation on the State itself not to commit genocide.

[1414] ICERD, Article 2.1(d).

[1415] See, Drew Mahalic and Joan G. Mahalic "The Limitation Provision of the International Convention on the Elimination of All Forms of Racial Discrimination," *Human Rights Quarterly* 9, no. 1 (1987): 86.

[1416] CERD, Report 18th Session, 389th meeting. UN Doc. CERD/C/SR.389 (1978), § 20.

offence punishable by law; (b) to declare illegal and prohibit organizations and activities that promote and incite racial discrimination from functioning; and (c) to prohibit public authorities and institutions from promoting and inciting to racial discrimination. Those acts, together with the prohibition of financing these acts[1417] represent a minimum content to be penalized.[1418] The explicit phrasing of the above obligations implies that the ICERD itself is not self-executing but requires additional legislative efforts from States parties,[1419] regardless of whether the ICERD is an integral part of a country's domestic law or whether racial discrimination is already prohibited through common law or by constitutional law.[1420]

Although Article 4 contemplates criminal sanctions,[1421] these sanctions are reserved for the most serious and intentional circumstances.[1422] The ICERD by no means imposes a duty to implement criminal legislation across the board. Even in the case of hate speech, the CERD encourages a panoply of legal measures, including civil and administrative sanctions[1423] and promotional measures (Section 2.3), according to the gravity of the case and the specific circumstances at stake.

394. In Europe, the ECRI has defined that criminal law should minimally cover genocide [1424] and hate-related acts, such as public incitement, insult, threats, defamation, trivialization, and dissemination of racist ideas.[1425] The acts of public incitement to violence, hatred or discrimination, "public insults and defamation," or respective threats should be criminalized in their intentional forms only.[1426] A balanced normative framework is required from States whose legislation should be

[1417] Id., § 5, stressing that financing of the other activities is to be included in the list of activities to be punished.

[1418] Id., § 3.

[1419] CERD, "Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination", UN Doc. A/CONF/119/10 (1983), § 216.

[1420] CERD, Report 18th Session, 387th Meeting, UN Doc. CERD/C/SR.387, pp. 27-28, § 3; Report of 25th Session, 557th Meeting, UN Doc CERD/C/SR.557 (1982), p. 79.

[1421] Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *The American Journal of International Law*, 79, no. 2 (1985): 297; and Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *International and Comparative Law Quarterly*, 15, no. 4 (1966): 996-997.

[1422] CERD, *General Recommendation No. 35 - Combatting Racist Hate*, adopted on 26 September 2013, UN Doc. CERD/C/GC/35, § 12.

[1423] Id., § 9.

[1424] ECRI, General Policy Recommendation No. 7, CRI(2003)8, § 19.

[1425] Id., § 18.

[1426] Ibid.

overall effective, dissuasive, and proportional, contemplating also alternative penalties for less serious offenses.[1427]

1.1.2 - Aggravated Circumstances for Racially Motivated Crimes

395. Given racial discrimination's pervasive effects, there is convergence among both UN and European that there is a positive obligation to consider racist motivation as an aggravating circumstance for other crimes established domestically.[1428]

1.2 - Monitoring and Regulation

396. A set of measures of monitoring and regulation have been identified as necessary to prevent or avoid recurrence of racial discrimination by both private and public sectors. The CoE's ECRI has been active in *e.g.* recommending the creation of systems of monitoring racist incidents by the police in the context of racial profiling.[1429] Regarding discrimination in employment, ECRI has also recommended the creation of specialized domestic bodies mandated to (a) implement, (b) monitor, (c) establish accountability mechanisms, (d) set indicators and benchmarks, (e) gather, (f) and monitor equality data.[1430] Likewise, the CERD has reinforced that monitoring instances and tendencies of racial discrimination is key for compliance with the ICERD.[1431]

Three important areas involving special protection of racially discriminated groups have been identified in international human rights law that deserve a detailed analysis, as follows:

[1427] Id., § 22.

[1428] Id., § 21; CERD*, General Recommendation No. 34 - Racial Discrimination against People of African Descent*, 3 October 2011. UN Doc. CERD/C/GC/4, § 36; Durban Declaration and Programme of Action (2001), § 84 and Durban Review Outcome (2009), § 84; Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal law, Article 4.

[1429] ECRI, General Policy Recommendation No. 11, CRI(2007)39, § 12.

[1430] ECRI, General Policy Recommendation No. 14, CRI(2012)48 § 10.

[1431] CERD, Concluding Observations on *e.g.* Finland, CERD/C/FIN/CO/19; 2009); Chile CERD/C/CHL/CO/19-21, 2013; and Japan CERD/C/JPN/CO/7-9 (CERD, 2014). See also Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies* (Antwerp: Intersentia, 2005), 196.

1.2.1 - Demarcation of Indigenous Lands

397. In the field of protection of indigenous peoples, which is marked by heightened vulnerability, important Inter-American case law has imposed under Article 21 ACHR (right to property), an obligation to demarcate the lands they traditionally occupy, together with effective monitoring mechanisms.[1432] Those mechanisms are vital to secure their rights,[1433] especially against attacks (invasion) from third parties.[1434]

1.2.2 - Impact Assessment Studies in order to Protect Indigenous Peoples

398. Article 7.3 of ILO Convention No. 169 provides that governments shall conduct studies to assess the impact of development activities that may affect the rights to indigenous land, whose results should be the main criterion for the accomplishment of such activities. In *Saramaka v. Suriname* (2007), the IACtHR stated that socio-environmental impacts should ensure the rights of communal use of land vis-à-vis the projects carried out in such lands and should be designed by independent experts under the State's supervision.[1435]

1.2.3 - Privatization and Concession of Public Services

Concerning privatization and concession of public services, the CERD has recommended *e.g.* that licenses given to privately-owned bars and discotheques be

[1432] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, § 138. On an evolving interpretation of Article 21 ACHR, in this regard, see Chapter 7, Section 3.1.

[1433] IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, §143.

[1434] IACHR, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1, 1997. Chapter VI, §§ 33-40; Indigenous and Tribal Peoples' Rights over Their Ancestral Land and Natural Resources**,** Norms and Jurisprudence of the Inter-American Human Rights System**.** OEA/Ser.L/V/II.Doc.56/09, 30 December 2009, § 114. This positive obligation through case law goes further than the general obligation under ILO Convention 169 to only recognize those lands (Article 14.2).

[1435] IACtHR, *Case of the Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, § 129. See also the UNGPBHR, speaking of a special duty of "corporate due diligence" (Principles 17 through 21), in relation to vulnerable groups, which includes indigenous peoples. These Principles should be guided by State positive obligations to protect this group, see: UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN. Doc. A/HRC/15/37, § 48.

accompanied with an express prohibition of racial discrimination.[1436] While it seems obvious that States do not relinquish their obligations to prevent racial discriminations while delegating public services to the private sector, *de facto* segregation (either created or aggravated by private activities) remains a conspicuous risk of systemic dimensions. Chapter 9 (Section 3) will deal in detail with this obligation, demonstating important components to be taken in consideration by the authorities in order ot prevent and address instances of racial exclusion in the provision of those services.

1.3 - Obligation to Consult the Affected Communities

399. In line with the general obligation to consider the views of the concerned communities on laws, policies, or public matters that may impact their rights,[1437] racial equality and non-discrimination law has devised specific state obligations.

The ECtHR has incipiently required that the authorities consult affected groups in policies that may impact their rights in cases revolving around housing accommodations for Romas and Travelers.[1438]

In treaty-law, Article 6 of ILO Convention 169 provides for the obligation to consult indigenous peoples "through appropriate procedures and in particular with their representative institutions."[1439] It is thus implied that those procedures are to be implemented, enabling participation "at least [to] the same extent as other sectors of the population."[1440] This procedure serves to address historic exclusion of indigenous peoples from the mainstream decision-making processes.[1441]

A failure to establish such a procedure is in itself an instance of discrimination. [1442] Expanding from this initial obligation set by Convention 169, the UNDRIP has

[1436] CERD, Concluding Observations on Norway. U.N. Doc. CERD/C/304/Add.88, § 17. The UNGPBHR a specific obligation to monitor private activities to prevent acts of racial discrimination.

[1437] See, Chapter 2, Section 1.2.2.

[1438] ECtHR, *Bagdonavicius and Others v. Russia,* no. 19841/06, 11 October 2016, §§ 106-108.

[1439] ILO Convention 169, Article 6.1(a), in conjunction with similar provisions on Arts. 15, 17, 22, 27 and 28.

[1440] ILO Convention 169, Article 6.1(b).

[1441] UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/HRC/12/34 (15 July 2009), § 41.

[1442] See, e.g. the ILO's General Observation (CEACR) of 2008, published in the 98th ILC session (2009): "disregard for such consultation and participation has serious repercussions for the implementation and success of specific development programmes and projects, as they are unlikely to

developed the "FPIC"— *free, prior, and informed consent* standard to apply to any activity that might impact their rights.[1443] This standard has been embraced at the UN level,[1444] (including the CERD[1445]) and by the Inter-American system.[1446]

The FPIC standard is to be applied according to the national contexts,[1447] but consultations are to be culturally adapted.[1448] Consultations are deemed *free* in that they should be conducted without threats, harassment, or other pressure by the authorities or powerful private actor interested in the respective project. *Prior*, naturally, refers to an ex ante obligation to establish the relevant consultation process before a given project gets started. *Informed* implies that the community be aware of the potential environmental and health risks inherent that project,[1449] also through "constant communication between the parties."[1450] The *consented* parameter implies that the communities have a meaningful say and sufficient leverage during the

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reflect the aspirations and needs of indigenous and tribal peoples". In *Sarayaku*, the IACtHR adapted its traditional understanding of an obligation to organize the State apparatus to a specific obligation to create channels of dialogue with the indigenous communities through their representative institutions. *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, § 166. This adaptation demonstrates this Court's willingness to include indigenous matters in the mainstream policy-making, but in such a way that is culturally adaptable.

[1443] UNDRIP, Article 10: "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

[1444] HRC, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc. A/HRC/12/34 A/HRC/12/34, §§ 38-53.

[1445] CERD, *General Recommendation No. 23 on the Rights of Indigenous Peoples*, adopted at its fifty-first session (1997), § 4 (d).

[1446] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, § 217 (an indigenous community of around 300 members that had the lands they traditionally occupied progressively taken by the government and private actors).

[1447] ILO CEACR, complaint made under Article 24 of the ILO Constitution by the Federal District Engineers Union (SENGE/DF), GB.295/17; GB.304/14/7 (2006), § 42; see also A/HRC/12/34/Add.6, Appendix A, § 28.

[1448] IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, § 159, including that they must reflect the internal processes of the communities involved. See also: Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Authentic Workers Front (FAT) GB.283/17/1 (2001), § 109.

[1449] IACtHR*, Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, § 208.

[1450] Ibid. Being a procedure of information exchange between the parties involved on the risks related to a policy or project, it entails an obligation by the State to actively acquire knowledge about the likelihood of the violations of the rights of this vulnerable group.

negotiations. The consent should be express rather than tacit.[1451] Though one cannot speak of a veto right,[1452] the authorities should seek to build consent,[1453] according to the options offered by the involved groups.[1454]

400. However, authorities should avoid essentialism by considering indigenous peoples in their diversity, instead of a single unified social cluster. The IACHR has underscored the importance of the effective participation of indigenous women (and to consider their needs) in the design of public policies affecting their lives and their rights,[1455] including by facilitating their participation and to strengthen opportunities of dialogue between their leaders and governments.[1456] In this reagard, a growing number of indigenous peoples have adopted their own consultation protocols, in order to inform the relevant government about their specific needs and interests during the pertinent negotiations, in view of a great diversity among several ethnicities.[1457]

1.4 - Obligation to Prevent Racial Discrimination Directly by the Authorities

401. A number of contentious cases have identified precise circumstances in which the authorities were required to take concrete measures to prevent acts of racial discrimination.

A blatant case of State negligence is well illustrated by the CATCttee's *Hajrizi Dzemajl et al. v. Yugsolavia* (2002). The police had received credible complaints of an imminent attack against a Roma community by villagers, which resulted in the

[1451] In *Awas Tingni*, the Nicaraguan Appeals Court, upheld by the Constitutional Court, decided that the respective community tacitly agreed with the oil exploration affecting their lands (at 53).

[1452] See ILO's CEACR, General Observation 2010, 2011. See also A/HRC/12/34 15 July 2009, § 46.

[1453] See also A/HRC/12/34 15 July 2009, § 48; ILO CEACR on Guatemala, B.294/17/1; GB.299/6/1 (2005), § 53. In the *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, the IACtHR noted that, despite the number of consultation meetings organized, a genuine determination, on the part of the authorities, to seek consensus was absent, § 198.

[1454] In the *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, the communities alleged that they would not be benefited by the oil concession at stake, but merely receiving a compensation in cash, § 127.

[1455] IACHR, Report "Indigenous Women and Their Human Rights in the Americas". OEA/Ser.L/V/II, Doc. 44/17, 17April 2017, § 65.

[1456] IACHR, Report "The Road to Substantive Democracy: Women's Political Participation in the Americas", OEA/Ser.L/V/II, 18 April 18 2011, §97.

[1457] See, OHCHR, Technical Note "E1Proceso Participativo sobre el Derecho a la Consulta Previa y el Consentimiento Previo, Libre e Informado de los Pueblos Étnicos de Colombia, 29 June 2017, available at [http://www.hchr.org.co/files/eventos/2017/Nota-tecnica-protocolos-pueblos-etnicos.pdf], accessed on 7 February 2019; and Carla F. Fredericks, "Operationalizing Free, Prior and Informed Consent". *Albany Law Review*, 80, no. 2 (2017): 429-482.

burning of the settlement. Some officers were present during the attack but did nothing to prevent it, even when they had noted a turbulent situation at the place. As a result, the Committee classified the authorities' behavior as *acquiescence* in the context of the relevant Convention's Art. 16.[1458]

This case contrasts with the ECtHR's *Király and Dömötör v. Hungary* (2017). In this case, the police took several preventative measures to protect a Roma neighborhood from attacks arisen out of a virulent extreme-right march. Measures included vehicle and identity checks, a precautionary strategy, and constant monitoring. The police action was scrutinized by the country's Supreme Court under the principle of proportionality. The ECtHR took the view that there was no obligation to disperse the marchers in light of the legislative framework in place that provided safeguards to the applicants. [1459]

402. Yet, beyond those opposing cases, it is necessary to analyze the contours of the obligation to prevent imminent threats in the context of racial discrimination. The *knowledge*, as a triggering factor of State responsibility, keeps several specificities in the ambit of equality and non-discrimination Chapter 6 (Section 3). A further look into this issue is made in Chapter 9 (Section 1) analyzed in specific contexts.

1.5 - The Obligation to Redress Acts of Racial Discrimination

403. As seen in Chapter 5, the obligation to redress violations cannot be conceived only through a universal standard, particularly when it comes to equality and non-discrimination. Likewise, the extent to which the enactment of legislation (civil or criminal) prohibiting racial discrimination is deemed to be effective hinges on the appropriateness of the legal framework put in place, vis-à-vis the violation at stake and on the level of diligence by which the authorities discharge their procedural obligations. In treaty-law, Article 6 ICERD provides for an obligation upon States to ensure a broad scope of means of redress:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial

[1458] CATCttee, *Hajrizi Dzemajl et al. v. Yugsolavia,* communication, no. 161/2000. Views of 2 December 2002, UN Doc. CAT/C/29/D/161/2000, § 92.

[1459] ECtHR, *Király and Dömötör v. Hungary,* no. 10851/13, §§ 63-69, 17 January 2017.

> discrimination which violate his [or her] human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.[1460]

This Article is indeed inspired by Article 8 UDHR and Article 2 ICCPR[1461] and is in line with the general duty of States to provide reparation for internationally wrongful acts.[1462] Indeed, a specific clause on the obligation to provide redress reinforces the ICERD's mission to be action-oriented. Despite its fragmented and ambiguous wording,[1463] today this article is read according to an ample range of positive obligations to redress racial discrimination in line with the CERD practice. Illustrative of this is the stance taken in *L.K. v. The Netherlands* (1989), in which the CERD applies the due diligence standard within the ICERD. [1464]

404. A specific obligation to provide remedies for acts of racial discrimination finds support in EU Law by 2000/43/EC ("Racial Equality Directive") [1465] and by

[1460] ICERD, Article 6, in connection with the corresponding right of victims of equal treatment before tribunals and public organs administering justice, under Article 5(a) ICERD. See also CERD *General Recommendation No. 15 on Article 4 of the Convention*, adopted at its forty-second session (1993), § 2.

[1461] Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination – (Reprint Revisited)*, (Dordrecht: Brill/Nijhoff, 2014), 64. ICERD's Article 6 seems more comprehensive than homologous Article 10 of the recent Inter-American Convention on Racism, not entered into force until December 2017.

[1462] See discussions in Chapter 3. Article 6 ICERD is contemplated at the Preamble of the Basic Principles on the Right to a Remedy and Reparation. This latter instrument requires that remedies are provided without discrimination (§ 25). See also Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law* (Dordrecht: Martinus Nijhoff, 2004), 127, citing Article 6 ICERD within the general context on the right to redress.

[1463] Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination – (Reprint Revisited),* 63-64, mentioning the discussions on e.g. whether it would imply the creation of special tribunals for racial discrimination (Soviet Union), and the Austrian proposal on "just satisfaction".

[1464] CERD*, L.K. v. The Netherlands,* communication no. 4/1991. U.N. Doc. A/48/18, p. 131, § 6.6 (xenophobic attacks by neighbours against a foreigner and disabled person). See also *Gelle v. Denmark* concluding that the ICERD would be dead letter if the States merely declares punishable acts of racial discrimination (publication of an article associating Somalis with criminals), communication no. 34/2004. UN Doc. CERD/C/68/D/34/2004, (§ 7.2).

[1465] EU, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, covering the areas of work relations, social security and access to social services (Article 3). Official Journal L 180, 19/07/2000 P. 0022 - 0026 Directive 2000, Article 1.

ECtHR's case law itself.[1466] Likewise, the Inter-American system has interpreted that remedies are to be provided to the victims without discrimination.[1467]

As in the general standard, the type of remedy to be offered by the victim (criminal, civil, or administrative) will rely on the violent nature of the violation. Violent crimes will attract stricter standards of a criminal nature,[1468] whereas other cases may be dealt with through civil courts, administrative bodies, ombuds-offices, etc. But a more nuanced view on the level of protection required has been recently emanated from the ECtHR's case law in the area of racist acts. In *R.B. v. Hungary* (2016), an obligation to apply criminal procedures was required where virulent acts, such as racial harassment, verbal attacks, and physical threats against a minority group, reached a certain level of seriousness though not reaching the severity of Article 3 ECHR. In those cases, the need to maintain a firm vigilance in fundamental values of a democratic society requires a higher standard as regards the positive Duty to Protect.[1469] However, as in the case of general discrimination (Chapter 6, Section 4), the threshold of Article 3 may vary according on how the Court deals with the psychological harm caused by those violent non-physical attacks. In less serious cases, there is only a general duty of due process on the authorities. In more serious cases, there is a minimum obligation to conduct thorough investigations through detailed standards. Alternatively, there is a relative obligation to press charges against the aggressor, in which regardless of the decision of the prosecution (to press charges or not) should be duly motivated in view of the applicable human rights standards.

1.5.1 – The Obligation to Investigate Racial Crimes

405. The obligation to conduct an investigation forms part of the core of the due diligence standard, which is clearly manifested, for instance in cases of gross violations, such as genocide. A very representative ruling in this regard was issued by

[1466] ECtHR, *Nachova and Others v. Bulgaria* [GC], § 161, nos. 43577/98 and 43579/98 (recognizing the interplay between under Article 2 (procedural obligation) and Article 14).

[1467] IACHR, *Simone André Diniz v. Brazil*, Case 12.001, Report N° 66/06, § 100 (rejection of a woman in a job interview due to her color), in which it was reaffirmed the racial component of the due diligence standard.

[1468] A fine example is ECtHR, *Abdu v. Bulgaria*, no. 26827/08, § 39, 11 March 2014, in which light physical injuries, in conjunction with the racial insults the applicant received from the skinheads who assaulted the applicant, were reasons for the Court to accept that the threshold of Article 3 ECHR was reached.

[1469] ECtHR, *R.B. v. Hungary*, no. 64602/12, § 84, 12 April 2016.

the Human Rights Chamber for Bosnia and Herzegovina in the *Srebrenica Cases* (2003). This ruling has affirmed clear terms such an obligation as it also applied the jurisprudences of both the ECtHR (Article 3 ECHR) and the ICTY. It held that Serbia was under a positive obligation to investigate those serious atrocities at stake.[1470]

Within the obligation to investigate acts of racial discrimination, a number of standards have been made evident via treaty-law or case law, which will be explained in the following sections:

1.5.1.1 - Revealing the Racist Component of a Violation

406. As seen in Chapter 7, in general, one of the root causes of vulnerability is the invisibility of victims vis-à-vis the state law-enforcement apparatus, requiring from the authorities in charge of the investigations to make supplementary efforts in order to identify racial discrimination motives from the facts and the allegations made by the complainants.

The CERD, in *L.K. v. The Netherlands* (1993), has construed an obligation of due diligence beyond its general concept, giving effectiveness to the very objectives of the ICERD. Hence, unveiling the racial motivation underlying acts of racial violence is the core of that obligation.[1471]

407. The obligation to reveal the racist motive of a violation, within the general due diligence standard, was made clear in a number of regional cases. In *Nachova and Others v. Bulgaria* (2005), the ECtHR held that the positive obligations under Article 2 ECHR required from the States the capacity to enforce criminal "law against those who unlawfully took the life of another, irrespective of the victims' racial or ethnic origin."[1472] Moreover, it held:

> [w]hen investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.[1473]

[1470] HRCmbBE, *The Srebrenica Cases (49 applications)*, Decision on Admissibility and Merits, (7 March 2003), § 190.

[1471] CERD, *L.K. v. the Netherlands*, § 6.6.

[1472] ECtHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII.

[1473] Id., referring to the Chamber Judgment.

Indeed, the Court introduced thereto the *Thlimmenos* paradigm[1474] in the sense that a positive obligation to investigate the killing should consider the necessary distinction between crimes with a possible racial motivation and other cases. It further warned about the gravity of such failures:

> […] Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights[1475]

1.5.1.2 – Unbiased Conduct by the Authorities

408. In neutral terms, the question of judicial impartiality of justice system denotes an obligation of objectivity, meaning that justice operators perform their duties according to the law. This implies generally a duty of abstention. In the case of (racial) discrimination, the question of judicial partiality subtly reveals frequently (racial) biases and prejudices, imprinting in the justice system the values of the dominant groups in a given society. To the extent that these biases and prejudices represent hindrances for discriminated groups to seek redress for the violations sustained, an instance of discrimination is produced. As seen in Chapter 7 (Section 4.2.4), many obstacles for racially vulnerable groups to obtain redress are a result of covert discrimination.[1476] These obstacles can be a result of racial biases or prejudices and, related thereto, the lack of sensitivity on the part of the justice operators to deal with cases of racial discrimination.[1477]

For instance, in *Simone Diniz v. Brazil* (2006), the discontinuation of a criminal complaint by the prosecutor was a result of insensitivity by the justice system on racial issues.[1478] Concomitantly, training and sensitization of the justice system operators are main components within the duty to promote, as seen in Section 2.3.

[1474] Id., referring to *Thlimmenos*, § 44.

[1475] Ibid.

[1476] See CERD*, General Recommendation No. 31 on The Prevention of Racial Discrimination in the Administration and Functioning of Criminal Justice System*, § 19.b, recommending that victims of racial discrimination are treated without discrimination or prejudice, and that hearings, questionings or confrontations they are conducted with the necessary racial sensitivity. (UN Doc. A/60/18, pp. 98-108).

[1477] OAS, "The Situation of People of African Descent in the Americas", OEA/Ser.L/V/II. Doc. 62 (5 December 2011), §§ 15 and 137.

[1478] IACHR, *Simone André Diniz v. Brazil*, Case 12.001, Report N° 66/06, § 103 (rejection of a woman in a job interview due to her color). The IACHR referred to an almost automatic archiving of the

Moreover, the IACtHR has underscored that the judicial protection to be afforded to vulnerable groups should consider *i.a.* the customary law, values, customs, and traditions of those seeking justice.[1479]

1.5.1.3 - Promptness and the Question of Denial of Justice

409. Case law has singled-out instances in which the delays were so serious that they resulted in an expiration of the statute of limitations in respect of the offenders. A standard in this regard is illustrated by the ECtHR's *Angelova and Iliev v. Bulgaria* (2007), which involved a stabbing of Roma victims by two individuals. The authorities identified the assailants at a very early stage of the investigations, but the proceedings were delayed for more than eleven years.[1480] In a more recent case, the ECtHR held that the delay in redressing racial discrimination by the authorities constitutes an autonomous violation of a procedural obligation, as concluded in *Király and Dömötor v. Hungary* (2017).[1481] Other failures compounded in the case, (*e.g.* the insufficient interrogation and identification of suspects), led the Court to express concerns that the public would perceive the failures as condoning the racist march at stake.[1482] Indeed, individuals belonging to racially vulnerable groups that already face several obstacles to obtain redress for the violations sustained are disproportionately affected by such delays.

1.5.2 - The Obligation to Prosecute Racial Crimes

410. While the obligation to investigate is set on a very high standard of diligence, the judicial phase of redress for non-violent crimes is tempered by certain discretion by the authorities. As seen in Chapter 3 (Section 1.4.6), the obligation to bring

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criminal investigations related to racism, due to the apparent racial bias by the justice system in that country, which led the crime at stake unpunished.

[1479] IACtHR, *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, §184 (the government employees who handled the victim's complaint of rape lacked motivation and sensitiveness to deal with an indigenous victim).

[1480] ECtHR, *Angelova and Iliev v. Bulgaria*, no. 55523/00, § 116, 26 July 2007 (violation of a procedural obligation Article 2 ECHR). See also: *Ion Bălăşoiu v. Romania*, no. 70555/10, § 121, 17 February 2015 (no violation of a procedural obligation).

[1481] ECtHR, *Király and Dömötör v. Hungary*, cited above, §§ 79-80, dealing with a violent racist demonstration in a Roma neighbourhood.

[1482] Id., § 80 (violation of Article 8 ECHR).

charges is not absolute but hinges on the principle of expediency, in view of the inherent challenges in choosing the best cases to be brought to justice, even in relation to the most serious breaches of international law.[1483]

The CERD also construes the obligation to prosecute as a non-absolute one. In *A. Yilmaz-Dogan v. the Netherlands* (1988), which revolved around the dismissal of a woman of Turkish origin, the prosecutor chose to discontinue the case. The petitioner claimed that Articles 4 and 6 entailed a duty to actively prosecute allegations of racial discrimination. The Committee, partially accepting the petitioner's argument, stated:

> The Committee observes that the freedom to prosecute criminal offences - commonly known as the expediency principle - is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the raison d'être of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination, in the light of the guarantees laid down in the Convention.[1484]

It was relevant for the Committee in its balanced reasoning that the responding State demonstrated the possibility for judicial review upon the prosecutor's decision on a case-by-case basis, which was deemed in accordance with Article 4 ICERD.[1485] Hence, in cases of non-violent crimes, there exists a reasonable set of procedural avenues available for the petitioner, instead of complex "mechanisms of sequential remedies" up to a ruling of the domestic Supreme Court.[1486]

The discretionary power of the prosecution to bring charges in cases of racial discrimination has been particularly discussed in the context of (racial) hate speech. For instance, the wake of the case *Yilmaz-Dogan*, analyzed above, the Netherlands again invoked the principle of expediency in *L.K. v. The Netherlands* in relation to hate speech. This time, the Committee found a violation of Articles 4 and 6 in that—in addition to the inadequate investigation—the prosecutor did not present a

[1483] For Anja Seibert-Fohr, commenting that such obligation is not absolute, but that the CERD affords a leeway on the prosecution authorities, in *Prosecuting Serious Human Rights Violations* (Oxford: OUP, 2009), 173.

[1484] CERD, *A. Yilmaz-Dogan v. the Netherlands*, communication No. 1/1994. Opinion of 10 August 1998. UN Doc. CERD/C/36/D/1/1984, § 9.4 (approach confirmed in *General Recommendation No. 35*, § 17).

[1485] Ibid. Compare with IACHR, *Simone André Diniz v. Brazil,* § 131, in which the IACHR noted that the applicant had no judicial avenues to challenge the prosecutor's decision to discontinue the charges.

[1486] Ibid.

motivated decision not to press charges.[1487] Hence, the CERD applied a more nuanced analysis of the case. While confirming the relative obligation to press charges as in *Yilmaz-Dogan*, it decided that a freedom not to prosecute should be warranted by sufficient reasons according to the rights at stake.

In specific, the former case *L.K. v. The Netherlands*, in its whole, is an early manifestation of the relative positive obligation to curb hate speech by the "due regard clause" in Article 4 ICERD, according to which States parties:

> […] undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of [racial discrimination] with *due regard* to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention[1488]

This clause reflects a fine balance between the need to combat racial discrimination and the need to ensure safeguards for the enjoyment of other rights.[1489] In two important cases, the ECtHR held that this clause might have some bearing on delimiting the scope of a positive obligation to combat hate speech.[1490] However, nowadays, the tensions between racial equality and freedom of expression have been considerably nuanced by a new understanding by the CERD in this regard. After all, this Committee rejected "a zero sum game where the priority given to one necessitates the diminution of the other."[1491] Further, it reiterates that the "due regard" clause

[1487] CERD, *L.K. v. The Netherlands*, §§ 3.2 and 6.7.

[1488] ICERD, Article 4 (italics added).

[1489] A thin balance was reached during the negotiations of this Article, by the proposal of the United States of the wording "with due regard for the fundamental right of freedom of expression", nuanced by a subsequent Nigerian proposal: "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention." The latter became the final wording of the ICERD, but the relevant amendment was approved only by a vote. See: Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination – (Reprint Revisited*), 49-50. However, many reservations to this Article followed the ratification of ICERD. See David Kretzmer, "Freedom of Speech and Racism," *Cardozo Law Review*, 8 (1987): 445-449; and the statement of the delegate of the United States of America in the General Assembly. UN Doc. A/PV.1406, 53-55.

[1490] ECtHR, *Jersild v. Denmark, 23 September 1994, § 30,* Series A no. 298, (prosecution of a journalist for having interviewed a skinhead); and *Perinçek v. Switzerland* [GC], no. 27510/08, § 258-269, ECHR 2015 (extracts) (denial of the "Armenian Holocaust"). Though not elaborating the ICERD's "due regard clause", the Court reached very similar practical outcomes, particularly in the latter case, through a detailed analysis of the scope of the positive obligation to prosecute an alleged act of hate speech.

[1491] CERD, *General Recommendation No. 35 - Combating Racist Hate Speech,* adopted on 26 September 2013, UN Doc. CERD/C/GC/35, § 45.

under Article 4 applies to "human rights and freedoms as a whole"[1492] and not only to freedom of expression. The scope of an obligation to combat hate speech nowadays consists of a contextual application of the general standards to the variables of a concrete case. Moreover, contemporary case law attempts to tackle this scourge by strengthening promotional duties instead of concentrating in civil or criminal sanctions only. Hence, a positive obligation to prosecute acts of racial discrimination (in particular hate speech or similar acts) is rather variable. In order to engage in the specificities of this variable obligation, including its conditionalities, a closer examination thereof is made in Chapter 9 (Section 5).

1.5.3 – The Obligation to Provide Reparations

As seen in Chapter 5 (Section 1.5), reparations for acts of discrimination form part of the general obligation to provide redress. Specifically the field of racial discrimination, the ICERD's Article 6 requires literally that States parties afford "specific protection and remedies…", including "…just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[1493] The CERD has recommended States parties a wide range of reparations, despite the unclear wording of Article 6 in this regard. At the same time, general monitoring bodies and courts have extended the general obligation to afford reparations to violations involving racial discrimination. The following subsections will examine the several modalities of reparations in this specific field.

1.5.3.1 - Restitution

411. This reparation modality has gained particular momentum in the context of racial discrimination. Resettlement of lands originally occupied by indigenous peoples is a widely-recognized form of restitution. ILO Convention 169[1494] mandates States parties to adopt land reintegration measures as a matter of preference. The Inter-American practice conjugates this modality applying a strict *restitutio in*

[1492] Id., § 19.

[1493] ICERD, Article 6 (excerpts).

[1494] Article 16. In line with CERD, *General Recommendation No. 23*, § 5.

integrum tone, ensuring repossession of their traditional lands and preferring restitution to other modalities. [1495]

Restitution is also recognized in the case of refugees and displaced persons in relation to the properties they were forced to flee. The Guiding Principles on Internal Displacement (1998) emphasize the duty of States to assist returnees' recovery of the lands forcibly dispossessed or left behind upon displacement.[1496] Other restitution measures may imply the recovery of a polluted area, as held in the *Ogoni* cases.[1497] Furthermore, at the UN level, the reinstatement of city council members removed by an act of racial discrimination was recommended by the CERD in *L. R. et al. v. Slovak Republic* (2005).[1498]

1.5.3.2 - Satisfaction

412. Expressions of apologies and acknowledgement of past violations of a racial and ethnic nature are growingly observed in interstate practice. [1499] It remains inconclusive, however, if those good will statements enable other concrete results than improved bilateral relations. Apologies for more complex atrocities are often coined in a solemn but vague wording, given the pecuniary claims they may trigger. [1500] Truth commissions' reports have made plenty of use of the acknowledgment of past and ongoing suffering of marginalized groups.[1501]

[1495] IACtHR, Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs, § 126.

[1496] CommHR E/CN.4/1998/53/Add.2, Principle 29.2, also giving priority to restitution. See also the 2005 "Pinheiro Principles", UN Doc. E/CN.4/Sub.2/2005/17, Principles 2.1 and 2.2, giving preference to resititution. See also CERD, *General Recommendation No. 22: Article 5 and Refugees and Displaced Persons*, 24 August 1996, § 2(c).

[1497] *E.g.* AfCmHPR, *Soc. and Econ. Rights Action Ctr. v. Nigeria* Communication 155/96, 15th Session, AAR Annex V (2000-2001), third resolutive paragraph (*in fine*); and ECOWAS Court of Justice, *Soc. and Econ. Rights Action Ctr. v. Nigeria*, Judgment ECW/CCJ/JUD/18/12, of 14 December 2012, § 121 (i).

[1498] CERD, *L. R. et al. v. Slovak Republic*, communication No. 31/2003. Opinion of 7 March 2005. UN Doc. CERD/C/66/D/31/200310 § 12.

[1499] See, Great Britain apologies for its responsibility for the Irish Famine in the XIX Century; France's apologies for the deportations of Jews by the French to concentration camps during World War II; and USA's apologies to Rwanda, for its recognized inaction on the genocide.

[1500] During the 2001 Durban Conference, the UK and EU "profoundly deplore[d] the individual and collective suffering by the slave trade and slavery." See DDPA §§ 99 and 100. In 2002, Belgium apologized for its involvement in the overthrowing of Patrice Lumumba. Brazil, in 2005, pleaded apologies for the transatlantic slave traffic, which was followed by a series of measures to increase ties between Brazil and some West African countries. On the other hand, France's Sarkozy, proposed a new era of relations with Africa, but without "regret", by the "Dakar Speech" in 2007.

[1501] The Brazilian Truth Commission's Report recommended the authorities to issue a formal statement of apologies for slavery of the Africans and indigenous peoples.

Supranational jurisprudence, on the other hand, has not explored the full potential of this modality. In *Nadege Dorzema v. Dominican Republic* (2012), for instance, the IACtHR's order to organize a public ceremony fell short of capturing the racial component underlying the massacre at stake.[1502] Satisfaction measures serve the goal of bringing about a serious reflection on the gravity of a given violation. Therefore, satisfaction measures should be formulated so as to capture the pertinent systemic failures, operating in connection with measures of non-recurrence to enhance broader societal debates.

Within this modality, cessation orders were granted in relation to the ongoing pollution of an indigenous community land in the *Ogoni* case (2012) by the ECOWAS Court of Justice.[1503]

Other measures include the identification and repatriation of the bodies of the non-national victims[1504] and the publication of the relevant judgment.[1505]

Reopening investigations at domestic level has been considered, particularly when the decision to close a case was taken arbitrarily. However, in the *Ogoni* case before the ACmHPR, the order to re-open the investigations was coined in a rather neutral language, despite the magnitude of the contamination at stake and the impact on the local communities.[1506] Furthermore, in *Nachova and Others*, investigations were re-opened even in the absence of a specific order of the ECtHR in its judgment.[1507] A few orders in the Americas that deal specifically with the attribution of personal responsibilities for the excessive use of force against foreigners and blacks[1508] also miss the opportunity to tackle the invisibility of victims of racial discrimination in the justice system.

[1502] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic* Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, § 265 (killings and other forms of violence against Haitian migrants).

[1503] ECOWAS Court of Justice, *Soc. and Econ. Rights Action Ctr. v. Nigeria*, § 121 (ii).

[1504] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic Merits, Reparations and Costs*, § 253.

[1505] Id., § 263.

[1506] AfCmHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, communication no. 155/96. Decision of 27 October 2001, 15th Activity Report: 2001 – 2002, at 9.

[1507] This case was declared closed by CoE Committee of Ministers' Resolution CM/ResDH(2017)97.

[1508] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs, § 249; IACHR, *Wallace de Almeida v. Brazil*, § 168.1.

1.5.3.3 - Rehabilitation

413. To the extent that an act of racial discrimination leads to important physical or psychological consequences for the victims or their communities, rehabilitation may be required. In large-scale atrocities with a significant racial-ethnic component, comprehensive community healing and victims' rehabilitation have been ordered.[1509] An important measure awarded by the IACtHR in *Nadege Dorzema* was the direct provision to the survivors of police violence with psychological assistance, as well as a cash payment to the survivors living abroad for this purpose. [1510] In the wake of the massacre against a Maya Achí community, the same Court ordered the provision of medical and psychological treatment to the survivors, including treatment by the healers of that community.[1511]

1.5.3.4 - Compensation

414. Monetary compensation has also been awarded when restitution measures are impossible to provide. Though discussed at length under the DDPA process, the duty to pay compensation for past atrocities[1512] has had inconclusive results.[1513]

415. In individual cases, the CERD has dealt with this modality in general terms only[1514] and at times does not even recommend damages at all.[1515] A large sum on compensation (one billion USD) was awarded by the ECOWAS Court of Justice in the *Ogoni* case (2012) to the respective indigenous community in the aftermath of a

[1509] DDPA, § 64.

[1510] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic* Merits, Reparations and Costs, §§ 258-261.

[1511] IACtHR, *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, § 289.

[1512] Durban PrepCom Document, A/CONF.189/PC.1/2, p. 6.

[1513] Not even the comprehensive CARICOM Ten-Point Plan for Reparatory Justice contemplates such modality (available at [http://www.caricom.org/caricom-ten-point-plan-for-reparatory-justice/], accessed on 7 February 2019. However, a right to reparation for victims, and for their descendants had been recommended at the Durban Process 2001. See contribution paper by the former Sub-Commission, UN Doc. A/CONF.189/PC.1/13, § 4(f). See also Kristian Myntti, "The Right to Reparation of Victims of Racial Discrimination in Human Rights Law," *Human Rights in Development Online* 7-1 (2001): 311-312.

[1514] E.g. CERD, *V.S. v. Slovakia*, opinion of 4 December 2015. UN Doc. CERD/C/88/D/56/2014, § 9; *Mahali Dawas and Yousef Shava v. Denmark*, opinion of 6 March 2012. UN Doc. CERD/C/80/D/46/2009, § 9; *Saada Mohamad Adan v. Denmark*, opinion of 13 August 2010. UN Doc. CERD/C/77/D/43/2008, § 9; *L.G. v. Republic of Korea*. opinion of 1 May 2015. UN Doc. CERD/C/86/D/51/2012, § 9, merely specifying that compensation for lost wages (pecuniary damages).

[1515] CERD, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, opinion of 26 February 2013. UN Doc. CERD/C/82/D/48/2010, § 14.

large oil spill.[1516] More specifically, in *Simone Diniz*, the IACHR recommended as pecuniary damage compensation for the violations established in the decision.[1517] As per non-pecuniary damage, the IACHR recommended the provision of a financial assistance for the victim to pursue her university studies.[1518]

1.5.3.5 - Guarantees of Non-Repetition in a Structural Perspective

416. Reparation measures aiming at structural changes play a significant role in international case law. Legislative action is the most frequent type of measures ordered, including the amendment regarding burden proof,[1519] the use of force against racially vulnerable groups,[1520] the removal or relevant obstacles,[1521] and the implementation of consultation rights.[1522] Frequently, the CERD requests review of prosecution policies[1523] and action against the dissemination of ideas of racial superiority.[1524] It has also requested or that statements amounting to hate speech would no longer be protected by freedom of speech provisions.[1525]

Moreover, training of justice and law-enforcement staff is often awarded, including specifically on racial discrimination[1526] and on border control and due process.[1527] Other measures have been the creation of specialized agencies or offices in charge of

[1516] ECOWAS Court of Justice, Soc. and Econ. Rights Action Ctr. v. Nigeria, § 113.

[1517] IACHR, *Simone André Diniz v. Brazil*, § 4.

[1518] Id,, § 3. Similarly, IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs, § 242.

[1519] IACHR, *Simone André Diniz v. Brazil,* § 5.

[1520] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, § 275.

[1521] IACtHR, *Case of the Saramaka People. v. Suriname,* § 194 (c).

[1522] Id., §194 (d).

[1523] CERD, *Mahali Dawas and Yousef Shava v. Denmark*, § 10; *Dragan Durmic v. Serbia and Montenegro*, communication no. 29/2003. Opinion of 6 March 2006, UN Doc**.** CERD/C/68/D/29/2003, § 11.

[1524] CERD, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, § 14.

[1525] CERD, *The Jewish Community of Oslo v. Norway*, communication no. 30/2003. Opinion of 17 June 2003, UN Doc. CERD/C/67/D/30/2003, § 12.

[1526] IACtHR, *Case of the Río Negro Massacres v. Guatemala*, § 291 (agreed by the respondent State); IACHR, *Simone André Diniz v. Brazil*, § 7.

[1527] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, § 270.

the investigation of racial crimes[1528] and the prevention of further racial profiling by the security forces.[1529]

Measures of a broader scope include sensitization campaigns to the public at large on racial discrimination[1530] or on regular and irregular migration, particularly when a pattern of violation is involved.[1531] They can include the drafting of an agreement between the government and the media sector to prevent future racist advertising.[1532]

These modalities, aimed at a *transformation* of past discriminatory patterns in opposition to plain restitution,[1533] risk being merely symbolic if the relevant results are not monitored through benchmarks, indicators, and constant monitoring with the participation of the affected communities.

2 - Duty to Fulfill

417. The Duty to fulfill is divided into three main duties: to facilitate, to provide, and to promote, as seen in the following sections. As will be seen in this section, in the context of (racial) equality and non-discrimination, this duty gains prominence, in view of the purpose itself of this duty, one of supporting, through different means, individuals who are unable to enjoy rights from themselves. Given the wide variety of obligations that may fall within the scope of this type of State duty, a number of obligations that are remarkably identified, either via treaty provision or through judge made law, are analysed in detail, as guise of illustration in this section.

2.1 Duty to Facilitate

The series of actions included into this general duty are aimed mostly at removing the *de facto* obstacles for racially marginalized groups to enjoy their rights. General measures that are put in place according to the discretion of States include mainly the

[1528] IACHR*, Simone André Diniz v. Brazil*, § 9 and 10.

[1529] IACHR, *Wallace de Alemeida v. Brazil*, § 185 (agreed by the respondent State).

[1530] IACHR, *Simone André Diniz v. Brazil*, § 12.

[1531] IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs, § 272.

[1532] IACHR, *Simone André Diniz v. Brazil*, § 9.

[1533] Compare with discussions in Chapter 5, Section 1.5.2.

adoption of programs, strategies or specific measures to facilitate the enjoyment of rights of those who face racial discrimination.[1534]

Other specific measures have been particularly identified within the context of racial discrimination, via treaty law or relevant interpretation, as will be demonstrated in this section.

2.1.1 - Recognition of Specific Lifestyles

418. In the ambit of racial discrimination, the CERD, in line with the ECtHR's *Thlimmenos* ruling, states that "the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration."[1535] This statement is another affirmation of the scope of substantive equality, implying positive duties. A number of developments in case law are important mentioning in this study, in that they reval, within the ambit of substantive equality, a duty of States to recognize specific lifestyles of ethnic groups. The cases of the Roma, from the European system and of indigenous peoples, from the Inter-American system, are worthy specifying, as follows.

2.1.1.1 - The Roma

419. The plight of the Roma gained elevated importance with varying levels of success before European litigation bodies. On the right to housing, the ECtteeSR has taken a strong stance on the obligation to facilitate their itinerant culture. In the early *European Roma Rights Center v. Greece* case (2004),[1536] the applicants sought relief under ESC Article 16 (right to housing), alleging insufficient provision of dwellings and stopping places to meet their specific needs, as well as evictions of both settled and nomadic groupings. The Committee, recalling previous cases involving duties of accommodation,[1537] held that housing in the context of Roma should not merely be provided above sub-standard levels,[1538] but should also include the arrangement of

[1534] See Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies*, 197.

[1535] CERD, *General Recommendation No. 32 - The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination,* adopted 24 September 2009, UN Doc. CERD/C/GC/32, § 8.

[1536] ECtSR, *European Roma Rights Center v. Greece,* collective complaint No. 15/2003, decision on the merits of 8 December, 2004.

[1537] Id., § 21.

[1538] See, e.g. in a later case, in which this Committee held that the settlement of Roma persons in temporary housing containers was unacceptable under the terms of Article 31 ESC, particularly that

stopping places,[1539] according to their cultural lifestyles. More emphatically, in the later case of *ERRC v. Italy* (2005), a violation of the ESC was found by ECtSR, mainly in view of a

> […] failure to take into consideration the different situation of Roma or to introduce measures specifically aimed at improving their housing conditions, including the possibility for an effective access to social housing.[1540]

420. Turning to the ECtHR, in *Chapman v. the UK* (2001), the applicant challenged the national decision that denied her an application for site camping on a land owned by her. Importantly, the Court recognized the applicant's long tradition of a travelling lifestyle to be within the ambit of Article 8 ECHR, regardless of the length of the period that this people settle in a given space.[1541] The Court went on to hold:

> Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.[1542]

421. Nonetheless, on the application of the above understanding, the Court held by a majority of 10 to 7 votes that the denial was a necessary measure to protect the environment at the opposed camping site. A wide margin of appreciation afforded was based on the consensus argument in view of "such a far reaching positive obligation."[1543] This judgment is a fine example of the Court acting in polycentricity. The vulnerability argument, confronted with policy considerations, resulted in a

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high walls were built, isolating them from the rest of the population thus amounting to stigmatization. *Centre on Housing Rights and Evictions (COHRE) v. Italy*, complaint No. 58/2009, § 58. Decision of 12 June 2010.

[1539] Id, § 25. A violation on Article 16 was found given the inadequate provision of stopping places to the concerned group.

[1540] ECtSR, *ERRC v. Italy*, Complaint No. 27/2005. Decision on the merits of 7 December 2005, § 21.

[1541] ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 73, ECHR 2001-I, considering her choice of settling for long periods in view of her child's hindered education possibilities. This ruling represented a departure, as regards the scope of Article 8 ECHR, in relation to *Buckley v. the United Kingdom* (1996).

[1542] Ibid.

[1543] Id., § 98.

stance of judicial deference.[1544] Relevant literature has criticized this judgment, calling it questionable.[1545]

As the issue gained increasing attention,[1546] the ECtHR has developed a more detailed reasoning, requiring robust procedural safeguards,[1547] meaningful consultation with the affected communities,[1548] and a proportionality assessment.[1549] In those circumstances, the merely declared positive obligation to recognize the Roma's traditional lifestyle and to facilitate it (in *Chapman*) has become progressively applicable by the ECtHR. At the same time, the series of Roma housing cases changed their profiles considerably as greater attention was attached to forced evictions of this vulnerable group. Further discussions on this issue will follow in Section 2.4 of this Chapter.

2.1.1.2 – Indigenous Peoples

422. The duty to facilitate through the recognition of the tenure of lands traditionally occupied by indigenous peoples cannot be conceived outside the scope of substantive equality. This obligation flows from the principle that individuals should enjoy the right to property without discrimination.[1550] At the same time, while States are not obliged to provide land to a given ethnic group, they are obliged to modify laws and policies in order to recognize specific of enjoying the right of (communal) land property. Otherwise, treating equally indigenous and non-indigenous on the

[1544] The dissenting joint opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Stražnická, Lorenzend, Fischbar and Casadevall alerted to an undue attachment to the issue of consensus, in a case which actually required an evolutive interpretation.

[1545] See, Frédéric Sudre et al., *Les Grands Arrêts de la Cour Européene des Droits de l'Homme* (Paris: PUF, 2003), 350; Sarah Spencer, "Gypsies and Travellers": Britain Forgotten Minorities," *European Human Rights Law Review* 4 (2005): 335-343.

[1546] See: CoE Commissioner for Human Rights, Recommendation CommDH(2009)5, 17, calling upon European countries to address the particular housing aspects of those groups..

[1547] ECtHR, *Connors v. the United Kingdom, § 88; Yordanova and Others v. Bulgaria*, no. 25446/06, § 105, 24 April 2012.

[1548] ECtHR, *Bagdonavicius and Others v. Russia*, no. 19841/06, § 107, 11 October 2016.

[1549] ECtHR*, Yordanova and Others v. Bulgaria*, § 129; *Winterstein and Others v. France*, no. 27013/07, § 158, 17 October 2013.

[1550] Mattias Åhrén*, Indigenous Peoples' Status in the International Legal System* (Oxford: OUP, 2016), 165-166.

matter of use of land would reinforce dominant values of a given society, thus entailing a form of discrimination.[1551]

Concretely, ILO Convention 169 mandates States parties to take positive steps to recognize the unique attachment of indigenous peoples to the land they traditionally occupy (Art 14.1), to adopt procedures to identify those lands (Art. 14.2), and to create mechanisms to resolve the relevant land claims (Art. 14.3).[1552] These imply simply a duty to recognize an *ex tunc* right over those lands "whether or not such a right was recognized [by the State]."[1553]

423. With a strong resonance of this convention in the Americas, the IACtHR has construed Article 21 ACHR as to entail an obligation to recognize the communal use of indigenous lands. Through an evolving interpretation, *Awas Tingni* (2001) held that the notions of property and possession over the lands do not necessarily equate to the classical conception of property.[1554] Rather, taking only this classical conception would mean to render the ACHR merely illusory by failing to consider the right to property within the cultural and spiritual perspectives of indigenous peoples.[1555] The IACtHR has consistently held that, in order to give effect thereto, States parties are obliged to create an effective mechanism to delimit and demarcate those lands.[1556]

2.1.2 Elaboration of Racial Equality Data

424. As seen in Chapter 5 (Section 2.1.6), the obligation to elaborate specific equality data is obvious in some protection systems (e.g. the CEDAW and the CRPD), whereas in Europe it has not been yet clearly pronounced. However, in the field of

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[1551] See, *e.g.* James Anaya, stating that the recognition of the indigenous traditional use of land is a corollary of the principle of non-discrimination. *Indigenous Peoples in International Law,* 2nd edition (Oxford: OUP, 2012), 142.

[1552] Similarly, UNDRIP, Article 26.1.

[1553] ILO, CEACR, 73rd Session, 2002, observation on Peru, § 7.

[1554] ILO Convention 169, Article 13.1. See in case law: IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, § 145. See also HRCttee: *General Comment No. 23 - The Rights of Minorities (Art. 27)*, 4 August 1994. UN Doc. CCPR/C/21/Rev.1/Add.5, stating that the indigenous peoples' right "to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources" (§ 3.2)**.**

[1555] E.g IACtHR, Case of *Kichwa Indigenous People of Sarayaku v. Ecuador*, § 145.

[1556] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, §§ 153-164; *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, §119; *Case of the Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, §133.

racial discrimination, important developments have occurred even in this region, as demonstrated here.

Globally, political consensus on the use of statistics in the combat of racial discrimination was reached during the Durban Conference (2001) on the collection, compilation, analysis, and dissemination of statistical data in order to assess the situation individuals or groups sustaining racism.[1557] Through the UPR mechanism, an apparent emerging practice among UN member States is observed regarding this obligation.[1558] Those two components reinforce the understanding that the law on positive obligations may include the obligation to elaborate (racial) equality data.

Moreover, the UN treaty bodies regard the use of such data as a fundamental tool in their supervisory function. Guidelines for reporting on the two Covenants require the presentation of data disaggregated by ethnic origin.[1559] The CERD, according its long-standing practice, requires that States parties, when conducting national censuses, collect and provide to the Committee data concerning ethnic diversity, mother tongues, or languages commonly spoken, as well as any other information on "race, color, descent, or nation or ethnic origins."[1560] It emphasizes that

> [i]f progress in eliminating discrimination based on race, colour, descent, or national or ethnic origin (hereinafter racial discrimination) is to be monitored, some indication is needed in the CERD-specific document of the number of persons who might be treated less favourably on the basis of these characteristics.[1561]

1557 DDPA, § 92. See also § 31. The DDPA conditions the issue of collection of disaggregated data to the consent of the victims; to the principle of self-identification; to the exclusive scope of monitoring of the situation of marginalized groups and to the consideration of account social indicators aiming at devising policies to narrow the existing gaps (ibid). This Commitment was renewed in the Durban Review Conference (2009), see the relevant Outcome Document, § 103.

1558 HRC, UPR Reports *e.g.* A/HRC/8/45 (UPR, 2008), on Ukraine; A/HRC/8/45 (UPR, 2008), on Switzerland; A/HRC/10/74 (UPR, 2009), on Montenegro; A/HRC/15/6 (UPR, 2010), on Spain; A/HRC/17/8 (UPR, 2011) on Austria; A/HRC/19/4 (UPR, 2011), on Tanzania; A/HRC/27/4 (UPR, 2014), on Albania; A/HRC/29/8 (UPR, 2015), on Spain; and A/HRC/30/6 (UPR, 2015), on Mongolia.

1559 HRCttee, "Consolidated Guidelines for States Reporting", CCPR/C/66/GUI/Rev.2, § C.6; and CESCR, E/C.12/2008/2, §§ 3 and 10. See recent practice: CEDAWCtteee.g. CEDAW/C/DEN/CO/7 (CEDAW, 2009), on Denmark (minority women), CEDAW/C/RUS/CO/8 (CEDAW, 2015), (nationality of women suffering violence). CRC CRC/C/VEN/CO/2 (CRC, 2007), on Venezuela (afro descendent population); and CRC/C/AUS/CO/4 (CRC, 2012), on Australia (indigenous children).

1560 CERD, "Guidelines for Reporting", CERD/C/2007/1. See also CERD*, General Recommendation No. 32*, stressing the need of accurate data, disaggregated by race, ethnicity and other grounds, with a gender perspective, in order to appraise the specific needs of temporary special measures, § 17.

1561 Id, § 11, including disaggregated data on complaints, prosecutions and sentences issued (Section D).

In the Americas, Article 12 of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance contains a specific provision on the obligation to elaborate equality (disaggregated) data.[1562]

425. In Europe, as seen in Chapter 5 (Section 2.1.6), the General Regulation on Data Protection (GRPD) [1563] poses several conditions in processing data on identifiable individuals who belong to a certain ethnic group ("special categories").[1564] For its part, the Racial Equality Directive simply speaks of an "independent survey concerning discrimination,"[1565] leaving a broad discretion for national implementation and generally expresses the need to elaborate a "national knowledge-base on discrimination."[1566] Yet, data collected by national equality bodies are seldom broken down into ethnicity.[1567]

But, even though the overall European legislation is restrictive on equality data, specific bodies have made the case for collecting such data stronger. In 2015, the ECRI's General Policy Recommendation 15 (on combatting hate speech) reinforces the need to process data more consistently, systematically and comprehensively.[1568] It rejects the argument of failure to elaborate disaggregated data only on the grounds of data protection[1569] (the focus of the GRPD) by requesting States to report in statistical

1562 Article 12: "The States Parties undertake to conduct research on the nature, causes, and manifestations of racism, racial discrimination, and related forms of intolerance in their respective countries, at the local, regional, and national levels, and to collect, compile, and disseminate data on the situation of groups or individuals that are victims of racism, racial discrimination, and related forms of intolerance."

1563 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

1564 Id., in *numerus clausus*, (a) the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and (b) the processing of genetic, biometric or health data "for the purpose of uniquely identifying" a person's sex life or sexual orientation.

1565 EU Racial Equality Directive, Article 13.

1566 Timo Makkonen, Equal in Law, Unequal in Fact – Racial and Ethnic Discrimination and the Legal Response Thereto in Europe, (Leiden: Martinus Nijhof, 2012), 311.

1567 Open Society Foundation, "Ethnic Origin and Disability Data Collection in Europe: Measuring Inequatligy – Combating Discrimination", 19, available at [https://www.opensocietyfoundations.org/sites/default/files/ethnic-origin-and-disability-data-collection-europe-20141126.pdf], accessed on 7 February 2019.

1568 ECRI, General Policy Recommendation No. 15, on Combating Hate Speech, Adopted on 8 December 2015, CRI(2016)15, § 3.(d).

1569 At the same time as it recognizes the need for safeguards regarding personal data, at § 80.

format complaints and instances of hate speech.[1570] Such bold stance by the ECRI, together with important reports underscoring the need to take those measures,[1571] strengthens the understanding that collecting racial equality data consists of a positive obligation of the State to elaborate equality data.

Furthermore, during the last decade, important scholarly and policy works were devoted not only to mitigate such conflicts, but also to reinforce the necessity of producing disaggregate data.[1572] This region has witnessed an unprecedented population diversification, requiring a shift from "color-blindness" to "ethnic consciousness."[1573] This reasoning is even more justified if courts are committed with effective implementation of human rights treaties in the area of racial equality.[1574] As seen also in the area of discrimination, in general, the development of a positive obligation to elaborate racial equality data may be restricted to the still ongoing process in Europe, which creates a focus of regional particularism in this regard.

1570 Id, § 82.

1571 *Eg*. OSCE, Hate Crimes in the Region – Incidents and Responses, Annual Report for 2009, 141; CoE Commissioner for Human Rights, "Human rights of Roma and Travellers in Europe" (2012) stating that the low practice of broken-down data into ethnicity poses serious problems for the advancement of this minority in Europe, 36.

1572 For instance, *European Handbook on Equality Data: Why and How to Build a National Knowledge Base on Equality and Discrimination on the Grounds of Racial and Ethnic Origin, Religion and Belief, Disability, Age and Sexual orientation* (Luxembourg: Office of Official Publications of the EC, 2007); Olivier De Schutter and Julie Ringelheim, *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights* (Brussels: Bruylant, 2010); Patrick Simon, "Collecting Ethnic Statistics in Europe: a Review," *Ethnic and Racial Studies* 35, no. 8 (2012): 1366-1391; Timo Makkonen, *Equal in Law, Unequal in Fact – Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*, 301-342.

1573 Patrick Simon, "Collecting Ethnic Statistics in Europe: a Review", 1367.

1574 The EU itself recognizes that insufficient and inconsistent data collection represents a major challenge, see: Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, 5. See also: European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Framework for National Roma Integration Strategies up to 2020" COM (2011) 173 final.

2.1.3 - Temporary Special Measures

426. Under the ICERD system, TSMs[1575] are strengthened by a unique mandatory clause in Art. 2.2:

> States Parties *shall*, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.[1576]

The CERD had not dealt with the relevant normative aspects until the adoption of *General Recommendation No. 32* (2009)[1577]. Interestingly, contrasting with a traditional reparatory perspective,[1578] those measures are regarded today by the CERD as continued violations with a forward-looking objective of correcting them and preventing their recurrence.[1579] The Committee interprets this obligation across the board—beyond the grounds of discrimination listed in the ICERD Art. 1.1—instead of its previous fragmented approach.[1580] Moreover, instead of focusing on only one single group, a multi-sectorial scheme is at times required, in order to address intersectional discrimination in concrete situations.[1581]

[1575] Through its diverse forms, *e.g.*, "reservation system", under the Indian Constitution, Article 15; "affirmative action" in the Brazil, South Africa and United States practice, "positive action" under EU 2000/43/EC, Article 5.

[1576] Italics added.

[1577] CERD, *General Recommendation No. 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, adopted on 24 September 2009, UN Doc. CERD/C/GC/32. But the CERD had in previous occasions explained that the term "when the circumstances so warrant" did not imply an exemption, but a certain margin of discretion in implementing TSM's. See, Drew Mahalic and Joan G. Mahalic "The Limitation Provision of the International Convention of the Elimination of All Forms of Racial Discrimination", 83; UN HRComm, The Concept and Practice of Affirmative Action: Preliminary report submitted by Mr. Marc Bossuyt, UN Doc. E/CN.4/Sub.2/2000/11, § 25. The mandatory nature of the CERD is eminently a corollary of the substantive equality concept, as seen in CERD *General Recommendation No. 32*, § 8. Similarly, Article 5 of the EU Racial Directive; the Inter American Convention on Racism (Article 5); the Indian Constitution's Article 15.4; judgments of Supreme Courts of the United States, e.g. *University of California Regents v. Bakke* 438 U.S. 265 (1978). 438 U.S. 265 (even if narrowly) and Brazil's Supreme Court judgment on ADPF 168 (2012).

[1578] Basic Principles on the Right to a Remedy and Reparation, § 83.

[1579] CERD, *General Recommendation No. 32*: "the emphasis should be placed on correcting present disparities an on preventing further imbalances from arising." § 22.

[1580] *E.g.* in favor of Roma persons: *General Recommendation No. 25,* A/55/18, Annex V.C, §§ 28, 29 and 40; *General Recommendation No. 27*, UN Doc. A/55/18, Annex V.C27-28; descent-based discrimination: *General Recommendation 29*, §§ 5, 6 and 36. This includes situations of human deprivation, as an expanded form of human rights violations, General Recommendation 32, § 33.

[1581] CERD, *General Recommendation No. 32*, § 7, adhering to the concept of intersectional discrimination. In domestic practice, the Brazilian Law 12,711 (2012) reserves 50% of the places in

427. This obligation is moderated by a *sunset clause*. Article 1.4 accepts a differentiated temporal treatment in function of specific objectives, the means to achieve them, and the produced results:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. [1582]

428. Through its practice, the CERD has delimited the scope of the positive obligation to establish TSMs through interplay between both Article 1.4, which allows these measures as a legitimate means to address racial discrimination, and Article 2.2, which makes TSMs mandatory. A key component of this interplay is indeed the concern that these measures—although permissible and at times necessary—may interfere with the rights of other individuals not belonging to discriminated groups. Accordingly, the State obligation to promote TSMs is applicable to the extent that it does not encroach on the rights of the non-targeted groups. [1583] In this regard, the analysis of the rights of a beneficiary group (through a

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public universities and technical institutes to applicants who have attended integrally public high schools. Within that percentage, 50% of the places are allocated for students from very low-income families. Another amount of places are reserved to applicants who are disabled or who self-declare black or indigenous. The proportion for the latter will cases vary according to public statistical data from each region of the country.

[1582] Article 1.4 ICERD; CERD (underline added): See also: *General Recommendation No. 32*, § 27. In the same vein, the Indian Supreme Court, in *Indra Sawhney v. Union of India* (1992), which warned that, since reservation is not a goal in itself, this measure "cannot outlast its constitutional object". AIR 1993 SC 477, 1992 § 400-4.1. Similarly, US Supreme Court, case of *Grutter v. Bollinger*. Judgment of 23 June, 2003. 59 U.S. 306. Compare with the CERD questioning on India's constitutional amendment to extend to further 10 years a reservation system for the Anglo-Indian community: 39 UN GAOR Supp. (No. 18), § 284. Further comments, in Theodor Meron, "The Meaning and Reach of the International Convention of the Elimination of All Forms of Racial Discrimination," 305-306. However sustainability of the effects of the TSMs are to be insured, see CERD, *General Recommendation No. 32,* § 35.

[1583] See, Concluding Observations on Fiji, CERD/C/62/CO/32, § 15, where the CERD was concerned at over-broadness of the program at stake. For this Committee, it should not "diminish the enjoyment of human rights for all, […] in accordance with the rules and criteria established under international human rights law […] *i.e*. […] necessary in a democratic society, respect the principle of fairness, and are grounded in a realistic appraisal of the situation of indigenous Fijians as well as other communities. See also Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies,* 207, and repercussion in IACHR: "The Situation of People of African Descent in the Americas". OEA/Ser.L/V/II. Doc. 62. 5 December 2011. Such interplay had been already suggested by Bossuyt,

positive obligation) is assessed in conjunction with the rights of the remainder of society (through a negative obligation). Such understanding significantly resembles *mutatis mutandis* the ECtHR's stance in the "mirror" cases,[1584] in which the complementarity between positive and negative obligations was emphasized. Hence, it is opportune (and plausible) to conceive a positive obligation to put in place TSMs through the traditional parametes of legitimacy, necessity, and proportionality in a democratic society, as will be examined in the following subsections. A number of cases yielded by high courts in jurisdictions that have long experience with this matter will be used in order to strengthnen the arguments of this section.

2.1.3.1 - Legitimacy

429. The ICERD opens a narrow window for motives of applying TMS, namely the *sole purpose* clause[1585] of advancement of disadvantaged groups (ICERD, Art. 4.1). However, the CERD has been generous in practice, taking also into account in this criterion, the measures themselves, and the means utilized to that end.[1586] In US law, that Supreme Court, for its part, has developed the very strict *compelling interest*[1587] standard of legitimacy, which has in practice rejected any "race conscious" policy.[1588] For instance, remedying past societal discrimination can hardly be evoked the sole legitimate interest.[1589] Given the high stringency of this parameter, in *Fisher v. University of Texas* (2016) the efforts made by the respondent university to carefully shape the arguments advanced to justify its affirmative action program is notable. The university's argument, accepted by the Supreme Court, consisted of a "reasoned, principled explanation" instead of an *amorphous* justification. The university explained that the program aimed at promoting cross-racial understanding and

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HRComm, UN Doc. E/CN.4/Sub.2/2000/11 (Bussuyt Report), § 44, and in the *Belgian Linguistic Cases*, Series A no. 6, Ser. A, p. 34.

[1584] See discussions in Chapter 3 (Section 4.2.3).

[1585] CERD, *General Recommendation No. 32*, § 21. Likewise, see the "Bossuyt Report" alerting on the strict justification scope of affirmative action policies, *e.g.* excluding the mere amelioration of a certain cluster, § 65.

[1586] CERD, *General Recommendation No. 32*, § 22.

[1587] Since *Regents of the University of California v. Bakke*, opinion of Justice Powell, for whom narrowly racial or ethnic is only a single, but important, component of a broader scope of perspectives furthering diversity.

[1588] Se further discussions:, Ashutosh Bhagwa, "Affirmative Action and Compelling Interests: Equal Protection at the Crossroads," *Equal Protection Jurisprudence* 4 No. 2 (2002): 260-280.

[1589] US Supreme Court*, City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989).

increasing diverse workforce.[1590] Furthermore, the scheme at stake was not based on a racial or ethnic dimension but understood as holistic in nature.

2.1.3.2 - Necessity in a Democratic Society

430. CERD's *General Comment No. 32* underscores that the necessity criterion draws inspiration from the international adjudication system, where a high threshold is required when a public policy measure under review is likely to encroach on individual rights. However, the matter on how to transpose the *pressing social need* to the context of TSMs takes diverse forms under domestic practice.

The United States practice, one of the few making a strong case in this regard, requires the authorities to demonstrate the exhaustion of racially-neutral schemes as a general policy and considers using racially-conscious counterparts as an exceptional policy. In *Fisher et al.,* the applicant argued that there were options besides a racially-conscious scheme that could have been envisaged before having resorted to the impugned one. The Supreme Court rejected this argument. The University of Texas proved that it attempted without success an extensive array of non-racially conscious measures before applying the affirmative action scheme, including scholarship programs, opening of regional centers, and increasing a recruitment budget.

In other contexts, the necessity parameter can be based on the underrepresentation rates of the groups benefiting from a given scheme. In India, the leading case *Nagaraj* (2006) laid down a refinement of the reasons that States may invoke for the adoption of *reservation* programs in the public sector. To prove the necessity of making use of reservation policies, it is overall required that an authority demonstrate: (a) the existence of a backwardness; and (b) the insufficient of representation of members of the concerned group for the post at stake.[1591] For its part, the Brazilian Supreme Court in the ADPF 186/DF (2012) accepted the argument about the need to establish an ethnic quota program for black students in public universities, considering an

[1590] US Supreme Court, *Fisher v. University of Texas at Austin et al*, 579. U. S. __ (2016), 13. The affirmative action program at stake is applied by the undergraduate admissions office, combining an objective "academic index", with a more flexible "personal achievement index", a holistic review that also takes into account the applicant's race (but not exclusively).

[1591] Indian Supreme Court, *M. Nagaraj & Others vs Union Of India & Others*, 19 October, 2006 (2006) 8 SCC 212. The importance of this leading case is that it established, as a form or certiorari, the bases of application of constitutional amendments 77, 81, 82 and 85, all of them providing for reservation schemes for career promotion in the public service for scheduled casts and tribes. In the subsequent *U.P. Power Corp. Ltd vs Rajesh Kumar & Ors* (27 April, 2012), this Court held unconstitutional a reservation system not meeting these criteria.

extremely low representation of 2% of black students in higher education in the country.[1592] The Court deemed it important to emphasize that public institutions must comply with the constitutional objectives of eradicating poverty and marginalization.[1593]

Naturally, the necessity criterion is assessed contextually in accordance with the choices made by the authority in the concrete case. The term "when the circumstances so warrant" in the ICERD Article 2.2 allows a margin of discretion to the authorities in view of the diversity of situations in each State.[1594] Variations include the ethnic composition of a country, regional disparities, and relevant major challenges. Indeed, the scope of leeway afforded will rely on the extent to which a scheme is "tailored to meet the particular needs of the groups or individuals concerned."[1595] This makes it difficult to speak of pre-fixed solutions.[1596]

2.1.3.3 - Proportionality

431. CERD's *General Recommendation No. 32* operates under the rationale that the means used to design and operationalize TSMs may be legally challenged under the proportionality criterion.[1597] This is by no means different from the general proportionality standard in general human rights law, where any policy put in place (while in principle deemed justifiable and necessary) should keep a close relationship between the goals sought and the means applied.

In this regard, programs applying TSMs should be formulated to tackle the specific *representation deficits* of the beneficiary group. In this regard, the core of the *M. Nagaraj & Others*' judgment was that the Indian Union could only propose affirmative action schemes provided that it demonstrates a quantifiable representation

[1592] Brazilian Supreme Court, ADPF 186/DF (2012), 17. The impugned program, set at the University of Brasília, was designed to allocate 20% of places within its competitive exams for black students and a small number of places for indigenous candidates.

[1593] Id., 9.

[1594] CERD, *General Recommendation No. 32,* § 30. A margin of discretion was similarly afforded by the Supreme Courts of the United States, in *Fisher*; Brazil, in ADPF 186/DF; and in India, in *M. Nagaraj & Others vs Union Of India & Others*. Some of these modalities are shown in the "Bossuyt Report", 17-18.

[1595] CERD, *General Recommendation No. 32*, § 27.

[1596] See, *e.g.* in *Adarand Constructors v. Pena*, the US Supreme Court mandated that TSMs are "narrowly tailored" to the specific equalization process. 515 US. 200 (1995), § 227. In *Gratz et al. v. Bollinger et al.* an automatic assignation of 20 points for unrepresented minorities based solely on the grounds of race was held unconstitutional.

[1597] CERD, *General Recommendation No. 32*, § 16.

deficit for the public post at stake. It noted that "even if the State has compelling reasons […] the State will have to see that its reservation provision does not lead to excessiveness…"[1598] Evidently, this condition can only be satisfactorily met when disaggregate data are properly elaborated, as *General Recommendation No. 32* itself reinforces.[1599]

2.1.4. - Access to Documentation and Registration

432. It was seen in Chapter 2 (Section 2.1.2.2) that personal official documentation is a fundamental means of ensuring the exercise of rights. In Chapter 5 (Section 2.1.3) in particular, the obligation to provide a birth certificate is aimed at i.a. providing the child with legal protection and recognition of legal personality, a condition *sine qua non* for an individual to enjoy rights. On other occasions, recognizing an individual's gender identity through the national registry system is an essential means to ensure the right of private life (in an identitarian perspective) and other rights on equal footing.

2.1.4.1 - Civil Registry and Birth Certificate

433. In the context of racial discrimination, the CERD affirms that birth registration should be provided by States parties without discrimination.[1600] The CERD has raised concerns about children from certain marginalized sectors who are not registered at birth.[1601] Likewise, the CRCCttee has underscored the States Parties' obligation to take special measures to secure registration at birth, including for indigenous children.[1602]

In the Americas, under Art 18 ACHR (right to a name) the IACtHR was confronted with the systematic denial of birth certificates to children of foreign orign. In *Yean and Bosico Sisters v. Dominican Republic* (2005) this Court noted that the respondent

[1598] Indian Supreme Court, *M. Nagaraj & Others*, 45, repercussion in *Suraj Bhan Meena Vs. State of Rajasthan* (2010). The former judgment set the parameters for validation of the new constitutional amendment allowing reservation programs in India.

[1599] CERD, *General Recommendation No. 32*, § 17.

[1600] CERD, Concluding Observations on Dominican Republic: CERD/C/DOM/CO/12 (2008).

[1601] CERD, Concluding Observations on Bosnia and Herzegovina, CERD/C/BIH/CO/7-8 (2010); on Brazil, CERD/C/64/CO/2 (2004); and on Malawi, CERD/C/63/CO/12 (CERD, 2003).

[1602] CRCCttee, *General Comment No. 11*: *Indigenous Children and Their Rights under the Convention*, 12 February 2009. UN Doc. CRC/C/GC/11, § 42. This Committee also stresses that "States parties should ensure that indigenous communities are informed about the importance of birth registration and of the negative implications of its absence on the enjoyment of other rights for non-registered children" (§ 43).

state denied birth certificates to the applicant children, thus creating obstacles for them to pursue elementary education, acquire nationality, and seek aid in public hospitals.[1603]

In the same vein, indigenous peoples often face hindrances in obtaining civil registration, as underscored in *Sawhoyamaxa Community v. Paraguay* (2006). The IACtHR, noted that the 18 victims killed in the massacre did not have birth nor death certificates. Hence, their legal inexistence impeded their relatives to seek justice. Recognizing that their geographical and social challenges lead to extreme risk and vulnerability,[1604] the Court held *in casu* that legal and administrative measures to ensure civil registration for indigenous peoples should be put in place, owing to the present scenario of exclusion and discrimination.[1605]

2.1.4.2 - Granting of Nationality, Citizenship and Naturalization

434. The sovereign rights of States to grant nationality has been somewhat nuanced in view of an number of inequality concerns.[1606] For instance, the CERD has stressed that discrimination against certain groups of foreigners is not allowed under the ICERD regime.[1607] In the same vein, barriers for the naturalization for long-term residents should be removed.[1608] In this respect, special attention should be given to certain identifiable groups *e.g*. residents of African descent.[1609]

In the Americas, the case of *Girls Yean and Bosico* yielded a positive obligation to simplify the procedures to obtain nationality[1610] given the insurmountable complexity of the domestic rules at stake, making it virtually impossible for the applicants born in

[1603] IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, §186.

[1604] Id., §191.

[1605] IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs, § 189.

[1606] Among these concerns, see: CERD, *General Recommendation No. 30 on Discrimination against Non-citizens*, 19 Aug 2004, Sixty-fifth session (2005), § 2.

[1607] ICERD. Art 3.1 CERD, *General Recommendation No. 30*, §§ 13-14.

[1608] CERD, *General Recommendation No. 30*, § 13; concluding observations on the Democratic Republic of Congo: A/62/18 (CERD, 2007); Lithuania: CERD/C/LTU/CO/3 (CERD, 2006); Qatar: CERD/C/60/CO/11 (CERD, 2002); Yemen: A/57/18(SUPP) (CERD, 2002); and Portugal: CERD/C/304/ADD.117 (CERD, 2001).

[1609] CERD, *General Recommendation No. 32*, § 47.

[1610] IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*, § 173.

the Dominican Republic but of Haitian origin to succeed.[1611] This discriminatory practice led to a legal limbo, rendering the applicants vulnerable.[1612]

2.1.4.3 - Access to Regularization and Documentation

435. States also have a sovereign right to control the entry of non-nationals in their territories. Yet, aliens do not forfeit their rights because of their migration status.[1613]Accordingly, States should make sure that their migration policies comply with human rights standards.[1614] Domestic authorities are allowed differentiate between nationals and foreigners[1615] and between those in a regular and an irregular situation. However, this possibility to differentiate must be interpreted restrictively. Differences in treatment require an objective, reasonable, and proportional justification.[1616] The acquisition of documentation is essential to realize basic rights, such as housing, education, and healthcare.[1617]

However, in view of more recent European regulations,[1618] the ECtHR has incrementally recognized the States' obligations to facilitate the regularization of foreigners under the broad provision of Article 8 ECHR[1619] by means of an evolving

[1611] See the particulars of the case regarding discrimination based on age and gender on Part II, Chapter 2.

[1612] IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*, § 180.

[1613] IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, § 118, explaining that while a State is permitted to take measures against those migrants not complying with national law, their rights should be respected without any discrimination; HRCttee, *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), § 10, stating that the ICCPR rights apply to both nationals and aliens.

[1614] IACtHR*, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16**,** §§ 117-119; UN HRC, Report of the Special Rapporteur on the Human Rights of Immigrants, (2008), UN Doc. A/HRC/7/12, § 14.

[1615] ICERD, Article 1.2. and CERD *General Recommendation No. 30*, § 1; IACtHR, *Advisory Opinion OC-17*, § 135, in relation to work permits.

[1616] CERD, *General Recommendation No. 30*, § 3: "guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law"; IACtHR, *Advisory Opinion OC 18*, § 119; ACmHPR, *Union Inter-Africaine des Droits de l'Homme et al. v. Angola*; Communication No: 159/96, decision of 11 November, 1997, § 20.

[1617] See the concern raised by the CESCR on the limitations of equal access to health to *i.a.* asylum seekers and undocumented migrants. *General Comment No. 14*, 11 August 2000. UN Doc. E/C.12/2000/4, § 34.

[1618] Mainly by EU Directive 2003/109/EC.34, amended and expanded by Directive 2011/51/EU (2011).

[1619] During the negotiations of the ECHR, a provision on asylum was deliberately omitted from its text, but subsequent Protocol 4, Article 4 ECHR provides for a prohibition of collective expulsions.

interpretation.[1620] In *Boultif v. Switzerland* (2006), the Court required for the first time a proportionality assessment between the maintenance of public order and the preservation of family unity.[1621] The Court thereafter steadily protected the nuclear family independent of the length of the existence of this relation.[1622] In turn, the protection of "private life" is weighed against the personal, social, and economic relations developed by the person along time.[1623]

436. A full-fledged approach of indirect discrimination in this regard was taken in *Biao v. Denmark* (2016). The period of 28 years from the acquisition of a Danish nationality, as a requirement to start a family reunion procedure, created a suspicious differentiation between country-born and naturalized citizens.[1624] It has thus led to a disproportionate effect on persons of foreign origin who acquired Danish nationality on a later stage of their lives. A breach of Article 14 ECHR was found owing to the failure of justifications from the State for such disparate effect.[1625] Still, the relevance of the *Biao* ruling is to modulate the margin of appreciation, inherent to this case profile, to an increasing recognition of the rights of aliens to establish family ties.

2.2 - Duty to Provide

437. As seen in Chapter 5 (Section 2.2), the State obligations identified within the duty to provide may have an enlarged scope (compared with this duty in general), owing to their focus on vulnerable sectors that are unable to enjoy fundamental rights by themselves, thus requiring special state assistance.

[1620] Early judgments, *i.e. Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94), on family reunion of spouses and children living overseas; *Nasri v. France,* 13 July *1995*, Series A no. 320-B(migration within the scope of "family life"); *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, on the precarious situation of the russophone community in the Baltic region; illustrated the potential of Article 8 to deal with rights of migrants.

[1621] This Court gave the possibility for an irregular non-EU applicant to obtain the required documents, while criticizing the authorities for their excessive formalism, in *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 43-44, ECHR 2006-I.

[1622] Daniel Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?," *International and Comparative Law Quarterly*, 57, no. 1 (2008): 94.

[1623] Ibid.

[1624] ECtHR, *Biao v. Denmark* [GC], no. 38590/10, § 93, 24 May 2016: "no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination," referring to the precedent of *Hoogendijk* (2005).

[1625] Id., § 126.

Among a number of a number of instances of rulings interpreting CPR treaties, *M.S.S. v. Belgium and Greece* (2011) is a fine illustration of the recognition of a positive duty to provide. In normal circumstances, the object and purpose of the ECHR on social rights, as interpreted by the ECtHR, is restricted. Yet, in view of the heightened vulnerability of the victim at stake, this Court demonstrated its willingness to entertain extreme poverty within the ambit of CPRs. The applicant, an Afghan refugee arriving in Greece, was sent to Belgium and thereafter sent back to Greece. He alleged that while waiting for a decision on his asylum request in Greece he spent months under abject poverty, devoid of basic needs such as housing, food, and hygiene items. His ordeal was worsened by a late issuance of work permit and several humiliations and threats by the migration authorities towards him. Taken all those facts in conjunction, the Court found a violation of Art. 3 ECHR.

Although other traditional factors by which the Court finds a violation of this article, such as detention conditions,[1626] a particularly consideration on his living conditions outside detention was elaborated in the judgment. For the Court, the applicant, wholly dependant on the State in order to ensure subsistence, was forced to live in a city park for months, to look for food, and to rely on charitable organizations—permanently fearing of being robbed—and thus sustained severe hardship that reached the threshold of Article 3 ECHR.[1627] Such obligation of provision of minimum living conditions, however, was not totally construed by the Court itself. It relied on the European regulation that establishes standards for the reception of asylum seekers.[1628]

The Court, considering for the first time asylum seekers as a vulnerable group and lowering the traditional threshold of Article 3, reduced the margin of appreciation on the authorities, even when a duty to provide was at stake. Accordingly, it also rejected that the respondent State was undergoing a serious financial crisis and an unprecedented influx of migrants in its territory.[1629] For the Court, the incapacity of the applicant to provide basic living conditions for himself under those specific

[1626] ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 230, ECHR 2011, noting the precarious situations of the detained asylum seekers in Greece. This Court had held previously that the "total official indifference", leading to a situation of want and deprivation may reach the threshold of Article 3 when the individual is in a situation of serious deprivation of basic needs (*Budina v. Russia*, Appl. No. 45603/05 (18 June 2009)).

[1627] Id., § 238, stressing the applicant's heightened situation of vulnerability.

[1628] Council Directive 2003/9/EC of 27 January 2003, (OJ 2003 L 31 p. 18).

[1629] ECtHR, *M.S.S. v. Belgium and Greece* [GC], §223.

circumstances was a compelling factor to find a positive obligation to directly provide services and goods to the applicant. Subsistence, in fact, is the main justification of the duty to provide, as explained by Eide.[1630]

Besides the above case, the duty to provide in the field of racial discrimination is also found in specific contexts, as will be seen in the following subsections.

2.2.1 - Interpretation in Court Proceedings

438. In treaty law, a number of instruments establish an obligation to provide interpretation services in criminal cases for defendants who are unable to speak a court's official language (CCPR Article 14.1(f); ECHR Articles 5.2 and 6.3(a);[1631] and ACHR Article 8.2(a)). But, in view of litigants not speaking a court's language, the lack of interpretation services may compromise basic procedural safeguards in a concrete case.[1632] Issues of non-compliance with such obligations arise when the language barrier has a significant negative impact in a person's defense, leading *e.g.* to the impossibility of filing appeals.[1633] In criminal proceedings, this obligation applies across the board, as being of an *ex officio* nature, even if the accused does not formally request it.[1634]

In the context of vulnerable groups seeking justice, the Inter-American Court emphasized this obligation in *Rosendo Cantú v. Mexico* (2010). An indigenous woman, victim of sexual violence, faced several hindrances in attempting to have the perpetrators brought to justice. The IACtHR, among other factors, identified the lack of a Spanish language interpreter during the investigations and prosecutorial phases of the criminal proceedings in which the victim participated. The applicant at times had an *ad hoc* help of her husband in some hearings, which was by no means adequate.

[1630] This is probably the reason why Judge Sajó, in his partly dissenting opinion, raised concerns about the ECtHR be entertaining welfare provisions, which would be outside the object and purpose of the Convention.

[1631] Also in the EU, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, OJ 280/1 on 26/10/2010, Article 2.

[1632] For instance, when that the accused has sufficient knowledge of the court language (e.g *Güngör v Germany,* no. 31540/96, decision 17/05/2001)); or when the accused understands spoken language, but not written language (*Amer v Turkey*, no. 25720/02, 13/01/2009).

[1633] E.g. HRCttee, *Rastorgueva Tatyana v. Poland*, communication no. 1517/2006. Views of 28 March 2011, UN Doc. CCPR/C/101/D/1517/2006, § 9.7. no violation.

[1634] ECtHR, *Hermi v. Italy* [GC], no. 18114/02, § 72, ECHR 2006-XII.

The Court underscored the Mexican authorities' failure to consider the applicant's vulnerable situation based on her native idiom and ethnicity.[1635] This shortcoming led to a violation of Articles 8 (judicial protection), 25 (judicial guarantees), and Article 1.1 (non-discrimination clause) of the ACHR.[1636]

2.2.2 – Housing for the Roma

439. Another area of human rights law concerning provision duties in favor of vulnerable persons is the one on Roma's housing rights. Besides their traditional nomadic lifestyle, as seen in Section 2.1.1.1, concerns have also been given to their fixed settlements, frequently facing poor sanitary installations, lack of access to basic services and infrastructure, and arbitrary evictions.[1637] In general, the CESCR recommends that States parties take measures within their available resources in order to find alternative solutions to avoid homelessness, whenever an evicted person is unable to arrange a housing solution for herself or himself.[1638]

The ECtHR, aware of the concerns of the precarious housing situation of the settled Roma, has indirectly implied an obligation of provision of a home in connection with other obligations and safeguards. *Yordanova and Others v. Bulgaria* (2012), regarding the eviction of a sedentary Roma community that had occupied a piece of land for many years, is a fine illustration. Given the frequent evictions the individuals of this community suffered, the Court has emphasized "one's home is a most extreme form of interference with the right under Article 8."[1639] Accordingly, the Court established nuanced criteria to calibrate the margin of appreciation in cases such as this one,[1640] which should count on procedural safeguards to ascertain whether the authorities do

[1635] IACtHR, *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs, § 185.

[1636] Also in *M.S.S. v. Belgium and Greece* [GC], the lack of an interpreter and some failures of this interpreter to provide the applicant with correct information on the proceedings led the ECtHR to find a breach of an obligation to provide, in this context, §§ 301-311.

[1637] See CoE Recommendation Rec(2005)4 of the Committee of Ministers to Member States on Improving the Housing Conditions of Roma and Travellers in Europe, calling upon the authorities to provide the same level of basic services as the remainder of the population.

[1638] CESCR, *General Comment No. 7 The Right to Adequate Housing (Art.11.1): Forced Evictions*, adopted on 20 May 1997, E/1998/22, § 16.

[1639] ECtHR, *Yordanova and Others v. Bulgaria*, no. 25446/06, § 118, 24 April 2012.Id, § 118, (iv).

[1640] Id., § 118.

not overstep this margin.[1641] Thus, a strict scrutiny on the pertinent proportionality analysis,[1642] may imply the provision of housing arrangements for the concerned person as a measure of last resort, or as a provisional measure.

440. Comparably, the ECtteeSR, as a general rule, holds that the right to housing under Article 16 of the Revised European Social Charter does not only mandate the provision of sufficient supply of housing. It also requires (a) that housing policies take into account the needs of families and (b) that adequate standards are set, including essential services like electricity and heating.[1643] But, overall, the principles of social inclusion and solidarity impose a duty of equality when States discharge the obligations following from this article.[1644]

In any event, the set of obligations in this context, comparing the ECteeSR and the ECtHR (keeping in mind their differences) is multi-fold, not limited to a simple duty to directly provide housing for Roma.

Naturally, the ECtteeSR, competent to decide on collective complaints on social rights, entertains Roma housing issues in a more systemic fashion. For instance, in *ERTF v. the Czech Republic* (2016), the ECtteeSR received an allegation of a systematic housing policy for the Roma in that country, including inaccessible and inadequate housing, and racial segregation. Given the insufficiency of measures by the responding government to address this pattern, this Committee decided for a non-compliance of Art. 16 of the ESC in conjunction with its Preamble (non-discrimination).[1645] Yet, despite the obvious differences between the scopes of the obligations ordered by the ECtteeSR and the ECtHR, the root causes of this housing problem in this case and in *Yordanova* reflect the insufficient consideration of the Roma in public policies, the lack of safeguards against evictions, and the lack of prior consultation with this group on this matter. Hence, these hybrid cases, operating

[1641] Id, § 118, (iii).

[1642] Id, § 129, emphasizing the need of a strict proportionality assessment, in view of a vulnerable group, such as the Roma. This approach was also adopted in the later case of *Winterstein and Others v. France*, no. 27013/07, § 160, 17 October 2013.

[1643] ECtteeSR, *European Roma Rights Center (ERRC) v. Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 24.

[1644] Id, § 19, by virtue of the ESC's Preamble.

[1645] ECtteeSR, *European Roma and Travellers Forum (ERTF) v. Czech Republic*, Complaint No.104/2014, decision on the merits of 17 May 2016, § 79.

through a combined set of positive and negative obligations, make less the differences between positive and negative obligations, in this context, less relevant.

2.3 - Duty to Promote

441. The duty to promote under racial equality and non-discrimination is associated with the State obligation to take measures to raise awareness and provide training on racial discrimination and racial equality.

The ICERD mentions such an obligation specifically under Article 7,[1646] which is deemed mandatory and of immediate effect by the CERD.[1647] This Committee applies this obligation with the purpose of combating prejudices, promoting understanding, tolerance, and friendship, and disseminating the purposes and principles of the UN Charter, the UDHR, and the Convention itself.[1648] There is hardly any General Recommendation in which the Committee does not address this obligation. For instance, *General Recommendation No. 13* (1993) specifies that Article 7 is predominantly complied through intensive training of public officials.[1649] It could not more emphasized that the fulfilment of essential safeguards (negative obligations), *e.g.* related to police and detention functions, relies on intensive training particularly on racial discrimination matters.[1650]

Measures on the promotion of racial equality include information on the avenues for relevant remedies against racial discrimination,[1651] sensitization of judges, and the training of law enforcement officials in dealing with complaints of racially motivated

[1646] ICERD, Article 7: "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention".

[1647] CERD, *General Recommendation No. 5*, *Reporting by State Parties*, 14 April, 1977. UN Doc. A/32/18; HRI/GEN/1/Rev.3, 102-103, third preambular paragraph; *General Recommendation No. 35*, § 30, stressing the importance of the duty to promote within the ICERD, and § 31.

[1648] Id., second preambular paragraph.

[1649] CERD, *General Recommendation No. 13: Training of law Enforcement Officials in the Protection of Human Rights*, 21 March, 1993 UN Doc. HRI/GEN/1Rev.3, p. 107, § 2.

[1650] Ibid.

[1651] For instance, on Concluding Observations on Iceland (CERD/C/ISL/CO/19-20); and on Kazakhstan (CERD/C/KAZ/CO/4-5), including foreigners and asylum seekers.

crimes.[1652] The compliance with this obligation also implies the allocation of additional financial resources.[1653]

Article 3 of the UNDHRET establishes the human rights education and training should contribute to the prevention of all forms of discrimination, stereotyping, and incitement to hatred and harmful attitudes.[1654]

Similarly, in Europe, the CoE's ECRI underlines the necessity of States to train, raise awareness and combat racism, xenophobia, antisemitism and intolerance, not only in general,[1655] but also against Roma/Gipsies,[1656] and Muslims[1657], and to combat hate speech.[1658] CoE Member States are recommended by the ECRI to give the pertinent monitoring bodies they establish a clear mandate to promote or contribute to training for certain target groups.[1659]

442. An indication of the growing importance of this type of duty is the emphasis placed on it by the CERD in its *General Comment No. 35,* on hate speech. That document presents a balanced equation between punitive obligations (Art. 4 of the ICERD) and promotional obligations (Art. 7 of the ICERD).[1660] As the Committee has nuanced the obligation to criminalize such acts, it has given significantly greater importance to the several measures related to the duty to promote.[1661]

[1652] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies*, 205-206. See also Concluding Observations on Tunisia (CERD/C/TUN/CO/19); Georgia (CERD/C/GEO/CO/4-5); and Moldova regarding mandatory training (CERD/C/MDA/CO/7).

[1653] ICERD, Concluding Observations on Norway, CERD/C/NOR/CO/19-20 (2011); Japan CERD/C/JPN/CO/7-9 (2014); and Russia CERD/C/RUS/CO/20-22 (2013).

[1654] UNDHRET, Article 4(e).

[1655] ECRI General Policy Recommendation N° 1: Combating racism, xenophobia, antisemitism and intolerance, Adopted on 4 October 1996, CRI(96)43 rev.

[1656] ECRI, General Policy Recommendations No. 3 on Combatting Racism and Intolerance against Roma/Gipsies, CRI(2000)21.

[1657] ECRI, General Policy Recommendation No. 5 on Combatting Intolerance and Discriminations against Muslisms. Adopted on 16 March 2000, CRI(98)29 rev.

[1658] ECRI, General Policy Recommendation No. 15, on Combating Hate Speech, Adopted on 8 December 2015, CRI(2016)15.

[1659] ECRI, General Policy Recommendation No. 2, on Specialized Bodies to Combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level. Adopted on 13 June 1997, CRI(97)36.

[1660] CERD, *General Recommendation No. 35*, § 30, stressing the importance of the duty to promote within the ICERD, and § 31, recalling mandatory nature of this duty.

[1661] Id., §§ 32-44, exemplifying a wealth of measures, such as training judges and justice operators on hate speech, engagement with civil society, the general public and religious organizations; and remembrance actions for past atrocities.

It should be noted that this duty to promote is of pivotal importance for the authorities in order for them to obtain the necessary skills for appropriately handling complaints of racial discrimination and for devising inclusive policies. The awareness and specific skills acquired by State agents and staff are key to obtain the necessary *knowledge* to prevent and redress instances of racial discrimination. It will be seen in Chapter 9 (Section 2) that States can only comply with their duties to respect or protect when this *specific knowledge* is acquired.

Concluding Remarks

443. The scope of positive obligations in relation with racial discrimination takes specific contours in order to address the specific vulnerabilities of the pertinent right-holders.

In this context, the obligation to prevent discrimination beyond the global objectives implies the placement of particular safeguards, including a specific knowledge on the vulnerabilities of the victims. Further discussions on such criterion are addressed in Chapter 9.

Remedies, in this context, are to be conceived through the factual obstacles marginalized groups face in access to the law-enforcement apparatus. The general obligations of redress also aim to remove the victims from invisibility by requiring a specific duty to unveil the racist motive in each occurrence. On the other hand, the obligation to prosecute remains of the same nature, containing policy elements in choosing whether or not to press criminal charges against an alleged perpetrator. The principle of expediency does not impose any specific form, all the more in the "due regard" clause under Art. 4 ICERD. What is required in discharging the duty to prosecute is a degree of soundness (as opposed to arbitrariness), provided that the alleged victim has the right to a judicial review of the said prosecutorial decision. The duty to provide reparations has important ramifications in the satisfaction modality with a bourgeoning practice of apologies for past atrocities. However, the pecuniary modalities have not shown any specific contour to address the harms at cause. Structural modalities, for their part, are of salient practice by the CERD and the Inter-American system.

The duties to facilitate bring very defined contours in the present context. The last decade witnessed the formation of a duty to facilitate the traditional lifestyles of ethnical minorities, such as the Roma (in relation with their nomadic routines) and indigenous peoples (in relation with the peculiar attachment to the lands and pertinent natural resources). The facilitation of access to documentation for irregular permanent residents can be said to be an emerging practice where the ECtHR has recently applied a strict proportionality test, thus reducing States margin of appreciation.

The duty to promote, which can be considered an autonomous, is a key normative component in relation with racial discrimination rather than ancillary duty. Though it has not played a sizeable role in case law, the works of the CERD (with special mention to those combatting hate speech) have conjugated this duty with the obligation to penalize this phenomenon.

Even in the case of racial vulnerability, the duty to provide has a delimited field of application. The ECtHR applies such duty with a cautious wording, exploring the boundaries of the ECHR itself. However, it cannot be said that this court read welfare duties in a Convention specialized in civil and political rights. As a matter of fact, in the case of Roma housing, the ECtteeSR has also not had a specific focus on direct provisions of homes. Rather, the host of obligations entertained include prior consultation, planning, and access to information on the possibilities to buy a home.

Chapter 9 – Delimiting the Scope of Positive Obligations in the Context of Racial Discrimination – Specific Contexts

Introduction

444. This Chapter has the purpose of examining the conditions delimiting the scope of positive obligations in relation to racial discrimination. This Chapter builds upon the discussions and conclusions of Chapter 6 with a closer look in concrete situations against which the extent of positive obligations can be tested. In each section, after a brief comment on the general rule delimiting the scope of a given positive obligation, concrete situations involving issues of racial discrimination will be presented in order to further refine the research.

The selection of the concrete situations was based on the criteria of relevance in the current legal and social debates. Frequently, these situations unveil instances of heightened asymmetry between the parties at stake, e.g. transnational corporations, ethnic groups marginalized by privatization schemes and indigenous peoples. Hence, the analysis of the extent of positive obligations through these situations also aims to make a legal thesis more permeable with current social debates surrounding positive obligations, particularly when they involve the most marginalized groups of society.

To the knowledge parameter, specific cases of the protection of densely areas populated by a given ethnicity and the construction of a hydroelectric power plant in an area affecting indigenous rights will be applied. Assessing the severity of the impact parameter, the case of extractive industry on indigenous lands will serve as a practical test. On the extent of positive obligations to prevent discrimination from non-State actors, the problem of privatization of public services and the risks of racial marginalization will serve as another practical test. At last, the balancing of competing rights and interests will be tested through the conflicts between freedom of expression and protection of racial equality, through the phenomenon of hate speech.

Common parameters in this ambit also apply here, such as the element of knowledge of a violation or its likelihood to materialize, as well as the specific characteristics of the beneficiaries of such protection-vulnerable individuals. Section 1 will apply the relevant standard in public international law to more specific settings, viz. adequate police safeguards in areas densely populated by marginalized sectors (Section 1.1)

and the risk assessment of licensing of extractive industries affecting the rights of indigenous peoples (Section 1.2).

Section 2 will examine the question of the minimum severity of an impact triggerin State responsibility to address instances of racial discrimination. It will take stock of specific measurement contexts, such as qualitative and quantitative disparities, including the different thresholds applicable to different rights (Section 2.1). Thereafter, a specific study on impact assessment of extractive projects affecting indigenous lands will be conducted in order to address a pressing current issue (Section 2.2).

The issue of privatization, as well as its effects on marginalized groups, has attracted the attention of scholarly writings, case law, and international debates. Section 3 is devoted to understand the relevant normative dynamics within the positive duty to protect racially or ethnically sensitive clusters from discrimination caused by activities conducted by non-state actors. The issue of de facto racial segregation has received insufficient attention—and without clear indication of what are the specific obligations of States to prevent or address this phenomenon.

Moreover, the procedural aptness of international and supranational adjudicatory mechanisms to deal with cases of structural racial discrimination, as well as the alternative approaches currently in place, will be examined in Section 4. From the research concluded in Chapter 6 (Section 6), this section will deal in detail with concrete examples in which those mechanisms deal with structural racial discrimination, including the relevant challenges and potentials.

Section 5 consists of more detailed analysis on the extent of positive obligations to combat racial hate speech. It builds upon the discussions on the research about the principle proportionality delimiting the scope of positive obligations in general (Chapter 3, Section 4). The ever-recurring issue of hate speech has undergone important debates; specifically, the CERD has focused on the issue, looking into a wealth of perspectives from other monitoring systems. Concomitantly, the ECtHR has been called to rule on new trends of hate speech, such as political platforms that use discriminatory speech and controversial religious speech. Those developments, entailing multi-faceted and nuanced considerations, demonstrate more than before an importance of understanding the boundaries of positive obligations in this context through the principle of proportionality.

Section 6 focuses the analysis to the developments in international racial equality law (in particular in the European and Inter-American systems) on the acceptance of statistical evidence to establish instances of indirect discrimination and on the reversal of burden of proof. It will shed further light on the case law of both systems in order to have a better grasp on the respective practices.

1 - The Knowledge Component in Specific Contexts

445. As seen in Chapter 8 (Section 1.4), the element of knowledge triggering a positive obligation to prevent an act of racial discrimination to materialize is assessed in concreto, depending on the specificities of the case. It is also plausible to state that such obligation assumes different forms, according to different contexts. In Chapter 6 (Section 3) it was argued that protection of vulnerable groups requires specific knowledge by the authorities in charge in order to comply with the relevant preventive positive obligations. This section will analyze how this differentiated knowledge applies to racial discrimination.

Two specific contexts in which international adjudicatory mechanisms have dealt with are analyzed in this subsection: the preventive safeguards in areas populated by sensitive groups and the precautionary measures regarding infrastructure projects affecting indigenous communities.

1.1 - Safeguards in Areas Populated by Vulnerable Groups

446. The operation of security forces in areas populated by racially and ethnically vulnerable groups has demonstrated legal challenges as to the preventive measures to be taken by these forces in order secure the rights of those groups who are consistently marginalized. Two important cases with different profiles can illustrate the question, as follows.

Vasil Sashov Petrov v. Bulgaria (2010) revolves around the killing of a Roma individual in the proximity of a Roma neighborhood. The ECtHR found a violation of Article 2 ECHR (substantive and procedural limbs), given that the use of a firearm was unnecessary. Examining a further complaint about Article 2 in conjunction with Art. 14 ECHR, the Court found it necessary to analyze, following the foundations of

the *Nachova and Others* case,[1662] whether the officers in question knew of the victim's ethnicity. The Court found that the knowledge of the victim's origin could not be established, given the low visibility of the crime scene at that evening. Moreover, the details about proximity of the relevant community were not clearly elaborated in the case. Accordingly, the Court was careful to not explore further if the authorities ought to have known of the victim's ethnicity, which would have enabled further inquiries on a high likelihood of a Roma individual to be shot in the area.[1663]

On other occasions, the presumed risk of a discriminatory act is so palpable that knowledge is considered certain, engaging State responsibility to take preventive measures. In *Wallace de Almeida v. Brazil* (2009), the victim (a black young man) was killed by a stray bullet during a violent police operation within a slum area mostly populated by afrodescendants. The IACHR found a breach of several Articles of the ACHR, even though the death of the victim was not intentional. For the Commission, the location itself of the events - a slum and its ethnic connotation - was fundamental for finding that the risk of death of a black person was certain. For the Commission, the police ought to have known that that operation would very likely affect that vulnerable sector. Statistics showing a much higher amount of killings of black persons in comparison with white persons, added to a long record of racial violence in those contexts, supported the Commission's stance to call for a specific (racial) application of the knowledge parameter. [1664]

A comparison between those cases should consider the different approaches of both regional organs and by the profiles of the cases analyzed. Nevertheless, it is relevant to emphasize that the qualified knowledge at stake relies greatly on a specific training of the police forces and on monitoring by the relevant authorities. Sensitization of forces and policy makers on the racial component of any police planning and operation within the context of the duty to promote (Chapter 8, Section 2.3) lies at the heart of this qualified knowledge.

[1662] Discussed in Chapter 7 (§ 407 above). The ECtHR reaffirmed the requirement of a specific knowledge of the ethnic component of police operations in *R.B. v. Hungary*, no. 64602/12, 12 April 2016, regarding the police operations to protect a Roma neighborhood against a racist manifestation.

[1663] ECtHR, *Vasil Sashov Petrov v. Bulgaria,* no. 63106/00, § 69, 10 June 2010.

[1664] IACHR, *Wallace de Almeida v. Brazil,* Case 12.440, Report 26/09. Decision of 20 March 2009, § 100.

1.2 - Precautionary Measures Regarding Infrastructure Projects Affecting Indigenous Communities

447. In cases involving certain vulnerable groups, international law places an obligation to proactively obtain the specific knowledge to prevent violations, as seen in Chapter 8, regarding the obligation to consult concerned communities.

In this regard, the IACHR's 2011 interim decision on the Xingu River Basin (*Belo Monte v. Brazil*) deserves a detailed analysis.[1665] The Commission took note that the life and integrity of the Xingu communities, located in the impact zone of a hydroelectric powerplant and dam, were at risk.[1666] Hence, it requested the responding State to suspend the relevant licensing process and construction works, mainly based on the insufficient consultations with the concerned groups. This decision was highly controversial.[1667] But, putting aside for a while the political and institutional matters surrounding this decision, the Commission's stance appears persuasive. The central legal point in the decision was that the State had the sufficient knowledge, including from information provided by the indigenous community affected, to take preventive or mitigating measures in order to prevent highly probable harm to the rights of the indigenous community in question through the relevant consultations. First, the Commission acted at an initial stage of the licensing process—early enough for the authorities to explain the legality of the consultations already held—without considerable financial implications for the project. Secondly, the consultations were alleged to be merely formal, which could hardly qualify with free, prior, and informed concept (FPIC) standard[1668] also given the several injunctions the federal government had sought to prevent the pursuance of the consultation process.[1669] Thirdly, the key point of the request by the IACHR was to enforce an obligation to prevent large-scale violations in light of the unsound risk assessment made by the authorities in question. The several flaws in the relevant consultation process had dragged on for nearly a

[1665] IACHR, PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil.

[1666] An estimate of 20,000 persons were at risk of displacement.

[1667] E.g. Philippe Hanna and Frank Vanclay, "Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent," *Impact Assessment and Project Appraisal* 31, No. 2 (2013): 150.

[1668] Domestic litigation pointed out to several flaws in the licensing process, including a very short consultation period and the disregard of many conditionalities posed by the environmental agencies.

[1669] The government filed a series of "suspensão de segurança" injunctions, in order to circumvent its obligation to perform consultations according to the PFIC standards.

decade.[1670] It is important that the Commission made the necessary connection between the compliance with the PFIC standards and the duty to proactively gather specific (ethnically sensitive) knowledge.

Overall, one notes the exacerbated asymmetry between the parties at stake. This high scrutiny by the IACHR resonates with, *mutatis mutandis*, the ECtHR practice of narrowing the margin of appreciation when an instance of vulnerability is at stake,[1671] as in the present case. Transponsing the European acquis to the Inter-American case (at least for the sake of academic interest), in discordance with the reasonableness principle underlying the "proceduralization" approach, the authorities attempted systematically to circumvent PFIC standards[1672], instead of demonstrating reasonable steps pursue genuine consultations. Lastly, it follows from the national proceedings that the affected communities could not have a meaningful leverage during the largely formal consultation process.

2 - The Severity of the Impact

448. Within the actionable thresholds engaging positive obligations, the case of (racial) discrimination requires specific criteria, according to the specific vulnerabilities at stake. This Section will firstly address the basic components of the assessment of the severity of the impact of a violation in cases of racial discrimination. Thereafter, the specific context of the impact of extractive industries on the rights of indigenous peoples will be examined.

2.1 - In Cases Related to Racial Discrimination

449. Courts and scholars have looked into the contours of "detrimental effect" also in the context of establishing actionable thresholds that trigger a legal responsibility. A first modality is indeed demographic in order to ascertain how disparate (widespread) the impact is measurable through statistics. For instance, only a considerable *rate of underrepresentation* of a group in relation to the enjoyment of a

[1670] See, Biviany Rojas and Raul T. do Valle, "Suspensão de Segurança: Porque a Justiça Não Consegue Decidir sobre o Caso de Belo Monte," *JusDH*, 21 November 2013, available at [http://www.jusdh.org.br/2013/11/21/suspensao-de-seguranca-porque-a-justica-nao-consegue-decidir-sobre-o-caso-de-belo-monte/], accessed on 7 February 2019.

[1671] ECtHR, *e.g. Alajos Kiss v. Hungary,* no. 38832/06, § 42, 20 May 2010.

[1672] See discussions Chapter 6 (Section 5.4).

given right is sufficient to validate temporary special measures, as seen in Chapter 8 (Section 2.13.2).[1673] In litigation, such significant disparity may lead courts to establish a *prima facie* instance of discrimination.[1674] It happens that this demographic approach has its limitations, *e.g.* the reluctance by some authorities in producing disaggregated data and the unclear outcomes originated by statics alone. In fact, the new generation of EU Directives bring a hybrid approach, allowing applicants to advance arguments based on other facts than statistics.[1675]

450. On the other hand, the severity of the impact sustained by a vulnerable sector has been applied in cases of ethnic violence, representing an *intensity* modality. For instance, in *Hajrizi Dzemajl et al. v. Yugoslavia* (2002) the CATCttee held that the effect of burning the Roma applicants' homes was so severe that it reached the level of degrading treatment, particularly because the police were at the scene and took no measures—behavior which qualified as acquiescence under the CAT.[1676] In a more nuanced tone, different levels of impact may not reach the threshold of absolute rights, like personal integrity or life, but may well attain the level necessary to engage responsibility of other relative rights. In *R.B. v. Hungary* (2016), revolving around a right-wing manifestation in a Roma neighborhood, the ECtHR, taking abreast of this nuanced approach,[1677] took the view that the facts of the case did not reveal sufficient

[1673] According to Richard Townshend-Smith, this assessment is unavoidably a matter of statistics. "Justifying Indirect Discrimination in English and American Law: How Stringent Should the Test Be?," *International Journal of Discrimination and the Law* 1, no. 2 (1995): 105.

[1674] In some cases, significant disparities alone may be sufficient to establish a *prima facie* instance of discrimination. See: CJEU: *Enderby v Frenchay Health Authority and Another,* Case *C-127/92*, [1993] IRLR 591, § 17, stating that the date should "[c]over enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether in general, they appear to be significant"; US Supreme Court: *Teamsters v. United States* 431 US 324 (1977), 339. See also *Hazelwood School District v United States* 433 US 299 (1977), 307-308: "where gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination."

[1675] See, e.g. the CJEU's case *O'Flynn v. Adjudication Officer,* Case C-237-/94 of 23 May 1996, in which the detrimental impact was measured by the hardship of migrant workers to service funerals of their relatives within the country of work. The formula "substantial higher proportion", from the former Burden of Proof Directive, was replaced by the more flexible "particular disadvantage" criterion. See, Dagmar Schiek, "Chapter Three – Indirect Discrimination, in *Cases, Materials and Texts on National, International and Supranational Non-Discrimination* Law, eds. Dagmar Schiek et al. (Oxford: Hart Publishing, 2007), 423.

[1676] CATCttee, *Hajrizi Dzemajl et al. v. Yugoslavia*, communication no. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), § 9.2.

[1677] ECtHR*, R.B. v. Hungary*, no. 64602/12, § 79, 12 April 2016. Compare with *Abdu v. Bulgaria* (no. 26827/08, 11 March 2014), in which the Court considered that light physical injuries on the victim, together with the presumed racial motivation of the attack, amounted to a threshold of Article 3 ECHR, "particularly [in view of] the infringement of human dignity constituted by the presumed racial motive for the violence" (§ 39).

severity to engage Article 3 in view of the reduced risk of physical aggression and the police safeguards put in place. However, the ECtHR held that the fact that the march took place in a predominantly Roma neighborhood with incidents of attempted assaults targeting oral offenses directly against the applicants meant that the situation reached the threshold of Article 8 ECHR "in the sense of ethnic identity."[1678] The Court, embracing the group harm approach, meticulously applied the intensity threshold according to the right in question.

In order to better grasp how this general understanding applies in concrete, the following sections applying it to specific situations.

2.2 - The Impact of Extractive Activities on Indigenous Peoples and Traditional Communities

451. A pressing international problem is the impact caused by extractive activities on the rights of indigenous peoples.[1679] Important case law has dealt with serious harms, such as the introduction of contagious diseases brought by construction sites in indigenous lands,[1680] disruption of religious sites by seismic explosives,[1681] and large-scale oil spills.[1682]

These violations occur in contexts of considerable imbalance of economic and political powers between indigenous communities and the enterprises operating in indigenous areas.[1683] This circumstantial vulnerability may be aggravated by the persistent failure by States to comply with consultation standards,[1684] causing a "great

[1678] Id, § 80.

[1679] See, UN HRC, Extractive industries Operating within or near Indigenous Territories. Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/HRC/18/35, § 57.

[1680]IACHR, *Yanomami v. Brazil*, Resolution Nº 12/85, Case No 7,615 of 5/03/1985.

[1681] The violations continued even after the IACtHR issued an order for precautionary measures against Ecuador.

[1682] ACHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Application No. 155/96. Decision of 27 October 2001; ECOWAS Court of Justice, SERAP v. the Federal Republic of Nigeria, Judgment No. ECW/CCJ/JUD/18/12, of 14 December 2012.

[1683] See, UN HRC, Report of Special Rapporteur on the Rights of Indigenous Peoples (2009), UN Doc. A/HRC/12/34 § 51, calling states to address such asymmetry.

[1684] This problem is illustrated by the Joint Urgent Appeal by the UN Special Mandates, No. UA USA 7/2016, on the allegation made by the Sioux tribe about the lack of prior consultation in view of the construction of the Dakota Access Pipeline.

degree of skepticism" among those communities as to the benefits from those extractive projects.[1685]

452. In a series of cases concerning the effects of extractive activities on indigenous communities, the HRCttee case law represents a recognizable effort to make a contextual and proportional assessment of those situations. In the first of those cases, *Ilimari Länsman v. Finland* (1994), the HRCttee was called upon to ascertain whether a quarrying activity affected the applicant's reindeer husbandry within the scope of Article 27 ICCPR (right to self-determination). The Committee established as a central question "whether the impact of the quarrying on Mount Riitusvaara is so substantial that it does effectively deny the authors the right to enjoy their cultural rights in that region."[1686] It accepted that the respondent state had a legitimate interest in the economic development of the region, but it also acknowledged that reindeer husbandry was an essential element of that culture.[1687]

As a first parameter to assess the safeguards implemented, the Committee held that there was a formal permit process allowing that extractive activity.[1688] Having been satisfied that the concerned community was duly consulted,[1689] the necessary information to support a sound risk assessment by the authorities was present. The authorities put in place mitigating measures, in particular by forbidding quarrying inside the reindeer pasturing area during certain periods.[1690] Measuring the real impact that the said extractive activity had on the husbandry, the Committee noted that the limit of 5,000 cubic meters of stone approved was not likely to disrupt the applicant's traditional reindeer herding. On the basis those elements, taken in conjunction, the HCttee found that there was no violation of Article 27 ICCPR.

[1685] UN HRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/12/34, § 60.

[1686] HRCttee, *Ilmari Länsmän and Others v. Finland*, communication no. 511/1992, views of 26 October 1994, U.N. Doc. CCPR/C/52/D/511/1992, § 9.5.

[1687] Id., §§ 9.2 and 9.3.

[1688] Compare with HRCttee, *Poma Poma v. Peru*, communication No. 1457/2006 U.N. Doc. CCPR/C/95/D/1457/2006, where the environmental impact licensing procedure itself was put in question.

[1689] HRCttee, *Ilmari Länsmän and Others v. Finland*, § 9.6. In the later case *Jouni A. Länsman and Others* (communication no. 671/1995), this Committee noted that during the consultations the applicants had not reacted negatively, § 10.5. In *Äärelä and Näkkäläjärvi v. Finland* (communication no. 779/1997), modifications in the logging permit were made after consultations with the concerned community.

[1690] Id., § 9.7.

The Committee's strict overview on the magnitude of the project in question is noteworthy. It indeed issued a warning in the sense that further responsibility of the State might arise should the maximum logging permit be increased with, as a consequence, a considerable expansion of the impact on the husbandry activity.[1691] The accrued impact on reindeer herding was the object of two other cases examined in 1996[1692] and 2005,[1693] alleging increased effects due to further logging and road construction planning. The question in those cases was whether the intensity of logging activity and the prospect of both road construction and future logging plans, taken as a whole, would result in a significant negative effect on that community's rights. The HRCttee's conclusion was that in concrete terms the overall size of the reindeer population remained high, despite the increase in the potentially impacting activities.[1694]

This moderate stance on the part of the HRCttee avoided imposing a far-reaching obligation to preserve the said territories untamed by (a) accepting as *legitimate interest* the economic development as a result of the extractive activity affecting that area and (b) performing a strict *proportionality control* by allowing only acceptable levels of nuisance on the applicant's lifestyle.

Such instance, however, was taken contextually. It would be hardly accepted that it could be transposed to all cases. In its economic sense, the parameter (a) is not easily accepted by specialized indigenous doctrine and the jurisprudence of the IACtHR.[1695] The parameter (b) in certain circunstances would entail a consideration of projects of significant magnitude involving extraordinary resource consumption in or surrounding the indigenous lands, frequently compromising the indigenous peoples' traditional interests and rights.[1696] For these reasons, the IACtHR, overseeing a

[1691] Id. § 9.8.

[1692] HRCttee, *Jouni A. Länsman and Others* (1996).

[1693] HRCttee, *Jouni Länsman and Others v. Finland* (2005), communication no. 1023/2001, U.N. Doc. CCPR/C/83/D/1023/2001.

[1694] Id., § 10.3.

[1695] Mainly given the incompatibility between the monetary value attributed to an extractive project and the cultural and spiritual values attributed to the indigenous lifestyles. See, Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford: OUP, 2016), 211-212, referring to the works of the *Saramaka* case, the CERD's practice, as well as to a writing of James Anaya.

[1696] Id., 213, noting that "irrespective of whether the extraction project would generate great wealth to society as a whole, it can hardly be considered proportionate if it leaves a great scar on the society and culture of indigenous community."

number of previous cases involving large extractive projects, has not demonstrably engaged in an extensive proportionality assessment, as did the HRCttee. As the *Sarayaku* flagship case portrays, Latin America is a region with large extractive potential for exportation involving transnational corporations, with an increased asymmetry between the entrepreneurs and the communities concerned. Added to that, in light of the unsatisfactory enforcement of the domestic safeguards (including the FIPC standards), the IACtHR was driven to reach a conclusion for a violation in those cases already in the first *according to the law* stage.

453. A comparison between the stances taken by the HRCttee and the IACtHR demonstrates that the extent to which a positive duty to protect an ethnic group from impacts caused by extractive industries hinges considerably on a specific and contextual analysis. Specific, in view of a first consideration on the preliminary standards on the rights of indigenous peoples (their particular forms of enjoy rights). Contextual, due to a second and more detailed consideration regarding the characteristics of the very group at stake (in opposition to a mere essentialist approach to indigenous peoples), and the geopolitical context in which the violations occur.

3 - The Private Sector and Systemic Exclusion

454. Another important context of understanding the extent of positive obligations in the field of racial equality and non-discrimination is the issue of (de facto) segregation of certain groups, which can occur without the intention of the authorities and engage State responsibility.

3.1 – Plausibility of a Legal Understanding of De Facto Segregation

455. This section will further apply the theoretical background from previvous chapters to the specific context of racial discrimination. States remain internationally responsible for racial discrimination committed by private parties, including through privatized services. While it is easier to understand this responsibility through intentional acts of the respective private actors, racial discrimination *as a result* of the services provided by these actors resulting in a systemic racial exclusion (or even a *de facto* segregation), though plausible, requires some more detailed consideration.

Three types of arguments are presented in order to justify such plausibility.

456. The first one is related to the State involvement. To begin with, under the theory of positive obligations, there are different approaches on which can be considered the "State" or "public authority"[1697] instead of a fixed concept. Moreover, types of contracts among the State and the private sector are varied in this context, ranging from public-private-partnerships, mixed consortia, to project financing. In fact, a sharp division between the public and the private has proven of little use or even working counter the objectives of substantive equality.[1698] Public-private relations are regarded as *symbiotic* in given contexts.[1699] In any case, it is reminded that the *due diligence* principle as applied to human rights law disregards the complexities of the general rules of State attribution, requiring mainly the knowledge of a violation (or its imminence) and the tolerance by the authorities in order to raise State responsibility.

457. Secondly, in view that the State intent is disregarded in the context of structural discrimination,[1700] the CERD in *General Recommendation No. 20* has specifically underscored an ample spectrum of State responsibility vis-à-vis the private sector in this context. It recalls that

> the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result [of

[1697] See, Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Antwerp: Intersentia, 2016), 243-246 and 254-260.

[1698] See, e.g. Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory," *Journal of Law and Society*, 18, no. 4 (1991): 48-463; Simone Cusack and Lisa Pusey, "CEDAW and the Righto to Non-Discrimination and Equality," *Melbourne Journal of International Law* 14 (2013): 9-10.

[1699] *Cf.* US Supreme Court, in *Burton v. Wilmington Parking Authority* 365U.S. 715(1961), found that the State was responsible for a private policy of not allowing blacks entering a coffee shop that was located in an area leased by the public authorities. There was no order from the public authorities to apply a segregational policy. The Court found the relation between the authorities and the coffee shop was so "symbiotic" to entail responsibility on the public authorities. However, the doctrine of State Act, by the US Supreme Court has been seen inconsistent to deal with the matter, since the mere licensing of a private activity has not been considered to raise State responsibility. In cases regarding racial issues, this Court has been more apt to held authorities in breach of the 14th Amendment of the US Constitution. Further reading: Duncan Kennedy, "The Stages of Decline of the Public/Private Distinction," *University of Pennsylvania Law Review*, 130 (1982): 1349-1357; Sheila S. Kennedy, "When is Private Public? – State Action in the Era of Public-Private Partnerships," *George Mason* University *Civil Law Rights Journal*, 1-2 (2001): 203-223. Compare with the ACHPR's *Ogoni* case (ACHRP, cited above), where the Nigerian authorities provided an oil company with armed security that killed a number of members of an indigenous people.

[1700] CERD, *General Recommendation No. 19: Racial Segregation and Apartheid* (Art. 3), 18 August 1995. UN Doc. A/50/18, Annex VII, p. 140, §§ 3-4. See also Chapter 7 (Section 2.3).

> the activities of private institutions] has neither the purpose nor the *effect* of creating or perpetuating racial discrimination.[1701]

For their part, the UNGPBHR pay attention only generically to a number of discriminatory factors[1702] in the context of the general State regulatory and policy functions. While these Principles do not impose international obligations on enterprises, States are thereby under an international obligation to prevent *de facto* racial segregation through proactive duties: *e.g.* to improve equal access, to ensure equitable regional distribution, to pay attention to the relevant intersectionalities (*e.g.* age, disability, gender), to conduct prior consultations with the affected sectors, and to produce data that may indicate patterns of inequality in the distribution of services and opportunities. Compliance with this obligation to prevent hinges significantly in obtaining specific (racial or ethnic) knowledge through *e.g* the production of equality data[1703] and consultation with the affected communities.[1704]

In some circumstances, the imbalance of powers between large-scale service enterprises and vulnerable public good users of certain racial or ethic attributes may be so significant to reveal genuine asymmetries in those relations. Moreover, in every society, pre-existing structural inequalities pose a challenge to the State when it is granting a concession or authorizing a given economic activity.[1705] On the other hand, business profit rationale is not aimed at a progressive realization or equalization of rights. Such improvements will not occur unless the authorities stipulate the appropriate corrective measures—either unilaterally or in an agreement with the enterprise concerned.

[1701] CERD, *General Recommendation No 20: Non-Discriminatory Implementation of Rights and Freedoms (Art. 5)*, 15 March 1996. UN Doc. A/51/18, Annex VIII A, p. 124, § 5 (italics added).

[1702] OHCHR, The Corporate Responsibility to Respect Rights (2012), HR/PUB/12/02, at 1 (commentary to the Geneal Principles): [t]hese Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men."

[1703] (Chapter 8, Section 2.2.1).

[1704] (Chapter 8, Section 1.3). These Principles speak only of "meaningful consultations" with the affected communities in Principle 18.

[1705] See, for instance, in the case of privatization of water supply in South-Africa, after the Apartheid regime: Brittany Morris, "Water Apartheid? A Case Study Examining The Parallels between Water Privatization in Neoliberal South Africa And Inequalities in Apartheid," in *Trial Six* 6 (2012): 16-23.

3.2 - Elements to Be Considered in the Risk Assessment of Racial Exclusion

458. In order to better grasp the contours of an obligation to prevent and address racial or ethnic exclusion in the context of (public) services provided by private entities, this study will apply the elements established by the practice of the CESCR, namely economic accessibility (affordability), physical accessibility, and acceptability. These elements are well known in both theory and practice and are useful tools to give a more detailed account on the normative aspects in this context.

3.2.1 - Affordability

459. Pricing policy, either implemented by a government or a private provider, can be considered a discriminatory component. Racially marginalized sectors, whether numerical minorities or majorities, frequently represent impoverished social strata and significantly affected by high prices.[1706] Unless a fair pricing policy is considered, particularly in the initial phases of a privatization,[1707] some sectors may have limited or no access to some goods and services. This policy it is not deemed discriminatory to the extent that it is justified. In *General Comment No. 15 on* the right to water, the CESCR has emphasized that equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.[1708]

In a more concrete situation, the South African Constitutional Court held in *City Council of Pretoria v. Walker* (1997) that differentiated electricity and water pricing policies and payment collections were constitutional. In the case at hand, the white communities were charged per cubic meter of water consumed, whereas the black counterparts were charged on a flat-rate basis in view of the very precarious

[1706] See, Stein, "Reforming the Water and Sanitation Sector in South Africa", Pretoria 2000, cited by Anton Kok, "Privatization and the Right to Access to Water," in *Privatisation and Human Rights in the Age of Globalisation*, eds. Koen De Feyter. et al. (Antwerp-Oxford: Intersentia, 2005), 265.

[1707] During the first phases of the concession agreements, prices charged to the public in general are normally higher, due to the repayment of the investments private concessionaires to build new infrastrure. In some modern concession agreements, unit prices (*e.g.* cubic meters of water, road kilometers, or internet Megabytes) of the fees charged to the public are included in the criteria of bid winning in public tenders, tending to increase access to these services and goods.

[1708] CESCR, *General Comment No. 15*: *The Right to Wate*r, 20 January 2003. UN Doc. E/C.12/2002/11, § 27. See also concluding observations on Nepal (right to water), E/C.12/1/ADD.66, § 60; on Kazakhstan (right to social security), E/C.12/KAZ/CO/1; and on Veneuzela (health care), E/C.12/1/Add.56, § 29.

infrastructure in the poorer communities. The Court was careful to remind that a constitutional State must apply the right to equality in a rational rather than vindicatory manner. Rapporteur Langa DP, joined by the majority, noted that the aim of the policy to apply differentiated charges had a legitimate objective and was temporary in nature, aimed at the continuation of the provision of water, in a "difficult transitional period".[1709]

The Court's *conditio sine qua non* to hold this policy constitutional was to assert that this policy was objective and temporary, though it cannot be seen as a true affirmative action measure as such.

Another issue on affordability is that market forces may act in a manner that goods conventionally aimed at the domestic supply, such as food, might be diverted to exportation, leading to price increases in the internal market. Some groups who traditionally live on forest harvesting or hunting might face scarcity of goods they traditionally consume and be forced to find other more expensive nutritional means.[1710]

3.2.2 - Physical Accessibility

460. Racial disadvantage has an important territorial aspect,[1711] impacting the equal regional distribution of resources and opportunities.[1712] Facilities that used to service racially disadvantaged communities may be closed or relocated by new private

[1709] Constitutional Court of South Africa, *City Council of Pretoria v Walker,* CASE CCT 8/ 1997 4 SA 189. Judge Sachs dissenting, in part arguing that the selective enforcement policy was not objectively based and the geographic enforcement, though coinciding with racial and ethnic concerns, does not constitute indirect discrimination.

[1710] See, in this regard: UN HRC, Preliminary Study of the Human Rights Council Advisory Committee on Discrimination in the Context of the Right to Food, (22 October 2010). UN Doc. A/HRC/13/32, § 28 (on fishing activities).

[1711] E.g. CESCR, *General Comment No. 14 – The Right to the Highest Attainable Standard of Health*, 11 May 2000, UN Doc. E/C.12/2000/4, § 12: ("health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations…").

[1712] CERD, Concluding Observations on Madagascar, UN Doc. CERD/C/65/CO/4, § 16. See also, Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Treaty Bodies* (Antwerp: Intersentia, 2005), 41.

owners, hindering access to essential services.[1713] For instance, health services located close to slum areas, densely populated by ethnically discriminated groups, may be discontinued. Better resources (*e.g.* doctors, equipment, supplies) may be reallocated to hospitals of privileged areas, enabling higher rentability. In the same vein, groups with nomadic lifestyles may face disproportionate impacts when only precarious settlement spots are offered by the authorities, *e.g.* next to or under highways, far from public facilities, commerce and public transportation and devoid of sanitation, water, or sewage systems.[1714]

3.2.3 – Acceptability

461. This criterion relates to the cultural aspects surrounding the offering of goods and opportunities.[1715] For instance, this applies to new consumption habits imposing consumption patterns incompatible with the culture of some indigenous peoples and affecting negatively their health or other rights.[1716] In emerging economies, exhaustion of traditional resources by intensive extractive activities, increased industrial output, and proximity with mainstream societies may force them to acquire such goods and products, affecting the enjoyment of their rights, such as the right to health.[1717]

[1713] Vernellia R. Randall, *Race, Health Care and the Law, Regulating Racial Discrimination in Health Care*", Conference Paper, Racism and Public Policy, Durban 2001, at 6, available at [http://www.unrisd.org/], accessed on 7 February 2019.

[1714] See, Sandra Feldman, *Discrimination Law*, 2nd ed. (Oxford: Clarendon, 2011), 70.

[1715] CESCR, *General Comment No. 12 - The Right to Adequate Food*, adopted on 19/05/1999, UN Doc. E/C.12/1999/5, § 8: "acceptable within a given culture". See also the "non nutrient-based values" in this context, § 11.

[1716] The right to food of indigenous peoples is closely related to the tenure and control of their traditionally occupied lands, see: *Preliminary Study of the Human Rights Council Advisory Committee on Discrimination in the Context of the Right to Food*, UN Doc. A/HRC/AC/6/CRP.1 (2010), § 51. The Special Rapporteur on the Right of Indigenous Peoples has recommended Kenya to revise the policy of the privatization of communal ranches, with the participation of the communities concerned, to counteract the negative consequences of the "willing seller-willing buyer" practice. UN Doc. A/HRC/4/32/Add.3, § 101.

[1717] See, e.g. Luana P. Soares et al. "Prevalence of Metabolic Syndrome in the Brazilian Xavante indigenous population," *Diabetology & Metabolic Syndrome* 7 No. 105 (2015), demonstrating raising trend of health impacts arisen out of changes in food consumption among that indigenous community.

4 - Overcoming Procedural Challenges on Structural Racial Discrimination

462. As seen in Chapter 7 (Section 4.2.4), a number of factors pose obstacles for members of vulnerable groups to seek remedies domestically. Access to international mechanisms, requiring specific expertise, high costs, and other resources are no less difficult for many of these groups claiming their rights.[1718] It was seen also in Chapter 6 (Section 6) that although equality and non-discrimination treaties and relevant case law impose positive obligations beyond individual rights, most of the relevant complaint mechanisms are designed to entertain individual claims. At the same time, interesting approaches, including by the ECtHR and the IACtHR, have entertained non-discrimination claims on a structural manner, even if indirectly.

This section builds upon the above-mentioned sections, providing a closer analysis in the field of racial discrimination. This section will revisit the approaches of "pattern of discrimination" by the IACtHR and of the pilot judgment procedure by the ECtHR regarding the specific subject matter of this Part III.

4.1 – Predominant Individual Standing

463. Following the general pattern, ICERD's Article 14.1 on individual communications comprises a limited standing only,[1719] despite the obligations beyond an individual scope provided by this Convention, viz. Article 2.2 (to provide temporary special measures) and Article 7 (to combat racial prejudices). [1720] Similarly, the HRCttee has limited the scope of collective claims under Article 27 of the ICCPR (right to self-determination).[1721] This Committee admits such claims in respect to each individual right, operating an indirect manner to make extra-individual rights justiciable.[1722] Given its special competence to oversee overall compliance with the

[1718] Chapter, Section 4.2.4.

[1719] ICERD, Article 14.1. Similarly, CMW, Article 77.

[1720] Jennifer Devroye, "The Case of D.H. and Others v. the Czech Republic," *Northwestern Journal of International Human Rights* 7 no. 1 (2009): 88.

[1721] See, for instance, *Kitok v. Sweden*, (communication 197/1985, views of 27/07/1988) where the HRCttee examined the claims of under Article 27 solely regarding the applicant's individual right, applying the strict "claim to be a victim" criterion. UN Doc. CCPR/C/33/D/197/1985, § 63. Similarly, *Jouni Länsmän and Others* (2005*)*, § 6.1.

[1722] Ludovic Hennebel, *La Jurisprudence du Comité des Droits de l'Homme des Nations Unies – Le Pacte International Relatif aux Droits Civils et Politiques et son Méchanisme de Protection Individuelle* (Brussels: Bruylant, 2007), 369.

ESC (including systemic inequalities), the ECtteeSR has championed in ruling on structural violations against the Roma.

However, as a matter of fact, the individual rights perspective does not totally hinder important considerations on structural racial inequality at the merits stage. The ECtHR has at least on two occasions approached cases of this type beyond the applicant individuals. In the *Roma Schooling Cases* overall the ECtHR made an assessment on a discriminated sector rather than on individual cases, reinforcing a positive obligation to address such patterns.[1723] In *Aksu v. Turkey* (2012), concerning the allegation that a dictionary contained pejorative definitions on the Roma, the ECtHR applied a flexible agency concept. Given the applicant's Roma origin, the Court extended to him a victim status[1724], since the impugned dictionary containing stigmatizing content was likely to violate his right to privacy. Those instances in which structural racial discrimination is addressed have, however, an indirect and limited effect on this problem.

4.2 – Adjudicatory Alternatives for Addressing Structural Racial Discrimination

464. This section makes an analysis of the approaches adopted by the Inter-American and the European systems of addressing structural discrimination through contentious cases. It is important here to assess not only whether the relevant decisions detected a systemic problem on racial discrimination, but also if remedies awarded were adequate to the systemic issue at stake.

4.2.1 - The Inter-American Approach - Patterns of Racial Discrimination

465. Within the long-standing practice of both the IACtHR and the IACHR in assessing patterns of violations, including patterns of discrimination[1725], *Simone Diniz v. Brazil* (2006) appears very representative. IACHR's statement on the particularly

[1723] Jennifer Devroye, "The Case of D.H. and Others v. the Czech Republic," ibid.

[1724] ECtHR, *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 53-54, ECHR 2012. Similarly, ECmHR, *Könkämä and 38 other Saami Villages v. Sweden*, Application No. 27033/95, decision of 25/11/96; CJEU, *Feryn* (2008), CJEU, Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, Judgment of 10 July 2008, § 24. Further comments, see Harriet Ketley, "Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples," *International Journal on Minority and Group Rights* 8, no. 4 (2001): 348.

[1725] See examples of this practice in Chapter 6 (Section 6.2).

vulnerable situation in which Afro-Brazilians are found[1726] corroborated the finding of generalized racial discrimination in the enjoyment of the right to judicial protection. As the Commission stated:

> The archiving of the case was not an isolated event in the Brazilian justice system; rather, the Commission has shown that it reflects a purposeful and explicit pattern of conduct on the part of the Brazilian authorities, when they receive a complaint of racism.[1727]

The relevance of this *dictum* is not only related to the detection of a pattern of violations, but also to the use of statistics by the Commission and the ample scope of reparations awarded to both the applicant and to society at large, such as a payment of compensation, training for judiciary on racial discrimination, and organization of seminars on racism on the media. At the same time, American states are reluctant in implementing general reparations measures. This reluctance is sometimes difficult to overcome, given the OAS lacks a political supervisory mechanism, such as in the CoE's system.[1728]

4.2.2 - The Potential of the ECtHR's Pilot Procedure in Systemic Racial Discrimination

466. As discussed in Chapter 6, the ECtHR's Pilot Judgment Procedure has shown its potential to address systemic discriminations, notably on disability rights.[1729]

Interestingly, also, in *Kurić and Others v. Slovenia* (2012) the Court entertained violations of Articles 8 and 13 and 14 ECHR in favor of eight stateless applicants claiming arbitrary deprivation of a permanent resident status. In addition to finding the respondent State in breach of the Convention, the Court deemed the case suitable for the adoption of a pilot-procedure, given that the interests at stake transcended the

[1726]IACHR, *Simone André Diniz v. Brazil*, Case No. 12.001, Report No. 66/06. OEA/Ser.L/V/II.127 Doc. 4 rev. 1, § 44. See also *Wallace de Almeida v. Brazil*, § 64, where the IACHR established by statistical evidence greater propensity of blacks to be killed in slum areas by the police.

[1727] IACHR, *Simone André Diniz v. Brazil*, § 102.

[1728] *Cf.* Sean Burke, "Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights," *Minnesota Journal of International Law* 20-1 (2011): 136 proposing that the IACtHR establishes a mechanism such as the European pilot procedure in order to resolve cases involving indigenous rights.

[1729] ECtHR, *W.D. v. Belgium,* no. 73548/13, § 173, 6 September 2016.

applicants' perspectives and concerned general measures potentially impacting other individuals under similar circumstances.[1730]

The Court observed that only a few repetitive cases were pending before it, and yet it decided to adopt a pilot judgment, which shows an inclination of the Court to deal the root causes related to structural racial discrimination.[1731] However, beyond a compensation scheme,[1732] the Court did not order any legislative reform, possibly in view of the specific competence of the Committee of Ministers for such matters.[1733] Such an instance of judicial restraint, in view of keeping it within its institutional role, limited in this case the potential of this Court to deal with structural discrimination. However, as it has been argued in Chapter 6 (Section 1.2.3.4), the ECtHR could find alternatives to be a catalyst of internal processes through the pilot-judgment procedure. This Court, for instance has ordered a number of mechanisms to respondent States, such the active search[1734] of beneficiaries of a remedial scheme, which can potentially remove individuals belonging to vulnerable groups from invisibility.While maintaining its principal role of deciding on individual petitions, the Court's potential to address systemic discriminations originating from these petitions is recognized, contrary the criticism that it would be transformed in a "human rights small claims tribunal."[1735]

5 - The Question of Balancing Competing Rights – Racial Hate and Discriminatory Speech v. the Protection of Equality

467. The issue of (racial) hate and discriminatory speech has been object of heated debates. These debates were notably marked by a (supposed) dilemma between a liberal approach in defense of freedom of expression and an egalitarian approach in

[1730] ECtHR, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 413, ECHR 2012 (extracts).

[1731] Id., § 414.

[1732] Id., § 415.

[1733] See, Resolution CM/ResDH(2016)112, by which the Committee of Ministers decided to close the examination of the case, in view of the legislation adopted by the responding State to adopt an ad hoc scheme for payment of compensation of a wide number of potential victims.

[1734] ECtHR, *Burdov v. Russia (no. 2),* no. 33509/04, § 130, ECHR 2009, ordering reparations regardless of the difficulties in identifying the relevant beneficiaries.

[1735] Paul Mahoney, "An Insider's View of the Reform Debate" [https://njcm.nl/wp-content/uploads/ntm/T2b_NTM2FNJCM-bull2E_040211_Final_LR.pdf], later referred to in Steven Greer and Faith Wylde, "Has the European Court of Human Rights become a 'Small Claims Tribunal' and Why, if at All, Does it Matter?," *European Human Rights Law Review*, 7, no. 2 (2017): 146.

defense of racial equality through criminalization of hate speech. Such alleged dichotomy nowadays has lost ground to a more reasoned and holistic understanding according to which both rights are mutually reinforcing and, in fact, upholding free speech as a component to create an enabling environment for tolerance and mutual understanding. As a consequence, the extent of a positive obligation to combat this type of racial discrimination has been object of much more gradation and contextual analysis instead of a binary method (plainly abstention or criminalization), relying substantively on a sound proportionality approach and concrete elements of the case at stake. The following section presents an analysis on the extent of positive obligations through balancing freedom of expression and protection of racial equality.

468. Before proceeding to the substantive analysis of this section, a methodological consideration is necessary. Besides an integrated approach focusing on normative gap-filling from specialized (group-focused) treaties to general CPR treaties, the area of hate speech presents an occasion to also observe an integration from general CPR treaties to specialized (group-focused) treaties. As will be seen, the CERD, as a monitoring body of the ICERD, a convention that deals in Article 4 specifically with "hate speech", has sought guidance in the more general source of the ICCPR on the question of freedom of expression.

The combat of hate speech has been historically dealt with caution, in view *e.g.* of the fragile balance reached during the negotiations of Article 4 ICERD in relation with the "due regard clause". In this sense, the fight against racial discrimination cannot be at the cost of freedom of expression. In revisiting this issue recently, the CERD remarkably took into account detailed concepts regarding the protection of freedom of expression, in order to shape its latest understanding on the scope and extent of Article 4. In fact, it can be said that The CERD reassessed this matter in light of the recent developments emanating from other general systems, thus from human rights law as a whole.

On the other hand, the ECtHR, in recent judgments dealing with the conflicts between freedom of expression and racial equality, has also relied on the authority of the ICERD, in order to improve its reasoning beyond its own *acquis* on Articles 10 and 14 ECHR, as will be seen in this section.

Hence, the subsections that follow will approach the issue of the limits of positive obligations to combat hate speech with a closer look at human rights integration. As it will be seen, there is a notable synergy among the different monitoring systems in this specific issue. Some aspects of this issue have not been not yet settled, in which the several systems keep have diverging views, such as the glorification of violence and hate and violent political speech. Yet, once more, it is by no means suggested uniformity, but rather a dialogue between the several systems, while also respecting regional approaches and specific contexts that cannot be captured by a unified view on the combat of hate speech.

5.1 – Preliminary Considerations

469. Hate speech is a phenomenon encompassing various cultural, political, and historic contexts. Hence, a universal definition of this phenomenon has proven difficult.[1736] The combat of racial hate speech has since its inception been object of heated debate on what is exactly the set of obligations (positive and negative) at stake. The debate on the extent of these obligations have been polarized on a binary between unfettered speech and criminal law sanctions, which is of reduced practical value today. International law, through evolving interpretation, has restricted the use of penal law as a tool of social control that had negative impacts in violation of civil liberties, *e.g.* in the cases of vagrancy, homosexuality, and drugs use.[1737] As seen in

[1736] This study is aware of the difficulties on the definition of hate speech. Other concepts in the ambit of equality and non-discrimination, such as violence against women and disability also have fluid definitions and are deemed as evolving concepts that can be interpreted according to certain contexts. This study works under the premise that it is possible to analyze the balancing between the protection against racial discriminaton and freedom of expression without attaching to a precise definition of the term hate speech. This sub-section concentrates on circumstances in which certain expressions are already prohibited by domestic law or defined as non-permisible in a concrete case under litigation, which is deemed as a sufficient basis to elaborate the relevant arguments. One of the few definitions of hate speech is found in EU Recommendation No. R (97) 20. Accordingly, it "shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." Adopted by the Committee of Ministers on 30 October 1997 at the 607th Meeting of the Ministers' Deputies (Appendix). See also the CoE Additional Protocol on Cybercrime, defining "racist and xenophobic material, as those which advocate, promote and incite hatred etc., Article 2.1. Its explanatory report delineates that the verbs (a) advocate, according to the Report, means "a plea in favor of hatred discrimination or violence"; (b) "promote" implies "an encouragement to or advancing hatred, discrimination or violence"; and (c) "incite" means "to urging others to hatred, discrimination or violence."

[1737] ECtHR, the "Vagrancy" Cases: *De Wilde, Ooms and Versyp v. Belgium*, 18 November 1970, Series A no. 12; *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12; *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, Series A no. 14 (detention of vagrants); *Salgueiro da*

Chapter 8 (Section 1.5.2), the scope of obligations to curb hate speech transcends criminal law and civil or administrative sanctions. At the same time, the duty to promote racial and ethnic understanding is regarded as an autonomous rather than an ancillary obligation. The latter respective measures include actions and policies that aim at deconstructing stereotypes, training, and overall creating an enabling environment that upholds freedom of expression and racial equality.[1738]

5.2 – the CERD's Approach – Then and Now

470. The CERD, though historically affirming an interplay between freedom of expression and prohibition of discrimination, has not provided until recently a firm pronouncement to this question. The ICERD's "due regard" clause was adopted as a compromise to apply Article 4 in relation to all rights, including freedom of expression and not exclusively the latter.[1739] This idea of interdependence of rights instead of mutual exclusion[1740] has been reinforced by the CERD since 1986 as a token of moderation among different opinions on the effects of the "due regard" clause.[1741] In early times the CERD had somewhat, in general terms, tilted the balance towards a greater protection of racial equality.[1742] However, in revisiting this matter in

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Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX (criminalization of homosexual behavior); CoE Commissioner for Human Rights, "Criminalisation of Migration in Europe: Human Rights Implications". Issue Paper CommDH (2010) (criminalization of migrants); UN OHCHR, Study on the impact of the world drug problem on the enjoyment of human rights, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/30/65, 24 September 2015, § 61.

[1738] See Chapter 8 (duty to promote).

[1739] See comments in Chapter 8, Section 1.5.2 (about a non-absolute obligation to prosecute acts of racial discrimination).

[1740] CERD, "Positive Measures designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4" (1986), A/CONF.119/10, § 225. Compare with the ECtHR's approach on the ICERD's "due regard" clause, in *Jersild v. Denmark,* 23 September 1994, § 63, Series A no. 298.

[1741] See, Karl Joseph Partsch, commenting on the three different approaches: (a) States parties are now allowed to take any action that would restrict the rights referred to in that clause (USA); (b) States should strike a balance between the competing rights and duties (Canada); and (c) States are not allowed to allege protection of civil rights to exonerate from the obligations to enact laws to give effect to the ICERD (UN Human Rights Division in Geneva, 1979). In: "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination," in *Striking a Balance: Hate Speech Freedom of Expression and Non-Discrimination*, eds. Kevin Boyle et al. (Essex, 1990), 24-25.

[1742] CERD, *The Jewish Community of Oslo and Others v. Norway*, communication no. 30/2003. Opinion of 15 August 2005, UN Doc. CERD/C/67/D/30/2003, § 10.5. Compare with Stephanie Farrior, "Molding the Matrix: The Theoretical and Historical Foundations of International Law and Practice Concerning Hate Speech," *Berkeley Journal of International Law* 14, no. 1, (1996): 52, noting that the

a more consistent manner, in *General Recommendation No. 35* (2013), the Committee refined its understanding on the matter. It reaffirmed that the Convention is a living instrument and should be interpreted in consonance with international human rights law in general (the "sister human rights bodies" included[1743]) instead of claiming any *lex specialis* status to the ICERD. It strengthened the already existing complementarity between the above-mentioned rights by the CERD and by the HRCttee.[1744] This approach resonates significantly with the ECtHR's counterpart of leaving untouched the equal value it attributes to freedom of expression and the right to privacy, even when hate speech is at stake.[1745] In short, the reach of positive obligations to address hate speech is to be understood in accordance with the current reconceptualization of this phenomenon itself.

5.3 - The Need of a Proportionality Assessment

471. Regarding the jurisprudence of general monitoring bodies, the early decades of case law on hate speech, of both the HRCttee and the ECtHR, witnessed a straight dismissal of the admissibility of complaints involving *e.g.* denial of the holocaust,[1746] totalitarian regimes,[1747] and instilling fear on the Muslim community[1748] through the "destruction of rights" clause of Article 17 ECHR and Article 5.1 ICCPR. Under the argument that such expressions counter the treaties' objectives, this approach

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CERD, through this clause, tends to give greater weight to racial equality and dignity, justified by the "bitter experience of racist acts that led to great suffering."

[1743] CERD, *General Recommendation No. 35 - Combating Racist Hate Speech*, 26 September 2013. UN Doc. CERD/C/GC/35, § 4. The CERD has rejected a "zero sum" equation between competing rights, § 45. See: Patrick Thornberry, commenting that the new integrated reading of Art. 4, in line with other conventions, makes it more "permeable", despite the ICERD's clear prescriptive nature, in *The International Convention on the Elimination of All Forms against Racial Discrimination, A Commentary* (Oxford: OUP, 2016), 289 (citing Diaconu, 2007).

[1744] CERD, *General Recommendation No. 15: Organized Violence Based on Ethnic Origin*, adopted on 23 March 1993. UN Doc. A/48/18, 114-115, § 4; HRCttee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, adopted on 12 September 2011. UN Doc. CCPR/C/GC/34, §§ 28, 32 and 50, recognizing the existence of a State obligation to combat racial hatred under the ICCPR.

[1745] ECtHR, *Delfi AS v. Estonia* [GC], no. 64569/09, § 139, ECHR 2015.

[1746] ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions 1998-VII

[1747] HRCttee, case of *M.A. v. Italy*, communication no. 117/1981. Views of 10 April 1984, U.N. Doc. Supp. No. 40 (A/39/40), 190, regarding the reestablishment of the Fascist Party; and ECtHR's cases of *B.H., M.W., H.P. and G.K. v. Austria*, No. 12774/87, (dec.); *Nachtmann v. Austria,* No. 36773/97, (dec.); and *Schimanek v. Austria*, No. 32307/96, 1/2/2000, (dec.)

[1748] ECtHR, *Le Pen v. France*, Application no. No. 18788/09. (dec.); *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI.

generated a categorical presumption of incitement to hatred, resulting in conceptual and practical problems. Scholarly works criticized this approach for: (a) hindering constitutional identities and subsidiarity of international monitoring;[1749] (b) denying one's right to have one's case judged by a supranational organ;[1750] (c) generating a boomerang effect on the applicants[1751] instead of serving the objectives of the ECHR;[1752] and (d) preventing the HRCttee to set clear criteria on the relations between Arts. 19 and 20 ICCPR.[1753] Overall, these clauses are to be applied observing a high threshold, when the speech at stake is devoid of any purpose of exchanging views and ideas.[1754]

Gradually this practice has been losing strength. In Geneva, the HRCttee declared admissible the case of *Faurison v. France* (1996).[1755] In Strasbourg, the ECtHR inaugurated a practice of delineating the contours of cases raising the issue of hate speech, *e.g.* through *Soulas and Others v. France* (2008) and *Féret v. Belgium* (2012).[1756] This practice is notably confirmed by *Perinçek v. Switzerland* (2015),[1757] involving a case of negation of the "Armenian Genocide."

[1749] Stefan Sottiaux and Gerhard Van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights," *Hastings International & Comparative Law Review* 31 no. 1 (2008): 125.

[1750] Hannes Cannie and Dirk Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?," *Netherlands Quarterly of Human Rights* 29, no. 1 (2011): 69.

[1751] Dirk Voorhoof "European Court of Human Rights Jean-Marie Le Pen v. France," *IRIS* 2010-7:1/1, available at [http://merlin.obs.coe.int/iris/2010/7/article1.en.html], accessed on 2 August 2018.

[1752] See: David Keane, "Combatting Hate Speech under Art. 17 of the European Convention on Human Rights," *Netherlands Quarterly of Human Rights*, 25, no. 4 (2007): 661, commenting that the ECtHR, in *Jersild v. Denmark*, would have plainly legitimized the prosecution of a journalist, if the "destruction of rights" clause had been accepted, without a further examination of the respective context.

[1753] Manfref Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: Engel, 2005), 477-479.

[1754] The ECtHR has since early cases restricted the scope of Art. 17 to cases threatening the very essence of democracy, as in *Lawless v. Ireland (no. 3)*, 1 July 1961, p. 45, Series A no. 3. Or, according to Oetheimer, this Article applies only to the most serious cases, when the speech in question is totally devoid of any polemic or informational purpose, "La Cour Européenne des Droits de l'Homme Face au Discours de Haine," *Revue Trismestrielle des Droits de l'Homme* 69 (2006) 66-70. See also: Principle 4 of Recommendation No. R (97) 20 on hate speech (30 October 1997).

[1755] HRCttee, *Faurisson v. France*, communication no. 550/1993. Views of 8 November 1996, U.N. Doc. CCPR/C/58/D/550/1993, regarding an academic who consistently denied the existence of gas chambers.

[1756] ECtHR, *Soulas and Others v. France,* no. 15948/03, 10 July 2008, involving the publication of a book about the "Islamic colonization", pictured in a military fashion; *Féret v. Belgium,* no. 15615/07, 16 July 2009, involving distribution of pamphlets and posters by the leader of a right-wing party allegedly stereotyping the Muslim community.

472. Unlike the entrenched approach in the United States of the *market place of ideas* that makes freedom of expression trump over other rights, international monitoring bodies and most national jurisdictions have a tradition of paralleling equality and fundamental freedoms in principle. Hence, it is ascertained in a concrete case through a balancing test the extent to which a positive or a negative obligation applies, according to a contextual assessment.

Despite the general approach to ponder those conflicts in a concrete case, some ad hoc attitude persisted. In *Féret v. Belgium* (2012), a tight majority (4-3) of the ECtHR found that the sanctions against the applicant were justified and proportionate. However, in methodological terms, it transpires from the judgment that a thorough balancing test was not fully applied. While the Court attempted to respond to the growth of extremist political platforms, it did not build up on its previous efforts to reconcile freedom of expression and public order.[1758] Moreover, this Court seems to have returned using Article 17 ECHR, in two recent controversial cases[1759] in an apparent casuistic manner that do not exactly warrant the high threshold of this article.

473. Since freedom of expression and equality in principle enjoy equal importance, a soundly elaborated test in the concrete case enhances the chances of establishing the appropriate extent (if any) of the positive obligation due, within each relevant context. Recently, the CERD, in order to provide greater protection to freedom of expression, has embraced the threefold test of legality, necessity, and proportionality[1760], in line

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[1757] ECtHR, *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts). Likewise, *Mariya Alekhina and Others v. Russia*, application No. 38004/12, 17 July, 2018, regarding the conviction of protesters in an anti-Orthodox performance.

[1758] E.g. ECtHR, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, ECHR 1999-IV. See discussions in: Stefan Sottiaux, "Two Standards of Incitement – Advocacy and Illegal Action under the First Amendment and Article 10 ECHR," Proceeds of the 7th Transatlantic Conference – Freedom of Expression, Brussels, 28 May 2008.

[1759] ECtHR, *M'Bala M'Bala v. France*, application No. 25239/13 (inadmissibility decision of 20/10/2015), regarding the conviction of a comedian for having proferred harsh contents during a performance; and *Belkacem v. Belgium*, application No. 34367/14 (inadmissibility decision of 27/06/2017), regarding the conviction of a radical islamist for having posted controversial religious content on social media. *Belkacem* has been criticized as deviating the purpose of Article 17 ECHR, forcing it artificially to the field of hate speech, instead of keeping it as a clause of protecting the democratic institutions and the core values of the ECHR. See: Louis Triaille criticizing this judgment for applying an overly general criterion to assess the applicant's intent, and deviating from the purpose of Art. 17, in "La Détestable Liberté d'expression de Fouad Belkacem devant les Hautes Juridictions – Deux Constructions Jurisprudentielles pour la Lui Refuser," *Revue Trimestrielle des Droits de l'Homme*, 115 (2018): 744-746.

[1760] CERD, *General Recommendation No. 35*, § 12.

with the requirements of general CPR treaties, and according to the HRCttee's[1761] and the ECtHR's long-standing practice.[1762]

Given the recent convergence among different international systems, notably by the CERD's recent change in approach through *General Recommendation No. 35*, it is now possible to recognize common approaches among the several monitoring systems in this regard. In other words, States acting with such purpose must concurrently ensure that safeguards are respected in relation to the individuals at whom an interference is aimed. The extent of a positive obligation in a concrete case then will be measured against the observance of a correspondent hands-off duty both in complementarity, as analyzed as follows:

5.3.1 - Provided by Law

474. Compliance with the positive obligation to combat hate and discriminatory speech must be accompanied by legal safeguards established *ex ante* that provide sufficient predictability and guidance to foresee "what sorts of expression are properly restricted and what sorts are not," as established by both the HRCttee[1763] and the ECtHR in similar vein.[1764] For instance, in *Belge v. Turkey* (2016) the ECtHR was skeptical as to the clarity of the newly amended law prohibiting "dissemination [of] propaganda in favour of a terrorist organization" through which the applicant was convicted.[1765]

Further, general bans on expressions coined as *e.g.* "blasphemy laws" or laws against "defamation of religions"[1766] are in principle in contradiction to the "freedom with

[1761] HRCttee, *General Comment No. 34*, §§ 5-6 and 8.

[1762] ECtHR, see for instance *Aksu v. Turkey* [GC], § 62-68, ECHR 2012, in which the Court disregarded a strict abidance to the pursuit of a precise boundary between the positive obligation to protect the Roma Community and the negative obligation to respect the author of the dictionary at stake. Instead, it applied the principle of *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012, and opted to only supervise whether the domestic courts have made a sound balance of the competing interests at stake.

[1763] HRCttee, *General Comment No. 34,* § 25. At the same time, laws should not be contrary to non-discrimination provisions, § 26.

[1764] For instance, ECtHR, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; and *Cumhuriyet Vakfi and Others v. Turkey,* no. 28255/07, § 50, 8 October 2013.

[1765] ECtHR, *Belge v. Turkey,* no. 50171/09, § 29, 6 December 2016.

[1766] See, HRCttee, *General Comment No. 34*, §§ 47-48; Rabat Plan of Action (Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred), UN Doc. A/HRC/22/17/Add.4, § 19; and Joint

responsibility" maxim and may stretch outside the scope of protection of equality. Restrictions should be the least intrusive possible,[1767] leaving criminal sanctions for serious crimes only,[1768] considering a host of least restrictive civil or administrative sanctions as a matter of proportionality. [1769]

5.3.2 - Legitimate Interest

475. Assessing the validity of a given interference with a given impugned speech requires advancing persuasive arguments, including the specific purpose of addressing speech of this type. For this criterion, the risks involved in not restricting a right must be *relevant* and *sufficient*.[1770] It can be said that this test confers a first *moral validation* for an argued duty to act. For instance, in *Jersild* the ECtHR accepted the allegation adduced by the Danish authorities of the "vital importance of combating racial discrimination in all its forms and manifestations." [1771] As mentioned above, by equating democracy and equality, the ECtHR and a number of constitutional courts accept that, in order to maintain the high values of a democratic society, limitations to freedom of expression are to be restricted in very exceptional circumstances only.[1772]

Yet, at the same time as curtailing free speech may be justified for democratic purposes, additional care is to be taken when assessing the actual purpose of a restriction in the context of political debates.[1773] For instance, it may be considered

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statement the UN Rapporteurs on contemporary forms of racism, freedom of religion or belief, and freedom of opinion and expression at the OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, available at [http://www2.ohchr.org/English/issues/religion/docs/SRjointstatement22april09.pdf], accessed on 7 February 2019.

[1767] HRCttee, *General Comment No. 27: Article 12 (Freedom of Movement)*, adopted on 2 November 1999, CCPR/C/21/Rev.1/Add.9, § 14.

[1768] CERD, *General Recommendation No. 35*, § 12.

[1769] CERD, *General Recommendation No. 35*, § 9; Rabat Plan of Action, § 20. As the Canadian Supreme Court held in *R v Keegstra*, [1990] 3 S.C.R. 697: "[w]hile other non-criminal modes of combatting hate propaganda exist, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm". Similarly, ECtHR, *Lehideux and Isorni v. France*, § 57.

[1770] Id., § 72.

[1771] ECtHR, *Jersild v. Denmark*, § 30.

[1772]ECtHR, i.a. *Féret v. Belgium*, § 64.

[1773] Stefan Sottiaux and Stefan Rummens, "Concentric Democracy: Resolving the Incoherence in Rights' Case Law on Freedom of Expression and Freedom of Association," *International Journal of Constitutional Law* 10, no. 1 (2012): 120, noting that when such feelings are not aired, public debate is

that the public has a legitimate interest to debate on an array of issues related to racial equality, even to criticize questions relating to multiculturalism[1774] or migration policies. At the same time, the HRCttee has for instance understood that the term "the rights and reputation of others" under Article 19.3(a) ICCPR also covers individuals or community as a whole, which can justify restrictions on certain expressions in order to combat biases and intolerance in a given context. [1775]

5.3.3 - The Necessity of the Interference

476. In order to validate any interference with a given speech, authorities are required to demonstrate a pertinent *pressing social need*.[1776] In other words, how compelling does the threat at stake interfere with the freedom of the speaker? The demonstration of the threat must be specific and individualized.[1777] In fact, the ICERD's "due regard" clause (imposing a balancing between racial equality and other rights, including freedom of expression) is *per se* a manifestation of a high threshold necessary to curb speech and other fundamental freedoms.[1778]

A strict abidance to this criterion is important to uphold the high value that human rights law attributes to fundamental freedoms. Moreover, a firm assessment of this criterion reduces the risk of a casuistic judgment. In *Féret*, the ECtHR, albeit rightly accepting the government's justification of protecting a minority,[1779] seemed to hastily reach an outcome without the necessary care on this parameter.

Consisting of a threshold test, the necessity parameter in connection with the legitimacy arguments adduced by the authorities performs a first stage of the

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muffled, tending to favor an antipolitical environment and at times reinforcing populist and extremist platforms.

[1774] Canadian Supreme Court, *Keegstra* (1990): "[p]rovisions do not forbid Canadians from criticizing the values of equality and multiculturalism".

[1775] *E.g.* HRCttee, *Ross v. Canada,* communication no. 736/1997. Views of 18 October 2000, UN Doc. CCPR/C/70/D/736/1997, § 11.5, accepting that the removal of a teacher disseminating anti-Semitist ideas in classroom served the purpose of maintain a school environment free from religious intolerance.

[1776] E.g. ECtHR, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 71, Series A no. 216.

[1777] HRCttee, *General Comment No. 34*, § 35.

[1778] CERD, *General Comment No. 35*, in which the CERD speaks of an "appropriate weight in decision-making processes" in assessing the scope of the obligation at stake (§ 12).

[1779] ECtHR, *Féret v. Belgium*, § 78.

proportionality test, through which the aims sought (combat of racial discrimination) are checked against the measures put in place (curtailing of free speech). Given its contextual nature, as made evident by contemporary international human rights law, an array of criteria to validate the soundness of an authority's choice has been progressively devised. Importantly it is at this very stage where the scope of the margin of appreciation is established according to the variables at stake, as follows.

5.3.3.1 - Intent and Purpose

477. State measures— administrative, civil, or criminal — that implicate the restriction of freedom of expression or opinion are validated only when the intent to incite hatred and violence is unequivocal.[1780] An important example in this regard is *Sürek v. Turkey (No 1)*, which regarded the publication by a magazine shareholder of critical letters about the Army in the fight against the PKK in that magazine. ECtHR held that the state of mind of the applicant in "a clear intention to stigmatize the other side of the conflict"[1781] justified the restriction in cause. In *General Recommendation No. 35*, the CERD itself has cast aside any doubt that a strict liability test for a speaker applies.[1782] Neither qualifies *recklessness*, implying a stringent *mens rea* standard, in this regard.[1783] The intent should be clearly characterized as a specific call ("tout appel"),[1784] *viz*. to influence other to commit harmful acts.[1785] Hence, the state of mind of a speaker should be unequivocally aimed at inciting hatred or violence. In this regard, it is questionable that speeches that purely aim at apology, glorification, or provocation[1786] may be strictly regarded as hate speech. Moreover, in *Belkacem v.*

[1780] ECRI, General Policy Recommendation No. 7 On National Legislation to Combat Racism and Racial Discrimination, Adopted on 13 December 2002, §18; CERD *General Recommendation No. 35*, § 16; The Camden Principles on Freedom of Expression and Equality, Principle 12.1.ii; Rabat Plan of Action, § 29 (c).

[1781] ECtHR, *Sürek v. Turkey (No. 1)*, § 62. Compare with *Jersild*, in which the Court has not found a specific *animus* on the part of the journalist to propagate racial ideas; and with *Delfi AS*, exempting the internet portal of a specific *animus* to proffer hatred.

[1782] CERD, *General Recommendation No. 35*, § 16.

[1783] E.g, in the Canadian Supreme Court, *R. v. Keegstra,* and Stefan Sottiaux, "Two Standards of Incitement – Advocacy of Illegal Action under the First Amendment and Article 10 ECHR", 13.

[1784] Manfred Nowak, *CCPR Commentary*, 475.

[1785] Patrick Thornberry, *The International Convention on the Elimination of All Forms against Racial Discrimination, A Commentary* (Oxford: OUP, 2016), 292 ("stirring up of – usually – violent or unlawful behavior").

[1786] For instance, in *Leroy v. France*, (no. 36109/03, 2 October 2008), the clear intent of the applicant to instill violence, by drawing and publishing his cartoons that depicted an anti-US sentiment, was difficult to identify, though the ECtHR found justified the criminal sanctions against him. Compare with a more principled stance of the ECtHR in *Perinçek v. Switzerland* [GC], downplaying the specific intent of the applicant in denying the "Armenian Holocaust".

Belgium (2015), it is doubtful whether the applicant's virulent militancy on his own interpretation of Sharia principles, materialized by a video posted on social media, clearly demonstrates specific intent to incite to hatred.[1787]

But even aided by those somewhat more refined yardsticks, discovering the intent in each expression may result in an incomplete survey, as the line dividing direct and indirect incitement is tenuous, [1788] as some concrete cases demonstrate.[1789] Unveiling one's intent may be indispensable but not sufficient to determine a case of hate speech.[1790] Hence, further elements may be of help in such an assessment.

5.3.3.2 - The Content

478. The content of the speech is another important element that helps to identity the extent of a positive obligation to prevent acts of racial discrimination through harmful forms of speech. Relevant treaty provisions do not indicate which precise content should be prohibited by domestic law. Article 20 ICCPR speaks of "propaganda of war," "incitement to discrimination, hostility or violence," and "advocacy of national, racial or religious hatred."[1791] The HRCttee has not to date established clear floor and ceiling tests thereof. ICERDs' Article 4 mandates States parties to forbid and punish the dissemination of ideas based on racial superiority, incitement to or acts of violence, [1792] and promotion and incitement to racial discrimination [1793] (including by public authorities) [1794] without clear definitions established by the CERD. Given the indeterminacy of the concept of hate speech

[1787] ECtHR, *Belkacem v. Belgium* (2017).

[1788] E.g. ECtHR, *Incal v. Turkey, 9 June 1998,* Reports of Judgments and Decisions 1998-IV.

[1789] In, CERD, *TBB-Turkish Union in Berlin/Brandenburg,* (CERD/C/82/D/48/2010), it remained rather unclear the intention of an interviewee to disseminate an idea of racial superiority, leading the CERD to unconvincingly decide in the affirmative case. This approach was strongly challenged by a dissenting opinion of member Manuel Vázquez.

[1790] Stefan Sottiaux, "Two Standards of Incitement – Advocacy and Illegal Action under the First Amendment and Article 10 ECHR", 14.

[1791] See, *e.g.* Nowak, *CCPR Commentary*, 739, commenting that the vagueness of Art. 20.2 may leave room for abuse. See also P. Thornberry, "Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination (ICERD)," *Religion and Human Rights* 5, nos. 2-3 (2010): 129, note 49. Ghanea alerts that Art. 20 ICCPR does not deal with hate speech itself, but is limited to forms of incitement, in *The Concept of Racist Hate Speech and its Evolution over time*. Paper presented at the United Nations Committee on the Elimination of Racial Discrimination's day of thematic discussion on Racist Hate Speech 81st session, 28 August 2012, Geneva.

[1792] ICERD Article 4(a). See also, *CERD General Recommendation No. 15*, § 3.

[1793] ICERD Article 4(b).

[1794] ICERD Article 4(c).

itself, its core content should be restricted to the most severe forms of contempt. The Canadian Supreme Court, for instance, has made clear that hate propaganda is a means of conveying a message, but it is the very content that will determine how repugnant (and thus socially reproachable) it can be.[1795] Hence, a prohibited content "must be construed as encompassing only the most severe and deeply felt form of opprobrium."[1796] This assertion goes hand-in-hand with the precept that freedom of expression covers not only ideas that are easily acceptable by society, but also those that shock or disturb.[1797] Thus it is doubtful, for instance, that the highly heated and even disrespectful dispute between readers in a web portal examined in the GC's *Delfi AS v. Estonia* (2015) could be framed as hate speech,[1798] in which the Grand Chamber straightforwardly endorsed the Estonian Supreme Court's qualification in that sense.

But, admittedly, a given expression must be ambiguous or contradictory, not disclosing precisely one's intent to incite violence or other forbidden form of speech[1799] without an analysis on its probable negative effects. For instance, it has become less evident that the mere dissemination of racist ideas or opinion on historical facts can configure a prohibited type of speech.[1800]

5.3.3.3 - The Probable Harmful Effects

479. The likelihood to stir violence or hatred is an important element to help discovering the harmful nature of a given expression. There seems to be a

[1795] Canadian Supreme Court, *Keegstra* (1990).

[1796] Ibid.

[1797] ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24. Likewise, HRCttee, *General Comment No. 34:* "The scope of paragraph 2 [of Article 9] embraces even expression that may be regarded as deeply offensive", § 11.

[1798] ECtHR, *Delfi AS v. Estonia* (2015) [GC], § 18, except a few comments, as noted by the dissenting judges.

[1799] E.g. ECtHR, *Zana v. Turkey,* 25 November 1997, § 58*,* Reports of Judgments and Decisions 1997-VII, noting that the applicant's statements defended the PKK, but at the same time disapproving of the massacres involved in the relevant conflict.

[1800] See this approach in recent authorities, such as: CERD, *General Observation No. 35*, §§ 13-14, stressing that only dissemination leads to incitement. Compare with the CERD decision in *TBB-Turkish Union in Berlin/Brandenburg v. Germany* (2013), revolving around an interview by a politician sharply criticizing the migrant population, and drawing comparisons of IQ levels and skills among migrants of different origins, where apparently, the dissemination of those ideas alone amounted to a failure to punish that politician. Incitement was rather presumed by the Committee (§ 12.8), whose approach was rightly challenged by dissenting opinion of member Manuel Vasquez, for not inquiring further on the likelihood of the harm to be caused by such dissemination (§ 4). But see also the the unsettled position of the CERD, exposed by Thornberry, in *The International Convention on the Elimination of All Forms against Racial Discrimination, A Commentary*, 291-292.

convergence among different systems on this criterion.[1801] For instance, in *Zana v. Turkey*, given the contradictory and ambiguous content of the applicant's statements, a central issue for the ECtHR to accept that there was a pressing social need to penalize him was that the PKK had killed civilians in the same days. It was concluded that the applicant's statements were prone to intensify the already instable situation in the region at stake.[1802] In less tense situations (but with probable immediate effects), in *Ross v. Canada* (2000) the HRCttee accepted that it was necessary to transfer a teacher to a non-teaching position for having published and disseminated anti-Semitic materials at school. The Committee found compelling that these materials as an effect generated a "poisoned school environment" for the Jewish children at that school.[1803]

By doing so, the ECtHR and the HRCttee implicitly request from speakers a duty of prevention or even of risk-assessment. Prevention is not a strange element in criminal law. However, depending on how far-fetched a court may apply this approach, a fine balance may be in jeopardy at the cost of freedom of expression. A likely better way to maintain this fine balance is to ascertain whether a given danger is concrete and imminent, as the indicated by the CERD itself.[1804] In line with the CERD, the Canadian Supreme Court in *Keegstra* was cautious by not stretching such assessment.[1805]

The ECtHR was confronted with this dilemma in *Féret.* In the absence of an unequivocally violent content or explicit intent of the pamphlets at stake to stir hatred,[1806] the ECtHR concluded that the electoral pamphlets under analysis would generate negative sentiments and hate towards foreigners for certain voters.[1807]

[1801] See, e.g. CERD, Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, Official Records of the General Assembly, Sixtieth Session, Supplement No. 18 (A/60/18), § 20.

[1802] ECtHR, *Zana v. Turkey,* 25 November 1997, 57-60.

[1803] HRCttee, *Ross v. Canada*, § 11.6, See also *Vejdeland v. Sweden*, about the dissemination of homophobic material put at students' school lockers, where the contact with such materials was considered by the ECtHR inevitable and the damage was deemed potentially high, given the student's impressionable and sensitive age.

[1804] CERD, *General Recommendation No. 35*, § 16.

[1805] Stefan Sottiaux "'Bad Tendencies' in the ECtHR's Hate Speech Jurisprudence," *European Constitutional Law Review* 7, no. 1 (2011): 48.

[1806] ECtHR, *Féret v. Belgium*, § 70.

[1807] Id., § 69.

Indeed, in times of sophistication of the racial discourse,[1808] a court may be prone to apply an evolutive interpretation. Yet, given the series of non-criminal measures put in practice by Belgium to address this phenomenon,[1809] it would have been preferable for the Court to make a critical point on the real need to apply prosecutions. It remained doubtful that the applicant's behavior would pose a *concrete* and *imminent* risk to the minority in question. Hence, one may wonder whether the Court had incurred in the so-called *bad tendency*,[1810] which can be characterized by an attempt by a court to achieve long-term equality goals through criminal law (at the cost of freedom of expression).[1811]

Admittedly, beyond physical violence, the social harms caused by hate speech are well known in case law. [1812] At the same time, supranational monitoring bodies need to be careful by not hastily presuming any social harm against a given group, even more so if the measure sought by the authorities to curb an impugned expression includes criminal law.

In recent cases, however, the ECtHR has shown its capacity for a more principled analysis even in difficult decisions, as in *Perinçek v. Switzerland* (2015). Revisiting the question on how concrete and imminent the harm is done by a known denialist to continue his long-standing campaign, the Court took a sharp stance by focusing on the present risk of incitement to genocide or hatred against the relevant community rather than on attempting to stop the applicant's pursuance of his long-term agenda. It proceeded in that way, even recognizing that his campaign may be deemed racist and anti-democratic. Yet, given the absence of an imminent threat to stir violence or

[1808] See, Hadewina Snijders and Ruth Wood, commenting on Van Donselaar's view that "not that the extreme-right becomes more moderate, but rather that other groups that subtly espouse rightest agendas mask these agendas behind facades of liberalism and, in doing so, gain more mass support than extreme-right groups that espouse similar philosophies in a more open manner," in "What if Hate Speech Were Criminalized?," *When Is Free Speech Hate Speech?,* ed. Martin Gitlin (New York: Greenhaven, 2018), 71.

[1809] E.g. "cordon sanitaire", disbanding of a political party, and several political condemnations of hate speech.

[1810] As yielded by the US Supreme Court in *Whitney v. California*, 274 U.S. 357 (1927). For a comprehensive study, see: William B. Fisch, "Hate Speech in the Constitutional Law of the United States", The American Journal of Comparative Law"50 (2002): 463-492.

[1811] As the ECtHR apparently did in *Féret v. Belgium*, § 69, in a practice that was indeed criticized by the three dissenting judges.

[1812] As the ECtHR approached in *Asku v. Turkey* and the HRCttee in *Ross v. Canada*.

hatred in Switzerland, the Court found that the effects of the ideas imparted by him were not so serious as to deserve criminal sanction.[1813]

5.3.3.4 - The Status of the Speaker

480. The probable effects on the propagation of a given speech will vary according to the status of the speaker in question. The social or political position of the speaker, considering her or his ability to propagate hate, is a key variable. In the area of political speech, Sottiaux and Rummens elaborated the *decreasing tolerance* equation, which attributes lesser or more responsibility to a speaker depending on her or his power to influence the public debates. For instance, persons located at the periphery of the decision-making centers, even if they convey anti-democratic and extremist ideas, are less likely to influence the public debates than prominent political actors. At times, those ideas expressed by the former represent repressed dissatisfaction in certain parts of the society.[1814] On the other side of the, as the authors impart:

> […] if the democratic system is to preserve its core values and is to be able to fight off extremist challengers of the democratic regime, tolerance for extremist ideas should diminish as the political actors expressing them find themselves closer to the actual centers of decision- making.[1815]

In this vein, as the ECtHR highlighted in *Erbakan v. Turkey* (2006), politicians as public figures should avoid disseminating statements that are likely to instill intolerance.[1816] For the same reason, the CERD has pointed to the risks that political created by statements that instill stigma or stereotypes or non-nationals.[1817] This understanding should nevertheless be combined with the special protection granted to free speech of politicians as representatives of their constituencies, particularly in the case of members of the opposition parties.[1818] Given the need for a very delicate

[1813] ECtHR, *Perinçek v. Switzerland* [GC], § 251-252. It is also noteworthy the Court's reasoning *Király and Dömötör v. Hungary* (2017), in which it validated the domestic Supreme Court proportionality assessment into the police decision not to disperse an anti-Roma manifestation, until it became violent when the police took crowd management measures, § 70.

[1814] Sottiaux and Rummens, "Concentric Democracy: Resolving the Incoherence in Rights' Case Law on Freedom of Expression and Freedom of Association", 117.

[1815] Ibid.

[1816] ECtHR, *Erbakan v. Turkey,* no. 59405/00*,* § 64, 6 July 2006. In *Willem v. France*, (no. 10883/05, § 37, 16 July 2009), the ECtHR held that a mayor, given his official duties, should preserve a neutral attitude and not incite to discrimination.

[1817] CERD, *General Recommendation No. 30 on Discrimination against Non-Citizens*, 65th session (2005). UNDoc. HRI/GEN/1/Rev.7/Add.1, § 12.

[1818] ECtHR, *Incal v. Turkey*, § 46; and *Féret v. Belgium*, § 65.

balance, non-punitive measures should be applied first (like mediation, warnings, and political condemnation)[1819] and the escalation of punitive measures should place criminal sanctions at the edge of the scale.

At times, the influential role of *teachers* on the pupils' formation of personality has been addressed in contentious cases. Some restrictions on their relevant acts may be justified to preserve equality and the dignity of students belonging to the targeted sectors.[1820] But, given the high importance of transformative objectives inherent in to the duty to promote present for instance in Art. 7 ICERD, the added value of applying punitive measures should be considered in view of other actions and policies aimed at creating an enabling environment of tolerance and mutual understanding, where freedom of expression represents itself the antidote against hate speech.

5.3.3.5 - Targeted Persons or Groups

481. Asymmetry is both cause and consequence of hate speech. Usual targets have lower resilience from the attacks sustained through freedom of speech, because i.a. they cannot access and influence a meaningful part of the political and democratic spaces in order to present their arguments too. Concomitantly, violence and stigmatization push them further to the periphery of these spaces.[1821] Hate and stigmatizing speech also impact the freedom of expression of many targeted groups. This is a challenge that should not be disregarded by policy makers.[1822] For instance, asylum-seekers, immigrants, religious minorities, Roma, Sinti, Gypsies, and Travellers are particularly vulnerable to hate speech by extremist parties,[1823] which

[1819] Sottiaux and Rummens, "Concentric Democracy: Resolving the Incoherence in Rights' Case Law on Freedom of Expression and Freedom of Association", 118, referring to the Belgian multi-party arrangement to apply a *cordon sanitaire* to the extreme right party "Vlaams Blok"/ "Vlaams Belang".

[1820] HRCttee, *Ross v. Canada*, § 11.6 See also *Faurisson v. France*, communication no. 550/1993. Views of 8/11/1993; and ECtHR, *Seurot v. France*, application no. 57383/00, decision of 18/05/2004.

[1821] In this regard, it is compelling the phrasing by Michel Rosenfeld "hate speech might best be characterized as a pathological extension of majority feelings and beliefs", in "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," *Cardozo Law Review*, 24, no. 4 (2003): 1561.

[1822] Richard Delgado and Jean Stefancic, *Understanding Words that Wound* (Boulder: Westview Press, 2004), 21.

[1823] See, *i.a.* J, Camus "The Use of Racist, anti-Semitic and Xenophobic Arguments in Political Discourse", ECRI - Strasbourg, March 2005; European Monitoring Centre on Racism and Xenophobia (EUMC): *Racism and Xenophobia in the EU Member States - Trends*, *Developments and Good Practices*, Annual Report 2005, Part 2, available at [https://www.peacepalacelibrary.nl/ebooks/files/COE_camus_en.pdf], accessed on 7 February 2019; the CoE's High Commissioner Report: Human rights of Roma and Travellers in Europe (2010), 45-49; and UN HRC Resolution 18/15, "The Incompatibility between Democracy and Racism", UN Doc. A/HRC/RES/18/15, 14/10/2011, 8th preambular paragraph.

make use of an insidious discourse. This indeed was the key message conveyed by the ECtHR in *Féret*,[1824] though the relevant methods to reach this judgment are questionable, as seen above. Such instances of vulnerability, particularly the ones affecting equal political participation and long-lasting discrimination, may be a reason for narrowing the State's margin of appreciation, as seen in Chapter 6 (Section 5.4).

5.3.3.6 - The Surrounding Context

482. Another component of a nuanced assessment on the probable deleterious effects of an expression is the prevailing context at the time when the expression is disseminated. This criterion has gained acceptance by the CERD[1825] following a steady practice at the ECtHR that has considered the historical and geopolitical background of an impugned expression.[1826] A clear illustration is *Sürek v. Turkey* (1999), where the Court noted that the impugned letters containing a hateful content were published in a setting of conflicts between the government forces and the PKK, involving loss of lives in the relevant region. From that context, it concluded that the letters would be capable of instilling additional violence and held that the government discharged its positive obligation by sanctioning the applicant.[1827]

This, however, is not an easy assessment. Courts may make over-cautions assessments of this criterion at the cost of free speech. In *Leroy v. France* (2008), the Court seemed to have given excessive weight to the world commotion arisen out of the attacks on the Twin Towers in 2001. It transposed the risk perceived in the United States to the Basque region, where a cartoon sympathetic to the bombings was published.[1828] Even accepting that the topic required caution on the part of the cartoonist,[1829] the non-violent reactions to the cartoon[1830] could not translate into a

[1824] ECtHR, *Féret v. Belgium*, § 77.

[1825] CERD, *General Recommendation No. 35*, § 15, second item.

[1826] See, inter alia, ECtHR, *Sürek v. Turkey (No. 1)*, § 59; *Rekvényi v. Hungary* [GC], no. 25390/94, §§ 41 and 47.

[1827] ECtHR, *Sürek v. Turkey* (No. 1), § 62.

[1828] ECtHR, *Leroy v. France, no.* 36109/03, §, 2 October 2008. The cartoon depicted the said attack with the subtitle: "we have all dreamt about it [...] the Hammas has made it." (free translation).

[1829] Id., § 45.

[1830] Id, § 10. Sottiaux, commenting on the case, noted that "it is difficult to maintain that the terrorist attacks against the United States created a security risk in the Basque region comparable to, for example, the sensitive situation prevailing in certain regions in Turkey, which were at issue in the PPK-related speech cases," in *Leroy* v *France*: Apology of Terrorism and the Malaise of the European Court of Human Rights' Free Speech Jurisprudence," *European Human Rights Law Review* 3 (2009): 424.

compelling obligation to prosecute him. Similarly, as seen above, in *Féret v. Belgium*, a probable cause of the criticism on a probable *bad tendency* thereby was to attach disproportionate importance to the tense electoral climate at that time[1831] to justify a curb into freedom of political speech.

Years after, *Perinçek v. Switzerland* (2015) provided an occasion to take a more refined assessment on the matter. It wisely modulated the link between the incidents that took place in 1915 in Armenia and the effects of a negationist speech in Switzerland in present times, which it considered to be tenuous. Recalling the strict standards of *Zana* and *Sürek (No. 1)*, it downplayed the pressing need to penalize the applicant, in the light of the circumstances in which a positive obligation did not apply. It noted the lack of evidence of frictions between the Turkish and Armenian communities in Switzerland,[1832] taking into account that the Swiss courts primarily focused on the national context.[1833] The Court found that the means employed (penalization of speech) to achieve the aims pursued (protection of the honor of the Armenian community and of public order), were not justifiable.[1834]

5.3.3.7 - The Media at Stake, in Particular the Internet

483. The role played by the media and other means of communication can be relevant to ascertain the extent of a positive obligation to curb hate speech or of a need to impose sanctions. The ECtHR has at times made differentiations on the impacts different sorts of media may have.[1835] For instance, in attributing responsibility to journalists, it has held that it is commonly understood that the printed media often have a less immediate and powerful effect than the audiovisual media.[1836]

a) – The Internet

484. The Internet is undoubtfully a very distinctive means of information, given its capacity to store and disseminate information and the vast and growing number of users worldwide. The ECtHR thus understood that its risk to violate rights, in

[1831] ECtHR, *Féret v. Belgium*, § 73.

[1832] ECtHR, *Perinçek v. Switzerland* [GC], § 244.

[1833] Id, § 245.

[1834] Id, § 246. Compare with the dissenting opinion of judges Spielmann, Casadevall, Berro-Lafèvre, De Gaetano, Sicilianos, Silvis and Kūris, advancing the argument on the universal state obligation to comply with *erga omnes* obligations, §§ 6 and 7.

[1835] ECtHR, *Jersild v. Denmark*, § 31

[1836] See ECmHR, *Purcell and Others v. Ireland*, no.15404/89, (dec.), Decisions and Reports 70, 262.

particular those protected by Article 8 ECHR, is higher than other media, such as the printed press.[1837] In this context, harmful speech has in fact grown exponentially, raising concerns at different levels. At the same time, one cannot underestimate the role the Internet plays at the opposite end of the spectrum—it serves as a powerful tool to combat racism and hate speech itself.[1838]

More emphatically, the user-generated content, while considered an unprecedented form of exchange of ideas on the web, poses elevated risks of disseminating hate speech throughout the web, thus entailing important implications on the liability for illegal sorts of expressions.[1839] Yet, the Internet by its strong commercial nature, does not evenly disseminate the information provided in all sites for a number of contractual and technical reasons. The ECtHR seems to have captured this nuance, as it makes a necessary differentiation between smaller individual or non-profit sites with limited visits[1840] and larger commercial sites with a much larger audience.[1841] In any case, the potential of disseminating prohibited expressions cannot be hypothetically measured by the size of the provider. This can be an important indicator, but it cannot be the only one. Courts of law, lacking the expertise for matters as complex as Internet metrics, could borrow support from related expert opinion in order to ascertain the exact reach of an objectioned expression.[1842]

b) - Artistic Manifestations

[1837] ECtHR, *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 98, 16 July 2013.

[1838] HRC, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 68/150, UN Doc. A/HRC/26/50, §§ 25–28, on the risk of Internet in propagating Hate speech; and Report of the UNGA, A/67/326, 8-11, on the freedom of speech while combating hate speech in the internet; See also DDPA §, 90.

[1839] ECtHR, *Abdulhadi Yıldırım v. Turkey*, no. 13694/04, § 48, 15 December 2009; *Delfi AS v. Estonia* [GC], §110.

[1840] ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 82, 2 February 2016.

[1841] ECtHR, *Delfi AS v. Estonia* [GC], §§ 115-116.

[1842] See an interesting study for measurement of hate speech on social media: Mainack Mondal, Leandro A. Silva, and Fabrício Benevenuto, "A Measurement Study of Hate Speech in Social Media," Proceedings of the 28th ACM Conference on Hypertext and Social Media 2017, Prague, Czech Republic, accessed on 15 October 2017, available at [https://dl.acm.org/citation.cfm?id=3078723].

485. The right to freedom of expression clearly covers artistic manifestations,[1843] including satiric expressions that "must be examined with particular care,"[1844] as the case of cartoons that may be examined within their respective contexts[1845] and by their variegated natures.[1846] For instance, heated debates took place on whether the series of Danish cartoons in depicting the Islam in themselves constitute a form of protected speech.[1847] Controversial initiatives addressing what had then been conceptualized as "defamation of religions"[1848] were tabled at the UN HRC, suggesting blanket prohibitions against cartoons of this type. UN Special Rapporteurs called to analyze the issue considered that the concept is inaccurate, as it cannot be inferred therefrom *in abstracto* any alleged conflicts between racial equality and freedom of expression.[1849] A shift has been proposed from a sociological to a legal debate within current international human rights law.[1850]

5.3.4 - Severity of the Measures Taken

486. Once the necessity of an encroaching measure is justified, the severity of the restrictions actually imposed form part of the overall proportionality appraisal.[1851] Given that criminal law is to be used as a matter of last resort, prison sentences are hardly deemed proportional to a possible abuse of the right to freedom of expression.

[1843]E.g. HRCttee, *General Comment No. 34*, §§ 11 and 12. However, the ECtHR has not granted it a blanket protection see, in *Müller and Others v. Switzerland*, Judgment of 24/05/1988, Series A no. 133, §§ 33-34.

[1844] EctHR, *Vereinigung Bildender Künstler v. Austria*, Judgment of 25/1/ 2007, § 33: "satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate."

[1845] *E.g.*, in *Kulis and Rozicki v. Poland* (Judgment of 06/10/2009) the ECtHR observed that the applicants' cartoons had the purpose of alerting children food behavior, criticizing an advertisement of a potato crisps brand, aimed at children healthy food habits (violation of Art. 10).

[1846] In *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, (communication no.1487/2006, decision of 1/04/2008), the HRCttee found inadmissible, by non-exhaustion of domestic remedies, the claim related to the Jyllands-Posten cartoons.

[1847] Rich discussions have been published, including: Paul Sturges, "Limits to Freedom of Expression? Considerations Arising from the Danish cartoons affair" *IFLA Journal* 32, no. 3 (2006): 181-188; Kevin Boyle: "The Danish Cartoons", *Netherlands Quarterly of Human Rights*, 24, no. 2 (2006): 185-191.

[1848] See, e.g. HRC Resolution 21/33, "From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance".

[1849] Freedom of expression and incitement to racial or religious hatred. Joint Statement of UN Rapporteurs (2009).

[1850] UN Doc. A/HRC/9/12.

[1851] See the ECtHR's docket on the issue: *Ceylan v. Turkey* [GC] Judgment of 08/07/1999, Reports, 1999-IV, § 37; *Tammer v. Estonia*, Judgment of 06/02/2001, Reports, ECHR 2001-I, § 69; and *Skaÿka v. Poland*, Judgment of 27/5/2003, §§ 41-42.

In *Karataş v. Turkey* (1999), the Court was "struck by the severity of the penalty imposed on the applicant," who was "sentenced to over thirteen months," and by the "persistence of the prosecution's efforts to secure his conviction."[1852]

In contrast, alternative punishment when criminal sanction is deemed necessary can demonstrate a well-calibrated approach by the judicial authorities.[1853] Notably, in *Féret*, it was probably persuasive for the ECtHR that the applicant was penalized with a series of measures other than a prison sentence,[1854] though the necessity to initiate criminal proceedings was not clearly demonstrated, as seen above.

Yet, even when one receives a light sentence, the effects of a criminal conviction on an individual carries non-negligible sequels in that individual's life, including stigmatization and impediments to exercise certain acts in civil, economic, and political life. It is important to assess in a given case whether the concrete sanction imposes a *de jure* or *de facto* chilling effect, even if it consists of only civil damages.[1855]

6 – Establishing Racial Discrimination before International Systems – A Long-Awaited Development

487. One of the obstacles of justicializing claims for (racial) indirect discrimination is the difficulty of establishing it before courts. Proving indirect racial discrimination through statistical data in international human rights case law was made possible at a later stage, when compared to gender cases. These obstacles firstly relate to the possibility of presenting evidence of structural discrimination that affects the applicants. On a second stage, once an international court accepts the existence of indicia of racial discrimination, it can re-balance the burden of proof by requesting the respondent State to prove that the differences at stake are objective and reasonable.

Comparing the two practices of the European and the Inter-American systems on this subject matter provides one with a better understanding on how cases relating to

[1852] ECtHR, *Erbakan v. Turkey*, § 69, in relation to an excessive sentencing of one-year imprisonment and the prohibition of the applicant's exercise of his civil and political rights.

[1853] E.g. ECtHR, *Vejdeland and Others v. Sweden*, Judgment of 9/2/2012, § 58; and *Soulas v. France*, § 46.

[1854] ECtHR, *Féret v. Belgium*, § 80.

[1855] See, e.g. ECtHR, *Independent Newspapers (Ireland) Limited v. Ireland*, no. 28199/15, § 85, 15 June 2017.

positive obligations with a racial structural component were only gradually accepted by these systems.

6.1 – Acceptance of Statistical Evidence

488. The ECtHR started accepting statistical evidence as a means to establish a *prima facie* instance of discrimination only in the late 2000s in spite of important authoritative sources, like the EU Race Directive (2000)[1856] and the vast practice of the US Supreme Court.[1857] The turning point on the acceptance of statistical evidence to establish instances of disproportionate impact under the ECtHR was the case of *D.H. and Others v. Czech Republic* (2007). The Chamber initially merely referred to the ECRI reports on the responding State and based itself on a precedent that undermined the importance of statistics.[1858] This outcome was highly criticized, notably this downplaying of the importance of statistics.[1859]

Before the Grand Chamber, both applicants and third-party interveners formally requested the Court to clarify the standard on the use of statistical evidence in order to establish a presumption of discrimination. The Grand Chamber referred to a broad body of law inside and outside the CoE. It also recalled *Nachova and Others*[1860] to stress the difficulties on the part of applicants in proving indirect discrimination, concluding that these difficulties require the adoption of less rigid standards of evidence.[1861] Equally important was the recognition that, *mutatis mutandis*, in cases of gender disparity the Court had been prepared to accept evidence of different forms.[1862] The Court thus held:

> In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and

[1856] Council Directive 2000/43/EC, Preamble, § 15.

[1857] US Supreme Court, *Watson v. Fort Worth Bank,* 487 U.S. 977, 987 (1988), p. 487. In 2015, this Court held that the Fair Housing Act may be challenged by claims bases on disparate effect through statistics, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 US _ (2015).

[1858] ECtHR, *Hugh Jordan v. the United Kingdom,* no. 24746/94, § 154, 4 May 2001.

[1859] Among others, Morag E. Goodwin, commenting on the disparity of the progressive stance by the CJEU and the ECtHR in this regard, "D.H. and Others v. Czech Republic: A major Set-back for the Development of Non-discrimination Norms in Europe," *German Law Journal*, 7, no. 4 (2006): 430.

[1860] ECHR, *D.H. and Others v. The Czech Republic*, § 186.

[1861] Id., § 185.

[1862] Id., § 187, referring to *Hoogendijk* and *Zarb Adami.*

> significant will be sufficient to constitute the prima facie evidence the applicant is required to produce.[1863]

The Court went further to state that this "does not, however, mean that indirect discrimination cannot be proved without statistical evidence,"[1864] leaving open the spectrum of evidence to prove indirect racial discrimination.[1865] The Court's flexibility was reflected in further similar cases, such as *Sampanis and Others v. Greece* (2008).[1866] In the latter case, the sole fact that Roma pupils were assigned to "special classes" in separate premises was persuasive enough for the Court to conclude that such segregation had an essentially racial element. In *Orsus and Others* (2010), the statistics data brought by the applicants were considered insufficient by the Court. Nonetheless, a *prima facie* instance was established based on the placement of the majority of the children in separate classes based on a dubious placement test. The relevant ECRI reports on that country and the manifestation of intolerance on the parts of the parents of non-Roma students reinforced the body of evidence at stake.[1867]

The Inter-American practice also demonstrated a considerable slow pace in accepting such forms of evidence, as seen in some cases relating to judicial bias in applying the death penalty. Hesitance is illustrated in *Willie L. Celestine v. the United States* (1996), where the IACHR decided that statistics alone cannot serve as means to prove subtle discrimination.[1868] Only a decade later, in *Wallace de Almeida v. Brazil* (2009) the applicants brought to the Commission statistics from the government itself and from the UNESCO, indicating a much higher percentage of killings of the young, black population, in comparison with white youths. The IACHR was satisfied with the compelling significance of the disparity at stake and concluded that "being black, young, male and single means being a preferred target of lethal violence in

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[1863] Id., § 188.

[1864] Ibid.

[1865] Edouard Dubout, "L'Interdiction des Discriminations Indirectes par la Cour Eurpéene des Droits de l'Homme: Rénovation ou Révolution? – Epilogue dans l'affaire *D.H. et autres c. République Tchéque, Cour Eurpéene des Droits de l'Homme* (Grande Chambre), 13 novembre 2007," *Revue Trimestrielle des Droits de l'Homme* 75 (2008):839-840.

[1866] ECtHR, *Sampanis and Others v. Greece,* no. 32526/05, 5 June 2008.

[1867] ECtHR, *Oršuš and Others v. Croatia* [GC], §§ 154-155.

[1868] IACHR, *Willie L. Celestine v. the United States*, Case 10.031. Resolution No. 23/89, OEA/Ser.L/V/II.77 rev.1 Doc. 7, § 41. See also, *William Andrews v. The United States*, Case 11.139, Report Nº 57/96, OEA/Ser.L/V/II.95 Doc. 7, § 154, relating two statistical evidencing that black defendants were more likely to receive death penalty than the white counterparts.

Brazil."[1869] It thus recognized that police killings overall had a disproportionate impact on black adolescents.[1870]

6.2 - The Burden of Proof in Cases of Racial Discrimination

489. Such recognition has allowed both systems to impose a shift of the burden of proof, making it easier for applicants to make their case. In Europe, Article 8 of the Racial Equality Directive explicitly provides for this shift.[1871] In *D.H.*, the disparate impact on Roma pupils in the access to education allowed the Court to establish a *rebuttable presumption*,[1872] imposing an obligation on the respondent State to demonstrate that such impact was justifiable and proportional.[1873]

Concluding Remarks

490. The definition of the boundaries of positive obligations in relation to racial discrimination relies considerably on contextual assessments beyond the general standard applicable. These assessments operate in function of vulnerability factors affecting certain social clusters. A clear example is the very specific field of

[1869] IACHR, *Wallace de Almeida v. Brazil,* Case 12.440, Report 26/09. Decision of 20 March 2009, § 64.

[1870] Id., "The disproportionately high number of subjects with black characteristics among the victims killed in police actions is a clear indication of a racist tendency in the state's law enforcement apparatus" (§ 66).

[1871] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 – 0026. See the CJEU's case of "*Feryn*" (2008), in which the CJEU held that it was for the employer to prove that his employment practices do not reflect his statements on not hiring persons of Moroccan origin, § 34. The straightforward analogy between gender and race, embedded in this directive was criticized due to the hesitance of domestic authorities to disaggregate data into race, see: Virginie Guiraudon, "Construire une Politique Européene de Lutte contre les Discriminations: l'Histoire de la Directive "Race", *Societés Contemporaines*, 53, no. 1 (2004): 22. See also, in general: Tyson Adam, "The Negotiation of the European Community Directive on Racial Discrimination," *European Journal of Migration Law* 1, no.3 (2001): 199-229.

[1872] Mark J. Janis *et al*. note that the decision of the Court's Section was difficult to understand, given the Court's refusal to consider the fact that intelligent and above-intelligent Roma children were often placed in "special" schools, on the basis of the results of psychological tests, conceived for the majority of the population, not taking into consideration the Roma's specifics. In *European Human Rights Law – Text and Materials* (Oxford: OUP, 2008), 492. See also dissenting opinion of Judge Cabral Barreto, in § 2.

[1873] Similarly in *Sampanis and Others v. Greece,* § 82, in which Roma students were segregated in an annex building; and *Oršuš and Others v. Croatia*, § 155, related to the separation of Roma students allegedly to their poor command of Croatian language. As in *Sampanis*, the parents of non-Roma students opposed the enrolling the Roma pupils in the mixed classes, which reinforced the Court's conviction of an instance of discrimination.. See the opinion of Judge Bonello in *Angelova v. Bulgaria*, already suggesting that the Court should shift the burden in cases of racial discrimination that involved high tensions and impunity (§ 17).

indigenous protection, where positive protective obligations require a qualified specific knowledge in order to minimize the risk of violations or to mitigate the impact of a given activity on their traditional lifestyles. The example of areas densely populated by ethnically sensitive groups is another contextual area requiring specific knowledge and training by *e.g.* the security forces.

On the matter of privatization of public services, there are plausible legal arguments within the theory of equality and non-discrimination to conceive instances of *de facto* racial segregation that do not originate from an intent of the authorities or of the private company involved. A positive obligation to prevent or redress occurrences of such segregation can be construed, for instance, through the well-established elements by the CESCR (affordability, physical accessibility, and adaptability) that can be checked against the risks involved in the transfers of these (essential) public services.

International adjudicatory mechanisms have only recently kept the pace with the growing docket of cases revealing structural racial discrimination—and only more recently have these mechanisms taken abreast more adaptable approaches in cases of racial discrimination (namely the acceptance of statistical evidence and the shift of the burden of proof). This late acceptance contrasts with the substance of cases that increasingly ingrain equality law in public policies.

Balancing the competing rights of freedom of expression and racial equality cannot be seen today as a very distinctive area of human rights law. Hate speech is a social phenomenon that manifests itself by different sorts and degrees in different regions of the world. The various supervisory bodies researched do not attach any *a priori* greater value to either racial equality or freedom of speech to yield a general hierarchy between a positive obligation to protect against hate speech or a negative obligation to respect freedom of expression. Rather, the extent of the positive obligation required (as well as its nature—protection or promotion) will vary considerably according to a host of circumstantial factors at stake. Today, the various international monitoring mechanisms have reached a notable convergence in terms of stressing the importance of a structured proportionality assessment and of not attributing aprioristic values. This convergence undermines possible claims of *lex specialis* by the ICERD in the ambit of combating racial hate speech. To the contrary, the CERD has read the ICERD on the issue of hate speech in close connection with the general counterparts: the ICCPR and the ECHR. As a consequence, an obligation

to prosecute acts of hate speech has been considerably regarded as applicable to the most serious cases. The CERD has firmly engaged in a "chilling effect" language, reaffirming the value of freedom of expression by denying a zero-sum equation in delimiting the scope of a positive obligation to combat racism. What can be called a liberal approach by the CERD in revisiting this matter can probably be explained by the ample acceptance by this committee of the case law and principles governing freedom of expression. This is a clear example of integration of a general system to a specific system.

General Conclusions

491. After reaching the end of the research on the content and extent of positive obligations, first in general, then extended to the field of equality and non-discrimination, and thereafter to that of racial equality and non-discrimination, time has come to draw the main conclusions of this research.

Many decades after the judgment in *Marckx v. Belgium*, the ECtHR and other international human rights monitoring bodies have developed an impressive body of jurisprudence on positive obligations, mainly justified by the need for effectiveness of human rights treaties and for an interpretation according to present-day conditions. The general conclusion of this thesis shows considerable areas of interplay among the several systems studied, with a noticeable cross-referencing and a greater openness to external law, on the part of the AfCtHRP and the IACtHR, although the ECtHR has also during the last decade opened to legal developments abroad. The HCttee, for its part, still shows some reticence as regards external sources in interpreting the ICCPR provisions. The scope of positive obligations has been shaped by several factors, such as the limits *ratione materiae* of the CPR treaties, the proportionality assessment and the subsidiarity of international monitoring bodies. Other technical factors play an important role in delimiting their scope, depending on how severe an impact may be for an individual, or the knowledge of a violation or the imminence of this violation to materialize.

The principle of substantive equality, as an essential component of effectiveness, has in general terms been embraced by human rights law, through a wealth of scholarly writings and case law (including by CPR monitoring bodies). However, there is still a good potential of this principle to be explored. Case law has embraced this principle gradually, with still some areas of hesitance, such as family and LGBTI rights. The area of disabilities, though also embracing this principle, invites the human rights community to a deeper look at the capability theory. Within racial discrimination, there is also an impressive body of case law addressing positive obligations in order to uphold substantive equality. A better acceptance of statistics by the courts and monitoring bodies increases the chances for better addressing instances of structural racial discrimination through case law.

This concluding chapter will first summarize the findings of each of the preceding chapters through which the main arguments of the thesis were developed.

Subsequently, a general reflection will be provided for the reader. Finally, a number of suggestions for furtther research will be made.

Overview of the Findings

Part I of this dissertation made a general preliminary analysis of the State's positive obligations, in order to lay the theoretical foundations for the subsequent parts.

Chapter 1 presented a preliminary assessment of the claims for positive obligations based on the principles of effectiveness and evolving treaty interpretation, both in general international law and in international human rights law. It was shown that those claims are not an exclusivity of interntional human rights law, but form a well-established legal principle that permeates a number of other areas of international law, mostly in accordance with the standards established in the VCLT. Hence, finding positive obligations in civil and political rights treaties does not qualify as a *human-rightist* practice by international courts, unless international courts anticipate social developments through undue judicial activism. This chapter exposed the arguments reinforcing the role of States as the main human rights duty-bearers in international law, including through positive obligations.

Chapter 2 enabled the reader to gain a better understanding of the different meanings and purposes of positive obligations. It was seen that the several international monitoring bodies researched do not diverge substantively in applying the different types of positive obligations, divided into the duties to protect and to fulfill (the latter, in turn, divided into the obligations to facilitate, to provide and to promote). Different approaches, such as the ones based on the due diligence doctrine, as practised by the IACtHR, and on the procedural obligation to redress violations, by the ECtHR, do not differ when the practical results are taken into account. These practical similarities are also found to the extent that both courts agreeing on the very nature of due diligence, namely an obligation of reasonable means to prevent and redress violations. International monitoring bodies on ESCRs, though modest in case law and speaking in general terms, apply the duty to protect in a similar manner as the CPR counterparts. Similarly, the obligations identified within the duty to fulfill denote similar approaches among the different courts and monitoring bodies analyzed. Even

[1874]when the duty to provide is concerned, there is no strong divergence among the different monitoring bodies, as even the CESCR applies it moderately.

Chapter 3 made a critical analysis of the factors that define the scope of positive obligations. Regarding the interpretative methods, it has shown a balanced approach of the ECtHR in using the internal and the relevant external comparative approaches. However, case law on Article 12 ECHR presents an area of hesitance by the Court, serious enough in view of the constant social developments about the family itself. This chapter also analyzed the knowledge parameter, which triggers State responsibility to take positive measures, through its several forms. Likewise, this chapter demonstrated how the minimum severity parameter delimits the scope of positive obligations. An important part of this chapter was devoted to the use of the proportionality assessment, together with the margin of appreciation, as a tool to delimit the scope of positive obligations. Although this practice is more relevant in the European system, other systems (the Inter-American) have during the last decade made a more frequent use of the proportionality assessment. Focusing on the more relevant practice of the ECHR, the extent of positive obligations in concrete cases nowadays hinges on a very nuanced analysis. It remains difficult to conclude if the Court applies a less strict scrutiny with respect to positive obligations than to negative obligations. The Court itself has at least rhetorically denied any sharp difference in both cases and has applied both *quantitative* and *qualitative* types of reasoning in this context. Judge Wildhaber's proposal on "merging" the proportionality analysis, for both negative and positive obligations, using the relevant paragraphs of Articles 8-11, remains influential, with a number of important writings building thereon. The scope of positive obligations is also delimited in more nuanced terms by the Court's "procedural turn", implying a shared responsibility of this Court and the domestic authorities (in particular courts) in articulating a proportionality analysis, through an enhanced deliberative process domestically.

Part II built upon the research concluded in Part I, focusing on positive obligations in the field of equality and non-discrimination.

Chapter 4 opened the discussion, allowing the reader to have a better grasp of how positive positive obligations are justified in the area of equality and non-discrimination. Its main argument was that the acceptance by international human

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rights monitoring bodies of the principle of substantive equality necessarily implies a State that does not only refrain from discrimination, by also that protects against discrimination, promote and articulates of policies aiming to enhance equality. These various roles are clearly translated in specific non-discrimination treaties imposing obligations to modify discriminatory patterns, to establish affirmative action schemes and to offer reasonable accommodation and accessibility. This chapter also shed additional light on the issue of vulnerability, by attempting to understand the justifications for "special" positive obligations. It took as a point of departure the very basic concept of harm (as a result of a human rights violation), which may be experienced differently by some groups than by others in society. Thus, a given harm is more likely to materialize and to produce more severe impacts on some groups than on others. This difference in the likelihood of violations, and in the relevant impact, is closely related to the invisibility of some groups in policy making, to the low participation in the relevant instances and to the hindrances these groups face in obtaining redress for the violations sustained. It is important to note that the concept of harm is multifaceted, including *e.g.* physical, psychological and economic perspectives, in both individual and relational contexts.

Chapter 5, building upon Chapter 2, provided a survey of the jurisprudence and legal doctrine on the different types of positive obligations in the specific area of equality and non-discrimination. In comparison with the general part, discrepancies among the different monitoring bodies were more visible. These discrepancies were not so significant in relation with with the duty to protect, particularly in the area of domestic violence, in which regional courts significantly refer to the standards of CEDAW. However, in relation with disability, the obligations related to reasonable accommodation and accessibility received notable attention by the ECtHR, by combining the principle of substantive equality (evidenced in *Thlimmenos*) and the jurisprudence of the CRPD Committee. This is a fine example of integration of positive obligations from a specialized non-discrimination treaty to a general CPR treaty. On the other hand, the obligation to recognize same-sex relationships (including marriage) is accepted through different forms and arguments among the several systems researched. A large variance was also observed with respect to the duty to provide. While in some contexts (e.g. rights of prisoners) this obligation is normally accepted, there is an exaggerated reluctance in case law when arguments of public policy are advanced by the respondent State. In these circumstances,

polycentry motives are displayed by courts. A different perspective on these cases, through the capability theory (including by understanding the rejection of welfarism by the literature on equality and non-discrimination), would enable international courts to refine their reasoning and increase the effectiveness of their rulings when dealing with vulnerable groups.

Chapter 6 offered the reader a critical analysis of the factors delimiting the scope of positive obligations in the field of equality and non-discrimination. It also made a comparison between the (a) practice by general courts integrating obligations and concepts from specialized group-based treaties (as a matter of gap-filling) and (b) the practice of courts (in specific ECtHR) in dealing with positive obligations when there are no such treaties to be relied upon. The former case, though demonstrating somehow easiness for courts to interpret the relevant general treaty provisions inspired by specialized treaties, some hesitance and variance in approaches could be identified. This is the case of the CJEU, by referring to the CRPD in the context of EU anti-discrimination law, but not absorbing fully the social model of disability. The latter case law (on LBGTI rights) demonstrated a hesitance reading new positive obligations, as illustrated by the cases relating to the recognition of a newly assigned gender in the civil registry and ofame sex unions, incluing marriage. Such hesitation by the ECtHR may be explained not only by an exaggerated legal formalism by this Court, but also by concerns about its institutional role as a subsidiary organ. This chapter also offered an analysis of the extent to which the several mechanisms systems can adjudicate claims on structural discrimination, explaining their main limitations.

At the same time, a potential for dealing with structural discrimination exists, as is demonstrated by the "pattern of discrimination" practice of the Inter-American system and the practice of the ECtHR's pilot-judgment procedure in dealing *e.g.* with deinstitutionalization of persons with mental disabilities. The growing practice of dealing with structural discrimination, through individual petition mechanisms, is a logical (if not unavoidable) step, particularly when international courts have decisively accepted statistics as means of evidence for instances of discrimination.

Part III of this study benefited from outcomes of Part I and Part II in order to focus on positive obligations in relation to racial discrimination in particular. It applied the

theories and insights of the previous parts to the more concrete area of racial discrimination.

Chapter 7 provided the reader with a more specific discussion of the general principles of substantive equality (Chapter 4), on the field of racial discrimination, by analyzing the very tenets of the ICERD that imply positive obligations. A notable shift in the interpretation of this convention gave room to the acceptance of obligations to recognize different lifestyles such as those of indigenous peoples and Roma, with important repercussions in regional case laws. This chapter also provided a analysis of the question of racial discrimination by non-private actors and structural racial discrimination. The discussions on vulnerability in Chapter 4 received closer attention to the area racial discrimination. The initial discussions on intersectionality (in Chapter 5) were enhanced by linking racial discrimination to other types of discrimination.

Chapter 8 built on the findings of Chapter 5 by carrying out a detailed survey of positive obligations in relation to racial discrimination. As in Chapter 5, a strong convergence among the several monitoring systems was found with respect to the duty to protect. In some specific contexts, this general duty presented distinctive features, as in the case of the obligation to demarcate indigenous lands (IACtHR). It was shown that the obligation to redress racial discrimination had as its main component the duty to identify the racial motivation of an allegation at stake. Moreover, the general standards of redress are interpreted according to the specific needs of victims of racial discrimination. In this area the duty to fulfill presented an enlarged scope, compared to its general counterpart. Specific obligations to recognize traditional lifestyles entail a duty to take into account the relevant specificities in public policies, such as the nomadic nature of the Roma or the indigenous peoples' special relationship with the land and natural resources. The elaboration of racial equality data has its normative scope reinforced, particularly by the recent works of the ECRI. This chapter also demonstrated that the obligation to put in place temporary special measures relies even more nowadays upon a proportionality assessment than on a theoretical discussion of its obligatory nature. The duty to provide has shown a salient scope, as even the ECtHR has, in *M.S.S. v. Belgium and Greece*, found an obligation to provide the applicant, an asylum seeker, with basic subsistence means. The duty to promote racial equality is also well marked in the works of the CERD and the ECRI. A more relevant content in the duty to fulfill demonstrates that, even if

implicitly, case law may at times takes an approach similar to the capability theory, by stressing the need of State assistance (even direct provision of goods and services) as a means for realization of rights.

Chapter 9, on the extent of positive obligations in the field of racial discrimination, provided the reader with concrete situations in order to reinforce the theoretical discussions of the previous chapters. The discussions on the *knowledge* component were refined through an analysis of cases on safeguards in areas populated by ethnically sensitive groups and on precautionary measures to protect indigenous populations in the context of large infrastructure projects. The requirement of a qualified knowledge (of a preventive and specific nature) was made evident, which can only be obtained by training and awareness-raising, thus in complementarity with the duty to promote racial equality. The criterion of the severity of the impact, delimiting the scope of a positive obligation, was tested in the context of the current debates of extractive industries interfering with indigenous peoples, underscoring further the importance of an especially careful proportionality assessment, given the substantive vulnerability at stake. This chapter also shed further light on the question of *de facto* segregation caused by the privatization of public services, reinforced by legal arguments and relevant case law, submitting elements to be considered in order to prevent this segregation and monitor the equality in the provision of these services. It was also shown in this chapter that the obligation to protect racial equality by combatting hate and discriminatory speech also hinges on nuanced considerations, grounded on a sound proportionality assessment. An elevated importance of the proportionality assessment is particularly evident in view of the denial by case law of any hierarchy between freedom of expression and racial equality. This chapter finally provided the reader with a specific focus on the acceptance of statistical data by international adjudicatory bodies, which has given a deeper insight into racial discrimination of a structural nature and on rebalancing the burden of proof.

General Reflection

The obligations requiring actions by States under international human rights law receive the qualifier “positive” is explained in a large part by of the traditional liberal understanding influencing this area of law, by which individual rights demand a (negative) hands-off duty by the State. The debates on a positive or a negative State

obligation in other fields of international law seem of lesser relevance. Since both "types" of obligations are in fact legal constructs, based on several social and political assumptions, a categorical distinction between both has proven rather difficult to define. At the same time, a number of well defined positive obligations, of different natures and scopes, can be identified through treaty law and judge-made law, as seen in this study.

The extent of a positive obligation is also construed through evolutive interpretation, rendering the relevant treaty effective. Evolutive interpretation of a treaty naturally entails debates, such as about the subsidiary role of international adjudicatory mechanisms, the importance of legal cultures, the choices made by domestic authorities and the domestic observance of international human rights standards. All those considerations - varying considerably from region to region – imprint a very contextual nature on positive obligations. This variation can be observed in Europe, Africa, and Latin America, three regions monitored by human rights courts. In simple terms, the margin of appreciation doctrine in Europe, operating at times as a tool of judicial restraint, with the effect of delimiting the scope of positive obligations, reflects a natural consequence of domestic courts and democratic institutions that are familiar with and apply considerably the ECHR standards at home. For its part, the African system shapes the scope of positive obligations of member States to the specific regional challenges ahead. The Inter-American system, in turn, sees judicial activism by both the IACtHR and the IACHR as a means to cope with a process of democratic consolidation, in which domestic courts have a low knowledge of its case law. All in all, there is not a single formula for effectiveness of human rights.

"Special" positive obligations are designed to enable certain vulnerable groups to enjoy human rights on an equal footing with others. From the research conducted, it cannot be concluded that attention to these groups entails the creation of new rights. Further, as seen throughout this dissertation, it cannot be concluded that these obligations are so special as to imply an exceptional normative framework. Instead, they stem from the general standards applicable to all individuals, though shaped to take into account the specificities of the vulnerabilities at stake. Such shaping is legally justified to compensate for the rights-enjoyment deficits sustained by certain groups. This legal understanding is firmly grounded on the tenets of substantive equality, nowadays accepted by international human rights monitoring bodies. The concept of vulnerability can be seen as a useful tool for general CPR and ESCR

treaties also in order to compensate for the lack of specific attention for groups that enjoy rights differently than the remainder of the population. By contrast, the UN treaty bodies dealing with discrimination simply consider "their" relevant groups as rights holders, and reserve the notion of vulnerability to persons experiencing multiple facets of discrimination. Hence, in this regard, vulnerability is a matter of perspective.

The fears of the critics that vulnerable groups would proliferate, thus creating an unsustainable case law on non-discrimination, did not materialize in the applicable case law. Instead, most of the groups recognized orbit around the already known grounds of discrimination from the non-discrimination clauses of general human rights treaties. Notably, the ECtHR has adjusted its practice in order to prioritize which are the core values of the ECtHR, in contrast to peripheral matters when also dealing with vulnerability. Neither has the case law researched been extrapolated to ESCRs, with a few exceptions. After all, vulnerable groups expect rather recognition, respect, visibility and participation than welfarism (which they in fact reject). The capability theory, when used within the thematic boundaries of CPR treaties, add clarity and quality to the Court's judgments.

Indeed, the evolution of the normative body on positive obligations also thrives through integration among different systems. A number of these obligations (and concepts implying obligations) could be construed by the general monitoring system through the borrowing from the specialized (thematic or group-focused). The last decade witnessed an intensified effort by general systems to seek, in particular, specialized group-focused treaties and case law, which enabled the former to address a wider variety of contemporary issues affecting vulnerable groups. The overall scenario developed during the last decade can be regarded as positive, as an initial phase of "importing" and "exporting" sources and concepts that aid a general monitoring body to maintain the Zeitgeist of the relevant general treaty. For the coming times, such integration should be encouraged among the different monitoring bodies. At the same time, strict formulas or rigid methods for such integration should be avoided. It is doubtful whether conceiving such a single method is at all possible. Each monitoring body can find its own manner to interact with external sources, according to its (regional) traditions, procedural specificites and institutional natures. What is important is to develop the awareness in these bodies of the existence of

external sources that can properly fill a given lacuna, improve the body's reasoning and lead to providing victims with the best legal coverage possible.

Possibilities of Future Research

This study has addressed a number of questions, while at the same time raising a number of others and opening perspectives for future research. As a whole, it is hoped that this study contributes to the legal theory on human rights, through a better understanding of content and extent of positive obligations as a global legal phenomnon. It also tried to put more flesh into the discussions of positive obligations in the context of (racial) discrimination. However, as in every research, this study has taken certain priorities and perspectives, leaving aside opportunities to undertake further analysis.

This study opted for a comparative and integrated approach, in order to gain a better understanding of positive obligations through an analysis of several monitoring systems.

An essential finding of this study was that postive obligations might be shaped according to regional contexts, depending on societal debates, legal cultures and human rights challenges in a specific region. While aiming at a comparative and integrated approach, thus zooming out somewhat on a global picture, this study could not deal in depth with each regional perspective. A given regional perspective on positive obligations could be further explored outside Europe, to which most of the research is dedicated. There is an important need, for instance, of a dedicated study on positive obligations within the Inter-American system, particularly in view of the broad object and purpose of the ACHR, which speaks of social justice and other elements related to ESCRs. Another important aspect to be analysed would be the current debates on restricting the range of collective complaints by the IACHR and the probable effects on the role of this regional system of advancing the consolidation of democracies and in combating structural inequalities. It would be interesting, beyond a merely legal analysis, to conduct surveys with operators of the Inter-American system, including interviews with victims and judges, in order to understand the socio-political reasons shaping the case law on positive obligations in that region.

Moreover, a similar research, focused in the African system could shed further light on the rationales of both the African Commission and Court in reading positive obligations in the Banjul Charter. This regional system is considerably open for instruments and case law from outside Europe, which invites further research to delve into the rich case law from these two organs. Here too, surveys and interviews could be conducted with judges, government officials, NGOs and other important regional stakeholders in order to gain a better understanding of the specificities of the relevant judicial practice on positive obligations. Moreover, a prominent content on ESCRs in the Banjul Charter could lead to different outcomes, compared to the regional counterparts.

Likewise, this study prioritized the identification of general principles and common practices in the area of equality and non-discrimination. At the same time, important studies, of both social and legal relevance, could be specifically developed with some of the general outcomes of this study as starting points.

The study of vulnerability, which has been sufficiently explored in theoretical terms, has a large potential to be further tested in more practical scenarios. While the idea of welfarism is in practice rejected in this context, the duty to fulfill/provide implies direct provision of goods and services to individuals in vulnerable situations. This study performed a standard assement only of this obligation, but did not deepen more practical scenarios, or into specific types of discrimination. It would be interesting to further test this obligation against the object and purpose of general CPR treaties, and assess to what extent, for instance, the relevant obligations specified in specialized non-discrimination treaties are "transposable" to these general treaties. Further light could be shed, for instance, on disability rights in the context of CPR treaties, given the recent cases judged by the ECtHR and the debates surrounding the limits of these treaties to fully entertain these rights.

Intersectionality is another area of important potential to be researched. This study fell short in specifying what are exactly the normative consequences of identifying an instance of intersectionality, beyond pointing out to instances in which an intersectional approach by a court was taken or was otherwise necessary. This is a field that is treated mainly through exhaustive exemplification, but with still insufficient answers for judges and polcy makers. Current research has made an important account of intersectionality, but specifc obligations related to this

phenomenon could be further studied. For instance, the nature and content of the obligation to identify instances of intersectionality could be further developed. Moreover, detailed research on the normative components of gathering data disaggregated in more than one ground of discrimination is a possible way forward. It would be interesting, e.g., to research on affirmative action programs that combine these several grounds in a single scheme, in order to assess the successful experiences and the challenges found in practice. Equally important would be detailed research on the obligation to identify groups affected by intersectional discrimination (e.g. Dalit women, domestic workers, girl child soldiers), in a given context, as well as the relevant duty to monitor the implementation of the relevant policies.

Finally, the right to independent living and being included in the community (Article 19 CRPD), though receiving a specific general comment by the CRPD, still poses some challenges to traditional human rights law. Several state actions required to comply with this right largely overlap, combining deinstitutionalization measures, provision of personal assistance and support services, reasonable accommodation, recognition and equal participation. Such an innovative concept, as the whole of the CRPD, may put even more into question the artificial division between positive and negative obligations, as well as the conception of obligations through the tripartite typology of duties. Further research on this right can potentially assist courts to better understand and apply this right.

In sum, the study of positive obligations, in general, or with respect to equality and non-discrimination, as a global phenomenon, discloses many ramifications still unexplored. As societies evolve and elaborate new concepts and values, positive obligations require further reflection and research, in order to grasp what are the current requirements for the effectiveness of a human rights treaty. After nearly six decades of the entry into force of the main CPR treaties, important debates have influenced the question the effectiveness of human rights treaties, and still other debates will influence it in the coming decades.

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