

Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

ANALYSIS OF EUROPEAN LAW

as regard to access of detained persons to the law and to court

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PART I. EUROPEAN UNION LAW

THE NEED FOR EU MINIMUM STANDARDS ON DETENTION

Vincent Eechaudt, Jasmien Claeys, Tom Vander Beken

1. INTRODUCTION

More than 569 000 accused and convicted prisoners are held in prisons throughout the European Union. More than 90 000 of them are in pre-trial detention.¹ Detention conditions are regulated at different levels, ranging from the constitutional law, to prison law and international conventions. On the European level, the protection of fundamental rights in Europe in general and in European prisons in particular should be guaranteed by both the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFREU). Relevant human rights provisions foreseen in both instruments include those prohibiting torture and other forms of inhumane and degrading treatment or punishment. Prison life must – as an absolute minimum – conform with the standards spelled out in both instruments.

In practice, violations of the ECHR and CFREU provisions are not uncommon in detention settings. The ECtHR has held numerous times that **poor detention conditions** within EU Member States constitute a violation of the Convention rights.² Monitoring bodies such as the European Committee for the Prevention of Torture equally emphasize that detention conditions continue to be problematic in many countries.³ The same goes for NGOs like Fair Trials International.⁴ In addition, academic research in several EU Member States reveals that detention conditions are such that they hinder a safe, humane and rehabilitation oriented detention.⁵

Poor detention conditions are not only problematic in themselves since they constitute violations of fundamental rights, but they also compromise judicial cooperation in criminal matters within the European Union, hence the importance of EU-action on the matter. The EU has developed several instruments to enhance judicial cooperation in the last two decades, based on the principle of mutual recognition.

Mutual recognition instruments rely on the intrinsic mutual trust between the various EU countries. The concept of mutual trust refers to the idea that all Member States intrinsically

¹ Based on the latest Eurostat data, which shows the number of prisoners for 2016. Eurostat does not show the number of prisoners in Belgium and Scotland for 2016 (yet). See Eurostat, *Prison capacity and number of persons held (crim_pris_cap)*, last updated on 10 January 2019, available at <https://ec.europa.eu/eurostat/data/database>.

² The ECtHR provides a summary of its most relevant case-law on detention conditions on its website. See European Court of Human Rights, Press Unit, *Factsheet – Detention conditions and treatment of prisoners*, January 2019, www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf.

³ Annual reports and reports of visits to states parties are available online, at <http://www.cpt.coe.int>.

⁴ Fair Trials International, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, 2016, available at <https://www.fairtrials.org/publication/measure-last-resort>.

⁵ Vermeulen, G., Van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P. & De Bondt, W., *Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, Antwerp, Maklu, 2011; Vermeulen, G., Van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P. & De Bondt, W., *Material detention conditions, execution of custodial sentences and prison transfer in the EU Member States*, Antwerp, Maklu, 2011; Eechaudt, V., *Penitentiair tuchtrecht en internationale detentiestandaarden, naleving in België en Frankrijk*, Antwerp, Maklu, 2017.

trust each other's judicial system, thus including how pre-trial detention and custodial sentences are executed. The idea of mutual trust was deemed justified, since all Member States were to be equivalent to each other due to their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.⁶ In short, EU Member States have a shared basis of fundamental rights in their society, which justifies the principle of mutual recognition based on mutual trust.

As of today, two mutual recognition instruments allow for prisoners to be confronted with prison conditions in another EU Member State: the European Arrest Warrant and the Framework Decision on the transfer of prisoners.⁷ Being increasingly used in the judicial cooperation between the Member States, it is clear that the execution of mutual recognition instruments may lead to violations of fundamental rights of pre-trial and convicted prisoners. This concern has not only been expressed by different scholars⁸, but is also supported by recent jurisprudence of the Court of Justice of the European Union in the joined cases Aranyosi-Căldăraru, in which execution of the EAW was refused due to poor detention conditions in the issuing Member State.⁹ **Violations of fundamental rights** within the various countries of the European Union are thus an **impediment to judicial cooperation between the Member States**.

The fact that the execution of a European Arrest Warrant can be synonymous to cooperation between Member States at the expense of the fundamental rights of the surrendered person has previously given rise to action on the side of the European Union. The past decade the EU has played a major role in strengthening the procedural rights of suspects and accused persons as Member States agreed that common minimum standards were necessary to facilitate the execution of mutual recognition instruments. Indeed, the lack of a common understanding of human rights standards across EU Member States hampers EU cooperation and reflects the need for an EU-wide understanding of prisoners' fundamental rights. So, although individual EU Member States are responsible for their detention conditions, the European Union has convincing reasons to take a lead in this matter. This argument was equally brought forward at a recent Eurojust-meeting:

*"Despite different national approaches, the Aranyosi and Căldăraru judgment makes clear that the required threshold [for prison conditions] should be **the European minimum standard**. Therefore, a common understanding on this minimum standard is important. Despite an extensive number of judgements from the ECtHR, national authorities sometimes still struggle with a correct and uniform interpretation/application."*¹⁰

Hereunder we will further clarify why the European Union is correct to be concerned about prison conditions. Firstly, we will explain why the current Council of Europe instruments are

⁶ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, PB C 12, 15 January 2001.

⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002 and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5 December 2008.

⁸ Sanger, A., "Force of circumstance: the European Arrest Warrant and human rights", *Democracy and Security* 2010, afl. 1, 17-51; Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", *New Journal of European Criminal Law* 2015, afl. 4, 457-480.

⁹ CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru.

¹⁰ Council of the European Union, *The EAW and prison conditions. Outcome report of the College thematic discussion*, Brussels, 16 May 2017, 2.

not adequate to ensure smooth EU cooperation. They were designed with another goal in mind, and cannot provide the necessary preconditions for EU mutual recognition instruments. An individual can indeed have recourse to the European Court of Human Rights to assert rights arising from the European Convention on Human Rights. However, this has not proved to be an effective means of ensuring that signatories comply with the Convention's standards. We will shortly consider why (1). Subsequently, the evolution of judicial cooperation in criminal matters within the European Union will be set out : from the establishment of one common Area of Freedom, Security and Justice without internal borders (2), to declaring the principle of mutual recognition based on mutual trust as the cornerstone for judicial cooperation (3), and adopting several mutual recognition (MR) instruments (4). We will highlight the problems encountered in the execution of these MR-instruments. EU mutual recognition instruments related to imprisonment might not function properly if prison conditions in a Member State conflict with fundamental rights. Next, we will discuss the importance of the protection of fundamental rights for the proper functioning of European Union instruments (5) and the results of the Stockholm Programme, adopted hereto (6). The Post-Stockholm Programme (7) also refers to the need to establish of minimum procedural safeguards for suspected and accused persons in criminal proceedings throughout the European Union.

All of this will underline the need to pay attention to prisoners' rights on the EU-level. Moreover, it will explain why this is nothing more but the next logical step in the EU policy on judicial cooperation in criminal matters.

2. WHY THE PROTECTION PROVIDED BY THE ECHR IS INSUFFICIENT

In the following section we will explain why the protection foreseen by the Strasbourg system cannot guarantee the proper functioning of the EU mutual recognition instruments.

The ECHR sets out fundamental rights for suspects and defendants in criminal proceedings within Europe. Article 6 on the right to a fair trial and article 3 on the prohibition of torture are two of the most important provisions for the protection of human rights in criminal cases. Violations of the ECHR-rights are dealt with by the European Court of Human Rights. In practice, the Strasbourg Court is not always able to adequately enforce ECHR rights in the domestic criminal justice systems of the Member States.¹¹ For instance, Member States are obliged to effectively protect the rights of their citizens, yet violations of article 6 occur in all EU Member States as has been demonstrated by ECtHR case law against all of them.

The Court allows that Member States have a margin of appreciation when transposing ECHR standards to national legislation. This means that there is **no standard implementation** of the Convention, resulting in a different implementation of the ECHR-rights in each Member State. The European Commission acknowledges this: *'despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts about standards being similar across the EU'*.¹² Moreover, a 2009 study shows the worrying discrepancy between the ECHR-obligations and the domestic

¹¹ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 82.

¹² Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC(2011) 430, 11 April 2011.

legislation of some Member States as well as its implementation in practice. Certain fundamental rights, including basic aspects of a fair trial in the ECHR such as the right to remain silent, to have access to the file and to call and/or examine witnesses or experts, were not provided for in EU Member States' legislation. Nor was the implementation of ECHR-standards in practice in line with what the ECtHR required.¹³

The Strasbourg Court equally deals with a considerable **caseload** and **repetitive cases**. As a result of the backlog, it can take years before the Court reaches a final decision. Repetitive cases refer to cases on matters which have been dealt with by the Court in previous cases but which remain problematic because the concerned Member State fails to take the necessary action to improve or adjust the situation.¹⁴ This shows that judgments sometimes fail to bring systematic change in a country's practice.¹⁵ Since more than a decade the ECtHR has adopted 'pilot judgments' to force Member States to make structural improvements when the Court identifies systemic problems in a Member State.¹⁶ The Member State receives clear indications of the type of remedial measures needed to resolve the problem and are closely supervised by the Court during the process.¹⁷ Despite the pilot judgments and while the jurisprudence of the ECtHR shows general lines of thought, decisions of the Court are inextricably linked with the specific circumstances of the case. This makes it sometimes challenging to deduce general rules from its case-law. As a result, whether a Strasbourg judgment will have actual consequences for the national legal system depends to a large extent on how national authorities interpret the judgement as they have a substantial margin of appreciation in this respect.¹⁸

The Strasbourg system is also characterised by some **hurdles for individuals** taking recourse to the European Court of Human Rights. First of all, applying to the ECtHR can only be done after all domestic remedies have been exhausted, which means that the potential applicant has to take his case as far as the appeal system of his country allows. The process thus takes time and requires financial resources as procedures usually take years and the applicant might face substantial lawyers' fees and additional costs.¹⁹

In conclusion, although the ECtHR has been successful in setting general minimum standards on fundamental rights, the effectiveness of the ECtHR is still faces certain challenges. As such, fundamental rights in detention are not protected sufficiently in practically all European countries.²⁰ The European Commission similarly observed, in its report on the functioning of the EAW, that: "*While an individual can have recourse to the European Court of Human Rights to assert rights arising from the European Convention on Human Rights (...) this has not*

¹³ Spronken, T., Vermeulen, G., de Vocht, D., van Puyenbroeck, L., *EU Procedural Rights in Criminal Proceedings*, Antwerp, Maklu, 2009.

¹⁴ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 82-83.

¹⁵ European Court of Human Rights, *Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year Friday 27 January 2012, Address by Sir Nicolas Bratza President of the European Court of Human Rights*, 4.

¹⁶ Rule 61 Rules of Court of the European Court of Human Rights.

¹⁷ See European Court of Human Rights, *Factsheet – Pilot judgments*, January 2019.

¹⁸ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 83.

¹⁹ Morgan, 2012, p.76

²⁰ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 82.

proved to be an effective means of ensuring that signatories comply with the Convention's standards."²¹

3. HISTORICAL DEVELOPMENT OF JUDICIAL COOPERATION IN THE EU-CONTEXT

Given its initial economic objectives, the European Union originally had no ambitions in the field of fundamental rights protection and was not, or rarely, active in the area of criminal procedural law.²² However, certain historical developments made the European Union gear its attention to fundamental rights protection as a necessary next step to ensure further judicial cooperation between the EU Member States. This evolution has been the most pronounced when it comes to fundamental rights in criminal proceedings, but, as will be argued further, should equally be clear in the area of imprisonment.

On 14 June 1985, France, Germany and the three Benelux-countries signed the **Schengen Agreement**, agreeing to gradually abolish the internal border controls for persons. This agreement meant the creation of an area allowing free movement across borders between the five countries, the so-called Schengen Area. The Schengen Implementation Convention to implement the Schengen Agreement was subsequently signed on 19 June 1990. Even though the initial five Schengen Parties were also Member States of the then European Economic Community (EEC), the Schengen acquis was originally developed independently from the EEC.²³ However, the Schengen acquis was completely integrated into the institutional and legal framework of the European Union by the **Treaty of Amsterdam**, which was signed in 1997 and adopted in 1999. The abolition of border controls aimed at facilitating the free movement of persons, goods, services and capital but at the same time facilitated cross-border crime. Thus, judicial cooperation between the Member States had become more crucial than ever before. Hence, the Amsterdam Treaty further developed the European Union's competences in the field of judicial cooperation and introduced the concept of the **Area of Freedom, Security and Justice (AFSJ)**. This notion referred to the European Union not only as an area in which the free movement of persons was simplified, but also as an area where different police and judicial authorities could cooperate effectively. Cooperation in controls at the external borders, asylum, immigration, judicial cooperation in civil as well as in criminal matters and police operation had to shape this Area of Freedom, Security and Justice.²⁴

In the meantime however, the Council of Europe (CoE) had already taken several important measures to improve criminal cross-border cooperation. Cooperation in criminal matters traditionally covered six domains, all of which were tackled by the CoE: extradition, mutual legal assistance, transfer of prisoners, enforcement of sentences, transfer of proceedings and confiscation of proceeds of crime. The CoE adopted conventions, of which four were universally ratified by EU Member States: the ones on extradition, mutual assistance, transfer

²¹ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, 11 April 2011, 6.

²² Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 85.

²³ Vermeulen, G. & De Bondt, W., *EU Justice and Home Affairs: institutional and policy development*, Antwerp, Maklu, 2014, 15.

²⁴ *Ibid.*, 36.

of prisoners and the confiscation of proceeds of crime.²⁵ Two of them, however, proved less popular. The treaties on the enforcement of sentences and transfer of proceedings attracted only a few ratifications from EU Member States.²⁶ The European Union wanted to become involved in criminal cooperation despite the extensive activity of the Council of Europe for two reasons. The EU wanted either to supplement widely ratified Council of Europe Conventions, for instance by reducing the number of exceptions to the rules, or to find alternative routes to achieve the same ends where the Council of Europe measures had not attracted many ratifications.²⁷

To this end, the EU Member States agreed upon several Conventions, amongst others relating to the transfer of sentenced persons, the transfer of criminal proceedings and the validity of criminal judgments. Few of these conventions, however, generated any effect since the Member States were reluctant to ratify them, exactly as was the case with the Council of Europe conventions.²⁸ The procedures in place were still deemed too restrictive and excessively complicated. Moreover, the limited ratification of these conventions demonstrated a lack of the indispensable mutual trust between the EU Member States, necessary for a smoother cooperation with fewer formalities.

Bearing in mind the complicated and restrictive procedures, the European Council decided to facilitate cooperation between the judicial authorities of the different Member States.²⁹ To this end, the European Council introduced the concept of **mutual recognition** as the new cornerstone to judicial cooperation in criminal matters. This decision was taken at the **European Council of Tampere** of 1999, the first summit entirely devoted to Justice and Home Affairs.³⁰

The principle of mutual recognition differs significantly from traditional cooperation between Member States. Originally, assistance in criminal matters had to be requested, whereas mutual recognition requires States to execute the decision taken by the issuing State. This results in the executing State losing some of its sovereign power in the enforcement of criminal decisions on its territory. However, depending on the instrument involved, the executing State still retains some power to refuse to implement the issuing State's decision into an act within its own legal system.³¹

The principle of mutual recognition was not an entirely new concept when it came to cooperation between EU Member States. The principle was already applied in the economic sphere with the establishment of the EU internal market. Mutual recognition meant for instance that if one Member State deemed a product safe for its citizens, other Member States would accept this decision and thus consider the product safe for their own citizens too. Mutual

²⁵ European Convention of 13 December 1957 on Extradition, *ETS* 24; European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, *ETS* 30 ; Convention of 21 March 1983 on the Transfer of Sentenced Persons, *ETS* 112; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *ETS* 141.

²⁶ European Convention of 28 May 1970 on the International Validity of Criminal Judgments, *ETS* 70; European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters, *ETS* 73.

²⁷ Peers, S., "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", *Common Market Law Review* 2004, afl. 41, 6-7.

²⁸ *Ibid.*, 7.

²⁹ Vermeulen, G. & De Bondt, W., *EU Justice and Home Affairs: institutional and policy development*, Antwerp, Maklu, 2014, 96.

³⁰ Tampere European Council 15 and 16 October 1999, Presidency conclusions.

³¹ Peers, S., "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", *Common Market Law Review* 2004, afl. 41, 10

recognition allowed Member States to avoid the difficulties with having different legal systems within one economic area and avoiding the hurdles linked with harmonising the national contingencies when marketing goods throughout the entire European Union. Wanting to overcome the difficulties related to the differences between national criminal law systems too, the European Union decided at the Summit of Tampere to extend the principle of mutual recognition to criminal matters.

The Tampere Conclusions were translated to practical actions in 2000, prioritising 24 specific mutual recognition measures.³² These measures aimed at enhancing the free movement of criminal investigations, prosecutions and sentences within the European Union.³³ A twofold objective was expressed: “*Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights.*”³⁴ Nonetheless, attention was directly mainly at strengthening cooperation while the protection of individual rights was rather neglected.

Although the introduction of the principle of mutual recognition is an extension from its application in the internal market, there is an important difference. The European Council assumed that for the application of the principle of mutual recognition in criminal matters, the underlying law need not be comparable. The application of the principle in the internal market, however, usually requires either at least some basic comparability of underlying national laws, or the adoption of EC legislation to ensure that those national laws are sufficiently comparable.³⁵ Mutual recognition in criminal matters was a simplified version to ensure that judicial decisions taken in one Member State would indeed be recognized by every other Member State as if it was their own decision. Member States were expected to execute each other’s judgements without feeling any need for further requirements or adaptation checks against their own procedural standards. So, mutual recognition was to be considered recognition **without any imposed formalities**.³⁶ For instruments based on mutual recognition to work, **mutual trust** between the ratifying Member States is thus a crucial prerequisite.³⁷ This trust is grounded, in particular, on Member States’ shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.³⁸

4. DIFFICULTIES FACED BY MR INSTRUMENTS: THE CASE OF THE EAW

The execution of the Programme of Measures **to implement the principle of mutual recognition of decisions in criminal matters** dominated the Justice and Home Affairs’ agenda of the European Union for the following years. It led to the extension of the EU acquis

³² Programme of measures of 30 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15 January 2001.

³³ Peers, S., “Mutual recognition and criminal law in the European Union: has the Council got it wrong?”, *Common Market Law Review* 2004, afl. 41, 5-36.

³⁴ Programme of measures of 30 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15 January 2001.

³⁵ Peers, S., “Mutual recognition and criminal law in the European Union: has the Council got it wrong?”, *Common Market Law Review* 2004, afl. 41, 3.

³⁶ Vermeulen, G. & De Bondt, W., *EU Justice and Home Affairs: institutional and policy development*, Antwerp, Maklu, 2014, 101.

³⁷ Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters. COM(2000) 495, 26 July 2000.

³⁸ Programme of measures of 30 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15 January 2001, 10-22.

by adopting several mutual recognition instruments, of which the European Arrest Warrant (EAW) is arguably the most well-known.³⁹ The instrument provided a simplified and more flexible surrender of suspected and sentenced persons in criminal matters. It replaced all previous extradition procedures between EU Member States.⁴⁰

Judging by the numbers, the instrument is an operational success. Data are not available for all EU Member States, but recent figures show that at least 6518 people surrendered on the basis of an EAW in 2015.⁴¹ Data also show that the total number of executed European Arrest Warrants show a positive trend.⁴²

The Framework Decision on the EAW exhaustively lists the refusal grounds for mandatory and optional non-execution of the European arrest warrant. No reference is made to violations of fundamental rights as an explicit refusal ground for the execution of an EAW. This can be explained by referring to the assumed mutual trust Member States had in each other, which, after all, justified the adoption of mutual recognition instruments. In other words, EU Member States were assumed to respect fundamental rights and violations of these rights were thus not taken into account.⁴³ The preamble of the EAW Framework Decision stresses the basis for mutual recognition by explicitly recalling that the EAW “*is based on a high level of confidence between Member States*”.⁴⁴ Therefore, the execution of an EAW can be postponed or cancelled “*only in the event of a serious and persistent breach*” of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, by one of the Member States.⁴⁵

In practice, the fine line between mutual recognition and the obligation to respect fundamental rights, raised multiple issues when executing EAW's. The lack of judicial control, the abolishment of several safeguards and an excessive reliance on mutual trust entailed the risk of human rights violations. Later on, the Court of Justice of the European Union (CJEU) addressed the balance between mutual recognition and respect for fundamental rights on several occasions, revealing a gap between the expected and the actual mutual trust between the EU Member States.⁴⁶ In the *Radu* case, the *Melloni* case and the *Lanigan* case, the CJEU ruled on the right to be heard, respectively the right to a fair trial in the context of *in absentia* judgments and the right to liberty.⁴⁷ The main question always being: when does the protection of fundamental rights require a judicial authority to refuse mutual recognition, and to execute an EAW in particular?⁴⁸

³⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190, 18 July 2002.

⁴⁰ Böse, M., “Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant” in: Ruggeri, S., (ed.), *Human Rights in European Criminal Law*, Cham, Springer, 2015.

⁴¹ Commission Staff Working Document. Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2015, SWD(2017) 320, 28 September 2017, 5.

⁴² *Ibid.*, annex III.

⁴³ Article 1(3) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190, 18 July 2002.

⁴⁴ *Ibid.*, preamble, 10.

⁴⁵ *Ibid.*, preamble, 10.

⁴⁶ For a short overview, see Eurojust, *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*, October 2018, 69 p.

⁴⁷ CJEU 29 January 2013, case C-396/11, *Radu*; CJEU 26 February 2013, case C-399/11, *Melloni*; CJEU 16 July 2015, Case C-237/15 PPU, *Lanigan*.

⁴⁸ Tinsley, A., “The Reference in Case C-396/11 *Radu*: When does the Protection of Fundamental Rights Require Non-Execution of a European Arrest Warrant?”, *European Criminal Law Review*, afl. 3, 2012, 338-352.

The **case of Radu** was the first major case in this context. Ciprian Vasile Radu was suspected of aggravated robbery in Germany. Therefore, Germany issued four European Arrest Warrants in 2007 and 2008, on the basis of which he was subsequently arrested in Romania. However, Mr. Radu did not consent to his surrender and he raised several objections in the surrender proceedings against the execution of the EAWs. He claimed in particular that the executing state, Romania, had to ascertain that the issuing state, Germany, observes the fundamental rights laid down by the ECHR and the Charter of Fundamental Rights of the European Union. The executing authorities would be entitled to refuse execution of the EAW if this was not the case. It was the first time that the CJEU was asked in such a direct manner by a national court **whether mutual recognition could be refused on fundamental rights grounds**.⁴⁹ Mr. Radu referred quite generally to the rights to a fair trial, to the presumption of innocence and to liberty. He did however not further specify the alleged violations of these three rights. In fact, he only raised one point, stating that *“he had not been given the opportunity to hire a lawyer and to present his defense before the German authorities had issued the European Arrest Warrants”*.⁵⁰

In its judgment, the Court pointed out the principles of mutual trust and mutual recognition are essential for the AFSJ: *“An obligation for the issuing judicial authorities to hear the requested person before a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight.”*⁵¹ The Court thus ruled that fundamental rights obligations do not require the judicial authority of a Member State to refuse execution of an EAW on the ground that the requested person was not heard by the issuing judicial authorities before that warrant was issued. It further added that *“in any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system”*.⁵² The Court placed effectiveness considerations at the forefront of its reasoning in this case. Consequently, it answered the question whether mutual recognition could be refused on fundamental rights grounds in the negative.⁵³ Indeed, fundamental rights had to be interpreted *“in such a way as not to compromise the effectiveness of the European arrest warrant system”*.⁵⁴

On 5 April 2016, however, the Court of Justice of the European Union ruled differently in **the joined cases Aranyosi and Căldăraru**.⁵⁵ In the Case of *Aranyosi*, Hungarian judicial authorities issued two European arrest warrants with respect to a Hungarian national, Mr. Aranyosi. He was suspected of having committed two offences of forced entry and theft in Hungary. In this case, the EAWs were issued for the purpose of **criminal prosecution**. In the case of *Căldăraru*, Romanian judicial authorities issued an EAW with respect to Mr. Căldăraru

⁴⁹ Mitsilegas, V., “The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice”, *New Journal of European Criminal Law* 2015, afl. 4, 467.

⁵⁰ Böse, M., “Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant” in: Ruggeri, S., (ed.), *Human Rights in European Criminal Law*, Cham, Springer, 2015, 138.

⁵¹ Para. 40 CJEU 29 January 2013, case C-396/11, Radu.

⁵² Para. 41 *Ibid.*

⁵³ Mitsilegas, V., “The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice”, *New Journal of European Criminal Law* 2015, afl. 4, 467.

⁵⁴ Anagnostaras, G., “Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Căldăraru*”, *Common Market Law Review* 2016, afl. 6, 1689.

⁵⁵ CJEU 5 April 2016, joined cases no. C-404/15 and C659/15 PPU, *Aranyosi and Căldăraru*.

who was sentenced to one year and eight months imprisonment for driving without a driving license. In this case, surrender was requested for the purpose of **executing the sentence** in Romania.

Since the two men had been located in Germany, the German authorities were to execute the warrants. The German judiciary, however, found that the detention conditions in Hungarian and Romanian prisons might be of such a nature that they violated fundamental rights, in particular the provisions in the ECHR (art. 3) and the CFREU (art. 4) prohibiting inhuman or degrading treatment or punishment. The ECtHR ruled in 2014 and 2015 that Romania as well as Hungary had violated the ECHR as their prisons were overcrowded.⁵⁶ Moreover, reports issued by the European Committee for the Prevention of Torture were very critical of the prison conditions in both countries. The extradition would thus potentially lead to the imprisonment of Mr. Aranyosi and Mr. Căldăraru in conditions violating fundamental rights. Therefore, the German court referred to the Court of Justice of the European Union for a preliminary ruling to ascertain whether execution of EAWs can or must be refused when there are strong indications that the detention conditions in the issuing state infringe fundamental rights of the persons concerned.

The CJEU ruled that that execution of an EAW must be postponed, and ultimately refused, if the person concerned would be at risk of inhumane or degrading treatment due to the detention conditions he or she would be subject to if surrendered to the issuing Member State. The Court thus recognized for the first time that the risk of fundamental rights violations were a refusal ground for the execution of an EAW. By doing so, the CJEU clarified that **mutual trust is not unconditional and that Member States must assess respect for human rights prior to surrender following an EAW**.⁵⁷ The CJEU gave some guidance as to the kind of assessment that national authorities are required to make if serious concerns regarding prison conditions are being raised: *“Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States, must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the **executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, in the event of his surrender to that Member State.**”*⁵⁸ In case of objective, reliable, specific and properly updated evidence of detention conditions that violate fundamental rights, the executing state is thus obliged to ascertain the risk of inhuman or degrading treatment in the event of surrender of the person. In case of a real risk *“the executing judicial authority must request that supplementary information be provided by the issuing*

⁵⁶ See ECHR, *Vociu v. Romania*, 2014; ECHR, *Bujorean v. Romania*, 2014; ECHR, *Mihai Laurențiu Marin v. Romania*, 2014; ECHR, *Constantin Aurelian Burlacu v. Romania*, 2014; ECHR, *Varga and Others v. Hungary*, 2015.

⁵⁷ Bovend'eerd, K., "The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in The Area of Freedom, Security, and Justice?", *Utrecht Journal of International and European Law* 2016, afl. 83, 112-121.

⁵⁸ Para. 6 CJEU 5 April 2016, joined cases no. C-404/15 and C659/15 PPU, Aranyosi and Căldăraru.

judicial authority". The former may seek the assistance of the central authorities of the issuing State, which "*must send that information within the time limit specified in the request*".⁵⁹ Subsequently, "*the executing judicial authority **must** postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk*".⁶⁰

The Court judgment in the joined case Aranyosi-Căldăraru acknowledged that detention conditions are a decisive element in the application of the principle of mutual recognition of judgments in the European Union Area of Freedom, Security and Justice. This judgment has to be considered ground-breaking since it is the first in which the CJEU acknowledges that protection of fundamental rights limits the principles of mutual trust and recognition in judicial cooperation. The fact that surrender following a European Arrest Warrant has been actually refused by the CJEU due to a violation of fundamental rights has made it painfully clear that the Court acknowledges that the lack of mutual trust in the judicial cooperation between Member States is well-founded. Thus, **human rights violations cannot be ignored when deciding upon the execution of a European Arrest Warrant. The principle of mutual recognition does not relieve the executing state from its obligation to respect fundamental rights.**⁶¹ Accordingly, inadequate detention conditions in Member States can seriously hamper judicial cooperation using mutual recognition instruments based on mutual trust.

5. ATTENTION FOR PROCEDURAL RIGHTS

The refusal to execute European Arrest Warrants and other mutual recognition instruments, coupled with CJEU case law, showed that the European Union could not blindly assume mutual trust. After all, mutual recognition relies on mutual trust and confidence, and can therefore be seriously hindered by divergent interpretations of and respect for fundamental rights. The awareness grew that the current discrepancies in levels of procedural safeguards between Member States could seriously affect the realisation of 'an area of freedom, security and justice'.⁶² However, the focus was primarily laid on introducing minimum standards related to the procedural rights of suspect and accused persons and not on detention conditions. Nevertheless, rather than expanding the EU acquis with mutual recognition instruments, the EU decided to adopt minimum standards throughout the entire EU, thus providing a real basis for the until then presumed mutual trust between the Member States.

5.1 A FALSE START

The Commission highlighted the importance of developing procedural safeguards for suspects and defendants in criminal proceedings on the EU level in a Green Paper of 2003.⁶³ Mutual trust between the EU Member States had to be enhanced by harmonising the application of

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Böse, M., "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant" in: Ruggeri, S., (ed.), *Human Rights in European Criminal Law*, Cham, Springer, 2015.

⁶² Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 87.

⁶³ Green Paper on procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75, 19 February 2003.

existing ECHR standards at the EU level.⁶⁴ The minimum threshold regarding suspects' procedural rights in the EU are after all set by the European Convention on Human Rights, a treaty to which all EU Member States are party. Despite this, divergent application of the ECHR in the various Member States has hindered the reliance on mutual trust.⁶⁵ The main role for the European Union according to the Green Paper lies thus not in setting standards but in developing practical instruments for enhancing the visibility and the efficiency of the operation of those standards at the EU level.⁶⁶

The European Commission attempted to guarantee certain procedural rights on the EU level by presenting a proposal for a Framework Decision on procedural rights in criminal proceedings throughout the EU in 2004.⁶⁷ The explanatory memorandum to the proposal reads: "*If **common minimum standards** are applied to basic procedural safeguards throughout the EU, this will lead to increased confidence in the criminal justice systems of all the member states which in turn will lead to more efficient judicial cooperation in a climate of mutual trust*". The 2004 proposal thus did not envisage the creation of new rights nor the monitoring of compliance with the rights resulting from the ECHR, but **aimed at ensuring a reasonable level of protection for suspects and defendants in criminal proceedings in order to comply with the principle of mutual recognition**⁶⁸. This goal underlines the fact that the EU recognized that mutual trust still had to be built, although several mutual recognition instruments had already been adopted relying on the presumed mutual trust between the Member States.

The point of view expressed in the 2004 proposal was adopted in the Hague Programme, stating that "*the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceeding, based on the studies of the existing level of safeguards in Member States and with due respect for their legal traditions*". Nevertheless, no political agreement could be reached on the matter and concrete measures failed to be adopted. One of the main arguments of the opposing Member States was that they doubted the added value of the 2004 proposal in relation to the ECHR since they were convinced that the latter provided adequate protection for the rights of suspects and accused persons in the EU. Additionally, the lack of legal basis in the EU Treaties for such an initiative was put forward. Some Member States claimed that the EU did not have the competence to deal with the issue of procedural rights.⁶⁹ The work on establishing common minimum standards in order to guarantee procedural rights was eventually abandoned in 2007.⁷⁰

⁶⁴ *Ibid.*, 9.

⁶⁵ Vernimmen-Van Tiggelen, G., & Surano, L., Analysis of the future of mutual recognition in criminal matters in the European Union, 20 November 2008.

⁶⁶ Green Paper on procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75, 19 February 2003, 9.

⁶⁷ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328, 28 April 2004.

⁶⁸ Spronken, T., Vermeulen, G., de Vocht, D. & van Puyenbroeck, L., *EU Procedural rights in criminal proceedings*, 2009, <https://pub.maastrichtuniversity.nl/b4e7b80c-e2f0-446f-9b0e-12c12de337e1>.

⁶⁹ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 86.

⁷⁰ Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", *New Journal of European Criminal Law* 2015, afl. 4, 474.

5.2 CHANGING EU COMPETENCES UNDER THE LISBON TREATY

The Treaty of Lisbon provides a stronger basis for the protection of rights of suspected and accused persons in criminal proceedings.⁷¹ Amongst others, the Lisbon Treaty introduced new working structures, not only significantly simplifying the decision making process in the field of criminal law, but also strengthening the supervision of the Court of Justice in the area of judicial cooperation in criminal matters. Framework decisions were replaced with directives as main legislative instrument and majority voting replaced unanimity voting when adopting legislative proposals. The latter gave a new impetus to negotiations for new EU minimum standards. A directive is also a more stringent legal tool than a framework decision, since they generate direct effect, that is to say that they must be strictly complied with when the provisions are described unconditionally and are sufficiently precise and clear.⁷² It is thus clear that the Lisbon Treaty strengthened the legislative powers of the EU. As a result it has become easier, both in the preliminary negotiation process and in the enforcement of compliance, for the EU to guarantee the protection of procedural rights via minimum rules.

The provisions in the Lisbon Treaty with regards to the area of judicial cooperation have changed the context in which the European Arrest Warrant and other mutual recognition instruments operate. The Lisbon Treaty finally provides – almost a decade after the declaration at the Summit of Tampere – a treaty-basis for mutual recognition as the cornerstone for judicial cooperation in criminal matters.⁷³ Furthermore, the Lisbon Treaty clarifies the until then ambiguous relationship between approximation of national criminal law and mutual recognition. Thus, mutual recognition as well as approximation are both fundamental for judicial cooperation. Approximation is to be seen as a means to guarantee the proper functioning of mutual recognition, from which it follows that measures to approximate the laws of the Member States are only appropriate when mutual recognition requires so.⁷⁴

In relation to substantive criminal law, the Lisbon Treaty goes explicitly beyond the point of view that approximation is solely required for cross-border judicial cooperation. Approximation should not only be limited to particular serious crimes with a cross-border dimension but should also be used to ensure the effective implementation of Union policy in an area that has been subject to harmonisation measures.⁷⁵ Thus, the Lisbon Treaty provides a general competence provision for the approximation of substantive criminal law by means of directives.⁷⁶

This point of view seems to be slightly different in relation to procedural criminal law. The Treaty provides EU competence to adopt minimum rules on the rights of individuals in criminal procedures, but this competence is not general, but functional, following from the necessity requirement of article 82(2)(b) TFEU stating that the EU only has competence on the matter of procedural rights *to the extent necessary to facilitate mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension*. What is striking in

⁷¹ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 87-89.

⁷² Klip, A., *European Criminal Law. An Integrative Approach*, 2nd edition, Cambridge, Intersentia, 2012, 50-51; Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 87.

⁷³ Article 82(1) TFEU.

⁷⁴ Vermeulen, G. & De Bondt, W., *EU justice and home affairs: institutional and policy development*, Antwerp, Maklu, 2014, 103.

⁷⁵ Art. 83 TFEU

⁷⁶ Hecker, B., "The Development of Individual Rights Protection in European Criminal Law After the Lisbon Treaty" in Ruggeri, S., (ed.), *Human Rights in European Criminal Law*, Cham, Springer, 2.

this wording is that the EU competence in the protection of procedural rights is considered to be a flanking measure for mutual recognition instead of autonomously necessary to address the effects of the operation of mutual recognition instruments on the individual, already well-known by then.⁷⁷ This is made clear by the preambles of the Directives based on Article 82(2) TFEU, justifying the measures by linking them to mutual trust. In any case, regardless of the intention, the Lisbon Treaty allocates a central role to procedural rights in the EU area of criminal justice.

5.3 ATTENTION FOR PROCEDURAL RIGHTS: THE EU PROCEDURAL RIGHTS ROADMAP

The entry into force of the Lisbon Treaty was preceded by a renewed attention for procedural rights. A few months earlier the procedural rights debate was put back on the agenda by the European Commission. Subsequently, an important step was taken at the initiative of the Swedish Presidency with the presentation of the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*.⁷⁸ In this Roadmap, strategic guidelines for developing an Area of Freedom, Security and Justice were formulated, in which the Member States recognised the need for measures on the protection of procedural rights at European level. The preamble pointed out that there was “*room for further action on the part of the EU to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards*”. The Roadmap was not free of criticism. Some scholars stressed the fact that there is more to procedural rights than the traditional fair trial rights mentioned in the Roadmap, e.g. in the context of pre-trial evidence gathering.⁷⁹ The non-exhaustive nature of the list is emphasized in the Roadmap however.

The Roadmap identified five procedural rights which should be prioritised: translation and interpretation (Measure A); information on rights for suspected and accused persons in criminal proceedings and information about the charges (Measure B); legal advice and legal aid (Measure C); communication with relatives, employers and consular authorities (Measure D) and special safeguards for suspected or accused persons who are vulnerable, owing, for example, to age, mental, or physical condition (Measure E). The Roadmap also invited the European Commission to consider presenting a Green Paper on pre-trial detention (Measure F).

The Preamble of the Roadmap follows a twofold reasoning in acknowledging the importance of the establishment of procedural rights protection measures. It is stressed that common minimum standards in procedural law are considered essential “*in order to facilitate the application of the principle of mutual recognition*.” Furthermore, the Council recognized that “*procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial*.” This second argument is important since it explicitly links the establishment of procedural rights at EU level to ensuring a fair trial, thus no longer appointing

⁷⁷ Mitsilegas, V., “The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice”, *New Journal of European Criminal Law* 2015, afl. 4, 478-479.

⁷⁸ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4 December 2009; Spronken, T., “Effective defence. The letter of rights and the Salduz-directive” in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 89.

⁷⁹ De Bondt, W. & Vermeulen, G., “The Procedural Rights Debate: a Bridge Too Far or Still Not Far Enough?”, *Eucrim* 2010, afl. 4, 165.

procedural rights as mere flanking measure for mutual recognition but as an autonomous prerequisite for a fair trial. Recital 10 also explicitly refers to this second argument by stating that EU action in the field of procedural rights is needed to improve the balance between existing EU policy on law enforcement and prosecution on the one hand and the protection of procedural rights of the individual on the other.

The Roadmap is the first instrument to put forward rights that should be guaranteed on the EU level, but it is also the first in its kind to explicitly mention how these results should be achieved. Bearing in mind the difficulties that had risen in previous negotiations on procedural rights, the Roadmap prescribed a step-by-step approach, ensuring that priorities should be dealt with one at a time. Moreover, the sequence of the measures indicated the expected level of difficulty with regards to the negotiations. The first measure is thus considered to be the least controversial subject.

The Roadmap was not only formally adopted by the European Council on 30 November 2009, the day before the entry into force of the Lisbon Treaty, but it was subsequently implemented as an explicit part of the Stockholm Programme.⁸⁰ The latter, adopted by the European Council in December 2009, detailed the priorities for developing the Area of Freedom, Security and Justice, including strategic guidelines for a future common policy in the field of justice. These guidelines had to result in legislation providing minimum procedural rights' safeguards within the European Union.

6 RESULTS OF THE STOCKHOLM PROGRAMME: DIRECTIVES AND A GREEN PAPER

The implementation of the Roadmap has to date resulted in six directives on procedural rights in criminal proceedings, five of which were prioritised in the Roadmap, and a Green Paper on pre-trial detention. As previously stated, the mere fact that procedural rights are laid down in directives is added value in itself, even if these rights are comparable to those adopted in the ECHR. As directives are legally binding, the EU member states are obliged to implement the rules on procedural safeguards in their national legislation. This guarantees a uniform interpretation of the procedural rights.

6.1 THE DIRECTIVES

The directives adopted in accordance with the Roadmap create direct rights for *all* individuals involved in criminal proceedings within the EU Member States. In other words, it creates rights not only for those involved in cross-border cases involving mutual recognition, but also for individuals involved in purely domestic cases too.⁸¹ Some states strongly opposed this, claiming that the EU only has the competence to establish minimum rules for procedural rights for individuals involved in criminal matters having a cross-border dimension. Due to the institutional changes brought by the Lisbon Treaty, in which unanimity voting was replaced by majority voting, no consensus upon the matter was needed. It has to be pointed out that the directives apply to any individual in *criminal proceedings* and the procedural safeguards

⁸⁰ §2.4 The Stockholm Programme – An open and secure justice serving and protecting the citizens, OJ C 115, 4 May 2010.

⁸¹ Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", *New Journal of European Criminal Law* 2015, afl. 4, 462.

foreseen in the directives are thus limited to criminal proceedings *only*. The directives are applicable at all stages of the criminal proceedings, from the moment a person is suspected or accused of having committed a criminal offence until the final decision, including the resolution of any appeal.

The first directive following from the Roadmap, being the Directive on the right to interpretation and translation in criminal proceedings, was adopted in 2010.⁸² The directive had to be transposed to national legislation before 27 October 2013. The provisions should guarantee that the suspected or accused person understands what is happening and is able to make himself understood. If the person does not speak or understand the language that is used in the proceedings, he or she has to receive interpretation assistance. This assistance is not only required during criminal proceedings before investigative and judicial authorities and during police questioning, but must also be foreseen for communication between suspected or accused persons and their lawyer. The right to interpretation also includes appropriate assistance for persons with hearing or speech impediments. The right to translation, which is not mentioned as such in the ECHR, is also addressed.⁸³ More specifically, suspected or accused persons who do not understand the language of the criminal proceedings are provided with a written translation of all essential documents. Essential documents refers in this case to documents ensuring an effective defence.

The second measure, Directive 2012/13/EU on the right to information in criminal proceedings, was adopted in May 2012 and had to be implemented by the Member States by 2 June 2014.⁸⁴ This Directive ensures that all suspects and accused persons in the EU should be orally informed of their rights in criminal proceedings and of the accusation against them. In case a person is being arrested, he or she has to be given a written letter of rights in a language he or she understand. The Directive contains an indicative model Letter of Rights. There is also a specific provision foreseen for persons involved in European Arrest Warrant Proceedings stating that they have to receive a Letter of Rights promptly upon their arrest. The adoption of this Directive was not exactly plain sailing. Originally, Member States wanted to limit the scope of this directive only to suspects and defendants involved in cross-border cases. This led to heavy criticism since such a limitation would result in different treatment between citizens of the EU, and thus in discrimination.⁸⁵

Measure C of the Roadmap, on legal advice and legal aid, is addressed in two distinct directives. One of them being the third implemented directive, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings.⁸⁶ This Directive also dealt measure D too, on the right to communicate upon arrest. Member States had to comply with this Directive by 27 November 2016.

⁸² Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26 October 2010.

⁸³ Morgan, C., "The EU procedural rights roadmap. Background, importance, overview and state of affairs" in *Defence rights: international and European developments*, Antwerp, Maklu, 2012, 78.

⁸⁴ Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1 June 2012.

⁸⁵ Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 90.

⁸⁶ Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6 November 2013.

The European Commission followed a specific line of reasoning for the merging of measure C and D of the Procedural Rights Roadmap, without implementing both aspects of measure C in the same directive. The right to legal aid had been left out and was planned to be covered at a later date because the Commission wanted to avoid that the negotiations on the right of access to a lawyer were being hampered by financial aspects. The right to see a lawyer had to be discussed on its own merits void of financial considerations.⁸⁷ This can however be considered a rather naïve point of view since the right to legal assistance is intrinsically linked with the right to legal aid. It can thus hardly be expected that the Member States will not have the financial consequences in the back of their minds during the negotiations on the right to access to a lawyer.⁸⁸ Another reason for the merging was the impact assessment. Each proposal presented by the Commission must be accompanied by an impact assessment. Since the Commission lacked information on the legal aid regimes of the various Member States and since collecting this information would be a lengthy process, the Commission decided to cover that aspect of Roadmap measure C at a later date.⁸⁹ The Commission did however decide to address the right to communication altogether with the right to access to a lawyer because in at least 22 Member States out of 27 the right to communication was already included in domestic legislation on access to a lawyer. Therefore, it was assumed to be easier for the Member States to implement a directive that covers both these rights at the same time.⁹⁰

The right of access to a lawyer applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence. The person involved does not necessarily have to be deprived of his liberty. It applies until the final determination of the question whether the suspect or accused person has committed the offence, including sentencing and the resolution of any appeal. What is striking is the mentioning in the preamble of the necessity of the ability of the lawyer to raise a question regarding the conditions in which a person is deprived of liberty, but the absence of any reference hereto in the directive itself. The second part of the third directive, the right to communicate, refers to communication with relatives, employers and consular authorities. The Directive includes remedies to guarantee that an earlier breach of the right guaranteed by the Directive does not contaminate the fairness of the proceedings as a whole. This refers to the ECtHR judgement in the *Salduz-Case* in which was stated that if the right to a lawyer at the pre-trial stage is violated, remedial action must be taken to ensure that the thus obtained evidence is not used for a conviction, for instance through its exclusion. The remedies provision was clearly designed to secure compliance with the *Salduz* principle.⁹¹

This directive proved to be more difficult to negotiate than the previous ones. Three countries chose to make use of the opt out clause, namely Denmark, Ireland and the United Kingdom. The impact of the right to access to a lawyer on jurisdictions with strong inquisitorial features is indeed significant. Preceding the implementation of the this Directive, there were still Member States where the right for a legal counsellor to be present during interrogations was

⁸⁷ Morgan, C., "The EU procedural rights roadmap. Background, importance, overview and state of affairs" in *Defence rights: international and European developments*, Antwerp, Maklu, 2012, 78.

⁸⁸ Spronken, T., "Effective defence. The letter of rights and the *Salduz*-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 101.

⁸⁹ Morgan, C., "The EU procedural rights roadmap. Background, importance, overview and state of affairs" in *Defence rights: international and European developments*, Antwerp, Maklu, 2012, 78.

⁹⁰ *Ibid.*

⁹¹ Spronken, T., "Effective defence. The letter of rights and the *Salduz*-directive" in Vermeulen, G. (ed.), *Defence rights. International and European developments*, Antwerp, Maklu, 2012, 99.

not yet safeguarded, as was the case in the Netherlands.⁹² In Austria, Germany, Hungary, Ireland and Sweden, access to a lawyer was not granted immediately upon arrest.⁹³ Furthermore there were countries in which access could be restricted when the interest of the investigation required so. In Austria, Belgium, the Netherlands, Poland, Romania, Czech Republic, Spain and Sweden supervision of the communications between the lawyer and his client were possible.⁹⁴

The fourth directive was not prioritized in the Procedural Rights Roadmap, emphasizing the non-exhaustive nature of that list. The directive strengthens the right to be presumed innocent and addresses the right to be present at the trial.⁹⁵ This directive was adopted in March 2016 and had to be nationally implemented by 1 April 2018.

The fifth directive introduces procedural safeguards for vulnerable persons, more specifically children involved as suspected or accused persons in criminal proceedings.⁹⁶ It was adopted in May 2016 and has to be implemented by the Member States by 11 June 2019. The directive is linked to measure E of the Procedural Rights Roadmap, which called for specific safeguards for individuals involved in criminal proceedings which are explicitly vulnerable due to for instance their age or mental or physical condition.

The sixth and last directive to date addresses the right to legal aid, the second part of measure C of the Roadmap.⁹⁷ It was adopted by the Council in October 2016 and has to be complied with by the Member States on 11 June 2019. The purpose of Directive EU 2016/1919 is to ensure the effectiveness of the right of access to a lawyer provided for under Directive EU 2013/48 by ensuring that financial and judicial support is granted in criminal proceedings to all accused persons who cannot afford a legal defence with their own resources. The Legal Aid Directive is only applicable to suspected and accused persons in criminal proceedings and to requested persons in EAW proceedings. It is important to notice that the scope of the Legal Aid Directive is thus rather small. Within the specific EAW framework, responsibility of the lawyer in the issuing state goes beyond mere legal advice in criminal proceedings, since he has to assist the lawyer in the executing state by providing him with information and advice. This is the only case in which legal aid can be provided outside the limited borders of criminal proceedings. This means that the Directive on Legal Aid will have no impact at all on litigation related to detention conditions.

6.2 THE GREEN PAPER ON PRE-TRIAL DETENTION AND DETENTION CONDITIONS

The Procedural Rights Roadmap also invited the Commission to present a Green Paper on pre-trial detention. The Commission presented a Green Paper on the subject of pre-trial detention and detention conditions in general in June 2011, titled “Strengthening mutual trust

⁹² Spronken, T., Vermeulen, G., de Vocht, D. & van Puyenbroeck, L., *EU Procedural rights in criminal proceedings*, 2009, 51, <https://pub.maastrichtuniversity.nl/b4e7b80c-e2f0-446f-9b0e-12c12de337e1>.

⁹³ *Ibid.*, 38-39.

⁹⁴ *Ibid.*, 49.

⁹⁵ Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11 March 2016.

⁹⁶ Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21 May 2016.

⁹⁷ Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, O J L 297, 4 November 2016.

in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention.”⁹⁸ The Green Paper covers the interplay between detention conditions and mutual recognition instruments such as the European Arrest Warrant, as well as pre-trial detention. Although the other measures of the procedural rights package, the directives, are indirectly linked with detention too, the Green Paper is the first measure specifically focusing on detention conditions and aspects of pre-trial detention.

The purpose of the Green Paper was to identify appropriate measures to counter the impact of detention issues on mutual trust and thus on mutual recognition and judicial cooperation generally within the European Union. The duration of pre-trial detention varies considerably between the Member States. There are also significant disparities between Member States in definition, terminology and practice of pre-trial detention. Although detention issues are deemed to be the responsibility of Member States, the EU, too, deemed it had a certain responsibility to bear, notwithstanding the principle of subsidiarity. The EU’s interest in the matter of pre-trial detention is threefold. Firstly, excessively long periods of pre-trial detention are detrimental for the individual. Secondly, lengthy pre-trial periods and poor detention conditions in general affect the mutual recognition instruments and consequently prejudice the judicial cooperation between the Member States and, lastly, they do not represent the values for which the European Union stands.⁹⁹

The Commission specifically looked into the issues of pre-trial detention and into the possibilities to improve detention conditions within the EU. Several issues were identified in relation to pre-trial detention. To start with, the presumption of innocence is often neglected. Pre-trial detention has a serious impact upon the persons involved and by extension upon their families and friends, even more when this takes place in a prison in a foreign country. Case law under article 5 of the ECHR demonstrates that pre-trial detention is to be seen as a measure of last resort, it is therefore only deemed acceptable if there are no possible alternatives. Pre-trial detention is however too often an automatic, self-evident act, which it is not allowed to be under the ECHR provisions. The regular reviews are often a simple formality to meet the requirements under the ECHR. Suspected or accused persons who are non-nationals are often automatically put in remand due to their flight risk. Research shows that once pre-trial detention has been imposed, the detainee has a greater chance of being sentenced with a prison sentence post-trial. Moreover, many EU countries are faced with overcrowded prisons and poor detention conditions.

Concerning pre-trial detention the Green Paper explored the need for the European Union to establish minimum rules in order to strengthen mutual trust. The Commission specifically focused on the possibilities to impose provisions on a statutory maximum length of pre-trial detention and on the regularity of the review, referring to the recurring obligation for judicial authorities to justify extension of the pre-trial detention. Regarding detention conditions, the Commission explored the role of the EU in ensuring equivalent detention standards throughout the European Union by establishing minimum standards and monitoring of the detention conditions. On the level of the Council of Europe, there are the European Prison Rules, which address the issue of prisoners’ access to legal advice and legal aid, and the monitoring by the Committee for the Prevention of Torture (CPT), which publishes country-specific reports and

⁹⁸ Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, 14 June 2011, 2.

⁹⁹ *Ibid.*, 3.

recommendations. While said instruments have their respective strengths, compliance with the European Prison Rules is not mandatory and the recommendations of the CPT are not binding. The Green Paper informs that eleven Member States and the large majority of NGOs were in favour of EU minimum standards on obligatory and regular reviews of the grounds for detention. An example of such standard is the obligation for national judicial authorities to verify at certain intervals whether the prerequisites for pre-trial detention continue to exist. The majority of the Member States was not in favour of harmonizing maximum time periods of detention. Many Member States also did not support the adoption of EU minimum standards, arguing that the principle of subsidiarity meant that the EU lacks a legal basis to set minimum rules related to pre-trial detention. Moreover, they argued that the ECHR already provides a basis for mutual trust.

7 THE POST-STOCKHOLM PROGRAMME (2015-2020)

Following from the Green Paper and the adoption of the five directives related to the proposed measures of the Roadmap on Procedural Rights, the priorities set out in the Roadmap have been addressed. Still, as was mentioned in the Roadmap itself and repeated in EU documents following the implementation of the Roadmap, the Roadmap did not contain an exhaustive list of issues to be addressed, but identified several priorities. The European Parliament already pointed out that *“further work remains outstanding in relation to pre-trial detention, administrative detention and the detention of minors, in respect of which standards in many Member States fall short of human rights and other international standards*. It called upon the European Commission *“to revisit the case for establishing such standards in relation to pre-trial detention, administrative detention and detention of minors through legislative action”* in its mid-term review of the Stockholm Programme.¹⁰⁰

Despite this, the post-Stockholm Programme setting out the European Union’s policy lines for the period of 2015-2020 does not mention the establishment of minimum and enforceable standards on pre-trial detention. In 2014, the European Council recalled that one of the key objectives of the Union is to build an Area of Freedom, Security and Justice without internal borders, and with full respect for fundamental rights.¹⁰¹ While it brought attention to the work that was undertaken (i.e. the directives following from the Roadmap), the Council also agreed that mutual trust in Member States’ justice systems should be enhanced, including by continued efforts to strengthen the rights of accused and suspect persons in criminal proceedings. The Council put forward five overarching priorities for 2015-2020, one of them being that the EU as ‘a trusted area of fundamental freedoms’. Amongst others, the aim should be to build bridges between the different justice systems and traditions and to ensure mutual recognition of judgments.

So, while strengthening the rights of accused and suspect persons in criminal proceedings was mentioned as a key action point for the European Union’s policy in 2015-2020, an explicit reference to establishing minimum standards on pre-trial detention is lacking. That said, the European Commissioner for Justice, Vera Jourová, mentioned pre-trial detention reforms as one of her top priorities in a speech of 25 April 2016: *“My priority here is to improve the procedural safeguards related to pre-trial detention. The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation. **Poor detention conditions***

¹⁰⁰ Para. 47 European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme, 2013/2024(INI),

¹⁰¹ Conclusions of the European Council (26/27 June 2014), EUCO 79/14, 27 June 2014.

*can indeed lead to refusal of extradition under the European Arrest Warrant, as the European Court of Justice has recently made clear. Furthermore, pre-trial detention should only be a last resort solution. We see however that it is often used too early. Conditions in pre-trial detention are often worse than those in regular prisons.”*¹⁰² The European Parliament equally expressed its will to pursue prison conditions in line with fundamental rights, in its resolution on prison systems and conditions of October 2017: “*The European Parliament calls for the Commission and the EU institutions to take the necessary measures in their fields of competence to ensure **respect for and protection of the fundamental rights of prisoners, and particularly of vulnerable individuals, children, mentally ill persons, disabled persons and women, including the adoption of common European standards and rules of detention in all Member States.***”¹⁰³

8 CONCLUSION

Since the very establishment of an Area of Freedom, Security and Justice with the Treaty of Amsterdam, mutual recognition instruments have taken a pivotal role in ensuring judicial cooperation between EU Member States. The creation of an internal market without internal borders equally entailed closer cooperation between judicial authorities, ensuring cross-border crime could be dealt with swiftly. Mutual recognition, which implies that Member States recognize judicial decisions in criminal matters and execute them without further requirements, allowed for cooperation between Member States without the need to interfere too much with national criminal law. This made sense as criminal justice is an area in which Member States are sensitive when it comes to a loss of sovereignty. With the European Arrest Warrant and the Framework Decision on the transfer of prisoners, the EU currently has two mutual recognition instruments which allow for a swift transfer of suspects and convicted persons to other Member States.

Mutual recognition, however, requires mutual trust between these Member States. Indeed, Member states must feel confident to rely on each other's decisions without controlling them vis-à-vis their own substantive and procedural criminal law standards.¹⁰⁴ This means Member States need intrinsic trust in each other's judicial authorities, including in other Member States' commitment to fundamental rights. In practice, however, Member States have proven to have very different levels of protection of fundamental rights, showing that mutual trust sometimes lacks a factual basis. In other words, respect for fundamental rights in all Member States cannot *de facto* be assumed. As such, fundamental rights violations lead to *distrust* in each other's judicial system, which in turn hampers swift cooperation based on mutual recognition instruments. Guaranteeing fundamental rights thus not only serves the interests of the individuals involved, but is equally essential for the swift functioning of mutual recognition instruments. In practice, detention conditions in Member States which violate fundamental rights have led to the execution of mutual recognition instruments, such as the European Arrest Warrant, being refused.

¹⁰² Speech by Commissioner Jourová at the European Criminal Law Academic Network, 2016 Annual Conference, 10th Anniversary, Brussels, 25 April 2016, available at http://europa.eu/rapid/press-release_SPEECH-16-1582_en.htm.

¹⁰³ Para. 57 European Parliament resolution of 5 October 2017 on prison systems and conditions, 2015/2062(INI).

¹⁰⁴ Vermeulen, G., “Mutual recognition, harmonisation and fundamental (procedural) rights protection” in Maik, M., (ed.), *Crime, Rights and the EU. The future of police and judicial cooperation*, London, 2008, 89.

The European Commission recognized that there was *de facto* no equivalent commitment to fundamental rights in all EU Member States and realised the implications for judicial cooperation between Member States. The Commission therefore proposed to harmonise the application of existing ECHR standards at the EU level. Indeed, the difficulty was not that fundamental rights did not exist, but rather the broad margin of appreciation the ECtHR gave to Member States regarding how ECHR-standards must be interpreted, which posed a threat to mutual recognition. Moreover, the non-conformity of some Member States with ECHR standards also contributed to mutual distrust. To ensure full implementation of the ECHR standards and the consistent application of existing standards across Member States, and, thus, to facilitate the use of mutual recognition instruments such as the European Arrest Warrant, the European Council decided to develop its own minimum standards.¹⁰⁵ Consequently, the EU adopted six directives, which strengthened the procedural rights of suspected or accused persons in criminal proceedings. To date, minimum standards deal, amongst other, with the right of access to a lawyer, the right to communicate with third persons, the presumption of innocence and the right to legal aid.

The introduction of minimum standards for suspects and accused has thus been targeted at a uniform interpretation of procedural rights in criminal proceedings. Nevertheless, ensuring a consistent application of ECHR standards not only proves difficult when it comes to procedural rights. As case-law has made it abundantly clear, the current manner in which people are taken and held in pre-trial detention, has proven to be in violation of ECHR standards in many Member States on many occasions.¹⁰⁶ Just as was the case with the procedural rights of suspects and accused, problems currently experienced in pre-trial detention have a major impact on mutual trust and the use of mutual recognition instruments between Member States.¹⁰⁷ Taking this reasoning a step further, the detention conditions for convicted prisoners, which are equally problematic in many Member States, can also hamper swift cooperation between Member States, as both the EAW and the Framework Decision on the transfer of prisoners allow for the transfer of convicted persons.

We believe that the more open prisons are to judicial oversight, the better the chances are that these prisons will provide humane, safe and rehabilitation-oriented detention conditions. A first step towards EU minimum standards on pre-trial detention should therefore consist of guaranteeing prisoners a proper access to justice and a swift access to a lawyer in case their fundamental rights are at stake. Guaranteeing that prisoners can take up their case with an independent oversight body could provide the necessary impetus to ensure that prison conditions are in line with ECHR standards, and, thus, that mutual trust between Member States is strengthened. EU minimum standards focussing on access to justice and to a lawyer for pre-trial prisoners are therefore the first step to ensuring a swift mutual recognition-based cooperation between Member States, with minimum intervention from the EU when it comes to regulating detention conditions.

¹⁰⁵ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4 December 2009.

¹⁰⁶ See the EUPRETRIALRIGHTS chapter on the ECHR case law.

¹⁰⁷ CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru.

PART II. ECHR LAW

PRISONERS' ACCESS TO COURT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM. ACHIEVEMENTS AND PROSPECTS

Sofia Ciuffoletti, Daniela Ranalli, Hugues de Suremain

1. PROCEDURAL RIGHTS SUPPORTING THE EFFECTIVENESS OF SUBSTANTIAL RIGHTS

The principle of effectiveness is at the heart of the European Court of human rights case-law. The concern for effectiveness has led the Court to develop a twofold approach: on the one hand the Court has enhanced the procedural rights (in particular Articles 6 and 13 of the Convention), considered as “creators of safeguard” for substantial rights¹⁰⁸ and, on the other hand, the Court has strengthened and, sometimes, extended the material requirements, by combining them with additional procedural obligations, autonomous from those provided for by Articles 6 and 13 of the Convention.

The Court's case-law on prison matters is fully in line with this approach.

The development of procedural requirements has led to the extension and intensification of prisoners' ‘rights’¹⁰⁹. The reinforcement of procedural rights, and in particular Articles 6 and 13 of the Convention, has played an extremely important role. Article 6 of the Convention, particularly in its civil aspect, has made it possible to restore the principle of the rule of law in prison and to remove from the absolute discretion of the prison administration decisions affecting the personal situation of prisoners (relations with the outside world, disciplinary regime, access to outdoor exercise, etc.). At the same time, the configuration of procedural guarantees has led to develop protective standards at a European level and to harmonize national laws.

Article 13, in conjunction with Article 3 of the Convention, has proved to be an essential instrument for the development of procedural requirements regarding conditions of detention and has been widely used in the fight against prison overcrowding¹¹⁰. The Court has configured the general characteristics and minimum requirements that the right to an effective remedy in the prison field must fulfil. It provided for the articulation of two fundamental requirements: the preventive effect, *i.e.* the remedy must be capable of preventing or stopping ill-treatment, and the compensatory effect, such as to allow compensation for the damage suffered. The case law has set precise and strict procedural requirements for effective remedies, bringing them in line with the fair trial standards: the independence of the decision-making body from the prison administration; the binding force of decisions; the effectiveness of redress; the respect of a reasonable time of the proceeding¹¹¹.

¹⁰⁸ J.-C. Soyer, M. de Salvia, *Le recours individuel supranational, Mode d'emploi*, LGDJ, 1992, p. 79.

¹⁰⁹ C. Madelaine, *Perspectives européennes : portée et fonctions de l'accès des personnes détenues à un recours effectif (European Perspectives: Scope and functions of prisoners' access to an effective remedy). Les obligations procédurales issues de la CEDH en matière de surpopulation carcérale*, La protection des droits des personnes détenues en Europe, Actes de conférences, 21 avril 2016, 14-15 juin 2016.

¹¹⁰ H. de Suremain, *Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale*, in *European Prison Litigation Network*, p. 33

¹¹¹ *Ananyev c. Russie*, §§ 214-231.

Although it had a less significant quantitative impact, development of the procedural aspect of substantive rights has enriched the content and the substantial guarantees by recognizing a procedural obligation of the State, autonomous from Articles 6 and 13 of the Convention¹¹². Concerning the effectiveness, the Court has set out new procedural obligations arising from the material provision. Article 3 and the right to material conditions of detention compatible with respect for human dignity has been the privileged ground for the development of this interpretative technique of the Court. This approach has been widely used, for example, in life imprisonment case-law, where the obligation to provide procedural guarantees in the parole mechanism arising directly from Article 3¹¹³.

As a matter of fact, the Court asserted the applicability of procedural guarantees to prisoners at a very early stage, at a time when detainees rights were hardly taken into account by the organs of the Convention, when issues related to prison litigation escaped, according to the configuration of domestic law, the guarantees of a fair trial.

The evolution of case-law in this issue is characterized, on the one hand, by the effort to adapt the substantial right of the Convention to the complexity of the detention and the construction of a real legal status of detainees and, on the other hand, by the consolidation of procedural rights and guarantees as means for transforming the penitentiary condition.

1.1 THE ECTHR'S CASE LAW AS A TOOL FOR THE CREATION OF A LEGAL STATUS OF EUROPEAN PRISONERS

The prisoners' rights protection issue allows for an analysis of the ability of the Court to position itself as a judicial tool for the effective protection of rights by force of interpretative methods and strategy. As a matter of facts, prisoners' rights are not a specific focus of the Convention, yet since the beginning of its activity, the Commission received and decided a high number of applications by European prisoners. This seems to be connected to the role of international courts to provide a forum for minorities' rights in pluralistic societies. Specifically, for minorities and vulnerable individuals subject to state-power authority.

As shown by Van Zyl Smit and Snacken¹¹⁴, the early cases to reach the Commission and the Court never passed the threshold of the Commission, because of the theory of the inherent limitations. According to this theory the rights of persons in a particular legal situation (prisoners, but also mental patients, military personnel, officials) are more limited than those of others. As a consequence, detention entails the loss of a number of rights considered inherently limited (incompatible) with the *status detentionis*. The all issue is then to define what is 'inherently' incompatible from a normative standpoint. As Mireille Delmas-Marty puts it, "it is not the exercise of the relevant rights which is restricted, but the content of the rights

¹¹² Sur les obligations procédurales prétoriennes issues de droits matériels voir E. Dubout, *La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des droits de l'homme*, RTDH, 2007, p. 397-425 ; N. Le Bonniec, *La procéduralisation des droits substantiels par la Cour EDH, Réflexion sur le contrôle juridictionnel du respect des droits garantis par la CEDH*, Bruylant, coll. « droit de la CEDH », 2017, 682 p.

¹¹³ *Hutchinson c. Royaume-Uni* (GC), arrêt du 17 janvier 2017, n. 57592/08 ; *Murray c. Pays-Bas* (GC), arrêt du 26 avril 2016, n. 10511/10 ; *Petukhov c. Ukraine* (n. 2), arrêt du 12 mars 2019, n. 41216/13. D.Galliani, A.Pugiotto, *Eppure qualcosa si muove : verso il superamento dell'ostatività ai benefici penitenziari ?*, AIC, n. 4/2017 ; D.Ranalli, *L'ergastolo nella giurisprudenza della Corte Europea dei diritti dell'uomo. Tra astratto « diritto alla speranza » e concreto accesso alla liberazione condizionale*, Rassegna Penitenziaria, Rassegna Penitenziaria e criminologica, n. 1/2015.

¹¹⁴ D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and human rights*, Oxford: Oxford University Press 2009.

themselves”¹¹⁵. Therefore in the process to establish whether a national law or a practice is consistent with the Convention (*i.e.* answering the three questions: is there an interference with a right; is the interference prescribed by national laws; is the interference or restriction necessary in a democratic society with a view to attaining one of the aims which are set out in the Convention and proportionate) the analysis of the legitimate limitations to the rights was simply not conducted. The process stopped in light of the inherent nature of the limitations.

In 1975 the Court departed for the first time from the theory of the inherent limitations in the case *Golder v. United Kingdom*¹¹⁶, where it was held that “the interference with a prisoner’s correspondence with a lawyer by the state’s authorities constituted a breach of the Convention”. The Court found that the interference infringed upon the prisoner’s right of access to court as guaranteed by Article 6 and the right to correspondence as guaranteed in Article 8.

The Court grounded its reasoning on the rejection of the theory of the inherent limitations. Instead the Court held that, when it came to restricting the rights of correspondence, it could be done only on the general grounds that the Convention provided. In sum, the Court is rejecting the theory of inherent limitation as an *in abstracto* theory, basing its reasoning on the idea of the casuistic approach to questions of violations of rights and legitimate limitations:

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule *in abstracto* on the compatibility of Rules 33 para. 2, 34 para. 8 and 37 para. 2 of the Prison Rules 1964 with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder (De Becker judgment of 27 March 1962, Series A no. 4, p. 26)¹¹⁷.

The Court, further on, reduce the scope of the possible limitations and strengthen the strict scrutiny rule concerning the same legitimate limitations:

The Court accepts, moreover, that the “necessity” for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The “prevention of disorder or crime”, for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 (art. 5) does not fail to impinge on the application of Article 8 (art. 8)¹¹⁸.

Within this perspective and concerning the interpretation and evaluation of the legitimate nature of the limitations imposed on the same content of fundamental rights, it seems only appropriate that the “power of appreciation” left to states needs to be precisely defined. Mere assumptions concerning the prevention of disorder or crime and the interest of public safety and the protection of the rights of others need substantiation from the part of the Government. In sum, the purposes advanced by the Government in view of a limitation of prisoners’ rights cannot be presumed and simply derived from the *status detentionis*:

In order to show why the interference complained of by Golder was “necessary”, the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood “in a democratic society”, could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that Golder was seeking to exculpate himself of a charge made against him by that prison

¹¹⁵ M. Delmas-Marty and C.Chodkiewicz (Eds.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992, p. 216.

¹¹⁶ *Golder v. UK*, n. 4451/70, .

¹¹⁷ *Ivi*, §39.

¹¹⁸ *Ivi*, § 45 (*emphasis added*).

officer acting in the course of his duties and relating to an incident in prison. In these circumstances, Golder could justifiably wish to write to a solicitor¹¹⁹.

Snacken and van Zyl Smit propose an interesting reading of this early stage of prisoners' rights protection affirming that the Court and the Commission, during the first three decades of their work, engaged in this dynamic and evolutive interpretation only when it came to recognize the procedural aspects of prisoners' rights. Paradigmatic is the decision in *Silver and Others v. UK*¹²⁰, where the Court "was reluctant to engage with the substantive questions of prison administration"¹²¹. Interestingly enough, the Court discusses the violation of Article 13 and, while it holds not necessary to examine Article 13 taken in conjunction with article 6 § 1¹²², on the contrary, when Article 13 was taken in conjunction with Article 8, the Court acknowledged a lack of domestic remedy to the consolidated principles deriving from its own case law:

"113. (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see the above-mentioned *Klass and others* judgment, Series A no. 28, p. 29, § 64);

(b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (*ibid.*, p. 30, § 67); *SILVER AND OTHERS v. THE UNITED KINGDOM* JUGDMENT 38

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 26, § 60, and the *Van Droogenbroeck* judgment of 24 June 1982, Series A no. 50, p. 32, § 56);

(d) neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law (see the *Swedish Engine Drivers' Union* judgment of 6 February 1976, Series A no. 20, p. 18, § 50)".

The Court advanced the protection of procedural rights in *Campbell and Feld v. UK*¹²³, where it affirms the rights of prisoners to legal assistance in disciplinary procedures based on the conventional requirement that a "person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing".

Concerning Article 13, the Court reiterates that:

the restrictions on Father Fell's access to legal advice and on his personal correspondence were the result of the application of norms that were incompatible with the Convention. In such circumstances, as the Court held in its above-mentioned *Silver and Others* judgment (*ibid.*, p. 44, para. 118), there could be no "effective remedy" as required by Article 13 (art. 13)¹²⁴.

The dynamic dimension of the procedural aspect of prisoners' rights was not paired by a parallel protection of prisoners' substantive rights. Particularly concerning conditions of detention potentially in violation of Article 3, the Court appeared much more cautious.

¹¹⁹ *Ibidem*.

¹²⁰ *Silver and Others v. UK*, n. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75.

¹²¹ D. Van Zyl Smit and S. Snacken, cited above, p. 12.

¹²² As traditionally expressed by the Court's case law, once a violation decision is made under Article 6, there is no need to examine complaints under Article 13; this is because the requirements of the latter Article (art. 13) are less to cover astrict than, and are here absorbed by, those of the former.

¹²³ *Campbell and Feld v. UK*, n. 819/77 7878/77

¹²⁴ *Ivi*, §127.

According to the literature on the issue¹²⁵: “the Court seems to have accepted, without going into the matter too deeply, that what it regarded as the inevitable deprivation of imprisonment were not inhuman or degrading form of treatment”¹²⁶. It seemed like the theory of inherent limitations was fading away in relation to procedural rights but was reaffirmed in the field of substantive issues concerning conditions of detentions and Article 3 of the Convention.

As Livingstone notes, on this aspect:

(...) while the Court has shown itself willing to develop the standards of protection for those in detention at what might be called the higher end of the spectrum, it has remained reluctant to extend the scope of Article 3 at the lower end to cover more routine conditions produced by neglect. (...) Thus it is only in the case of political prisoners (...) that the Commission and Court have been prepared to find breaches of Article 3 in relation to things like overcrowding or inadequate medical treatment.¹²⁷

The dynamism, effectiveness and scope of the Conventional protection seemed dramatically insufficient.

However, the Court's stance changed rather drastically at the turn of the millennium. The Court became noticeably more prepared to make findings in respect of the full range of conduct prohibited in Article 3. In several major cases, the Court strengthened the protection of prisoners' rights. In 1996, in the case of *Aksoy v. Turkey*, it found for the first time that the treatment of a prisoners had been so harsh that it amounted to torture. In 1997, in the case of *Aydin v. Turkey*, the rape of a prisoners by an official had also been held to constitute torture.

In 1999, in the important case of *Selmouni v. France*, the Court reiterated the practice emerging from the cases of *Aksoy* and *Aydin* and commented that: “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future”.

In rapid succession, in two judgments in 2001 (*Peers v. Greece* and *Dougoz v. Greece*), regarding physical conditions, the Court abandoned the « intentional element » as a condition required in order for the treatment to be considered as contrary to article 3. In 2001, in the *Peers v. Greece*¹²⁸ judgment the Court affirmed that “although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.”¹²⁹. Moreover, the violation resulted from overcrowding and bad detention conditions in Greek prisons. In assessing the level and quality of detention conditions the Court relied heavily on CPT reports and findings. This trends will be then consolidated by the further development of the case law where the Court seemed more and more inclined toward accepting its role in the system of protection of prisoners' rights within the Council of Europe and the potentially fruitful collaboration with the CPT in the respect of the different competencies.

The real turning point in the case law concerning prisoners' rights is represented by the introduction of the ‘dignity perspective’. As Tulkens affirmed, the Court has moved from « the stage of ignorance of the general conditions of detention to that of recognising the right of any

¹²⁵ See D. Van Zyl Smit and S. Snacken, cit., p. 13 (and the cited references, particularly footnotes 50, 60, 62). See also, Trechsel, S., “Human Rights of Persons Deprived of their Liberty”, report prepared for the 7th International Colloquy on the ECHR, 1990, Doc. H/CoU (90) 3,20.

¹²⁶ D. Van Zyl Smit and S. Snacken, cit., p. 12.

¹²⁷ S. Livingstone, « Prisoners' Rights in the Context of the European Convention on Human Rights », (2000)2, *Punishment and Society* 309-324, at 314, as cited by D. Van Zyl Smit and S. Snacken, cit., p. 12.

¹²⁸ *Peers v. Greece*, 28524/95.

¹²⁹ *Ivi*, § 74.

detainee to conditions that respect human dignity »¹³⁰. Building on this development, the decade from 2000-2010 has, in this respect, seen a genuine increase in the number of proceedings in Strasbourg related to prison life. The European Commission of Human Rights has certainly admitted that physical conditions of detention can be found to be inhuman or degrading treatment. In the « *Greek cases* » it came to this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world¹³¹. Sudre however recalls that the Commission only penalised conditions of detention when two conditions were met: an objectively degrading environment and the intention to humiliate the detainee¹³². Ultimately, « the refusal, by the Commission, to take into account in its consideration the minimal European rules in the area left it the duty to set this threshold according to the specific data in question », which was placed at a very high level¹³³.

The right to humane conditions of detention has truly be established in favour of a judgment regarding the right to health in prison. As noted by F. Tulkens¹³⁴, these two rights, the right to protect health and the right to decent conditions, find their "*common matrix*" in *Kudła v. Poland*¹³⁵, where the Grand Chamber summarised the obligations of the State in these terms:

Article 3 requires that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.

The Court affirms, for the first time, in *Kudła v. Poland* that Article 3 guarantees the right to be "held in conditions that are compatible with respect for dignity". The reasoning of the Court in *Kudła* operates a qualitative leap, overcoming the indirect protection, adopted so far and consecrating a new right, the right to conditions of detention in accordance with human dignity.

To do this, the Court elaborates the argument of the "*minimum severity threshold*": the treatments and conditions of detention must reach a minimum level of gravity to fall under Article 3 and the evaluation of this *minimum* level appears "relative by essence". In the words of the Court: "the assessment of the minimum is, in the nature of things, relative, it depends on all the circumstances of the case, such as the nature and the context of the treatment, the method and method of its execution, its duration, its physical or mental effects, and in some instances, the sex, and the state of health of the victim."

¹³⁰ F. Tulkens, "droits de l'homme en prison", in J.-P. Céré (dir), Panorama européen de la prison, L'Harmattan, coll. "sciences criminelles", 2002, p.39

¹³¹ Claims nos 3321/67 and others, Commission's report of 5 November 1969, Year book 12

¹³² F. Sudre "L'article 3bis de la Convention européenne des droits de l'Homme : le droit à des conditions de détention conformes au respect de la dignité humaine", *Prev. art.*, p. 1508. To support this assertion the author refers to the European Commission on Human Right's decision, 15 May 1980, MCFEELEY and others v. United Kingdom, app. no. 8317/78, p. 54

¹³³ B. Ecochard, L'émergence d'un droit à des conditions de détention décentes garanti par l'article 3 de la Convention européenne des droits de l'homme, RFDA 2003. 99

¹³⁴ F. Tulkens, *Les prisons en Europe. Les développements récents de la jurisprudence de la Cour européenne des droits de l'homme*, Déviance et Société 2014/4 (Vol. 38)

¹³⁵

This initial appeal to the relativization of the assessment in relation to the *minimum* severity level and, therefore, in order to integrate a violation of the prohibition of inhuman and degrading treatment, appears as one of the essential argumentative key to safeguarding the absolute nature of art. 3 of the Convention.

The development thus described is part of the origin of a broader and more general changing approach that tends to appreciate breaches of fundamental rights in a stricter manner. Belda¹³⁶ has demonstrated that the lowering of the threshold of seriousness also leads to a redefinition of the concepts contained in article 3 through the notion of human dignity. The principle of respecting human dignity is a fundamental objective pursued by the Court when it applies, and therefore interprets, the Convention for persons deprived of their liberty. She explains that European judges adopt a specific approach to interpretation when they apply rights under the Convention to detainees, aiming to grant a privileged protection of their rights, due to the complexity of their status. In a ruling under the scope of article 3, which makes no exception to prohibiting inhuman or degrading treatments, the Court grants a basic right to decent conditions of detention. As a consequence, the Court affirms that the respondent Government must « organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties »¹³⁷.

This approach to interpretation—by which the Court has updated the possibilities of the text to construct a category based protection for detainees—was accompanied by an incorporation of the doctrine by other bodies of the European Council, and particularly soft case law, from the activity of the CPT. This approach is part of a more general tendency to take into account external sources in European case law. As revealed by Belda, a common European detention law is being progressively built, under the leadership of European judges and for which the "basic tools" used¹³⁸, then assimilated into law under the Convention, are a range of instruments with normative constraints.

Another interesting line of reasoning concerning international prison soft law instruments is the so called process of « hardening of the soft law » in prison field. As argued by P. Pinto de Albuquerque, Partly dissenting opinion, in *Muršić v. Croatia*, [GC], no. 7334/13 :

In the *continuum* between hard law and soft law, several factors may harden the text. Like a *degradé normatif*, the gradual normativity of the text increases with the number of these factors that are present and decreases with their absence. In this gradualist logic, it is ultimately up to the Court to decide "how much weight" to attribute to these hardening factors of soft law. 28. Soft European human rights law may be hardened by certain factors that relate either to the rule-making procedure or to the rule-application procedure. These are "building bricks in a wall of normativity."

According to this view, the hardening of prison soft law is particularly visible in Europe and concerns specifically the norms deriving from the activity of the CPT.

This is the case for requirements regarding the surface area that detainees must have available in collective cells. In its decision on *Kalachnikov v. Russia* in 2002¹³⁹, in order to judge if the size of the applicant's cell, which measured 17 m² and was occupied by between 18 and 24 detainees, raised problems covered by the scope of article 3 of the Convention, the Court

¹³⁶ Thesis cited above

¹³⁷ See for example, *Varga and others. v. Hungary*, 10 March 2015 no. 14097/12

¹³⁸ As opposed to the "methodological tools" represented by methods of interpretation.

¹³⁹ European Court of Human Rights, 15 July 2002, *Kalachnikov v. Russia*.

« recalled that the CPT has set the approximate minimum desirable surface area per person for a detention cell at 7 m² (see the CPT's 2nd general report – [CPT/Inf] (92) 3, §43), i.e. 56 m² for eight detainees » (§97). The Court, after specifying that « serious overcrowding was constantly the rule in the cell », concluded that this was "a state of affairs which in itself raised an issue under Article 3" (§97).

One perspective that opened up for an ongoing discussion is the auspiciability of the definition of an absolute presumption of violation of Article 3. While the majority, in *Sulejmanovic v. Italy*, (no. 22635/03, 16 July, 2009), found that according to a consistent case law¹⁴⁰ an available space inferior to 3 m² constitutes a sufficient element in order to attain the “*minimum level of severity*” requested by the scope of Article 3, the separate dissenting opinion of judge Zagrebelsky, joined by judge Jočienė marks a strict difference between what is intolerable and what is desirable in terms of prison condition¹⁴¹, confining the analysis of the Court to the former term, in order not to dilute the strength and absolute nature of Article 3:

La tendance que cet arrêt semble mettre en lumière, à savoir que la Cour place son examen dans le cadre de ce qui est « souhaitable », devrait avoir pour effet d'accroître la protection contre les traitements prohibés par l'article 3. Or, même si cette tendance se nourrit de générosité, elle favorise en réalité une dérive dangereuse vers la relativisation de l'interdiction, puisque plus l'on abaisse le seuil « minimum de gravité », plus on est contraint de tenir compte des raisons et circonstances (ou bien de réduire à néant la satisfaction équitable).¹⁴²

When called to ensure the proper consistency of the different approaches in respect to the minimum space to be allocated to detainees and of the application of the “strong presumption” criterion¹⁴³, the Grand Chamber in *Muršić* operated a relativization of the absolute nature of Article 3 of the Convention, by introducing the concept of cumulative effect of compensating factors¹⁴⁴ able to rebut a strong presumption of violation of Article 3 whenever the 3 sq. m of personal space in the cell is not guaranteed.

The next step in the case law is represented by the evolving use of quasi-pilot and pilot judgment in order to solve endemic and persistent violations of rights at a domestic level. According to the Court, assessing the effectiveness of a system of legal channels involves taking into account, in a realistic manner, not only the remedy available in theory in a domestic legal system, but also the general legal and political context in which it operates. The Court was required to specify the required features for domestic bodies called to recognise issues related to overcrowding in prisons and other physical conditions of detention. In particular, it did so in a highly instructive manner in the developments that it established, based on article

¹⁴⁰ See: *Aleksandr Makarov v. Russia*, n. 15217/07, § 93, 12 marzo 2009; see also *Lind v. Russia*, n. 25664/05, § 59, 6 dicembre 2007; *Kantyrev v. Russia*, n. 37213/02, §§ 50-51, 21 giugno 2007; *Andreï Frolov v. Russia*, n. 205/02, §§ 47-49, 29 marzo 2007; *Labzov v. Russia*, n. 62208/00, § 44, 16 giugno 2005, e *Mayzit v. Russia*, n. 63378/00, § 40, 20 gennaio 2005.

¹⁴¹ See *Sulejmanovic*, cited above, Dissenting Opinion by Judge Zagrebelski, pp. 18,19: “L’article 3 prévoit une interdiction absolue de la torture et des traitements inhumains ou dégradants. Même le droit à la vie (article 2) n’est pas aussi absolu. Je crois que la raison de la nature absolue de l’interdiction des traitements prohibés par l’article 3 réside dans le fait que, dans la conscience et la sensibilité des Européens, de tels traitements apparaissent comme intolérables en soi, en toute occasion et dans toute situation. Or, entre ce que l’on considère dans le cadre de l’article 3 comme étant intolérable et ce que l’on peut considérer comme étant souhaitable, il y a, à mes yeux, la même différence que celle qui a cours entre le rôle de la Cour et les rôles du CPT, du Conseil de l’Europe, des organisations non gouvernementales et des Parlements nationaux.”

¹⁴² Ibidem.

¹⁴³ For an overview of the different approaches, see the Dissenting opinion of Judge Sicilianos in the Chamber judgment in *Muršić v. Croatia*, Application no. 7334/13.

¹⁴⁴ *Muršić*, [GC], cited §§ 137 and 138.

46, for the measures expected from States following a pilot or quasi pilot judgment¹⁴⁵. Since 2009, prison overcrowding has been on the agenda of the Court with two quasi-pilot judgment Polish cases¹⁴⁶, immediately followed by Russian, Italian, Belgian, Bulgarian, Hungarian, Lithuanian, Croatian, Romanian cases¹⁴⁷. This situation marked the transnational dimension of the phenomenon in the European region¹⁴⁸ and the Court has dealt with the issue by building a rich case law under the scope of Article 3 of the Convention¹⁴⁹.

Prison overcrowding can be considered according to a twofold perspective since it can amount to inhuman treatment as a violation of human dignity and it is one of the primary impediments to resocialisation¹⁵⁰. Both perspectives are highly meaningful in light of the Court's case law, but if traditionally the issue of overcrowding and prison conditions involved a strong use of the human dignity category, recently the issue gained relevance under the resocialization viewpoint.

Starting with *Dickson*¹⁵¹, the Court made express reference to the English term 'rehabilitation' (or the French '*réinsertion*'¹⁵²) in order to frame the possible objectives of a prison sentence.

¹⁴⁵ A quasi-pilot judgement, as Tulkens described it: "puts the respondent State on notice that the Court's concerns are not limited to the individual case and that it is bound to remedy the violation in a holistic way. In so doing, it draws the attention of the Committee of Ministers (along with other Council of Europe authorities) to the fact that a systemic problem underlies the particular case" F. Tulkens, *Perspectives from the Court. A typology of the pilot-judgment procedure*, Seminar RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS PILOT JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL, Strasbourg, 14 June 2010. See also, L. Garlicki, "Broniowski and After: on the Dual Nature of Pilot Judgments", in L. Caflisch et al. (eds.), *Liber amicorum*

Luzius Wildhaber: human rights, Strasbourg views, Kehl-Strasbourg-Arlington, N.P. Engel, 2007, .p. 191; Ph. LEACH et al., "Can the European Court's pilot judgment procedure help resolve systemic human rights violations? Burdov and the failure to implement domestic court decisions in Russia", *Human Rights Law Review*, 2010, p. 358

¹⁴⁶ *Orchowski v. Poland*, no. 17885/04, § 154, 22 October 2009 and *Norbert Sikorski v. Poland*, no. 17599/05, § 161, 22 October 2009.

¹⁴⁷ *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, *Torreggiani*, cited, *Vasilescu v. Belgium*, no. 64682/12, *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Muršić v. Croatia*, cited

¹⁴⁸ And worldwide, see H.-J. Albrecht, *Prison Overcrowding – Finding Effective Solutions Strategies and Best Practices Against Overcrowding in Correctional Facilities*, UNAFEI, reprint April 2012. Interestingly enough, prison litigation and Courts' rulings around the world are assessed as an effective leverage for a decrease of prison population, p. 45: "Prison litigation has resulted in California being pressured into changing prison politics. In June 2007 the Delhi High Court ordered for example the Tihar authorities to release 600 prisoners charged with disturbing public peace, considered a relatively minor offence, to reduce overcrowding in the prison".

¹⁴⁹ As assessed in the *Mironovas and Others v. Lithuania*, nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, Partly dissenting opinion of Judge Paulo Pinto de Albuquerque, §2.

¹⁵⁰ As the UNODC Handbook on strategies to reduce prison overcrowding (2010) has indicated, prison overcrowding is "the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners".

¹⁵¹ *Dickson v. UK*, [GC], no. 44362/04.

¹⁵² The terminology is not neutral. The concept of 'rehabilitation' has been a source of controversy in the literature, during the 80's (See, F. Allen, *The decline of the rehabilitative ideal*, New Haven, Yale University Press, 1981, and, in general, D. Garland, *The Culture of Control*, Oxford, Oxford University Press, 2001) and has been superseded by terms (and concepts) like social reintegration or resocialization, especially in the continental European penology. Some authors have understood this different terminology as embedded in a different normative ideology: the Anglo-american concept of rehabilitation as opposed to the continental (mainly German, but also Italian made) concept of resocialization or social reintegration (See the excellent, L. Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany*, Oxford Monographs on Criminal Law and Justice, 2004, explaining this different approach and assessing why when the 'rehabilitative model' was facing a crisis of political legitimacy, German penologists, as well as legislators, policy makers and reformers shared a commitment to 'resocialization' as a substantive aim of imprisonment). More recently terms such as 'reintegration' have been used in order to potentiate the idea of a full legal position of the prisoner (See, Van Zyl Smit., S., Snacken S., *Principles of European*

If traditionally, criminologists have considered legitimate functions such as retribution, prevention (deterrence), protection of the public (incapacitation) and rehabilitation, more recently, “there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe’s legal instruments”¹⁵³. This shift is based on a differential understanding of the same concept of rehabilitation.

The Court is expressly fabricating its own autonomous concept which is no longer grounded on the Anglo-American (negative) version of mere rehabilitation “as a mean of preventing recidivism”¹⁵⁴, but rather as a positive “idea of re-socialisation through the fostering of personal responsibility”¹⁵⁵. The Court has recognized on several occasions “the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment”¹⁵⁶. In *Mastromatteo v. Italy* the Court acknowledges that “[o]ne of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm,” but at the same time, “the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment”¹⁵⁷.

It is through the most recent case law concerning life-long sentences that the Court expanded the concept of social rehabilitation or resocialisation, indissolubly connecting it with human dignity. The rehabilitative paradigm needs to be tested in light of the Strasbourg case law on overcrowding and prison conditions.

It seems clear that an international obligation exists for the State to consider resocialization as the primary purpose for imprisonment in respect of human dignity. Resocialization is seriously hindered by both an impoverished prison regime and detrimental material conditions of detention. This seems to be the more advanced perspective of the Court’s case law and could potentially support strategic litigation in different areas of prisoners’ life and rights.

1.2 PROCEDURAL OBLIGATIONS AS A TOOL FOR THE IMPROVEMENT OF PRISON CONDITIONS

1.2.1 ARTICLE 13, A PRIVILEGED ACCESS FOR THE PROTECTION OF PRISONERS’ RIGHTS

Traditionally seen as a tool for the implementation of the principle of subsidiarity, Article 13 plays a vital role in the sustainability of the Convention system. Article 13 fulfils a twofold

prison law and policy, cited). Finally the concept of (re)integration is used by Article 6 of the 2006 version of the European Prison Rules: “6 All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty”.

The Italian Constitution specifies that punishment shall aim to ‘re-educate’ the person upon whom sentence is passed (see Article 27: ‘Punishment cannot consist in treatment contrary to human dignity and must aim at re-educating the condemned.’ See for references to case law of the Italian Constitutional Court, ECHR, *Vinter and others v. the United Kingdom* (§ 72). For an historical and theoretical account of the ‘re-educative’ principle in the Italian constitutional history, see, A. Pugiotto, *Il volto costituzionale della pena (e i suoi sfregi)*, *Diritto Penale Contemporaneo*, 2014.

¹⁵³ *Dickson*, cited, §28.

¹⁵⁴ *Ibidem*.

¹⁵⁵ *Ibidem*.

¹⁵⁶ *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, with further references to *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; and *Schemkammer v. France*, no. 75833/01, § 31, 18 October 2005.

¹⁵⁷ *Mastromatteo v. Italy*, cited above, § 72.

dynamic role: on one hand it supports the other fundamental rights (trend toward the affirmation of the autonomous character of Article 13), on the other hand it is essential in order to stimulate the effectiveness of the national protection of the Convention (principle of subsidiarity). Concerning the second role, Article 13 is linked with the rule contained in Article 35 (exhaustion of domestic remedies before bringing an Article 34 application). As the Court said in *Kudła*:

The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, as a recent authority, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (*ibid.*).

Here lies the positive obligation for member states to guarantee the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The inexistence of such a remedy immediately entails a violation of Article 13.

The right to human material conditions of detention has been a privileged standpoint for the development of procedural requirements, to the point of serving as a matrix for a *ius commune* of the right to an effective remedy in the prison field, then transposed to other areas of prison life, in particular those also falling under Article 3, such as the protection of health. Thus in particular the articulation of two fundamental requirements, relating to the obligation placed on States to provide a preventive remedy, capable of preventing or stopping ill-treatment, and a compensatory remedy to enable the compensation for the damage that has resulted.

As to the characteristics of the remedies, the Court's case law has evolved and densified the procedural requirements, making a comparison with the canons of fair trial. As a matter of facts, the Court has investigated on various matters concerning the procedural requirements related to Article 13:

- Nature of the complaint body

Concerning the nature of the complaints body, the Court considers that the "national body" to which this provision refers does not necessarily need to be a legal institution. If it is not, its powers and the guarantees that it offers shall be taken into account in assessing the effectiveness of the remedy available before it¹⁵⁸. Taking into account the traditionally acknowledged place, in national law, of remedies within the penitentiary authorities, the main question from this point of view is to know if such a system meets the requirements of article 13. In this regard, the acceptance, for the purposes of article 13, of non-legal mechanisms, sometimes leads to ambiguous formulations regarding physical conditions of detention, which implies that recourse to a higher level of the penitentiary authority may be regarded as sufficient.

Although the States are free to choose the nature of the configuration of the recourse to be implemented this has not prevented the Court from promoting very specific models. Thus, in the case of *Ananyev v. Russia*, the Court promotes before the constitution *ex nihilo* of a mechanism potentially involving external people, who may not necessarily be legal professionals, citing the examples of the Dutch complaint commissions and British Boards of

¹⁵⁸ See *Kudła v. Poland*, op. cit., paragraph 157.

Visitors¹⁵⁹. This position is repeated in the Bulgarian pilot judgment¹⁶⁰ (§282). The more prudent Hungarian pilot judgment¹⁶¹ does not refer the State to any particular system.

Furthermore, the Court may also itself impose the intervention of another legal body. Thus, in the case of the detainees placed in disciplinary accommodation, which was unfit for habitation¹⁶², the Court expressly provided, with regard to the importance of the repercussions of detention in a disciplinary cell, the necessity for a "*legal body*", which must examine both the form and the content of such a measure. Such a solution may however be regarded as extending the requirement for the intervention of a judge, dedicated to the neighbouring field of isolation as a security measure (that may last for several years).

The Italian case can be an interesting point of view of the general and specific requirements attached to Article 13. Concerning the nature of the national authority, the then existing remedy in Italy was constituted by a procedure in front of the judicial authority specialized in penitentiary issues (*Magistratura di Sorveglianza*). In the *Torreggiani* pilot judgment¹⁶³ the Court affirms not only that the remedy deriving from Articles 35 and 69 of the Penitentiary law is ineffective¹⁶⁴, and that no compensatory remedy exists¹⁶⁵, but meaningfully the Court also declares that no common normative ideology exists, within the Italian interpretative community¹⁶⁶, on their role as protector of prisoners' rights¹⁶⁷. This constituted a real failure in the domestic legal order, which results in a defeat of the system of human rights' protection at a national level. This case shows how a contextualist, anti-formalist and effectiveness-driven approach to the interpretation of the scope of Article 13 and the right to an effective remedy can implement and substantiate the notion of access to justice in prison. The mere nominalist approach (a 'judicial' body) is rejected and an assessment of all the features and the

¹⁵⁹ The latter reference is the result of an error to the extent that this mechanism, which was already no longer in force, did not meet the requirements pronounced by the Court itself.

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¹⁶¹ *Varga and others v. Hungary*, cited above

¹⁶² In the *Payet* case, the cells in the disciplinary wing had no windows but an opaque dome in the ceiling. The air vents were infested with birds and the walking areas were frequently flooded with rainwater. The applicant remained there for 45 days. In a second judgment, the applicant was placed in a cell that had been burnt out where there was a suffocating odour.

¹⁶³ *Torreggiani and Others v. Italy*, [GC], (Applications n. 43517/09, 46882/09, 55400/09 et al.)

¹⁶⁴ *Torreggiani*, cit, § 97: "le seul recours indiqué par le gouvernement défendeur dans les présentes affaires qui était susceptible d'améliorer les conditions de détention dénoncées, à savoir la réclamation devant le juge d'application des peines en vertu des articles 35 et 69 de la loi sur l'administration pénitentiaire, est un recours qui, bien qu'accessible, n'est pas effectif en pratique, dans la mesure où il ne permet pas de mettre rapidement fin à l'incarcération dans des conditions contraires à l'article 3 de la Convention (paragraphe 55 ci-dessus)."

¹⁶⁵ *Ibidem*: "D'autre part, le Gouvernement n'a pas démontré l'existence d'un recours qui permettrait aux personnes ayant été incarcérées dans des conditions ayant porté atteinte à leur dignité d'obtenir une quelconque forme de réparation pour la violation subie".

¹⁶⁶ For a comprehensive theoretical approach to the concept of interpretative community from a legal realistic perspective, see E. Santoro, *Diritto e diritti: lo stato di diritto nell'era della globalizzazione. Studi genealogici: Albert Venn Dicey e il Rule of law*, Giappichelli, Torino, 2008.

¹⁶⁷ *Torreggiani*, cit, § 97: "À cet égard, elle observe que la jurisprudence récente attribuant au juge de l'application des peines le pouvoir de condamner l'administration à payer une indemnisation pécuniaire est loin de constituer une pratique établie et constante des autorités nationales". See also §§ 20-22. It is worthy to note that the only judicial intervention granting a judicial redress was the decision of the Surveillance judge of Lecce, 9 June 2011, according to which: "it does not appear as a convincing reconstruction the fact that the Surveillance judge should limit himself/herself to ascertain the infringement of the detainee's right, assuring its protection directly, without prejudice to the possibility for the prisoner to obtain a compensation for damages suffered as a result of the established injury" and condemned the administration to pay "as a compensation for damages the total amount of 220.00 €" (See, *contra*, Surveillance Judge of Udine, 24 December 2011, Surveillance judge of Vercelli, 18 April 2012 and Corte di Cassazione, n. 4772/2013).

characteristics of the procedure, the power of the judicial body and enforceability of its decisions is required.

- Procedure and accessibility

Concerning the procedure and accessibility for the prisoner, although the Court has abstained from providing a model for the system of recourse that is best able to meet the requirements of article 13, there is a clear preference for independent authorities or a specialist judge, taking into account the specific concern of the responsiveness of the mechanism and its knowledge of the penitentiary environment, but also its accessibility for detainees. Various aspects are taken into account, to varying degrees, in this regard: the cost of the proceedings, the complexity of the rules and the procedures, protection against reprisals, etc.

In the *Ananyev* judgment, the Court is satisfied that the procedure for preventive remedy provided for by domestic law is implemented at no cost to the applicant (§109). For the compensatory remedy to be established in performance of the judgment, it asserts that it must not include a regime with legal costs that place an excessive burden on an applicant who's action is with good cause (§228). On the grounds of article 6, in a general manner case law considers that the capacity for an applicant to pay legal costs, and the stage of the proceedings where these fees are required are also elements to be taken into account to know if access to the judge may be hindered. Restrictions of a purely financial nature, with no relation to the outlook for the success of the claim, may be subject to a particularly thorough examination. The Court has proven to be rather severe with regard to mechanisms including fees for seizing the judge regarding conditions of detention¹⁶⁸.

- Access to legal aid

As for access to legal aid, case law appears to be rather sparse. From the perspective of a fair trial, it takes into account the absence of legal aid but declares in its conclusions, not on the grounds of right to access to a judge, which is usually the grounds on which it considers the issue of free legal aid, but regarding a failure to be personally heard before a judicial body¹⁶⁹. It should however be noted that, in its judgment in *Aden Ahmed v. Malta* of 23 July 2013¹⁷⁰, regarding issues associated with the physical conditions for the retention of illegal immigrants, and for which the findings may be transposed to disputes regarding the prison system, the Court expressly asserted that the absence of a structured system of legal aid posed in itself a problem in terms of access to recourse, regardless of the merits thereof (§66). However, it does not seem that such a position has been taken at this time in a penitentiary dispute, whereas a country such as Russia, which has been subject to a pilot judgment, does not offer free access to a lawyer in this area. In reality, the Court insists rather on the seizing of competent organs by the detainees themselves, emphasizing the simplicity of the procedures¹⁷¹ or requiring the adaptation of rules governing establishing the facts.

- Fear of reprisal

The major obstacle to exercising means to rights in prison that is constituted by fear of reprisals now seems to be taken into account by the Court. In the judgment *Neshkov and others v. Bulgaria*, the Court therefore went to the trouble of specifying that the detainees must be able to pursue channels of recourse with no fear of punishment or prejudicial consequences due thereto (§191), thanks to the support of the European Prison Rules. The Court bases itself *mutatis mutandis* on the solution given in a case where the applicant was placed in isolation

¹⁶⁸ article 70.4 of the European Prison Rules of 2006

¹⁶⁹ *Vasilyev v. Russia*, 10 January 2012, no 28370/05; *Beresnev v. Russia*, 24 December 2013 no 37975/02. See the report on article 6 in this regard.

¹⁷⁰ no. 55352/12

¹⁷¹ *Neshkov*, cited above, §191; *mutatis mutandis*, *Marin Kostov v. Bulgaria*, no. 13801/07, § § 47-48, 24 July 2012)

due to their complaints to the prosecutor¹⁷². This innovation has not at this stage resulted in an "operational" instruction, which may require a specific protection mechanism for a person making a complaint.

- A regulated process, ensuring the participation of the applicant

To satisfy the requirements of article 13, the consideration of claims by detainees must follow a procedure which is defined by legislation and that ensures the participation of the interested parties. This means both allowing the facts to be established independently and avoiding the claims of detainees being ignored. On the one hand, the interested parties must be able to comment on the observations made by the authority in its defence, in order that their allegations may not be swept away by contradictory statements made by the penitentiary services. On the other hand, the body must be obliged by procedural rules to rule effectively on the claims for which it was seized.

In this respect, authorities such as the Prosecutor, responsible in some central and eastern European States for checking the legitimacy of the acts of the authority, were considered to be inadequate for the purposes of article 13, as they did not allow the detainee to follow the progress of the proceedings and to dispute the statements of the authority. Thus, the Court has analysed the system in force in Russia, in which the public prosecutors departments may make surprise inspections of detention, investigate and trigger proceedings for an offence in the case of failings, to which the penitentiary authorities are legally bound to respond within one month, in the form of a report stating the measures taken to remedy them. In spite of the coercive nature of the proceedings, the Court considered that this system may not be considered as effective recourse, as the prosecutor is not obliged to hear from the applicant and that the latter has no right to information on how the monitoring body has treated the claim, as the proceedings occur between the prosecutor and the inspected body¹⁷³. The same assessment was given of the Bulgarian system¹⁷⁴. It should be noted that the same considerations, further to those regarding the absence of an enforceable powers, led the Court to refuse to see Ombudsman institutions and the like as effective recourse under the terms of article 13¹⁷⁵.

It should be noted that the in the inspection undertaken under article 6§1 by the Court in compensation disputes regarding conditions of detention are mostly embodied by the issue of the participation of the applicants in hearings, regarding situations in which their witness statement is deemed to be crucial to settle the dispute¹⁷⁶.

- *Prima facie* case and Burden of Proof. A way of re-balancing the legal vulnerability of prisoners

According to the European judges, "for a domestic remedy in respect of conditions of detention to be effective, the authority or court in charge of the case must deal with it in accordance with the relevant principles laid down in the Court's case-law"¹⁷⁷. This requirement concerns primarily understanding the facts and, as a result, the administration of proof that must be equivalent to that in force before the Court. In this matter, with no directive in the Convention or the Rules of the Court, case law has established a general criteria which is, very strictly, that

¹⁷² Reference made to article 70.4 of the European Prison Rules of 2006, and, *mutatis mutandis*, *Marin Kostov v. Bulgaria*, no. 13801/07, § 47-48, 24 July 2012.

¹⁷³ Pavlenko, no 42371/02, §§ 88-89, 1 April 2010; Aleksandr Makarov, no 15217/07 §86, and Ananyev, cited above, §99.

¹⁷⁴ Neshkov and others v. Bulgaria, cited above, §212.

¹⁷⁵ See for example Ananyev and others, cited above, §§105-106

¹⁷⁶ See the chapter on article 6.

¹⁷⁷ Neshkov and others v. Bulgaria, 27 January 2015, no 36925/10, §187.

of proof "beyond any reasonable doubt"¹⁷⁸. As noted by Pastre Belda, "this means, therefore, a principal standard that is at least rigorous and that, first and foremost, places the burden of proof exclusively on the person claiming violation of the Convention."¹⁷⁹

However, to ensure that the regime of proof does not weaken the protection afforded by the Convention, the Court has greatly softened the strictness of this principle, stressing that the procedures followed before it do not always presuppose the principle by which the person claiming something must prove the truth of its allegations¹⁸⁰. This easing is particularly clear with regard to imprisonment¹⁸¹. Indeed, as found by Pastre Belda, "as establishing the truth of the alleged facts is a condition for the applicability of the immaterial provisions of the Convention, it is therefore fundamental for the applicant who is deprived of their liberty of movement, that the burden of proof is not exclusively placed on them, all the more so for serious allegations"¹⁸². The Court takes into account the context for the interpretation of the requirements of the Convention, *i.e.* the fact that the applicant depends entirely on the authority, making it impossible to demonstrate the alleged facts under normal conditions. Almost all of the evidence that may prove the truth of the allegations is held by the respondent authority, which controls access to the rooms in question and concretely holds the defendant in a situation of subjection. Therefore the Court asserts that "it falls upon the national authorities to gather the data that may demonstrate that a situation that is subject to a claim by an applicant to Strasbourg complies with the Convention"¹⁸³.

The same applies regarding disputes concerning conditions of detention. The Court always asserts that the procedure provided for by the Convention does not lend itself to a strict application of the *affirmanti incumbit probatio* principle as, "inevitably, the respondent government is sometimes the only one to have access to all the information that may confirm or refute the assertions of the applicant"; "the mere fact that the Government's version contradicts that of the applicant shall not, if no relevant document or explanation is provided by the Government, lead the Court to reject the allegations of the interested party as unproven"¹⁸⁴.

By virtue of the equivalence expected between the protection offered by a domestic judge and a common law judge from the Convention, the Court requires that they implement similar, or identical, rules of evidence. Thus the pilot judgment in *Ananyev and others v. Russia* recalls in a very explicit manner (§228) that the requirement for the applicants in the mechanism for remedy imposed by the Russian authorities should be satisfied by a simple initial proof of poor treatment (*prima facie* case). It should merely be required that the interested party produces elements that are easily accessible to them, such as detailed descriptions of their conditions of detention, declarations by witnesses or answers from inspection bodies (ombudsman, monitoring commission, etc.); it would then be down to the authorities to refute these allegations by producing documents demonstrating that the conditions of detention are not in violation of Article 3 of the Convention.

¹⁷⁸ Ireland v. United Kingdom, that also specifies that the system is that of the free assessment of the evidence: "the Court, being master of its own procedure and of its own rules (...) has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it" (§617).

¹⁷⁹ Thesis, cited above, p.

¹⁸⁰ Principle of *affirmanti incumbit probatio*

¹⁸¹ Also see the section regarding violence between detainees and by penitentiary staff, as well as that on protection of privacy.

¹⁸² Thesis, p.

¹⁸³ *Wegera v. Poland*, 19 January 2010, no 141/07, §69, regarding denying detainee's visitation rights.

¹⁸⁴ *Brândușe v. Romania*, no 6586/03, § 48, 7 April 2009; *Ananyev and others v. Russia*, cited above, § 123; *Torreggiani v. Italy*, cited above, §72

This system of protection meets the intention to make mechanisms for remedies work in spite of the obstacles to exercising these rights in detention, which arises due to the radical structural imbalance that characterizes the situation of the two parties to the process. It works in two phases. A first phase is marked by an adaptation of the purpose and means of evidence, which is in such a way that the applicant is not held to a procedure with a "burden of proof", or the obligation to demonstrate its complaints to give them sufficient grounds, which allows the opening of the second phase of consideration. This is embodied by the implementation of a mechanism of negative proof, which places the burden on the authority to refute the assertions of its opponent by producing elements to disprove them.

1.2.2 ARTICLE 6 : A TWOFOLD PERSPECTIVE

Since the beginning, the Court has recognized the existence of an essential link between the principle of the rule of law, access to justice and the effectiveness of the fundamental rights set out in the Convention. In *Golder* (1975)¹⁸⁵, a landmark case for the right to a fair trial and for the right of access to justice for detainees, the Court granted the right of access to the court for a detainee who wished to bring a defamation action against a prison officer who had accused him of having participated in a disturbance. The Court expressly stated that access to the judge, although not expressly proclaimed by the Convention, is an "inherent element"¹⁸⁶ of the rights guaranteed by Article 6 of the Convention and that "one can scarcely conceive of the rule of law without there being a possibility of having access to the courts"¹⁸⁷. In reaching this conclusion, the Court followed a teleological interpretation of the Convention, in light of the "universally recognized fundamental principles of law" and, in particular, in light of the principle of the rule of law.

Following the same approach and according to *fundamental principles of any democratic society*, the Court stated a few years later, in its judgment *Campbell et Fell v. United Kingdom*, that "justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Article 6"¹⁸⁸.

Prisoners access to justice thus becomes the corollary both of the principle of the rule of law and of the democratic principle. Beyond the statement according to which "prisoners in GENERAL CONTINUE to ENJOY ALL the FUNDAMENTAL RIGHTS and freedoms guaranteed under the Convention, SAVE for the right to liberty", the Court has recognized, in certain circumstances, reinforced protection and specific positive obligations of the State justified by the special vulnerability of detainees. The guarantees provided and the extent of positive obligations depend on the context in which prisoners' access to justice is at stake.

The Court's case law shows two different approaches, depending on whether it concerns access to justice for prisoners in criminal proceedings or in any other situation concerning prison litigation.

In the first perspective, the Court's case law recognizes the paramount importance of the right of defense in criminal proceedings and gives greater protection to the right to legal assistance. In this way, legal assistance and legal aid are closely connected. In the judgment *Salduz v. Turkey*¹⁸⁹, the Court affirmed that: "the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental

¹⁸⁵ *Golder c. Royaume-Uni*, arrêt du 21 février 1975, n. 4451/70

¹⁸⁶ *Golder*, précité, § 34

¹⁸⁷ *Ibidem*.

¹⁸⁸ *Campbell et Fell c. Royaume-Uni*, arrêt du 28 juin 1984, n. 7819/77 et 7878/77, § 69.

¹⁸⁹ *Salduz c. Turquie*, (GC), arrêt du 27 novembre 2008, n. 36391/02.

features of a fair trial¹⁹⁰". This is particularly relevant and is provided with a reinforced protection whenever the person is in police custody or in pre-trial detention. The reinforced protection is justified by the special vulnerability of the defendants, exposed to the risk of being subjected to torture or inhuman or degrading treatment during police interrogation, and is intended to ensure that the right to remain silent and not to contribute to one's own criminalisation remains concrete and effective.

Within the second perspective, the case-law on legal aid in any other penitentiary field shows a lack of consistency, mainly due to two reasons: the first being the limited applicability of Article 6 to proceedings concerning the prison system; the second being the fact that despite the large case-law on prison overcrowding and conditions of detention, on one hand the Court recognizes the right to an effective remedy (art. 13) to complain about the conditions of detention, calling on State to enforce a system of remedies, on the other hand this has not implied the express recognition of the right to legal assistance in this kind of proceedings¹⁹¹.

- Civil limb

The evolution in the field of civil litigation within the realm of public law has inevitably raised the question of Article 6 § 1 coming into play with regards to the exercise of its official powers by the public authority vis-à-vis prisoners. From this point of view, referring to the principle of the judgement *Golder v. The United Kingdom*, the Court has stated that the analytical framework that has been developed in this matter by its case-law is applicable under general law conditions. Three parameters are taken into consideration by the Court in order to tackle the issue of the applicability of Article 6 § 1 in its civil limb¹⁹²: the parameter of the existence of a "*dispute over a right*", the parameter of the existence, of which it can be said in a defensible way that it is recognized in the domestic order, and finally the parameter of the "*civil character*" of this right. These different aspects are laid down as distinct and cumulative conditions, but the case-law portrays them rather as links of a chain that is closely interlinked with the qualification pursuant to Article 6 § 1, as certain characteristics can be taken into account under any line of argument, depending on the case. Moreover, the three parameters exposed below are a response to a pedagogical concern, as they do not represent a systematic description of the different stages of the Court's approach.

As for the first aspect, Article 6 § 1 shall only apply if the "dispute", which can concern both the very existence of a right as well as its scope or the procedures of its exercise, is "real and serious", in the sense that the outcome of the proceedings must be directly decisive for the right in question, "*mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play*". In other words, a peripheral matter of the litigation cannot be taken artificially into account when characterizing such right. It is necessary to take into consideration the restrictions of the individual's rights of a civil character, "*on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, exclusion from outdoor exercise)*"¹⁹³ (§ 106). Moreover, if a claim brought before a court is to be presumed real and serious¹⁹⁴, this would

¹⁹⁰ *Ibidem* § 51. Ce principe, réaffirmé dans l'affaire *Salduz*, avait déjà été reconnu par la Cour Européenne des droits de l'homme dans l'affaire *Poitrimol c. France*, 23 Novembre 1993, § 34.

¹⁹¹ Voir *infra*

¹⁹² The Court is not always consistent in the way it deconstructs the conditions for the applicability of Article 6 § 1, and ties them together (see *Enea v. Italy* [GC]).

¹⁹³ *Enea v. Italy* [GC], (§106)

¹⁹⁴ *Bentham v. The Netherlands*, § 32 and *Rolf Gustafson v. Sweden*. In the case *Shishkov v. Russia*, the behaviour of the applicant, deemed "erratic", as he had filed multiple claims regarding his conditions of detention to different

change if there are clear indications proving that the claim is frivolous or devoid of any foundation. In a civil claim against the prison administration concerning the mere presence in the prison of HIV-infected prisoners, the Court ruled that the injury required by the domestic order to grant a financial compensation was impossible to characterize based on the charge invoked by the applicant¹⁹⁵. The same solution has been established with regards to the claim of injury arising from the absence of film screenings in the prison¹⁹⁶.

The second aspect implies that the right in question in the case be recognized in the national legal order. As a matter of fact, *“the Court should not create, by way of interpretation of Article 6 § 1, substantive law that has no legal basis in the concerned State”*. In order to assess the legal status of the applicant’s claims in national law, the Court takes as its point of departure the provisions of the relevant national law and the interpretation given to them by national courts¹⁹⁷. From this point of view, the Court states that it needs very serious reasons to go against the highest national courts by ruling, unlike them, that the person concerned could claim in a defensible way that he/she held a right recognized by domestic law¹⁹⁸. However, the autonomy of the analytical framework pursuant to Article 6 § 1 equally applies here, and the Court has to examine the legal density of the interests claimed by the applicant. In making this appraisal, *“one must look beyond the appearances and the language used and concentrate on the realities of the situation”*¹⁹⁹.

For an understanding, pursuant to Article 6-1, of the “right”, the discretionary character of the powers of the authorities in the exercise of their prerogatives can be taken into consideration, and can even play a decisive role. However, the mere presence of a discretionary element in the wording of a legal provision does not per se exclude the existence of a right²⁰⁰. In the Grand Chamber case *Enea v. Italy* [GC], the respondent Government pointed out that the choice of institution in which a prisoner served his/her sentence fell exclusively within the scope of the administrative authorities’ discretionary powers and was based on *“considerations falling wholly within the sphere of public law”*. These included order and security and the need to prevent possible acts of violence or escape attempts by prisoners. The Italian Government explained that *“in the presence of such extensive powers the subjective situation of the prisoner and his or her aspirations and claims were the subject of purely residual protection which could not have the same ranking in the legal system as the protection afforded to “rights”.*” (§ 90).

The Grand Chamber objects that *“any restriction affecting these individual civil rights must be open to challenge in judicial proceedings, on account of the nature of the restrictions (...).By this means it is possible to achieve the fair balance which must be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners’ rights on the other”* (§ 106). In other words, the balance between the requirements of order and security and the protection of prisoners’ interests is a matter for the courts, as the former cannot constitute in principle an obstacle to judicial review.

The sequence following the analysis of the legal status of the “right” in question leads the Court to research, according to the criterion outlined in the Grand Chamber judgement *Vilho*

instances and on different bases, the Court deems that the actions carried out by the person concerned cannot be considered as vexatious or abusive (§ 113).

¹⁹⁵ *Skorobogatykh v. Russia* (dec.).

¹⁹⁶ *Artyomov v. Russia*.

¹⁹⁷ *Masson and Van Zon v. The Netherlands*, § 49.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Van Droogenbroeck v. Belgium*, § 38, § 121.

²⁰⁰ *Camps v. France* (dec.), and *Ellès and others v. Switzerland*, § 16.

Eskelinen and others v. Finland [GC]²⁰¹, whether the national courts, in similar circumstances, accept to examine an applicant's claim²⁰². It is the so-called criterion of the "benevolent judicialization"²⁰³.

As for the different parameters, and taking into account, if need be, the requirements flowing from international law, the Court assesses whether the right has a legal basis in national law. Hence, it is the consideration of the absence of such a "right" to a prison leave in the domestic order of Luxembourg that has led the Court to rule that the provisions of Article 6 § 1 shall not apply to the requests for temporary permission to leave the correctional institution²⁰⁴. In the case *Enea v. Italy* [GC], the Grand Chamber initially takes into account the position of Italy's Constitutional Court, which has censured certain provisions of the law on the prison system, because they did not envisage any judicial remedy against a decision that may influence the rights of a prisoner (§ 100 and § 39). Subsequently, the Court bases its line of argument on the fact that "*most of the restrictions to which the applicant was allegedly subjected relate to a set of prisoners' rights which the Council of Europe has recognised by means of the European Prison Rules, adopted by the Committee of Ministers in 1987 and elaborated on in a Recommendation of 11 January 2006 (Rec(2006)2). Although this Recommendation is not legally binding on the member States, the great majority of them recognise that prisoners enjoy most of the rights to which it refers and provide for avenues of appeal against measures restricting those rights.*" (§ 101).

Independently of the legal qualification used in national law, the Court takes into account, as has been already said, the substantive content of the "right" and the effects attached to it by the concerned State's domestic law, with a view to determine whether it is of a "civil character". In this perspective, the proceedings that in national law flow from "public law", because they bring into play the powers of public authorities, flow in principle from the civil limb of Article 6 § 1, as their outcome is decisive for rights and obligations of a private character.

Disputes that have accrual ramifications clearly fall within the scope of this category. The same is true of compensation claims filed by prisoners concerning acts of violence perpetrated by state officials²⁰⁵, forcible feeding during a hunger strike²⁰⁶, poor material conditions of detention²⁰⁷ or inadequate health care²⁰⁸. It also applies to restrictions imposed on a prisoner's right to receive money from outside²⁰⁹.

Similarly, the Court has no difficulty in ruling that the restrictions on family rights fall within the scope of the rights of a private character, whether the question is a limitation of access to the visiting room²¹⁰ or security measures surrounding visits by relatives, such as the use of a separation system²¹¹.

²⁰¹ *Vilho Eskelinen and others v. Finland* [GC], § 41, which concerns civil service disputes.

²⁰² See the judgement *Ganci v. Italy*, which notably contains the recognition by the Constitutional Court of rights to the benefit of prisoners.

²⁰³ See *Oršuš and others v. Croatia*, § 105; "where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1".

²⁰⁴ *Boulois v. Luxembourg* [GC]

²⁰⁵ *Aksoy v. Turkey*, § 92; *Tomasi v. France*, § 121-122.

²⁰⁶ *Ciorap v. Moldova*.

²⁰⁷ *Beresnev v. Russia*.

²⁰⁸ *Vasiliev v. Russia*.

²⁰⁹ *Enea v. Italy* [GC]

²¹⁰ *Gülmez v. Turkey*; *Enea v. Italy* [GC].

²¹¹ *Stegarescu and Bahrin v. Portugal*, § 35-39.

Besides this hard core of the rights of a private character, the Court's conception of what falls within the scope of the "*sphere of personal rights*", and is as such of a "civil nature", is comprehensive and comprises potentially a wide variety of situations occurring in prison. The Court has for instance taken into consideration, besides the restrictions on the exercise of the right of access, the limitations of access to the prison yard, resulting from the implementation of a high security regime²¹². In the case *Musumeci v. Italy*, the Court makes a reference, without further explanation, to the limitations imposed on the prisoner's "*personal freedom*" that are associated with a reinforced surveillance system (E.I.V.), echoing the foundation of the relevant case-law of Italy's Constitutional Court. In the case *Enea v. Italy* [GC], which concerns the same measure, the Grand Chamber focuses its assessment on the most typical impacts on family links and heritage issues (§ 103). Without elaborating on the aspects of the restrictions imposed on the rights of the person concerned, in the case *Razvyazkin v. Russia*, the Court refers to the solutions of the judgements *Ganci*, *Musumeci*, *Enea v. Italy* and *Gülmez v. Turkey*, in order to state that the confinement of a prisoner to the disciplinary block falls within the scope of the civil limb of Article 6 § 1 (§ 133).

It is quite remarkable that prison litigation is not among the domains excluded in principle from Article 6 § 1²¹³. Because they represent particularly sensitive measures from the point of view of fundamental rights, the European case-law has allowed accessing the Court whenever the States were attempting to justify, in the name of security constraints and of the preservation of internal order, keeping a space that is completely subject to the discretion of the administration. Article 6 § 1 has compounded Article 13²¹⁴, strengthening the obligations imposed on the States. However, the case-law is characterized by a certain incoherence, since the issue of needing to understand which rights are held by the prisoner seriously affects the coherence of the protection granted by the civil limb of Article 6 § 1.

- Criminal limb. Temporal and material scope of Article 6 of the Convention.

The Court's use of autonomous concepts has resulted in including in the scope of Article 6 issues excluded from the criminal trial *stricto sensu* and from fair trial guarantees. The dynamic interpretation of Strasbourg judges has allowed the scope of the criminal trial to be extended to the pre-trial and, under certain conditions, to disciplinary proceedings²¹⁵.

With regard to the first point, the Court has at a very early stage recognized that right to legal assistance may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (*Imbrioscia c. Suisse* ; *Salduz v. Turkey*²¹⁶).

Right to legal assistance becomes extremely important in the pre-trial stage in order to compensate for the defendant's particularly vulnerable position: exposed to the risk of pressure

²¹² Ibid.

²¹³ Litigation concerning the entry and the residence of foreigners, taxation and voting, see *Vilho Eskelinin v. Finland*, § 61.

²¹⁴ See *Ganci v. Italy*. In this respect it should be noted on the one hand that the Court is in charge of the legal qualification of the facts of the case (*Gatt v. Malta*, § 19; *Jusic v. Switzerland*, § 99) and that on the other hand, in the framework outlined by the decision about the admissibility of the request, the Court can address any question of fact or of law that may arise during the proceedings before the Court itself (*Guerra and others v. Italy*, § 44, *Chahal v. The United Kingdom*, § 86 and *Ahmed v. Austria*, § 43).

²¹⁵ M. DELMAS-MARTY, *La matière pénale au sens de la Convention européenne des droits de l'homme comme flou du droit pénal*, RSC 1987, p. 819; B. RANDAZZO, *I principi del diritto e del processo penale nella giurisprudenza della Corte Europea dei diritti dell'Uomo*, Quaderno predisposto in occasione dell'incontro trilaterale delle Corti costituzionali italiana, spagnola e portoghese, Madrid 13-15 Ottobre 2011.

²¹⁶ *Imbrioscia c. Suisse*, arrêt du 24 novembre 1993, n. 13972/88 ; *Salduz*, § 50.

from the police force in order to obtain information and threatened both for his physical integrity and for their right not to incriminate himself.

With regard to the second point, the Court considers that proceedings concerning the execution of sentences do not fall within the limb of the criminal head of Article 6²¹⁷, however the question arose at an early stage as to whether “charges” being possibly brought during the enforcement of the sentence are subject to the fair trial safeguards, even as they are considered by disciplinary instances, and not by criminal courts. However, a criminal charge which arises during the execution of the sentence may be subjected to the guarantees of a fair trial, even if it is taken in charge by disciplinary bodies and not by criminal courts.

The European Commission of Human Rights, in the case *Kiss v. The United Kingdom*, came quickly out in favor of an application of the criteria of the judgement *Engel and others v. Netherlands* to disciplinary disputes in the prison system, which was supported by the Court a few years later.

The provision of procedural safeguards in disciplinary proceedings has allowed to restore the rule of law in prison and to set up of European standards of protection. However, the “autonomous concepts” potentialities do not seem to have been fully exploited by the Court, which has locked its reasoning into a binary logic relying on the category of ‘measures’: custodial measures as well as those involving deprivation of liberty and any other measure. In the absence of an extension of the penalty actually imposed, the disciplinary procedure is still out of the reach of the criminal limb of Article 6 § 1, even though it is subject to ‘legality’ requirements with regards to the charges and the scale of penalties, to judgement rituals, etc., which have been copied from those of criminal law enforcement²¹⁸.

The Court has built its jurisprudence based on two *leading cases*: *Campbell and Fell v. United Kingdom* and *Ezeh et Connors v. United Kingdom*²¹⁹ and applied, in the prison context, the ‘Engel Criteria’, developed in the context of disciplinary sanctions imposed on military personnel. In *Engel v. Netherlands*²²⁰, the Court stated that “in a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so” (*Ezeh et Connors c. Royaume-Uni*, GC, § 126; *Engel* § 82). In *Campbell and Fell v. United Kingdom* and *Ezeh and Connors v. United Kingdom*, the Court followed a substantial interpretation in order to assess the criminal nature of disciplinary measures and considered that the loss of remission and awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability (§§ 123-124). In its later judgments, *Young*²²¹ et *Black*²²² v. *United Kingdom*, the

²¹⁷ Aux termes de la jurisprudence de la Cour, l'article 6 de la Convention ne s'applique pas à l'examen d'une demande tendant à l'octroi de l'amnistie ni à des mesures visant à la réinsertion sociale, comme une libération conditionnelle ou des permissions de sortir, ni aux procédures concernant l'assignation à un régime de haute sécurité. Voir H. De Suremain, *L'article 6 de la CEDH et le droit de la Prison*, European Prison Litigation Network.

²¹⁸ H. De Suremain, précité.

²¹⁹ *Ezeh et Connors c. Royaume-Uni* (GC), arrêt du 9 octobre 2003, n. 39665/98 et 40086/98.

²²⁰ *Engel et autres c. Pays-Bas*, arrêt du 8 juin 1976, n. 5100/71 5101/71 5102/71 5354/72 5370/72

²²¹ *Young c. Royaume-Uni*, arrêt du 16 janvier 2007, n. 60682/00.

²²² *Black c. Royaume-Uni*, arrêt du 16 janvier 2007, n. 56745/00.

European judge confirmed this approach and found that Art. 6 of the Convention was applicable in the light of the third 'Engel criterion'²²³.

The presumption arising from the third Engel criterion is privileged to have set an automatic application of Article 6 guarantees as soon as the extension of time in detention to be actually served is at stake. On the other hand, this approach has encouraged the adoption of a restrictive interpretation and a sort of opposite presumption of non-application of Article 6 when the disciplinary sanction did not result in an extension of time in detention.

While the criminal nature of disciplinary sanctions resulting in an extension of the duration of detention is very clear in the Court's case law, the same cannot be said for disciplinary measures or, more generally, for disciplinary sanctions involving a serious deterioration in prison conditions.

In some cases against France (*Payet c. France*²²⁴, *Cocaign c. France*²²⁵ et *Plathey c. France*²²⁶), disciplinary block was considered as a simple deterioration of detention conditions excluded from the criminal limb of Article 6.²²⁷

In the *Payet* case, the applicant was placed in solitary confinement for forty-five days and the Court stated that "it has not been shown that it (the sanction) in any way extended the length of the applicant's detention"²²⁸. As a consequence, the Court held that "the sanction inflicted on the applicant was not of such a nature and gravity as to fall within the criminal scope"²²⁹. The Court strikingly considered that severity threshold reached for Article 3 but not for Article 6. Such restrictive interpretation is not justified in the light of the principle of coherence, according to which "the Convention must also be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions" (*Stec et autres c. Royaume-Uni* (déc.) [GC], n. 65731/01 et 65900/01).

A similar approach was adopted in *Cocaign v. France* and *Plathey v. France*.

In *Stitic v. Croatie*²³⁰, the Court found that the disciplinary penalties imposed on the applicant (solitary confinement) did not extend the applicant's prison term nor did it seriously aggravate the terms of the applicant's prison conditions. The Court seems to have taken into consideration not only the extension of time in detention, but also a new criterion, namely the serious aggravation of the conditions of detention. Nevertheless, in the Court's view, this sanction was not of such a nature and severity that the matter could be considered within the "criminal" sphere.

Thus, the punitive character of a penalty in a disciplinary block is not relevant in this respect.

On the one hand, the Court does not seem to consider the serious consequences that such a measure entails for prisoners. On the other hand, such reasoning, which puts the threshold of severity of the sanction so high, does not seem consistent with the evolution of the criminal

²²³ B. BELDA, *Les droits de l'homme des personnes privées de liberté, Contribution à l'étude du pouvoir normatif de la Cour Européenne des droits de l'homme*, Bruylant, 2010, p. 382

²²⁴ *Payet c. France*, arrêt du 20 janvier 2011, n. 19606/08.

²²⁵ *Cocaign c. France*, arrêt du 3 novembre 2011, n. 32010/07.

²²⁶ *Plathey c. France*, arrêt du 10 novembre 2011, n. 48337/09.

²²⁷ La Cour avait déjà configuré cette approche dans l'affaire *X. c. Suisse*, déc., 9 mai 1977, n. 7754/77, dans laquelle le requérant avait été puni avec 5 jours de cellule disciplinaire pour être rentré en retard d'une permission de sortir.

²²⁸ « il n'a pas été démontré qu'elle (la sanction) ait en aucune manière allongé la durée de la détention du requérant ».

²²⁹ « la sanction imposée au requérant n'était pas d'une nature et d'une gravité qui la fassent ressortir à la sphère pénale »

²³⁰ *Stitic c. Croatie*, arrêt du 8 novembre 2007, n. 29660/03.

law, which increasingly includes non-custodial sentences, alternatives to detention, having a significantly lower punitive element than the solitary confinement.

Such a restrictive interpretation is also not justified in the light of the principle consistently affirmed in the Court's case-law that "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and the purpose of that provision" (*Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).

1.3. A SPECIFIC GUARANTEE: ACCESS TO LAWYER IN POLICE CUSTODY AS A PROTECTION TOOL AGAINST ILL-TREATMENTS

"Pre-trial prisoners find themselves in one of the most vulnerable situations an individual can face during criminal proceedings, especially when they are denied access to legal assistance and information on their rights" (judge Sajo, in his separate opinion in the judgment, *Simeonovi v. Bulgaria*²³¹).

The Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial²³². Rights of defense are objectively compromised when defendants are deprived of liberty, not only because of difficulties to communicate with the outside world, but also because they are within police forces control and exposed to a risk of ill-treatment.

As emphasized by the doctrine "the preliminary investigation coercive nature, having regard to the defendant deprivation of liberty and the police interrogation, should (...) command and justify that the person deprived of liberty may benefit from the most elementary procedural guarantees in order to compensate for the authorities' coercive power, and thus, to effectively protect his material rights during the preliminary investigation (such as the right to physical and moral integrity), or his procedural rights (such as the right to prepare his defence effectively) in the perspective of the subsequent phases (investigation and criminal trial)²³³".

Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (*Salduz* § 55 ; *Ibrahim* § 255)²³⁴.

The right of an accused to legal assistance "is undoubtedly justified, especially in the initial stages of the proceedings when the accused has to confront the prosecuting authorities on rather unequal terms, and the fact that he is allowed the assistance of a legal specialist at the subsequent interrogations cannot effectively cure this defect" (judgment *Imbroscia v. Switzerland*, dissenting opinion of judge Lopes Rocha)

Due to the coercive environment of police custody and the psychological constraints to which defendants are subjected during the first interrogations²³⁵, no compensatory measures could effectively compensate for the absence of the lawyer in this phase of the proceedings.

²³¹ *Simeonovi c. Bulgarie* (GC), arrêt du 12 mai 2017, n. 21980/04.

²³² *Can c. Autriche*, 12 juillet 1984, avis de la Commission, § 50 ; *Salduz*, précité, § 54.

²³³ BELDA B., *op. cit.*, p. 392.

²³⁴ *Ibrahim et autres c. Royaume-Uni* (GC), arrêt du 13 septembre 2016, n. 50541/08 50571/08 50573/08 40351/09

²³⁵ BELDA B., p. 394.

Immediate access to a lawyer able to provide the right of an accused not to incriminate him/herself and to remain silent, which is of the fundamental features of a fair trial²³⁶. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no 54810/00 §100. *Salduz* § 54). The presence of the lawyer compensates for the asymmetry in the relationship between public prosecution and defendants and aims to ensure legality in the collection of the evidence

Conscious of the fact that if the Convention does not stop at the gates of prisons, the control of the guarantees devoted thereto becomes much more difficult beyond the bars

(whether prisons or police stations), the Court has granted a particular importance to the presence of the lawyer in the early stages of police interrogations (*Salduz* § 52). The mandatory presence of a qualified outside observer is a fundamental guarantee against ill-treatment and contributes to the achievement of a proper administration of justice.

1.3.1. SCOPE OF THE OBLIGATION AND ITS INTENSITY: THE RESTRICTIONS ADMITTED AND THE EXAMINATION OF THE OVERALL FAIRNESS OF THE TRIAL.

In *Salduz* judgment, the Court finds that only compelling reasons may exceptionally justify denial of access to a lawyer and such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (§ 55).

The need to justify the restriction on the basis of compelling reasons implies two types of consequences: on the one hand, the existence of such reasons does not exempt the Court from assessing whether the refusal of access to a lawyer has not in any event resulted in an irreparable infringement of the defendant's rights; on the other hand, the absence of such reasons determines a sort of presumption of violation of Article 6 of the Convention

Such a presumption of violation is set out as an *obiter dictum* in *Salduz*, insofar as the Court states that 'as a general rule' (§55) only exceptional circumstances and compelling reasons can justify a restriction of the rights of the defence in this context. The Court's position is more explicit in the case of the use of incriminating statements made without the assistance of a

²³⁶ L'article 93 de l'Ensemble des règles minima pour le traitement des détenus (Résolution (73) 5 du Comité des Ministres du Conseil de l'Europe) est ainsi libellé : « Un prévenu doit, dès son incarcération, pouvoir choisir son avocat (...), et (...) recevoir des visites de son avocat en vue de sa défense. Il doit pouvoir préparer et remettre à celui-ci des instructions confidentielles, et en recevoir. Sur sa demande, toute facilité doit lui être accordée à cette fin. (...) Les entrevues entre le prévenu et son avocat peuvent être à portée de la vue mais ne peuvent pas être à portée d'ouïe directe ou indirecte d'un fonctionnaire de la police ou de l'établissement. ».

La Recommandation Rec(2006)2 du Comité des Ministres aux États membres sur les règles pénitentiaires européennes, adoptée le 11 janvier 2006 lors de la 952^e réunion des délégués des ministres, dispose en ses parties pertinentes : « 23.1 Tout détenu a le droit de solliciter des conseils juridiques et les autorités pénitentiaires doivent raisonnablement l'aider à avoir accès à de tels conseils.

23.2 Tout détenu a le droit de consulter à ses frais un avocat de son choix sur n'importe quel point de droit. (...) »

23.5 Une autorité judiciaire peut, dans des circonstances exceptionnelles, autoriser des dérogations à ce principe de confidentialité dans le but d'éviter la perpétration d'un délit grave ou une atteinte majeure à la sécurité et à la sûreté de la prison. ».

L'article 14 § 3 b) du Pacte international relatif aux droits civils et politiques prévoit que toute personne accusée d'une infraction pénale a droit à « disposer du temps et des facilités nécessaires à la préparation de sa défense et à communiquer avec le conseil de son choix ».

L'article 48 de la Charte des droits fondamentaux énonce que « le respect des droits de la défense est garanti à tout accusé ».

lawyer to support a conviction, in which case it stated that such use would 'in principle' irreparably infringe the rights of the defence (§ 55-56).

The automatism of *Salduz* is questioned in *Ibrahim v. the United Kingdom*, concerning delayed access to a lawyer during police questioning owing to exceptionally serious and imminent threat to public safety²³⁷.

In this case, the Grand Chamber stated that the absence of 'compelling reasons' to restrict access to a lawyer does not in itself constitute a violation of Article 6 §§ 1 and 3 c) of the Convention (*Ibrahim*, §262), but is nevertheless an indication that a compromise of the guarantees of the defence has taken place and requires a very strict control by the Court and a reversal of the burden of proof. It is up to the Government to demonstrate that the restriction of access to legal assistance for the accused did not irreparably affect the overall fairness of the trial (*ibidem*, § 265).

The *Ibrahim* judgment provided the Court with an opportunity to clarify the definition of the "compelling reasons" for delaying access to the lawyer, configured as exceptional hypotheses, of a temporary nature and based on an individual assessment of the particular circumstances of the case.

The Court specified that the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention.

In order to assess whether compelling reasons have been demonstrated, it is of relevance, whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (*ibidem*, §§ 258 et 259).

The judgment shows which circumstances should be taken into account in order to evaluate the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings. It includes: the applicant special vulnerability, procedural guarantees, the quality of the evidence, the circumstances in which it was obtained and the weight covered in the conviction²³⁸.

²³⁷ Le 21 juillet 2005, deux semaines après les attentats-suicides à la bombe à Londres, d'autres bombes furent mises à feu dans le réseau de transports publics londonien sans exploser. Les trois premiers requérants, suspectés d'être les poseurs des bombes, furent arrêtés mais une assistance juridique leur fut refusée pendant des durées allant de quatre à huit heures de manière à permettre à la police de conduire des « interrogatoires de sécurité ». Le quatrième requérant fut initialement interrogé par la police en qualité de témoin et lorsqu'il commença à s'auto-incriminer l'interrogatoire ne fut pas suspendu afin qu'il puisse bénéficier des garanties et de l'assistance juridique accordées aux suspects.

²³⁸ a) la vulnérabilité particulière du requérant, par exemple en raison de son âge ou de ses capacités mentales; b) le dispositif légal encadrant la procédure antérieure à la phase de jugement et l'admissibilité des preuves au cours de cette phase, ainsi que le respect ou non de ce dispositif, étant entendu que, quand s'applique une règle dite d'exclusion, il est très peu vraisemblable que la procédure dans son ensemble soit jugée inéquitable; c) la possibilité ou non pour le requérant de contester l'authenticité des preuves recueillies et de s'opposer à leur production; d) la qualité des preuves et l'existence ou non de doutes quant à leur fiabilité ou à leur exactitude compte tenu des circonstances dans lesquelles elles ont été obtenues ainsi que du degré et de la nature de toute contrainte qui aurait été exercée; e) lorsque les preuves ont été recueillies illégalement, l'illégalité en question et, si celle-ci procède de la violation d'un autre article de la Convention, la nature de la violation constatée; f) s'il s'agit d'une déposition, la nature de celle-ci et le point de savoir s'il y a eu prompt rétractation ou rectification; g) l'utilisation faite des preuves, et en particulier le point de savoir si elles sont une partie intégrante ou importante des pièces à charge sur lesquelles s'est fondée la condamnation, ainsi que la force des autres éléments du dossier; h) le point de savoir si la culpabilité a été appréciée par des magistrats professionnels ou par des jurés et, dans ce dernier cas, la teneur des instructions qui auraient été données au jury; i) l'importance de l'intérêt public à enquêter

The case is in line with the judicial trend refusing automatism²³⁹ and encouraging *in concreto* evaluations. The Grand Chamber reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (§262). The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention, but has an impact on the assessment of overall fairness.

While the requirement of an overall assessment and the refusal of automatisms are the expression of a reasonable and reasoned approach to the construction of the judicial decision, they also and inevitably entail a major tolerance of any possible restrictions on the rights of the defence and a weakening of the protection.

According to the dissenting judges Sajó and Laffranque, *Ibrahim judgment* “frustrates years of European efforts to provide a high level of protection to procedural rights”. They regret that this judgment diminished the level of protection and weaken the irretrievability principle set out in *Salduz* and considered as a crucial tool for effective protection of the right to a fair trial and a fundamental safeguard against ill-treatment²⁴⁰.

This approach was confirmed in the further judgments *Simeonovi v. Bulgaria*²⁴¹ and *Beuze v. Belgium*²⁴². In the Bulgarian case, concerning Lack of access to lawyer during first three days of police custody, the Court clarifies that the starting point for the right to legal assistance should be the date of the applicant’s arrest²⁴³. Anticipating the obligation to provide legal assistance at the time of arrest offers a stricter guarantee against ill-treatment and more effective defendant’s rights protection.

sur l’infraction particulière en cause et à en sanctionner l’auteur ; j) l’existence dans le droit et la pratique internes d’autres garanties procédurales.

²³⁹ Le refus d’automatisme et l’évaluation globale caractérise, non seulement la jurisprudence en matière d’équité de la procédure, mais également la plus récente jurisprudence en matière de surpopulation carcérale. L’automatisme de la jurisprudence *Sulejmanovic c. Italie*, selon lequel la disponibilité d’espace inférieur à 3 mètres carrés correspondait automatiquement à une violation de l’art. 3 de la Convention, a été dépassé par la jurisprudence suivante et notamment les affaires *Ananyev c. Russie* et *Mursic c. Croatie*. Voir D. Ranalli, *Recenti interventi della Corte europea dei diritti umani: qualche spunto per riflettere sul sovraffollamento*, in *Rassegna Penitenziaria e criminologica*, n. 3/2014; A. Albano, *Prime osservazioni sulla sentenza 20 ottobre 2016 della Corte Europea dei diritti dell’Uomo in Mursic c. Croazia: un caso icastico*, *Rassegna Penitenziaria e criminologica*, n. 3/2015.

²⁴⁰ « L’absence d’un avocat lorsqu’un suspect en détention est confronté à la police pour la première fois a des effets durables sur l’ensemble de la procédure et la présence d’un avocat est une garantie importante contre les abus policiers. Dans certains cas, comme en l’espèce, il n’y a aucun moyen de s’opposer à la déclaration auto-incriminante initiale. (On ne peut pas rétracter un mensonge.) Permettre à une déclaration auto-incriminante faite en l’absence d’un avocat de servir à fonder une condamnation fait apparaître le procès comme étant fondamentalement suspect. Nous sommes là au cœur de la condamnation car il est impossible d’en effacer les conséquences à un stade ultérieur (sauf application d’une règle d’exclusion). Des considérations d’opportunité tenant à la dissuasion policière militent également en faveur de la quasi-règle d’exclusion découlant de l’arrêt *Salduz*. Si les autorités chargées de l’enquête savent que certaines pratiques contraires aux droits que l’accusé tire de l’article 6 § 3 peuvent conduire à l’annulation du procès, elles hésiteront à y recourir. Et, comme le dit l’arrêt *Salduz*, l’accès précoce à une assistance juridique auprès d’un conseil est une garantie fondamentale contre les mauvais traitements » (opinion en partie concordante, en partie dissidente § 16).

²⁴¹ *Simeonovi c. Bulgarie* (GC), arrêt du 12 mai 2017, n. 21980/04.

²⁴² *Beuze c. Belgique* (GC), arrêt du 9 novembre 2018, n. 71409/10.

²⁴³ Cette interprétation avait déjà été sollicitée par les juges Bratza et Zagrebelsky dans leurs opinions concordantes dans l’affaire *Salduz*. Les juges avaient souligné, en particulier que, les garanties reconnues dans l’affaire *Salduz* à partir des interrogatoires devraient s’appliquer, selon les juges concordants, dès le commencement de la garde à vue ou de la détention provisoire et devraient s’étendre tout au long de la détention dans les stations de police ou en prison. Le fait que le défenseur puisse voir son assisté détenu « permet, mieux qu’aucune autre mesure, d’éviter que la prohibition des traitements visés à l’art. 3 de la Convention ne soit enfreinte ». Voir *Salduz*, opinion concordante du juge Bratza et opinion du juge Zagrebelsky à laquelle se rallient les juges Casadevall et Turmen.

Anticipating protection is also intended to prevent informal interrogations, as in the present case, from taking place for the sole purpose of circumventing the obligation to ensure the prompt presence and assistance of a lawyer. The judgment transposed the statements of Judges Brazda and Zagrebelsky, expressed in their concurring opinions in *Salduz*, according to which access to a lawyer must be guaranteed from the very beginning of police custody or pre-trial detention and throughout the whole duration of detention.

In the judges view, the fact that defence counsel may see the accused throughout his detention in police stations or in prison “is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention”.

In the Belgian case, the applicant, arrested by the French gendarmerie and taken into custody for the execution of a European arrest warrant, alleged a lack of legal assistance during questioning by police and investigating judge in initial phase of criminal proceedings. The impossibility of obtaining legal assistance at the pretrial stage was due to the Belgian legislation in force at the time of the facts. The Court indicated, by way of example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation, and (2) the non-participation of the lawyer in investigative actions, such as identity parades or reconstructions (§ 135). In addition, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (§ 136).

The Court thus reiterated the refusal of automatism, the requirement for an overall assessment of the fairness of the proceedings and the importance of very strict control in the case of legislative restrictions with a general and mandatory scope. It is up to the Government, in these circumstances, to convincingly demonstrate that the applicant has been granted a fair trial overall.

2. THE SCOPE OF THE PROCEDURAL PROTECTION: PRISONER AS AN AUTONOMOUS ACTOR OF THE PROCEDURE?

2.1 BETWEEN EFFECTIVENESS AND SUBSIDIARITY

Procedural obligations have been conceived as a means of ensuring the effectiveness of substantive rights, at the same time the proceduralisation of rights²⁴⁴ also makes it possible to guarantee the principle of subsidiarity. This tension between effectiveness and subsidiarity permeates the whole *corpus* of case law concerning prisoners' rights, specifically considering pilot and quasi-pilot judgments.

By requiring states to create procedures to ensure the prevention and redress for violations of treaty rights, procedural obligations are therefore a means of promoting the principle of subsidiarity. As affirmed by Madelaine²⁴⁵ these obligations then have a dual interest for the Court. On the one hand, they are a strategic way of dealing with sensitive issues without

²⁴⁴ See F. Tulkens, « Le droit à la vie et le champ des obligations des États dans la jurisprudence récente de la Cour EDH », in *Mélanges en l'honneur du Doyen Gérard Cohen Jonathan*, Bruylant, 2004, p. 1626.

²⁴⁵ C. Madelaine, “Les obligations procédurales issues de la CEDH en matière de surpopulation carcérale”, in *La protection des droits des personnes détenues en Europe*, Actes de conférences, 21 avril 2016, 14-15 juin 2016.

interfering with penal and penitentiary policies adopted by States²⁴⁶. On the other hand, procedural obligations constitute a means for the Court to offload its mass litigation to the national authorities by identifying the measures to be taken both in order prevent a repetition of violations of the guaranteed right and to compensate, at the national level, the conventional violations thus preventing the applicants from seizing the Strasbourg Court again. Whenever the two instances, effectiveness and subsidiarity, goes hand in hand and are effectively balanced, making it possible to obtain redress for the alleged violation of the Convention at national level, they guarantee both the principle of subsidiarity and the effectiveness of the right concerned.

However, the two principles may also come into conflict and an abstract preference for subsidiarity over effectiveness could be the result of an excessive use of pilot judgment and proceduralization of rights. The temptation to use procedural obligation as a measure to reduce the number of pending applications is high at a time when the Court is overwhelmed by a growing number of applications: *“Une procéduralisation excessive visant à tarir à tout prix le flux de requêtes en les cantonnant au niveau national peut alors revenir à donner un blanc-seing aux autorités nationales, au risque d’un abaissement des exigences conventionnelles, sacrifiant ainsi l’effectivité des droits”*²⁴⁷.

An example of this temptation can be seen in the Italian pilot judgment procedure (so forth, PJP), *Torreggiani*. Contrary to the ruling in *Ananyev*, the Court decided that the examination of applications dealing solely with overcrowding in Italian prisons would be adjourned pending the adoption by the domestic authorities of the required measures at national level. This provision, compared to the PJP in the *Ananyev* case, represents a sort of “double standard” concerning the adjournment of similar cases. In the *Ananyev* case the Court, after having reminded that adjournment is a possibility rather than an obligation, as clearly shown by the inclusion of the words “as appropriate” in the text of Rule 61 § 6 and the variety of approaches used in the previous PJP, evaluates that due to the fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatments, does not consider it appropriate to adjourn the examination of similar cases. On the contrary, the Court observes that continuing to process all conditions-of-detention cases in a diligent manner will remind the respondent State on a regular basis of its obligations under the Convention and in particular those resulting from this judgment. On the *Torreggiani* case, on the contrary, the Court chooses to adopt a more deferential approach and to adjourn all similar cases.

Analysing all the pilot judgments in the prison field, it appears that the Court has finally established a formalistic approach, requiring the existence of a set of preventive and compensatory remedy, provided of certain characteristics and features, without assessing the concrete effectiveness of those remedies for the implementation of rights and without considering the set of procedural guarantee which could allow the prisoner to overcome the obstacles to the access to court and justice.

The Italian case is paradigmatic in order to understand the performative potential of a PJP and its actual reach in offering an effective prospect of relief and protection of rights.

After the pilot judgment in *Torreggiani*, the Italian Government introduced a system of preventive and compensatory remedies. The decision in *Stella v. Italy*²⁴⁸, closing the pilot judgment procedure against Italy, offered a positive evaluation of the system of remedies put in place by the Italian government, considering that no evidence enabled the Court to find that

²⁴⁶ See H. de Suremain, “Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale”, in *European Prison Litigation Network*, p. 33.

²⁴⁷ C. Madeleine, cited above.

²⁴⁸ *Stella v. Italy*, application no. 49169/09, 16 September 2014.

those same remedies did not offer, “in principle”, prospects of appropriate relief for the complaints submitted under Article 3 (prohibition of inhuman or degrading treatment) of the Convention. Interestingly enough, the applications had been lodged before the entry into force of the new Italian legislative provisions, thus allowing the Court to examine the situation at a time in which no remedy was available for the applicants. Nevertheless, respectfully asserting the crucial importance of its subsidiary role, the Court considered that there were grounds in the *Stella* case for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged and that this exception could apply to all similar cases pending before it. Those exceptions seem to include, specifically, situations in which, after a PJP, the State enacts a number of measures aimed at resolving the structural problem at a national level²⁴⁹. This same consideration was used in the case *Łatak v. Pologne*, n° 52070/08, § 82, closing the quasi-pilot procedure in Poland.

Worthy is to note that, concerning the pending applications at the time of these two judgments (*Stella* and *Łatak*), these decisions considered that the Polish and Italian laws gave to the applicants sufficient time to seek effectively redress before the national civil courts. The time frame between the decisions and the end of the time limit established in the Polish and Italian legislations left 8 months to Polish prisoners and 3 months to Italian ones. This means almost no time at all, considering the legal vulnerability of prisoners, their lack of access to legal information and the difficult access to lawyers and legal assistance. All of these fundamental issues were left unsolved and unconsidered by the Court. The reality showed that Polish and Italian prisoners haven't been able to have knowledge of the deadline and to file an application in front of the domestic judiciary on time.

The analysis of the *Stella* judgment shows how the relevance conferred to the effectiveness of the remedies, stressed once and again in the reasoning of the judgment, conflicts with the same idea that the “remedies did not offer, *in principle*, prospects of appropriate relief²⁵⁰”. Indeed, the effectiveness of rights at a European level can have multiple dimensions²⁵¹ and the *Stella* case clearly implies a more formalistic approach to effectiveness.

Significantly, though, the Court underlined that the positive evaluation in *Stella* does not undermine an eventual future re-assessment of the effectiveness of the remedies, “notably considering the ability of domestic Courts to provide a uniform case-law that is compatible with the requirements of the Convention”. This enunciation is a precious reminder of the fact that only a national case law (or *praxis*) consistent with the conventional system of rights is able to substantiate the effective remedy required by Article 13. Therefore, the mere textualist analysis (for example of the legislation, of its wording and even of its *ratio*) does not allow an in-depth evaluation of the reach and effectiveness of the remedy.

Another level of analysis, in order to assess the effectiveness of the remedy, is the level of compensation granted as a compensatory remedy in cases of violation of Article 3 at a national level. In *Stella*, the Court is ready to level down the protection afforded at the European level, accepting a low amount of money compensating a violation of the most absolute conventional rights:

²⁴⁹ Ivi, §45 “*Soucieuse d'affirmer l'importance cruciale du caractère subsidiaire de son rôle, la Cour estime qu'une exception au principe général selon lequel la condition de l'épuisement doit être appréciée au moment de l'introduction de la requête (paragraphe 40 ci-dessus) se justifie en l'espèce et doit s'appliquer à toutes les affaires similaires pendantes devant elle et qui n'ont pas encore été déclarées recevables. Par conséquent, la Cour examinera l'exception du Gouvernement à la lumière de l'état actuel du système juridique national.*”

²⁵⁰ Ivi, § 63.

²⁵¹ See, Rietiker D. (2010) ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights’, in *Nordic Journal of International Law*, Volume 79, Issue 2, pp. 245 – 277.

la Cour rappelle que lorsqu'un État a fait un pas significatif en introduisant un recours indemnitaire pour réparer une violation de la Convention, elle se doit de lui laisser une plus grande marge d'appréciation pour qu'il puisse organiser ce recours interne de façon cohérente avec son propre système juridique et ses traditions, en conformité avec le niveau de vie du pays (voir, entre autres, Cocchiarella [GC], précité, § 80). Ainsi, la Cour peut parfaitement accepter qu'un État qui s'est doté de différents recours et dont les décisions conformes à la tradition juridique et au niveau de vie du pays sont rapides, motivées et exécutées avec célérité, accorde des sommes qui, tout en étant inférieures à celles fixées par la Cour, ne sont pas déraisonnables (idem, § 96).

The same reductionist logic is applied in the *Domján v. Hungary* (n. 5433/17) case, closing the Hungarian pilot judgment procedure. In this case a compensation of 5 to 5.3 euros per day is considered reasonable and proportionate to redress a violation of Article 3 of the Convention:

28. The Court further reiterates that, within the context of prison overcrowding, in the case of Bizjak (decision cited above, §§ 37-43), it held that compensation awarded by a national court and representing approximately 30% of the award made by the Court in the pilot judgment Mandić and Jović v. Slovenia (nos. 5774/10 and 5985/10, § 132, 20 October 2011) did not appear to be unreasonable or disproportionate. The Court took a similar stance in *Stella and Others v. Italy* ((dec.), nos. 49169/09 and 10 others, §§ 19 and 62, 16 September 2014), where the level of compensation available domestically was EUR 8 per day of detention in conditions incompatible with Article 3 of the Convention. Having regard to economic realities, as suggested by the Government (see paragraph 11 above), the Court reaches the same conclusion as concerns an award comprised of between EUR 4 and EUR 5.3 per day of unsuitable conditions of detention in the Hungarian context.

The Court, in fact, represents the minimum standard of protection of rights that must be guaranteed by the member states of the Council of Europe, as affirmed by Article 53 of the Convention²⁵². From this postulate derives the implicit, but permeating, principle of subsidiarity which informs the whole system of protection of rights at the Council of Europe. In short, in deference to what has been called “complementary subsidiarity”, the national and European guarantee systems for the protection of humans rights must proceed hand in hand²⁵³, and:

[...] the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention²⁵⁴.

A through interpretation of the subsidiarity principle should take into account the nature of the multilevel system of protection of rights at the domestic and international-regional level according to the minimum standard rule, in the sense that the Court intervenes where national authorities are incapable of effectively guaranteeing the rights of the Convention and more favorable national human rights guarantees shouldn't be limited by the standards set in the Convention in order to ensure that the more favorable guarantee is applied. Subsidiarity principle cannot be understood in a formalistic way and the ECtHR's use of the principle of subsidiary is limited by the ECHR's guarantee that its rights are effectively applied²⁵⁵.

2.2 A SIMPLIFIED PROCEDURE. ACCESSIBILITY AND FAIR TRIAL GUARANTEES.

²⁵² Article 53 ECHR: “Safeguard for existing human rights. Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

²⁵³ See, H. Petzold, “The Convention and the Principle of Subsidiarity”, in R. ST. J. Macdonald - F. Matscher - H. Petzold (eds.), *The European System For the Protection of Human Rights*, Martinus Nijhoff Publishers, 1993, p. 42-43.

²⁵⁴ Juriconsult, *Interlaken Follow-Up. Principle of Subsidiarity*, 2010, p.3.

²⁵⁵ See, G.Füglister, “The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights’ Post-2011 Jurisprudence”, *Cahier de l’IDHEAP* 295/2016, Unité Droit public, available at: https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF

The case law of the Court on Article 13, has so far expanded the notion of domestic remedies and the scope of the procedural protection, as seen above, according to a systematic approach which tends more on the simplification of the procedural mechanisms, in order to bring the protection afforded by article 13 within the reach of detainees, than to covering the issue of remedies with all the due process and fair trial guarantees.

Thus, the Court has worked to simplify the procedural mechanisms, in order to bring the protection afforded by article 13 within the reach of detainees. This rationale makes it possible to handle the most common issues in European penitentiary systems: promiscuity related to overcrowding, insalubrity, constructions that are unfit for human habitation, etc. At the same time, working only on the side of the simplification of the procedure can be self-defeating.

Concerning this aspect, the Italian case can offer an interesting perspective, since the Italian complaint procedure before the Torreggiani pilot judgment, allowed the prisoners to seize directly and independently the competent judicial authority. Article 35 of the penitentiary law established a very generic "*diritto di reclamo*" (right to 'complain') stating that: "prisoners can address *oral or written requests or complaints, even in a sealed envelope*: 1) to the director of the institute, as well as to the inspectors, to the director general for the institutes of prevention and punishment and to the minister for grace and justice; 2) to the surveillance magistrate; 3) to the judicial and health authorities visiting the institute; 4) to the president of the regional council; 5) to the head of state" (*emphasis added*). Even if the judicial authority (specialized court) was comprised in the list of the bodies apt to receive the complaints, the procedure was not a judicial one and lacked all the guarantees of a remedy for the protection of rights. First of all the respect of the principle of due process of law remained highly questionable in a procedure where the equality of arms, adversarial proceeding, the independence and impartiality of the tribunal and the effectiveness of the remedy (*i.e.* the bindingness of the decisions of the Surveillance Judiciary) are not guaranteed. Even if the Italian Constitutional Court reiterated many times that the decisions of the Surveillance judiciary are not to be considered as mere reports, but "prescriptions or orders, whose binding nature for the prison administration is intrinsic to the purposes of protection that the law itself pursues"²⁵⁶, the procedure remained inconsistent with the aim and the scope of Article 13, since the remedy was a sort of "*recours gracieux au juge de l'application des peines*"²⁵⁷.

This simple procedure was therefore considered ineffective by the Court, thus showing that a right, such as the right to an effective remedy, should be articulated, at least in specific circumstances (and probably concerning vulnerable positions), through fully judicial claims. Claims that are subject to reasoning and interpretation and to a technical procedure which is essential for the fulfillment of the right itself and impose the assistance of a lawyer. In this perspective the fact that prisoners (only the literate ones) are able to write a simple, free form letter and that the procedure is simple is not itself a guarantee, on the contrary it can be considered a problematic issue in a situation of vulnerability due to the position of state control, where the assistance of a lawyer serve the purpose of informing and monitoring the situation and context in which the violation produced itself.

2.3 DIGITAL JUSTICE OR DIGITAL DIVIDE. ACCESS TO JUSTICE IN TIMES OF DIGITAL JUSTICE

Looking at the Court's case law, the issue of digital justice and access to Internet can be approached from a twofold perspective. On one side, the connection between prisoners' rights and Internet can be explored under the scope of Article 10 and the right to information and

²⁵⁶ Ivi, § 6.3 (our translation).

²⁵⁷ See *Diana c. Italie*, no 15211/89, 1996, §41

access to legal data and digital legal services. On the other side, the issue concerns the sensitive area of privacy and data protection.

2.3.1 ACCESS TO INFORMATION IN PRISON

In the information revolution era, traditional sources of law, as much as legal information have been progressively digitized. The development of digital technology in all aspects of life as a major factor of knowledge and integration seems to have had a paradoxical effect of more exclusion of prisoners and more isolation of prisons from the rest of society. In most European countries, the access to Internet is prohibited in prison, or limited to few experimental initiatives. The deprivation of detained persons from digital technology participate to increase their exclusion from the world outside of prison, and also limits their access to legal assistance. The rehabilitation mission of the prison administration is thus deprived of the necessary tools for almost all daily activities, whether professional, cultural, educational, social, civic or legal.²⁵⁸

This 'digital divide' can count as a new (and so far poorly analysed²⁵⁹) impediments to access to justice in prison and to the defence of detained persons: due to the poor legal and economic resources of detainees, an effective access to legal remedies depends above all on the level of legal aid available to them and the support from NGOs to carry prison litigation, and in particular their capacity to apply European law. This is why these hindrances should notably be fought by the EU legislation through recognition of the right to access to digital legal resources in prison as a necessary tool for an effective access to court.

Furthermore, while the Court has obliged certain national States to ensure an effective access of detained persons to their rights and to court through the implementation of effective domestic remedies²⁶⁰, the transformation of justice into digital justice has a strong impact on the access to justice, as legal acts, case-law and even parliamentary activities necessary for the defense and litigation are now for some of them only available on the Internet²⁶¹. Access to legal information on the Internet seems thus to be crucial for litigants and detainees that are in general not trained or allowed to use computers and digital devices. This process is detrimental to detainees and contributes to increase inequalities.

In a number of Council of Europe and other international instruments Internet access had increasingly been understood as a right, and calls had been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide". Moreover, an increasing amount of services and information are only available on the Internet.

Within the Council of Europe, the *Declaration on freedom of communication on the Internet*²⁶², recognizes the need for the removal of barriers to the participation of individuals in the information society on a non-discriminatory basis²⁶³ and the Recommendation CM/Rec(2014)6

²⁵⁸ Katsh, Ethan and Orna Rabinovich-Einy (2017) *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press ; Eubanks, Virginia (2011) *Digital Dead End. Fighting for Social Justice in the Information Age*, MIT Press.

²⁵⁹ See, *EUPRETRIALRIGHTS State of the Art on Legal Aid for Pre-trial Detainees*.

²⁶⁰ *Torreggiani and Others v Italy*, App. No 43517/09, ECtHR, 8 January 2013; *Vasilescu v Belgium*, App. No 64682/12, ECtHR, 25 November 2014; *Bamouhammad v Belgium*, App. No 47687, ECtHR, 17 November 2015.

²⁶¹ Case no. 17429/10, *Kalda v. Estonia*, ECtHR, 19 January 2016; §32.

²⁶² Adopted on 28 May 2003, at the 840th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe.

²⁶³ Principle 4 Removal of barriers to the participation of individuals in the information society : "Member states should foster and encourage access for all to Internet communication and information services on a non-discriminatory basis at an affordable price. Furthermore, the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect."

of the Committee of Ministers to member States on a *Guide to human rights for Internet users* affirms that:

3. The Internet has a public service value. People, communities, public authorities and private entities rely on the Internet for their activities and have a legitimate expectation that its services are accessible, provided without discrimination, affordable, secure, reliable and ongoing. Furthermore, no one should be subjected to unlawful, unnecessary or disproportionate interference with the exercise of their human rights and fundamental freedoms when using the Internet.

Any restrictions to this freedom must not be arbitrary, must pursue a legitimate aim in accordance with the European Convention on Human Rights.

The UN Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his report of 16 May 2011 to the Human Rights Council (A/HRC/17/27) refers to the concept of "digital divide" that defines the gap between privileged people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all, which include detainees²⁶⁴. As the UN Special Rapporteur puts it: "without Internet access, which facilitates the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States"²⁶⁵. The Internet is also defined as 'a medium by which the right to freedom of expression can be exercised' and can only serve its purpose if States assume their commitment to develop effective policies to attain universal access to the Internet. "Without concrete policies and plans of action, the Internet will become a technological tool that is accessible only to a certain elite while perpetrating the "digital divide"²⁶⁶.

The Court has tackled down this situation in *Kalda v. Estonia*, (n. 17429/10), where a violation of Article 10 was found because of restrictions placed on prisoner's access to certain Internet sites. The websites to which the applicant had requested access predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. The accessibility of such information promoted public awareness and respect for human rights. The national courts used such information and the applicant therefore also needed access to it for the protection of his rights in the court proceedings. When the applicant lodged his complaint with the domestic courts, Estonian language translations of the European Court's judgments against the respondent State were only available on the website of the local Council of Europe Office to which he had been denied access. As the Court affirms:

52. The Court cannot overlook the fact that in a number of Council of Europe and other international instruments the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. Internet access has increasingly been understood as a right, and calls have been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide" (see paragraphs 23 to 25 above). The Court considers that these developments reflect the important role the Internet plays in people's everyday lives.

The Court start by recognizing that: "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general"²⁶⁷ see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015; *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012; and *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03 and 23676/03, § 27, ECHR 2009). Then, the Court considers that "imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside

²⁶⁴ UN Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report of 16 May 2011 to the Human Rights Council (A/HRC/17/27), §61.

²⁶⁵ *Ibid*, §62.

²⁶⁶ *Ibid*, §60.

²⁶⁷ *Ivi*, §45.

world, including on their ability to receive information.”²⁶⁸. No general positive obligation exists for Contracting States to grant prisoners access to Internet.

This solution appears controversial if we consider the notion of digital divide, a notion that the Court is ready to accept (see above, §52 of the judgment), in light of the vulnerability of prisoners.

The only reason the Court found a violation of Article 10, then, lies on the fact that the State, in this case Estonia, already granted access to internet to prisoners. This results in a very uneven situation across European member states and as in a limited ability of intervention of the Court in order to implement access to information in prison and to bridge the digital divide gap in prison.

In a subsequent judgment, *Jankovskis v. Lithuania* (no. 21575/08), a prisoner complained that he had been refused access to a website run by the Ministry of Education and Science, thus preventing him from receiving education-related information in breach of Article 10 of the Convention.

The interest of this case lies in the fact that the Court interprets the case not considering access to internet in itself, but rather the access to a specific kind of information. As a matter of facts, the applicant’s complaint concerned a particular means of accessing the information in question: namely, that he, as a prisoner, wished to be granted access – specifically via the Internet – to information published exclusively on a website belonging to the Ministry of Education and Science. The court then reiterates that “imprisonment inevitably entails a number of restrictions on prisoners’ communications with the outside world, including on their ability to receive information”²⁶⁹. Therefore, as already affirmed in *Kalda*, (see *Kalda*, cited above, § 45), Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners, nevertheless, the Court considers that access to information relating to education is granted under Lithuanian law.

Therefore, there is a relevant difference between *Kalda* and *Jankovskis* cases in that in Lithuania, not only no law exists allowing prisoners to access the internet, but the prohibition on the inmates’ use of the Internet in prison can be said to be “prescribed by law” within the meaning of Article 10 § 2 of the Convention. Still the Court found a violation of Article 10, considering “the interference unnecessary in a democratic society”. First of all the Court argues that access to the internet has recently and increasingly “been understood as a right”, and calls have been made to develop effective policies to achieve universal access to the Internet and to overcome the “digital divide” (see *Kalda*, cited above, § 52).

The link between the internet access and the right to information is made by the Court pointing out the fact that “certain information is exclusively available on Internet” (*Jankovskis*, §62), therefore establishing the nature of internet as a tool in order to receive information which relate to education. The Court goes even further to affirms that it is not only a generic right to information that is at stake in the present case, but the right to social rehabilitation itself, since “it is not unreasonable to hold that such information was directly relevant to the applicant’s interest in obtaining education, which is in turn of relevance for his rehabilitation and subsequent reintegration into society” (§59). The Government, therefore, has a double responsibility: on the one hand, it has totally omitted any consideration on the nature of the site in question; in facta public platform, entirely managed by the Ministry; this should have been a suitable fixed point at least to dilute the risk linked to the security and to the proliferation of criminal activities. Secondly, the national authority is reproached for having taken into consideration the right to access to Internet as such, ex se, without understanding how in reality it is “only” a tool aimed at a particular purpose, the educational one and at the end, the social

²⁶⁸ Ivi, §46.

²⁶⁹ *Jankovskis v. Lithuania*, §55.

rehabilitation. According to the Court, therefore, the Internet is not yet a right *stricto sensu*, but can be a tool in order to exercise fundamental rights. A means and not an end.

The sole countries that have either implemented or at least experimented the Internet in prison are Belgium²⁷⁰, the UK, Denmark (only in minimum security prisons), Estonia (which is the only European country to have implemented in its legislation²⁷¹ ECHR's suggestion about allowing prisoners to have access to the Internet²⁷²) and the Netherlands (mostly in reintegration centres). Consequently, the deprivation of detained persons from digital technology contributes to increase their exclusion from the world outside of prison, and also limits their access to legal assistance.

In this regard, the absence or lack of access to the Internet in prison and in detention facilities threatens the ability of detainees to defend their rights in court on an equal footing than other citizens²⁷³. More broadly, the rehabilitation mission of the prison administration is thus deprived of the necessary tools for almost all daily activities, whether professional, cultural, educational, social, civic or legal.²⁷⁴ In this regard, the Strasbourg Court has ruled that in the light of its accessibility and its capacity to stock and communicate very large amounts of information, the Internet plays an important role in increasing the public's access to news and making easier the dissemination of information²⁷⁵.

Another critical trend has been retrieved in some European countries concerning the digitalization of justice and trial. The Italian case can show this trend: the newly introduced legislative decree n. 123/2018 has foreseen the possibility for prisoners to participate to Surveillance hearing through videoconferences. This seems to be more dictated by the necessity to cut the budget for prison transfer, than to the need to guarantee the personal participation. The presence of the prisoner in front of the Court is pivotal in order to guarantee the right to a fair trial and is important to reduce the prison seclusion and the material distance between the detained person and the Court.

2.3.2 PRIVACY AND DATA PROTECTION

Digital justice can also infringe upon Article 8 rights concerning privacy and data protection. The issue seems particularly relevant as it involves the storage and process of personal data and special category of personal data, such as data relating to criminal convictions and offences. The new Regulation (EU) 2016/679 (General Data Protection Regulation) include a specific provision for such data²⁷⁶ which imposes to State authority the duty to process these data "providing for appropriate safeguards for the rights and freedoms of data subjects".

²⁷⁰ See <https://www.ebo-enterprises.com/prisoncloud>

²⁷¹ Imprisonment Act ESTONIA [RT I 2009, 39, 261 - entry into force 24.07.2009] § 311: 'Prisoners are prohibited to use the Internet, except in the computers specially adapted for such purpose by the prison service which enable access under the supervision of the prison service to public legislation databases and register of judicial decision'.

²⁷² Case no. 17429/10, Kalda v. Estonia, ECtHR, 19 January 2016; case no no. 21575/08, Jankovski v. Lithuania, ECtHR, 17 January 2017.

²⁷³ Ibid., §33.

²⁷⁴ Katsh, Ethan and Orna Rabinovich-Einy (2017) Digital Justice: Technology and the Internet of Disputes, Oxford University Press ; Eubanks, Virginia (2011) Digital Dead End. Fighting for Social Justice in the Information Age, MIT Press.

²⁷⁵ Case no 64569/09, Delfi AS v. Estonia, ECtHR, 16 June 2015, §133; Case no 3111/10, Ahmet Yıldırım v. Turkey, ECtHR, 18 December 2012, § 48; Cases no 3002/03 and 23676/03, Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2), ECtHR, 10 June 2009, §27.

²⁷⁶ Art. 10 GDPR Processing of personal data relating to criminal convictions and offences: Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law

Government is responsible of protecting personal data of the prisoners. Most Prison Services act as registrar and european along as national legislation defines e.g. which registers it is responsible for, what is considered to be personal data, who has access to personal data, to whom the Prison Service is entitled to hand over such data and what are the data retention periods. We can expect a growing litigation at a european level on data protection of prisoners.

In the prison context, this provision appears particularly relevant as an Italian case can show. The case concerns the prisoners of the female section of Sollicciano prison in Florence. After a case of overdose death in prison, the prison administration asked to the female prisoners the informed consent to undergo a drug test, in order to prevent future possible episodes. Many prisoners agreed and subsequently the results of the test had been used to issue disciplinary sanctions. The Obudsman of Tuscany denounced the case to the Italian Ombudsman for the protection of personal data and an application was lodged to the civil judge who has recently issued a judgment sanctioning the violation of the right to privacy.

3. THE BLIND SPOTS OF PROCEDURAL PROTECTION, A THREAT TO THE WHOLE CASE-LAW STRUCTURE

3.1. THE LACK OF REALISM OF THE POSITION ON LEGAL AID

Right to legal aid is conceived in the ECtHR case-law as a prerequisite for the effectiveness of the right of access to justice.

According to International and European human rights law, the notion of access to justice obliges states to guarantee each individual's right to go to court – or, in some circumstances, an alternative dispute resolution body – to obtain a remedy if it is found that the individual's rights have been violated.²⁷⁷

Access to justice is directly linked to measures taken by States to remove the material and legal obstacles that may hinder access to justice for all. In particular, this entails the obligation for the state to remove the financial obstacles faced by citizens who do not have sufficient means to defend themselves in court or take legal action. In practice, this involves the introduction of a legal aid system.²⁷⁸

The establishment of a legal aid system aims to achieve effective access to justice and non-discrimination, namely the requirements at the heart of the conventional understanding of human rights.

providing for appropriate safeguards for the rights and freedoms of data subjects. 2Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

²⁷⁷ Manuel de droit Européen en matière d'accès à la justice, Agence des droits fondamentaux de l'Union Européenne, 2016, https://www.echr.coe.int/Documents/Handbook_access_justice_FRA.pdf

²⁷⁸ Au-delà des dispositions de la Convention Européenne des Droits de l'Homme et de la jurisprudence de la Cour de Strasbourg, le Conseil de l'Europe engage ses États membres à étoffer leurs systèmes d'aide judiciaire ; il a adopté plusieurs résolutions et recommandations en ce sens: la Résolution 76 (5) sur l'aide judiciaire en matière civile, commerciale et administrative ; la Résolution 78 (8) sur l'aide judiciaire et la consultation juridique ; la Recommandation 93 (1) sur l'accès effectif au droit et à la justice des personnes en situation de grande pauvreté, et la Recommandation 2005 (12) concernant la réglementation des demandes d'assistance judiciaire à l'étranger en vertu de l'Accord européen sur la transmission des demandes d'assistance judiciaire (STCE no 092) et de ses protocoles additionnels, CEPEJ, *Rapport sur les systèmes judiciaires européens : efficacité et qualité de la justice*, Edition 2014 (2012).

It is no coincidence that the doctrine of effectiveness, the founding principle of the Court's interpretative dynamism, was built on the landmark case of *Airey v. Ireland*²⁷⁹, concerning access to legal aid.

The Court's reasoning in that case is helpful in understanding the fundamental importance that procedural guarantees, and in particular, access to legal aid, have in the Convention system in order to ensure the full and effective enjoyment of fundamental rights.

The case concerned the impossibility for the applicant, in the absence of legal aid for family law proceedings, to bring an action for judicial separation, since her insufficient means did not allow her to cover the cost of such proceedings.

The reasoning of the Court is of great interest for three sets of reasons. First, the Court makes an *in concreto* assessment of the possibility of access to court. A domestic remedy was available in order to apply to the High Court and ask for the judicial separation and the assistance of a lawyer was not mandatory. Despite these considerations the Court wondered "whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily"²⁸⁰. The Court reasoning follows a substantialist approach, which goes beyond appearances and considers the accessibility of the procedure in the light of its complexity and the applicant's socio-economic and cultural conditions.

The second aspect of interest concerns the refusal of any water-tight division separating social and economic rights from the field covered by the Convention. Civil and political rights can have "implications of a social or economic nature" and social rights could be considered as prerequisites for the effective exercise of civil rights.²⁸¹

Following this approach, the Court rejected the Irish Government's argument that "the Convention's only express provision on free legal aid is Article 6 para. 3 (c) (art. 6-3-c) which relates to criminal proceeding" and "it cannot be said (that Ireland) have implicitly agreed to provide unlimited civil legal aid"²⁸².

Even if the Convention only guarantees legal aid in criminal proceeding, the effectiveness of the right of access to the judge may impose a system of legal aid in civil matters wherever representation by lawyer is mandatory or due to the complexity of the procedure and to the individual situation of the person concerned.

The last profile of interest concerns the fact that legal aid is considered not only as a prerequisite for guaranteeing the right of access to justice under Article 6 of the Convention, but also as an indispensable procedural element to ensure the effectiveness of substantive rights. According to the Court' reasoning, procedural guarantees of legal aid flows directly from substantive rights and becomes an 'inherent' and consubstantial element of it.²⁸³

Similarly, in *Golder*, the Court considered access to justice as the first condition for the realization of a fair trial and stated that "it would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court". The Strasbourg judges stress here that effective access to justice, through legal aid, is an inherent element of substantive rights, a prerequisite for its full and effective enjoyment.

The principles affirmed, although grounded in the specific circumstances of the case, are likely to be transposed to other contexts and clearly set out the weight of effectiveness principle in the interpretation of the Court.

However, this substantialist approach, main tool for ensuring the effectiveness of material rights from the procedural guarantee of legal aid and for providing access to justice for all,

²⁷⁹ *Airey c. Irlande*, arrêt du 9 octobre 1979, n. 6289/73.

²⁸⁰ *Airey c. Irlande*, précité, § 23.

²⁸¹ *Ibidem*, § 26.

²⁸² *Ibidem*

²⁸³ F. SUDRE, *Les grands arrêts de la Cour Européenne des droits de l'homme*, PUF, 2015, pp. 19 et ss.

without any discrimination based on socio-economic or financial conditions, has not been further developed in the subsequent case law.

The same considerations developed with respect to Ms. Airey's individual position could have justified a more realistic position with regard to detainees and could have opened the door to a more in-depth examination of the possibility for them "to present their arguments properly and satisfactorily" in absence of legal assistance.

The Court's case law in this matter is characterized by a twofold approach: the right to legal assistance and legal aid is fairly guaranteed in criminal proceedings, while it is marginally taken into account in the penitentiary field, including in pilot judgment procedures.

In criminal matters, the hermeneutic strategy of the Court is strongly supported by the clear and explicit normative basis of the right to legal aid, namely Article 6 § 3 (c). The right to legal aid is closely linked to the right to defense and the principle of equality of arms.

On the other hand, the particular vulnerability of the defendants and the risk of being subjected to inhuman and degrading treatment impose a stronger protection and require that access to the lawyer, of his own choice or committed *ex officio*, be assured from the first police questioning. The right to legal aid, is subjected to two conditions: the accused must show that he/she 'lacks sufficient means' to pay for legal assistance and 'interests of justice' should require legal aid to be granted.

As for the first condition, the Court has specified that it is up to the accused to prove his lack of financial means, but he/she needs not do so 'beyond all doubt'; it is sufficient that there are 'some indications' that this is so or, in other words, that a "lack of clear indications to the contrary" can be established²⁸⁴. Contrary to the case law on reimbursement of interpreting costs²⁸⁵ (Article 6 § 3 (e)), the Court does not exclude the possibility for the State to recover all or part of the costs of legal aid²⁸⁶ or ask for a contribution or payment in part of legal fees²⁸⁷.

²⁸⁴ *Pakelli c. Allemagne*, § 34.

²⁸⁵ *Luedicke et autres c. Allemagne* : dans cette affaire, la Cour a exclu radicalement cette possibilité, en fondant son appréciation sur le sens littéral des termes "gratuitement"/"free", figurant à l'article 6 par. 3 e), cette possibilité n'est pas en principe exclue dans le cas de remboursement des frais de l'aide juridictionnelle. La position de la Cour en matière d'aide juridictionnelle ne se fonde pas sur une différente interprétation du signifié de l'expression "gratuitement"/"free", qui reste celle que ces termes possèdent d'ordinaire dans chacune de ses deux langues officielles : ils ne visent ni une remise sous condition, ni une exemption temporaire, ni une suspension, mais bien une dispense ou exonération définitive (§ 40). La différente approche se fonde sur le fait que, contrairement au droit à l'interprétariat (art. 6-3-e), le droit à l'aide juridictionnelle (art. 6-3-c), ne consacre pas un droit de caractère absolu : il n'exige l'assistance gratuite d'un avocat d'office que si l'accusé « n'a pas les moyens de rémunérer un défenseur ».

²⁸⁶ La Cour a estimé, dans l'affaire *Croissant c. Allemagne*, que les juridictions allemandes pouvaient légitimement demander au requérant de couvrir les frais, à moins qu'il ne démontrât que la charge du coût de sa défense dépassait ses moyens. Selon la législation allemande, la nécessité de doter un accusé d'un ou plusieurs avocats d'office s'appréciait à la lumière des seuls impératifs des intérêts de la justice et la situation financière de l'intéressé était prise en compte seulement au stade de la procédure d'exécution qui suit le jugement définitif. La Cour a conclu en l'espèce que la vérification *ex post* de « l'absence de moyens » pour rétribuer un défenseur de son propre choix ne se heurtait pas au texte de la Convention, lequel n'empêche pas d'imposer à qui invoque l'insuffisance de ses moyens d'en fournir la preuve, soit au moment de la demande soit *a fortiori* pour demander le remboursement des frais.

²⁸⁷ Dans l'affaire *Morris c. Royaume-Uni*, la Cour a conclu à la non-violation de l'art. 6 de la Convention dans le cas où l'octroi de l'aide juridictionnelle était soumis à une contribution de 240 GBP, compte tenu du salaire du requérant à l'époque des faits. Dans l'affaire *Lagerblom c. Suède*, la Cour a considéré que l'art. 6 n'avait pas été violé même si l'aide juridictionnelle était soumise à la condition que le requérant payât une partie des frais de justice. Dans l'affaire *Orlov c. Russie*, dans lequel le requérant avait dû payer 170 EUR de frais en raison de l'aide juridictionnelle accordée, la Cour a conclu à la violation des garanties de l'art. 6 § 3b) et c) de la Convention sans toutefois se prononcer spécifiquement sur la question mais sur la base d'une évaluation globale des plusieurs défaillances au droit de la défense dans le cas d'espèce. Dans l'affaire *Chukayev c. Russie*, le requérant se plaignait de la violation de l'art. 6 § 3 de la Convention au motif qu'il avait été obligé à rembourser les frais de l'aide juridictionnelle accordée par les juridictions internes. La Cour a d'abord constaté que l'État avait pris en charge les frais de l'assistance judiciaire du requérant tout au long de la procédure et il ne cherchait à recouvrer qu'une partie de frais pour une

As for the second, the Court identified a number of criteria for determining whether the interests of justice require the granting of legal aid: the gravity of the sentence, the complexity of the case²⁸⁸ and the personal situation of the person concerned²⁸⁹. Considering the primary importance that the right to liberty plays in a democratic society, the Court stated that where deprivation of liberty is at stake, the assistance of a lawyer should be granted²⁹⁰.

The right to effective legal assistance includes the accused person's right to communicate with his/her lawyer in private and the effectiveness of legal assistance. Concerning the first point, the Court stated that only in exceptional circumstances the State may restrict confidential contact between a person in detention and his/her defence counsel (*Sakhnovski v. Russia*, GC, § 102).

In addition to confidentiality, the accused must be able to communicate with his/her lawyer, even in the presence of language barriers.

The Court recognizes that if the right to have the free assistance of an interpreter (Article 6 § 3 e) does not cover the relations between the accused and his/her counsel but only applies to the relations between the accused and the judge (*X. v. Austria*, Commission decision), However, impossibility of an applicant to communicate with his or her lawyer due to linguistic limitations may give rise to an issue under Article 6 §§ 3 (c) and (e) of the Convention (*Lagerblom v. Sweden*, §§ 61-64 ; *Pugžlys v. Poland*, §§ 85-92).

With regard to the second aspect, the Court affirmed at a very early stage that "the mere appointment of a legal-aid lawyer does not ensure effective assistance" (*Artico v. Italy*).

The effectiveness of legal assistance implies a duty of diligence of the appointed lawyer and the obligation of the State to intervene when the deficiencies of the legal aid lawyer appear obvious (*Kamasinski v. Austria*, § 65²⁹¹).

The State must provide the persons receiving legal aid with a service of such a level that the right of defence is not infringed in its substance and is guaranteed not only formally but also substantially. The Convention can thus ensure that the right to legal assistance, which is at the heart of a fair trial and an essential aspect of the rule of law principle, should be effectively recognized to disadvantaged people and does not become a privilege of those who have means to pay for a lawyer of their own choosing.

Right to access to a court and to legal aid have a lower protection in prison litigation that falls outside of the criminal limb. The obstacles encountered by detainees, due to the situation of complete dependence on the prison administration, to their socio-economic situation and to the difficulty of communicating with the outside world and accessing to digital resources are not sufficiently taken into account in order to ensure the effective access to justice. Contrary

valeur de 30 EUR environ. La Cour a enfin considéré que le requérant n'avait pas demandé une exemption des frais en raison de son indigence et a estimé qu'il est acceptable, aux termes de la Convention, que la charge de la preuve de l'insuffisance de moyens incombe à l'accusé. Le requérant n'avait présenté aucun document pouvant prouver son impécuniosité ni avait allégué aucune entrave à l'obtention de tels justificatifs. Dès lors, compte tenu du fait que le requérant avait bénéficié d'une assistance légale gratuite tout au long de la procédure et qu'il n'a pas demandé d'être exempté des frais et à la lumière également de la valeur réduite des dépens, la Cour a considéré qu'aucune atteinte à l'équité de la procédure ne pouvait être décelée en l'occurrence (§ 113-118).

²⁸⁸ Une affaire complexe en fait et en droit requiert de surcroît l'octroi de l'aide juridictionnelle. *Gutfreund c. France* ; *Granger c. Royaume-Uni* ; *Quaranta c. Suisse* ; *Pham Hoang c. France*

²⁸⁹ La Cour prend en compte à cet égard le manque éventuel de familiarité avec la langue employée devant un tribunal ou dans un système de droits particuliers (*Twalib c. Grèce*, § 53), la complexité de la procédure (*Quaranta*, cit.) et la situation personnelle de la personne intéressée (*Vaudelle c. France*, concernant une personne placée sous curatelle en raison de l'altération de ses facultés mentales) ainsi que de son âge (*Suzer c. Turquie*, 23 avril 2013, n. 13885/05)

²⁹⁰ *Benham c. Royaume-Uni* (GC); *Quaranta c. Suisse* § 33

²⁹¹

to the *Airey* case, the Court does not consider whether detained persons “would be able to present their case properly and satisfactorily” without the assistance of a lawyer.

The effectiveness of access to a court has been largely discussed in pilot judgment procedures. The Court defined in a rather precise manner the characteristics that such remedies must provide to satisfy the requirement of effectiveness, imposed by Article 13 of the Convention: a preventive and compensatory effect; the independence of the decision-making body vis-à-vis the prison administration; the binding force of decisions; the effectiveness of the repair; the respect of a reasonable time of the procedure²⁹². However, no importance has been given to legal assistance and its role as an indispensable instrument for rebalancing the asymmetry between the prisoner and the prison administration has not been duly taken into account.

Asymmetry that seems to be exacerbated by fears of retaliation or negative consequences related to the pursuit of a remedy. These may include direct reprisals by supervisors, the withdrawal of privileges by the administration, but also repercussions in terms of access to parole or other measure of individualization of sentences. Such risks are compounded by the lack of procedural safeguards for sentence adjustment, excluded from the scope of Article 6. The imbalance in the relationship between prisoners and the prison administration and the particular vulnerability of prisoners are normally taken into account by the Court's case-law as elements justifying increased procedural protection. It is sufficient to consider in this respect that Strasbourg judges recognize a reversal of the burden of proof in respect of the allegation of inhuman and degrading treatment²⁹³, justified by the particular vulnerability of persons under the exclusive control of police forces and by the fact that the administration is sometimes the only one with access to information that may prove a violation of Article 3 of the Convention²⁹⁴. Similarly, the Court recognizes the importance of the presence and assistance of a lawyer in police custody and pre-trial detention as an essential procedural safeguard to remedy the accused particular vulnerability, with the aim of avoiding ill-treatment and safeguarding the right not to incriminate oneself and to enjoy the right to a fair trial²⁹⁵. The case-law lacks coherence to the extent that these considerations do not come into play for the configuration of the right to an effective remedy. Contrary to the examples recalled, the assistance of a lawyer is not considered as an essential procedural guarantee to remedy the situation of vulnerability nor, contrary to the line followed in the *Airey* jurisprudence, a precondition for effective access to justice.

The case law on the effectiveness of remedies shows a rather formalistic approach and the right to legal aid, which should be considered as an element inherent to the effectiveness of the remedy, is completely ignored.

3.2. THE LACK OF CONSIDERATION FOR THE ROLE OF THE NGOS : THE *LOCUS STANDI* OF NGOS BEFORE THE ECTHR (UNDER ARTICLE 34 ECHR), STATE OF LAW AND PROSPECTS.

²⁹² *Ananyev c. Russie*, §§ 214-231.

²⁹³

²⁹⁴ *Torreggiani c. Italia*, précité, § 72 : « Sensible à la vulnérabilité particulière des personnes se trouvant sous le contrôle exclusif des agents de l'État, telles les personnes détenues, la Cour réitère que la procédure prévue par la Convention ne se prête pas toujours à une application rigoureuse du principe *affirmanti incumbit probatio* (la preuve incombe à celui qui affirme) car, inévitablement, le gouvernement défendeur est parfois seul à avoir accès aux informations susceptibles de confirmer ou d'infirmer les affirmations du requérant (*Khoudoyorov c. Russie*, n° 6847/02, § 113, CEDH 2005-X (extraits) ; et *Benediktov c. Russie*, n° 106/02, § 34, 10 mai 2007 ; *Brânduşe c. Roumanie*, n° 6586/03, § 48, 7 avril 2009 ; *Ananyev et autres c. Russie*, précité, § 123) ».

²⁹⁵ *Salduz* ; *Ibrahim* ; *Simeonovi* ; *Beuze* ; précités.

3.2.1 STATE OF LAW

According to Article 34 of the ECHR, every natural person as well as every non-governmental organization (NGO) or group of individuals can apply to the European Court of Human Rights (ECtHR). Article 34 of the ECHR provides that the Court “may receive application from person, nongovernmental organization or group of individuals claiming to be victim of a violation by one of the High Contracting Parties...” NGOs may, therefore, institute case before the Court as victim itself²⁹⁶ or as representative of victim²⁹⁷ and excluding, thus, an *actio popularis* challenge (see *Burden v. UK*, § 33). A scrutiny of laws by the European Court of Human Rights *in abstracto* is not foreseen in the Convention (*The Christian Federation of Jehova’s Witnesses in France v. France*) and applicants cannot have a law or regulation examined by the Court just because they deem it contravenes the Convention; they have to be personally affected (*Tanase v. Moldova*).

When laws or legal acts are concerned, establishing whether an applicant is affected in a way which gives him standing to lodge an application is not easy. In particular, it may prove difficult to discern between cases in which the applicant is considered a potential victim of a legal act and an application seeking an abstract examination of a law. The main criterion is whether the law is likely to affect him immediately or on the near future. In *Ligue des Musulmans de Suisse et autres c Suisse*, the applicants were Muslims who belonged to organizations advocating for reconciliation between Islam and other religions. They took issue with the result of a referendum in which a majority of the Swiss population had voted that the building of minarets should be prohibited in Switzerland. The ban on building minarets was not effective yet. The European Court of Human Rights declared the application inadmissible for the applicant could not claim to be a victim. It held that the result of the popular vote did not have an impact on the applicants yet and did not compel them to modify their behavior in any way.

It is not sufficient that the applicant is affected in the way that a law or measure applies to her/him in the sense that he is a resident of a certain country in which a legal act is passed or a member of the general public. For example, in *L.Z. v Slovakia*, the applicant complained about the naming of a street after a man who, according to him, had been a Nazi collaborator during the Second World War. The Court acknowledged that the issue raised by the applicant was important. It noted, however, that the applicant had not presented any evidence that the renaming of the street had had a negative impact on his private life (§ 75). Therefore it declared the application inadmissible.

3.2.2 COMPARISON WITH EU LAW

In the past, within EU law, NGOs could not be parties to a judicial proceeding unless they were either directly addressed by an EU decision, or directly and individually concerned by an EU decision or regulation. Later, the Lisbon Treaty introduced a provision expanding the right to challenge the EU measures. Article 263(4) of the Lisbon Treaty provides that: Any Natural or Legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures²⁹⁸.

This article, while maintaining the direct and individual concern principle in order to challenge the EU acts, provides that, in the case of regulatory acts, the individual concern criteria is not

²⁹⁶ *Conka and Others v. Belgium*, App. No. 551564/99 (2001). The Ligues des Droits de l'Homme could not claim since

they were not themselves victim of violation

²⁹⁷ *Yusupova and Others v. Russia*, App. No. 5428/05 (2009).

²⁹⁸ See Information and Notices in 50 OFFICIAL J. EUR. UNION (2007), available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF (last visited on Sept. 10, 2012).

required. Through this new rule of judicial review, NGOs may be recognized as having locus standi as party to challenge the regulation to protect a collective interest.

According to Article 40 of the Statute of the European Court of Justice (“ECJ”) and Article 93(1) of the Rules of the ECJ, any person establishing an interest in the result of the case submitted to the ECJ may intervene, except in the case between member States and/or institutions of the EU. An application to intervene shall be limited to supporting the form of order sought by one of the parties. The intervention must show direct and concrete interest in the outcome of the case. It is worth noting that under these provisions the intervening persons seek to protect their own interest in the dispute, not the interest of the proper administration of justice. This intervention is not thus *amicus curiae*. In various instances, NGOs attempted to intervene under Article 40 of the Statute of the ECJ, but were rejected by the Court simply because they could not have shown a direct interest established within the field of their objective²⁹⁹.

3.2.3 PROSPECTS: THE CENTRE FOR LEGAL RESOURCES ON BEHALF OF VALENTIN CÂMPEANU V. ROMANIA CASE AND THE ISSUE OF LOCUS STANDI FOR HIGHLY VULNERABLE INDIVIDUALS.

In *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (n. 47848/08) the Court granted standing to an NGO to act as a representative of a highly vulnerable person, with no next-of-kin, Mr Câmpeanu, a young Roma man with severe mental disabilities who was infected with HIV, who spent his entire life in the care of the State authorities and who died in hospital at the age of 18, as a result of neglect. He had no relatives, legal guardians or representatives, was abandoned at birth and lived in various public orphanages, centres for disabled children and medical facilities, where he did not receive proper health and educational treatment.

Undoubtedly this case falls into the category of what Dworkin calls the hard cases, since it does not fit into any of the categories covered by the Court’s case-law and thus raises a difficult question of interpretation of the Convention relating to the standing of an NGO which can’t be assumed as the direct, indirect or potential victim. The issues at stake are the principle that the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37 and the authorities cited therein) and the necessity of ensuring that the conditions of admissibility governing access to the Court are interpreted in a consistent manner. The Court considered that Mr Câmpeanu was in facts the direct victim³⁰⁰, within the meaning of Article 34 and that

²⁹⁹ See, e.g., *The Autonomous Region of the Azores v. Council*, 2004 European Court Reports (“ECR”) II-02153

³⁰⁰ The direct victim is the person, organization or groups of persons directly affected by an action or omission (*Brumarescu v. Romania*). The European Court of Human Rights interprets the term autonomously, i.e. a person or organization may be considered a victim by the Court even if he does not qualify as victim under domestic law. Victim status does not require being prejudiced (*Brumarescu v. Romania*), yet it is not possible to be the victim of an act which does not have any legal effect (*Monnat v. Switzerland*). In *Benamar and others v. France*, an expulsion order had been issued against the applicant. He was expelled, secretly returned to France and finally was granted a work and residence permit. The expulsion order was, however, never officially revoked. The European Court of Human Rights rejected his application, by which he claimed that the expulsion order violated his rights under article 8 ECHR as inadmissible because the order did not have any legal effect. Even temporary legal effects on the person concerned may suffice to be regarded as a victim. Temporary legal effects on the applicant may suffice to render him a victim. In *Monnat v. Switzerland*, the applicant was a radio journalist. Following complaints about one of his broadcasts, the official body competent for media regulation had found that the transmission violated media regulation. While the appeal by the applicant was pending, the broadcast was not available to listeners. The European Court of Human Rights held that this temporary effect was sufficient to consider the applicant as a victim. It also pointed to the negative effects on the applicant’s professional reputation. In order to give full effect to the provisions of the Convention, the ‘victim criteria must not be applied in a rigid and mechanical way (*Karner v. Austria*).

CLR could not be considered as an indirect victim³⁰¹ within the meaning of its case-law since the NGO had not demonstrated a sufficiently “close link” with the direct victim; nor had it argued that it has a “personal interest” in pursuing the complaints before the Court, considering the definition of these concepts in the Court’s case-law.

Finally the Court decided for the admissibility of the CLR’s application as a representative of the deceased, lodged with the Court after his death without any power of attorney:

Against the above background, the Court is satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law (see paragraphs 59 and 60 above; see also, *mutatis mutandis*, P., C. and S. v. the United Kingdom, cited above, and *The Argeş College of Legal Advisers v. Romania*, no. 2162/05, § 26, 8 March 2011). Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties’ obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.

Interestingly enough, for our analysis, the Court stress that even if Article 13 does not require a judicial authority, this form of procedural remedy is highly recommendable in this sort of cases:

In the Court’s opinion, the authority referred to in Article 13 may not necessarily in all instances be a judicial authority **in the strict sense**. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective (see *Klass and Others*, cited above, § 67). The Court has held that **judicial remedies furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13** (see *Z and Others v. the United Kingdom*, cited above, § 110)³⁰².

This case is potentially relevant if we consider the theoretical approach and legal reasoning of the Court in cases of vulnerable or, as in this case, highly vulnerable individuals.

As a matter of facts, the Court is ready to soften the rigidity of Article 34 rule concerning the *locus standi* in view of the “exceptional circumstances of this case and bearing in mind the serious nature of the allegations” (§112), which translated into a possible rule of reasoning in cases of highly vulnerable persons and for cases concerning violations of the most important fundamental rights, such as Article 2 and 3 of the Convention.

It appears clearly how the Court tried to affirm the exceptionality of this case in order to reduce and limit the possible development of this case as a precedent in its case law. This same point is highly criticized by the dissenting opinion of Judge Pinto de Albuquerque:

3. My point of discontent lies in the fact that the majority chose to approach the legal issue at stake in a casuistic and restricted manner, ignoring the need for a firm statement on a matter of principle,

³⁰¹ Actions or omissions which directly affect someone may also have an effect on third parties. For example, close family members of persons who are illegally detained may suffer from anxiety or grief. Third parties who are impacted by the infringement of another individual’s human rights may in certain circumstances have the right to lodge an application with the European Court of Human Rights on their own behalf as ‘indirect victims’. Persons affected indirectly only have standing if their suffering goes beyond what is normal or unavoidable in a case in which a family member is subjected to human rights violations. As the Court has held in *Cakici v Turkey*, whether close relatives can be considered indirect victims ‘will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be considered as inevitably caused to relatives of a victim of a serious human rights violation’ (para 98).

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³⁰² *Câmpeanu*, cited, §149, emphasis added.

namely the requisites for representation in international human rights law. The judgment was simply downgraded to an act of indulgence on the part of the Court, which was willing to close its eyes to the rigidity of the requirements of the concept of legal representation under the European Convention on Human Rights (“the Convention”) and the Rules of Court in “the exceptional circumstances of this case” (see paragraphs 112 and 160 of the judgment), and to admit the CLR as a “*de facto* representative of Mr Câmpeanu” (see paragraph 114 of the judgment). To use the words of Judge Bonello, this is yet another example of the “patchwork case-law” to which the Court sometimes resorts when faced with issues of principle.

The dissenting opinion proposes a principled reasoning, affirming that:

When confronted with a situation where the domestic authorities ignored the fate of the alleged victim of human rights violations, and he or she was unable to reach the Court by his or her own means or those of a relative, legal guardian or representative, the Court has to interpret the conditions of admissibility of applications in the broadest possible way in order to ensure that the victim’s right of access to the European human rights protection system is effective. Only such an interpretation of Article 34 of the Convention accommodates the intrinsically different factual situation of extremely vulnerable persons who are or have been victims of human rights violations and are deprived of legal representation.

Yet, it can be discussed that the potentiality of this case could be assessed having in mind the argumentative approach of high vulnerability cases. Even this “strictly opportunistic and utilitarian case-sifting methodology³⁰³” can be used in analogous cases, discussing the contextual version of the notion of vulnerability and the fact that the rationale for vulnerable position can be totally dependent on the subordination to the state authority. This situation is able to afford a reinforced positive obligation to member state in order to provide the highly vulnerable person with the proper tools for the effectiveness of the right to access to justice.

This implies a taxonomic work in order to identify, with a case by case approach combined with the principled reasoning proposed by Judge Pinto de Albuquerque, the situation in which an individual is completely dependent and subordinate to the state authority in condition of deprivation of liberty. In these cases, free and effective legal aid, combined with the provision for legal information and legal counselling provided by NGOs in prison and in police custody centres (as well as in all detention sites³⁰⁴, such as detention of migrants sites and total institutions) could be a key-point in order to reduce the risk of being completely devoid of the Conventional protection.

This should be paired with considerations for the possibility of establishing and assigning *locus standi* directly to NGOs in cases in which the highly vulnerable individual needs protection against violations of Article 2 and 3 rights, creating a concept of *de facto* representation, for cases involving extremely vulnerable victims who have no relatives, legal guardians or representatives.

To echo the consequentialist approach of the Court in *Câmpeanu* of the Court Article 34 of the Convention, “to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law”. This position can also be interpreted as a fulfillment of the subsidiarity principle and the provision of Article 34 stating that: “The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

³⁰³ Dissenting Opinion, cited, §6.

³⁰⁴ Relevant is to mention here that, as an example of the future challenge awaiting the Court, the new legislative decree on migration and public security in Italy, d.l. 113/2018, open for an indeterminate number of places for the detention of migrants in Italy.

Three subsequent cases are showing the limits and potentialities of this perspective within the ECtHR's case law.

In *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania* (n.2959/11), an application was lodged by an NGO (APADOR – CH), on behalf of a prisoner Mr Garcea, who died in prison in 2007. While serving a seven-year sentence, Mr Garcea was diagnosed with a mental illness and other health problems and was under regular supervision of the prison medical service. He had been in contact with the applicant association since the beginning of his prison term. In August 2004 he inserted a nail into his forehead and in early 2005 attempted suicide. Mr Garcea alleged that he was beaten up on several occasions and handcuffed and chained to a hospital bed. The applicant association lodged complaints with the domestic authorities after visiting him, stating that the lack of medical treatment amounted to torture and urging the prison authorities to stop using force against him. In June 2007 Mr Garcea inserted another nail into his forehead and was operated on in a civilian hospital. After his final return to the prison hospital he died there in July 2007.

The applicant association lodged an administrative complaint with the prison administration requesting an investigation into Mr Garcea's medical treatment. The prosecutor's office decided not to prosecute the prison doctors. Concerning the allegations of ill-treatment through improper medical care a court of appeal ordered that the investigation be continued in February 2011 after finding that the conditions that had precipitated Mr Garcea's death had to be established.

Concerning Article 34, the respondent Government submitted that the applicant association did not have *locus standi* as it did not fulfil the *ratione personae* criteria and was not able to show a strong link with Mr Garcea. The Court recalled its decision in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* to reaffirm that in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention. As in that case, serious allegations of violations of Articles 2, 3 and 13 of the Convention had been made in respect of a person with no known relatives and suffering from mental illness. Even though, unlike Mr Câmpeanu, Mr Garcea could have lodged a complaint during his lifetime, but at the same time had a relatively closer connection with the association that represented him, the Court considered that the applicant association had standing as his *de facto* representative.

Even in this case, the Court relies on the special vulnerability of the person, a multiple contextual vulnerability of a mentally ill, disabled detained person:

66. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 131, with further references).

More recently, another case saw the affirmation of the *locus standi* for an NGO in case of a deceased prisoner. In *Kondrulin v. Russia* (application no. 12987/15) there is a significant difference with the previous cases against Romania, the first applicant was in fact, the same direct victim, Vladimir Kondrulin, a Russian national. In February 2014, while serving a 13-year and ten month prison sentence for a criminal offence, Mr Kondrulin was diagnosed with terminal prostate cancer. In October 2014 this diagnosis was confirmed by a medical panel, which also checked Mr Kondrulin's medical condition against a list of illnesses provided for by Government decree which could have warranted his release. The panel concluded that his medical condition made him eligible for early release. In January 2015 a hearing was thus held

to examine Mr Kondrulin's request for early release. The doctor who was treating him testified in court that his condition had significantly deteriorated since the beginning of 2014. The court rejected, however, his request for release, finding that he had failed to reform while in detention and that his illness did not preclude further detention as the requisite medical treatment was available within the prison system. This decision was upheld on appeal in April 2015. In the meantime, in March 2015 the European Court of Human Rights (ECtHR) decided to apply interim measures under Rule 39, indicating to the Russian Government that Mr Kondrulin should immediately be examined by independent medical experts with a view to assessing: whether his medical treatment in the prison hospital was adequate; whether his condition required him being placed in a specialist, possibly civilian, hospital; and whether his state of health was compatible with detention in a prison hospital at all. The Government responded in April 2015 and, relying on a number of documents (including a copy of Mr Kondrulin's medical file, certificates, reports and statements), asserted that the medical treatment in the prison hospital corresponded to his needs. In the absence of any arrangements for an independent medical examination having been carried out as requested by the ECtHR, Mr Kondrulin's lawyer summoned two independent doctors to assess his client's state of health as well as the medical treatment he was receiving. They issued a report in May 2015 concluding that Mr Kondrulin's treatment in the prison hospital was inadequate. Mr Kondrulin's health continued to deteriorate and he died of cancer on 15 September 2015, four days before a hearing was scheduled to examine another request for his early release on health grounds. Mr Kondrulin's lawyer requested an inquiry into the circumstances of his client's death, but it ended with a decision in October 2015 not to open a criminal case.

The Court noted that Mr Kondrulin had died in custody, leaving no known relatives. The Russian NGO, AGORA Interregional Association of Human Rights Organisations ("Agora"), had represented Mr Kondrulin in his proceedings against the domestic authorities, and continued to do so even after his death, without the authorities ever having expressed any objections. Given their strong link with Mr Kondrulin and, bearing in mind the exceptional circumstances of the case as well as the serious nature of the allegations, the Court found that Agora's lawyers had standing to continue the application. It noted in particular that, in such cases as Mr Kondrulin's, not leaving it open to associations to represent victims ran the risk of allowing a State to escape accountability under the European Convention:

31. ...It has been also established that, in exceptional circumstances and cases concerning allegations of a serious nature, it should be open to associations to represent victims in the absence of a power of attorney, and notwithstanding that a victim may have died before the application in question was lodged under the Convention. The Court considered that to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that a respondent State might escape accountability under the Convention (see Centre for Legal Resources on behalf of Valentin Câmpeanu, cited above, § 112, and Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, no. 2959/11, § 42, 24 March 2015). 32. Considering the information in its possession, the Court notes that the applicant died in custody. He left no known relatives. Agora's lawyers represented him in his proceedings against the domestic authorities, and continued to do so even after his death, in the absence of any objections from the respective authorities. Accordingly, the Court considers that there was a strong link between the applicant and Agora. 33. Against the above background, the Court is satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to Agora to pursue the application (see, *mutatis mutandis*, Centre for Legal Resources on behalf of Valentin Câmpeanu [GC], cited above, § 112).

It seems that the "Câmpeanu test" imposes a two-steps assessment: first the strong link between the direct victim and the representing NGO and the exceptional circumstances of the case. This last criterion is established according to a number of not alternative conditions: 1. The special vulnerability of the direct victim, making it impossible for him to complain during his lifetime; 2. the importance of the allegations brought before the Court (the serious nature of the allegation, i.e. an alleged violation of Article 2 or 3 of the Convention); 3. the absence of heirs or legal representatives likely to seize the Court. The first criterion requires the NGO's contact with the victim and its intervention in the internal proceedings following the death, as

well as the recognition of its *locus standi* at a national level by the domestic authorities (see, *Câmpeanu*, cited above); §§ 104-111).

This trend toward the substantiation of the role of NGOs working with prisoners and the special protection for highly vulnerable persons has been recently interrupted by an inadmissibility decision of the Court. This decision allows us to highlight a number of shortcomings deriving from the “exceptional circumstances” approach adopted by the Court in *Câmpeanu*. In *Bulgarian Helsinki Committee v. Bulgaria* (dec., no.35653/12 66172/12) the critical issue arises on the criterion of the strong link between the direct victims and the NGO. Alarmed by a BBC documentary denouncing the situation of children with mental disabilities in an institution in Bulgaria, the NGO Bulgarian Helsinki Committee requested the State Prosecutor to investigate the conditions under which these children were accommodated in the home, and the deaths occurring there. In cooperation with the applicant organization, the State Prosecutor inspected various homes for disabled children. The association monitored the criminal investigations and lodged appeals against a number of decisions not to prosecute and discontinuance orders. Because a final judgment discontinued the investigations in the cases concerning the death of Aneta Yordanova and Nikolina Kutsarova, the applicant organization took these to the European Court of Human Rights.

Having regard to the exceptional nature of that application of the concept of *locus standi*, the criteria set forth in *Câmpeanu* were decisive for the examination of the present applications. The exceptional circumstances criterion was met: the direct victims, on account of their mental disability, their *status* as abandoned children and their extreme vulnerability, had not been in a position to complain, while alive, of the conditions in the home where they had been placed³⁰⁵. As the young girls had been abandoned at birth and had not had any contact with their biological parents while alive, and one of the mothers had explicitly waived parental rights, the children had *de facto* led an orphan’s life in the institutions in which they had been placed. Accordingly, even if the mothers remained the children’s legal representatives under domestic law, there had been no real link in the present case between the parents and children, with the result that no one had been responsible for protecting the children’s best interests. Accordingly, the parents in question could not be regarded as persons “capable of lodging an application with the Court”.

Nevertheless, the Court found that the “strong link” criterion was lacking: the applicant association had not had any contact with the adolescent children and had not taken an interest in their case prior to their deaths, which had occurred in October 2006 and October 2007 respectively. Long periods had elapsed not only between the girls’ deaths and the first steps taken by the applicant association in the respective investigations, but also between the decisions discontinuing the proceedings, of which the applicant association had already learnt, and their applications to the prosecution to have the investigations reopened.

Also, even if the NGO had intervened at domestic level it had not had formal standing in the domestic proceedings under Bulgarian law. It had not been party to the proceedings and had not enjoyed the procedural rights granted to the parties. It had only been able to challenge the prosecutor’s discontinuance orders and had not subsequently had the right to appeal against them before the courts.

³⁰⁵ 53. Pour ce qui est de la vulnérabilité des personnes concernées, la Cour remarque que, comme dans l’affaire *Câmpeanu*, précitée, les victimes directes, en raison de leur handicap mental, de leur statut d’enfants abandonnés et de leur grande vulnérabilité n’étaient pas en mesure de se plaindre de leur vivant des conditions dans lesquelles elles avaient été placées (*Câmpeanu*, précité, § 108). De même, les présentes requêtes soulèvent des allégations sérieuses de violation des articles 2 et 3 de la Convention (*ibidem*, § 112).

This formalistic approach does not provide a clear distinction on this ground between *BH* and *Câmpeanu*, since it is not self-evident whether domestic law granted full power of representation in *Câmpeanu* or they just acquiesced. Moreover, as stated:

To link the standing before the ECtHR to standing on the national level, is a dangerous practice. An undesirable consequence could be that states will become very careful in granting standing. It might even induce some to take measures not to accept or allow NGOs to represent victims at the national level, in order to circumvent subsequent standing of these same NGOs at the regional or international level. That this is not in the interest of the most vulnerable in society is self-evident³⁰⁶.

This interpretation seems at odds with the principle of effectiveness and directly and critically link the protection of fundamental conventional rights to domestic legislation, creating a pure discrimination between applicants in view of their nationality. This decision seems also to be in contrast with the very essence of the reasoning within the perspective of vulnerability, since the same fact that the domestic legislation excludes representation for these sort of cases render the individuals more vulnerable and therefore more in need of the same representation at an international level.

Conclusion

As we have seen, the absence of legal aid in domestic penitentiary issues is hardly ever sanctioned as such by the ECtHR. The development of the effective access to justice in prison is largely left to the initiative of NGOs, *pro bono* lawyers, associations and more or less formalized networks of professionals who act as “smugglers of law”. The recognition of a legal standing for NGOs representing the interests of prisoners before the ECtHR, which could partly compensate for the legal vulnerability of persons deprived of their liberty, is highly ambiguous. We could argue that a better recognition for NGOs would be likely to lead to a faster resolution of structural or systemic problems in European prisons.

3.3 PROSPECTS

3.3.1 VULNERABILITY IN CONTEXT : A TOOL FOR EXPANDING THE RIGHT TO ACCESS TO JUSTICE IN PRISON

According to a study by Al Tamimi on the protection of vulnerable groups and individuals by the European Court of Human Rights: “in recent years, vulnerability reasoning has played an increasingly prominent role in the case law of the ECtHR. Some have gone as far as calling the trend a revolution³⁰⁷”.

As shown by Peroni and Timmer³⁰⁸, the Court originally used the notion of vulnerability in cases involving Roma minorities, and has structured the line of reasoning along a contextual version of vulnerability, considering the specific historical and social feature of the targeted groups:

³⁰⁶ H. de Vylder, “The saga continues ... Legal standing for NGOs when de facto representing mentally disabled dying in institutions”, *The Strasbourg Observer*, August 29, 2016, available at: <https://strasbourgobservers.com/2016/08/29/the-saga-continues-legal-standing-for-ngos-when-de-facto-representing-mentally-disabled-dying-in-institutions/>

³⁰⁷ Y. Al Tamimi, *The protection of vulnerable groups and individuals by the European Court of Human Rights*, PhD Thesis, May 20, 2015, p. 5, citing A. Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’, in: M. Fineman & A. Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Farnham: Ashgate, 2013, pp. 147-170. Al Tamimi’s work is available at: <https://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf>;

³⁰⁸ See, L. Peroni, A. Timmer, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law”, *ICON*, (2013), Vol. 11 No.4, 1056-1085.

"[A]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority ... As the [European] Court [of Human Rights] has noted in previous cases, they therefore require special protection ...³⁰⁹". The Court went on expanding the scope of vulnerability to mentally disabled persons, by recognizing them as a "particularly vulnerable group in society, who have suffered considerable discrimination in the past."³¹⁰ The same notion was used for asylum seekers³¹¹ and people affected by HIV³¹².

From a theoretical point of view the same notion of vulnerability needs to be assessed from a critical point of view³¹³, following Fineman's discussion on the myth of the personal autonomy of the liberal subject³¹⁴. Fineman argues that the legal implications of the term vulnerability, specifically, in international human rights law, applied only to specific marginalized identities and groups, only serves to sustain the liberal myth that, "normally," people are self-sufficient, independent, and autonomous. As affirmed by Peroni and Timmer: "Instead Fineman proposes to understand vulnerability as a "universal, inevitable, enduring aspect of the human condition" and posits that the proper role of the state is to be responsive to this. She presents her vulnerability thesis as an alternative to traditional group-based US equal protection analysis. Fineman argues that her analysis is capable of delivering substantive equality (where the traditional analysis has failed) because her thesis turns the inquiry to the "institutional practices that produce the identities and inequalities in the first place."³¹⁵.

Starting with the etymological analysis of the word, 'vulnerability' stems from the latin word, *vulnus*, wound, and is therefore embodied in the corporeal dimension of physical suffering and harm³¹⁶. As a result vulnerability is a conditions that pertains to every human being for the same fact of being human, of being a 'social animal', since the notion of vulnerability bears a strong relational nature: "[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) . . . Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds."³¹⁷

Now all of these dimensions can be traced in the ECtHR's understanding and elaboration of its own autonomous concept of vulnerability. The anti-essentialist, relational, contextual nature of vulnerability and the fact of being harm-based are all matched in the casuistic approach employed by the Court:

Based on a close reading of the case law, our understanding is that the concept of group vulnerability, as used by the Court, has three characteristics: it is relational, particular, and harm-based. The Court's account of group vulnerability is first of all relational. As already transpired from Chapman, the Court locates vulnerability not in the individual alone but rather in her wider social circumstances. The Court's notion of vulnerable groups is thus relational because it views the vulnerability of certain groups as shaped by social, historical, and institutional forces. In other words, the Court links the

³⁰⁹ *D.H. and Others v. the Czech Republic*, n. 57325/00, Grand Chamber judgment of 13 November 2007, § 182.

³¹⁰ *Alajos Kiss v. Hungary*, n. 38832/06, 20 May 2010, §42.

³¹¹ See, *M.S.S. v. Belgium and Greece*, n. 30696/09, §251 (2011).

³¹² See, *Kiyutin v. Russia*, n. 2700/10, §63 (2011).

³¹³ Along with Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008–2009), ID., *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 268 (2010), ID., "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 THE ELDER L.J. 101 (2012).

³¹⁴ M. Fineman, *The Autonomy Myth: A Theory of Dependency*, The New Press, 2004.

³¹⁵ L. Peroni, A. Timmer, cited above, p. 1064.

³¹⁶ See e.g., J. Butler, *Precarious life : the powers of mourning and violence*, London ; New York, N.Y. : Verso, 2006; R. E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, University of Chicago Press, Chicago and London, 1986.

³¹⁷ Mary Neal, "Not Gods but Animals": Human Dignity and Vulnerable Subjecthood, 33 LIVERPOOL L. REV. 177, 186–187 (2012), as cited in L. Peroni, A. Timmer, cited above.

individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of. The emphasis on context inherent in the relational character of the Court's understanding of group vulnerability is in line with contemporary analyses that use vulnerability as a critical tool. As we have seen in Section 2.2, they all insist on the need to explore the role of societal or institutional arrangements in originating and maintaining vulnerability³¹⁸.

Now, what is particularly relevant is that the Court included prisoners within the category of vulnerable persons according to a specific reasoning, resting on the individual analysis of the different cases and not on the abstract characteristics of a "group".

As a matter of facts, the vulnerability reasoning cannot be considered as a doctrine, but rather as a "a case by case development, over time, in a wide variety of settings (...) which has crystallised into a particular interpretative approach employed by the Court in such cases in recognition of the factor of vulnerability³¹⁹". This casuistic approach has been criticized has been too loose and undefined, but it was argued that:

the categories of vulnerability in the Strasbourg system are loosely delineated to allow the Court the broadest freedom in future cases to identify other groups and categories that merit special attention. While this may be a point of criticism for some pointing to a certain laxity in the development of the notion, it is, in my view, necessary for an international human rights court faced with the complexities of modern life and the often unforeseeable realities of disadvantage and stigma to leave the categories of vulnerability open³²⁰.

Chenal goes even further holding that a system based on principles and fundamental rights cannot accept an abstract definition of the notion of vulnerability³²¹. In his view only a case by case approach and the same relational nature of the notion of vulnerability serves the purpose of the effective protection of conventional human rights³²².

Today, among all the categories, groups or individuals considered vulnerable, to different extent and degrees, by the Court (Al Tamimi counts: prisoners, non-nationals, victims, suspects, roma people, children, mentally ill persons and HIV persons, while Peroni and Timmer distinguish between vulnerable groups, roma people, asylum seekers, mentally ill persons and HIV persons and vulnerable individuals: prisoners and children³²³) prisoners are by far the most mentioned vulnerable category in the Court's judgments. In a first stage of this reasoning approach, the Court accepted that there are certain categories of prisoners that are vulnerable: these were prisoners who had been subject of ill-treatment, mentally ill prisoners or those who did not speak the language of the legal officer (see inter alia, *T.W. v. Malta*, 29 April 1999, no. 25644/94). Subsequently the Court came to the conclusion that all persons that are held in detention are in a vulnerable position, see the Grand Chamber case of *Salman v. Turkey* ([GC] 27 June 2000, no. 21986/93): "In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding

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³¹⁹ M. O'Boyle, « The notion of "vulnerable groups" in the case law of the European Court of Human Rights », p. 2-2, available in [https://www.venice.coe.int/webforms/documents/?pdf=CDL-LA\(2016\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-LA(2016)003-e)

³²⁰ Ivi, p. 10.

³²¹ R. Chenal, « La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali », in *Ars Interpretandi*, 2/2018 ;

³²² Ivi, p. 51.

³²³ See Peroni and Timmer, cited above, footnote n.7: "We will confine ourselves to the case law in which the Court speaks of vulnerable groups. There is a considerable amount of case law in which the Court recognizes that the applicant is in a vulnerable position individually, notably in cases concerning prisoners or children. These cases, however, lack a group-centered analysis and therefore raise different kinds of questions than the ones we address in this article. For an analysis of this other area of the Court's vulnerability case law, see 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* (Martha Fineman & Anna Gear eds., 2013)."

circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.”.

Now, this poses the question of the nature of the notion of vulnerability involved in the Court's case law. From a theoretical and methodological point of view, the Court adopts a casuistic approach to the understanding of a position of vulnerability, choosing a relativistic, contextual approach instead of an abstract and absolute version of the notion of vulnerability. As a consequence, the prisoners are not vulnerable person *ex se*, but they are vulnerable because they are in prison. So, the determinant for their vulnerability can be traced in their subjection to state control. The Court has held, in *Denis Vasilyev v. Russia*, that the dependence of prisoners on the authorities is the reason for their vulnerability. In other cases, the Court held that prisoners are vulnerable because they are limited in terms of access to medical assistance (*Wenerski v. Poland*). Other conditions during an imprisonment can exacerbate the vulnerable position of a prisoners, for example if the prisoners is held in custody with limited contacts with her/his family or the outside world, when she/he has had no representative during the proceedings or when a prisoners has noticed another prisoners being harmed or killed. The prisoners' situation is also considered particularly vulnerable when he has no representative, either in the criminal procedure (*Levinta v. Moldova*) or in the proceedings before the Court (*Ponushkov v. Russia, inter alia*). Finally, the length of the period of detention also influences the level of vulnerability, meaning that a person that is detained for a long period of time is considered particularly vulnerable, and vice versa (*Ochelkov v. Russia*).

Parallel to the notion of multiple discrimination or multi-factors discrimination, the Court has created the idea of multiple vulnerability factors. At first, next to the 'ordinary' prisoners, the Court has involved vulnerability reasoning in quite a number of cases involving mentally ill prisoners. The Court considers prisoners with a mental disorder either as 'particularly vulnerable prisoners', or as 'more vulnerable than the average prisoners' , or as prisoners 'in a particularly vulnerable situation' (See *inter alia: Munjaz v. the United Kingdom; Halilovic v. Bosnia and Herzegovina; Claes v. Belgium; Dybeku v. Albania; Sławomir Musiał v. Poland.; Lashin v. Russia*).

The Court has also considered prisoners who have health problems as vulnerable. As was the case with mentally ill prisoners, the health issues of prisoners are circumstances that make them 'particularly vulnerable' and 'more vulnerable than the average prisoners'.

Concerning the legal implications of vulnerability, always following Al Tamimi's research, the most evident consequence of recognizing a subject as vulnerable is that the state has a special positive obligation to protect that subject. The Court has, in different situations and with regard to different Articles of the Convention, made clear that vulnerable individuals and groups require special protection by the state, therefore expanding the scope of positive obligation for the States. The most evident consequence of recognizing a subject as vulnerable is that the state has a special positive obligation to protect that subject. The Court has, in different situations and with regard to different Articles of the ECHR, made clear that vulnerable individuals and groups require special protection by the state. The obligations differ per vulnerable subject and interest that needs to be protected. The Court has put special positive obligations on the state with regard to the right to life (Article 2 ECHR) and the prohibition of inhuman or degrading treatment or punishment (Article 3 ECHR) in cases where authorities are concerned with vulnerable subjects, i.e. prisoners;

In multiple cases about mentally disabled prisoners, the Court has held that the assessment of whether a treatment or punishment is compatible with the standards of Article 2 and Article 3 ECHR has to take into consideration the vulnerability of prisoners.

The expanded obligations vis-à-vis prisoners under Article 3 ECHR were further developed in *Orchowski v. Poland*. The Court gives a specific description of what it requires of a detention policy in order to be in accordance with Article 3 ECHR, namely that a person is detained “in

conditions which are compatible with respect for his human dignity”. The Court relied on the vulnerability of prisoners to demand a higher level of diligence from the state, and ultimately found a breach of Article 3.

Additionally, a lack of medical attention for detained persons with HIV or other health issues is regarded as a violation of Article 3 ECHR. States are obliged to take the vulnerability of these individuals into consideration and have a special duty to provide them with adequate and necessary medical assistance, in particular when it has been established that such treatment is urgent.

Adequate medical assistance means that the prisoners is regularly checked by “sufficiently qualified medical personnel” capable of effectively assessing his condition and setting up an adequate course of treatment for his health issues. This obligation pertains all the more to the assistance of prisoners with a physical disability.

Another implication of vulnerability in the Court’s case law is that the margin of appreciation of the state with regard to the vulnerable subject is narrowed. In several cases, the Court has held that the margin of appreciation afforded to the State is narrow when the restriction on fundamental rights applies to a vulnerable person.

Concerning the implication for the admissibility of the case, in *Tokić and others v. Bosnia and Herzegovina*), the applicants were charged with several criminal offences. They were all found not guilty due to insanity and ordered to be detained in the psychiatric wing of a prison. The case concerned the applicants’ complaint about the unlawfulness of their detention in that institution. One of the applicants, Mr Alibašić, had failed to go to the Constitutional Court, and therefore had not exhausted all domestic remedies. Nevertheless, the Court held that Mr Alibašić’s vulnerable position and the fact that the Constitutional Court had already ruled in a similar case made his complaints admissible.

A second procedural implication of vulnerability is the reversal of the burden of proof from the applicant onto the authorities. The most significant reversal of the burden of proof occurs in cases concerning detention. In these cases, the Court has found that – due to the vulnerable position of detained persons – the state is required to provide an explanation if the person were to be harmed while in detention and has used this principle consistently in its case law on overcrowding and prison conditions.

All of these examples make it clear that the Court adopt a notion of vulnerability strictly rooted in the concept of physical suffering and bodily harm: the Court considers prisoners vulnerable because they are under the control of the state and therefore their physical well-being depends on the state. As noted by Timmer, this notion of vulnerability is too narrow and limited³²⁴ to issues arising under Article 3 concerning physical state control, underestimating the issue of political and legal vulnerability of prisoners. The paradigmatic example is the *Scoppola v. Italy* (no 3), in which the Court held that disenfranchising certain prisoners for life pursues “the legitimate aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime³²⁵”.

The same consideration could apply with respect to legal vulnerability of prisoners, considered on a case by case perspective, but starting from the consideration that the essence of imprisonment is not only state control in physical well-being, but also the level of dependence and subjection from state authority and control in the area of personal autonomy, access to information and legal information in particular, contacts with the outside world, specifically concerning contact with lawyers or legal assistants. The legal vulnerability of prisoners should

³²⁴ A. Timmer, « A Quiet Revolution : Vulnerability in the European Court of Human Rights », in M. Fineman, A. Grear (Eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Routledge, 2013.

³²⁵ *Scoppola v. Italy* (No.3), Grand Chamber, n. 126/05, §92.

be assessed according to an analysis of the prison context and the specific condition of deprivation of liberty.

In this perspective, a potentially exportable reasoning is presented by the Court in the case *Aden Ahmat v. Malta* of 23 July 2013 (n. 55352/12). The Court consider the specific vulnerable position of the applicant: “not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances (see also *M.S.S.*, cited above, § 232), but also because of her fragile health” and finds a violation of Article 3 of the Convention, also affirming that the absence of a structured system of legal aid posed in itself a problem in terms of access to remedy, regardless of the merits thereof (§66):

The Court is struck by the apparent lack of a proper structured system enabling immigration detainees to have concrete access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of an immigration detainee making use of legal aid (moreover, in different and more favourable conditions than those of boat people) despite the hundreds of immigrants who reach the Maltese shores each year and are subsequently detained, and who often have no means of subsistence, only highlights this deficiency.

The Court is linking directly the condition of vulnerability of “boat people” to the reinforced positive obligation for states to provide a proper and structured system of “concrete access to legal aid”.

This findings are likely to be transposed to disputes regarding the prison system, in view of the specific, contextual vulnerability of persons deprived of their liberty.

The vulnerability-oriented reasoning should be paired with the principle of effectiveness in order to understand how to better secure access to justice for marginalized and socially excluded persons, in order to guarantee the protection of their fundamental conventional rights. As Tulkens puts it:

Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a cycle of impunity, deprivation and exclusion. Moreover, the relationship between poverty and obstructed access to justice is a vicious circle: the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems³²⁶.

This brief overview can be a useful tool in order to substantiate a line of reasoning concerning legal vulnerability in access to justice for European prisoners. The litigation in this field should keep into consideration the special

3.4 THE IMPACT OF AUSTERITY POLICIES ON THE ACCESS TO JUSTICE FOR DETAINEES. THE EUROPEAN COURT OF HUMAN RIGHTS CONFRONTED WITH THE “HUMAN CONSEQUENCES OF THE ECONOMIC CRISIS”.

The economic crisis that Europe and the world have experienced in recent years has caused challenges for the protection of fundamental rights in Europe. The negative effects of austerity policies on fundamental rights protection have been monitored and denounced by several European institutions.

On the “State of democracy, human rights and rule of law” report (April 2014), Secretary General M. Thorbjørn Jagland declared: « Les droits des personnes sont menacés par l'impact

³²⁶ Françoise Tulkens, « The contribution of the European Convention on Human Rights to the poverty issue in times of crisis », Paper delivered in the European Court of Human Rights on 8 July 2015, para 23 and fn 32.

de la crise économique et les inégalités croissantes. Les sociétés européennes ont souffert des effets de la récente crise économique, qui a profondément affecté la cohésion sociale dans de nombreux États membres et qui pourrait menacer à la fois l'État de droit et la démocratie »³²⁷.

These concerns are shared by the Council of Europe Commissioner for Human Rights and the European Agency for Fundamental Rights³²⁸. The Commissioner for Human Rights stressed that vulnerable and marginalized groups are hit hardest, especially in terms of access to justice. In his recommendations to Member States, the Commissioner called on Governments to "guarantee access to justice for all", in order to ensure the equal and effective enjoyment of all human rights - civil, political, economic, social and cultural - in times of economic crisis and austerity. Council of Europe member states have been invited to "ensure effective access to justice despite economic difficulties, by ensuring proper functioning of the judicial system, the legal aid system and complaint mechanisms that are easy to reach (...). Particular care should be taken in providing assistance and legal assistance to disadvantaged and marginalized groups so that they can express their grievances ". Prisoners are considered particularly vulnerable in times of economic crisis when they often came from difficult socio-economic context and often lack financial and cultural conditions³²⁹.

The crisis negative impact on detainees rights has been highlighted by Mr Dean Spielmann, former President of the European Court of Human Rights, in his speech at the opening of the *colloquium*: "Implementing the European Convention on Human Rights in times of economic crisis" in January 2013. Juge Spielmann stated that: "It must be said that those most affected by the crisis are the vulnerable, for example prisoners (and in difficult times many people clearly find it hard to accept high expenditure on prison renovation)"³³⁰.

In this context, the ECtHR had to discuss about the "human consequences of the economic crisis"³³¹.

The Court adopted a twofold attitude: on the one hand the Court, invoking the principle of subsidiarity, adopts a self-limitation *when addressing major economic decisions*, on the other hand the Court shows intransigence when it comes to preserving the core Convention rights: namely non-waivable rights and principles related to the concept and values of the rule of law, like the right to a fair trial.

The self-limitation approach has been adopted in the context of legislative measures affecting salaries and pensions.

In view of the wide margin of appreciation of States in the field of economic and social policies, the Court has, in its case-law, given precedence to state reasons for the fundamental rights

³²⁷ "State of democracy, human rights and rule of law in Europe" (SG(2014)1- Final), pp. 5 and 4."

³²⁸ European Union Agency for Fundamental Rights Agency (2013). *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*. Brussels. Available at <http://fra.europa.eu/en/publication/2013/european-union-community-values-safeguarding-fundamental-rights-times-crisis>. Such concerns were shared by the Commissioner for Human Rights of the Council of Europe and the European Agency for Fundamental Rights Commissioner for Human Rights of the Council of Europe (2013). *Safeguarding human rights in times of economic crisis*. Strasbourg: Council of Europe. Available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=2130915&direct=true>

³²⁹ *Ibid*.

³³⁰ Dialogue between Judges 2013, "Implementing the European Convention on Human Rights in times of economic crisis", Seminar of 25 January 2013, p. 5.

³³¹ L.A. Sicilianos, The European Court of Human Rights at a time of crisis in Europe, SEDI/ESIL Lecture of 16 October 2015, https://www.echr.coe.int/Documents/Speech_Judge_Sicilianos_Lecture_ESIL_20151016_ENG.pdf

affected by such measures. Often the economic parameters and the crisis context have become the strong points of the Court's argument. In *Koufaki and Adedy v. Greece* case, concerning a whole series of reductions in salaries, pensions and other benefits following the austerity measures adopted in 2010-2011, the Court declared the applications inadmissible in view of the wide margin of appreciation in regulating their social policy and taking into account that measures pursue a legitimate aim "in the public interest" and also coincided with those of the euro area Member States, in view of the requirement under European Union legislation to ensure budgetary discipline and preserve the stability of the euro area.³³² This decision has been followed in several occasions, for example in cases concerning austerity measures in Portugal (*Da Conceição Mateus and Santos Januario v. Portugal*³³³ ; *Da Silva Carvalho Rico v. Portugal*³³⁴), in Lithuania (*Savickas v. Lithuania*) and Italy (*Aielli and Arboit v. Italy*³³⁵).

In all these cases, the context of crisis coupled with the doctrine of the margin of appreciation alone justified the finding of no violation or the rejection of the applications as manifestly ill-founded and the closure of the examination at the admissibility stage without a decision in the merits. Only sparingly and in very exceptional situations the Court intervenes in the choice of priorities and of major economic measures finding a violation of the Convention in the context of austerity measures. For example, in *N.K.M. v. Hungary* case the Court found a violation of the right to the enjoyment of possessions in the context of austerity measure. It concerned a severance payment of which a portion had been taxed at 98%. As well, in *Belane Nagy v. Hungary*, concerning loss of disability benefits due to newly introduced eligibility criteria, the Court found that the disputed measure failed to strike a fair balance between the interests at stake, there was no reasonable relation of proportionality between the aim pursued and the means applied and found a violation of Article 6.

By contrast, the Court shows intransigence when it comes to preserving the essence of the Convention, and primarily the non-waivable rights, severely affected by economic crisis. Although several European states were already seriously concerned about prison overcrowding before the economic crisis, the latter aggravated it in some countries, in particular because of staff reductions and the lack of resources to improve conditions of detention.

The absolute nature of those rights requires a strong position of the Court, which, in turn, requires States to organize their penal system in a manner that ensured respect for the dignity of detainees, "regardless of financial or logistical difficulties"³³⁶.

While recognizing that prisons generally require the mobilization of significant financial resources, the Court has often emphasized in its case-law that lack of financial resources cannot justify detention conditions that are incompatible with Article 3 of the Convention.

Following this approach, the Court has adopted several pilot and quasi-pilot judgments concerning conditions of detention³³⁷ and has imposed on States a sort of 'obligation of result', to ensure that in all circumstances the conditions of detention continue to meet the requirements of Article 3, even if that means changing penal policy and mobilizing financial resources.

While these cases have led to a major reorganization of the national penitentiary systems and have led to the establishment of a domestic system of preventive and compensatory remedies, the accessibility and effectiveness of such remedies has been approached in a rather artificial

³³² *Koufaki et Adedy c. Grèce*, § 31.

³³³ Arrêt du 8 octobre 2013, n. 62235/12 et 57725/12 ;

³³⁴ Décision d'irrecevabilité du 24 septembre 2015, n. 13341/14 ;

³³⁵ Décision d'irrecevabilité du

³³⁶ *Orchowski c. Pologne*

³³⁷

manner. In its case-law, the Court has drawn attention to the requirements of prompt and effective redress.³³⁸

However, the effectiveness dimension of such remedies has not been taken into account in the Court reasoning, which does not duly consider the difficulties linked to prison and to prisoners' special vulnerability. Effective access to internal remedy can be very problematic whereas prisoners are often deprived of economic means to seek the assistance of a lawyer and taking into account the lack access to legal information in order to lodge a valid application. The Court substantialist approach, adopted in *Airey* and placed at the heart of the doctrine of effectiveness, is replaced here by a rather formalistic and artificial approach without adequate account of the penitentiary context. This dimension is not taken into account in pilot judgment concerning prison overcrowding.

It should be considered that although the Court has not pronounced itself on access to legal aid in order to complain about the violation of Article 3 resulting from poor conditions of detention, the question has not been explicitly submitted before the Court. Short-sightedness of the Court, but also a question not really exploited by prison litigations before the European Court.

It should be pointed out that, even in proceedings before the Court, the right to legal assistance and legal aid is relatively weakly protected. Legal aid is granted to applicants only in cases involving complex questions of fact and law and not in cases of a repetitive nature. The Convention system, founded on the right of individual application³³⁹, has been conceived in such a way as to enable any person to bring an action before the Court in order to complain of a violation of his or her fundamental rights, regardless of the assistance of a lawyer

The idea underlying this concept was to promote access for vulnerable people, such as detainees, to the Court. The absence of fees, the possibility of seizing the Court without the representation of a lawyer and the almost complete absence of formalities for lodging an application ensured accessibility for all, including most vulnerable people.

The evolution of Court and its working methods have, however, progressively imposed stricter and stricter formal criteria on the applicants, both in terms of administrative requirements, arising from rule 47 modifications³⁴⁰, and of admissibility criteria.

Rule 47 requires that an application shall be made on the application form provided by the Registry and it shall contain all of the information requested in the relevant parts of the application form. Failure to comply with the rule 47 requirements result in the application not being examined by the Court. The introduction of a new admissibility criterion³⁴¹ and the stricter application of pre-existing ones make it much more difficult and technically complex to lodge a valid application before the Court. Statistics fully confirm this difficulty and show that approximately 90% of the applications are declared inadmissible.

This evolution has not been accompanied by an in-depth reflection on the effective access to the Court of vulnerable and marginalized people. While exceptions to Article 47 are admissible (Article 47 § 5) and detention constitutes, in practice, a condition which may justify such an exception, that doesn't seem sufficient in order to avoid the rejection of the application.

Given the complexity and the technical requirements of the proceedings before the Court, the presence of a specialized lawyer becomes an essential condition for overcoming the admissibility stage and obtaining an examination on the merits. Such findings require the Court to proceed to a new interpretation in terms of effective access to its own judicial protection system and effective protection of fundamental rights for vulnerable and marginalized persons, including the right to individual application, cornerstone of the Convention system.

³³⁸ *Torreggiani and others v. Italy*, § 96-99; *Varga and others v. Hongria*, § 110.

³³⁹ European Convention on Human Rights, art. 34

³⁴⁰ Modifié les 17 juin et 8 juillet 2002, 11 décembre 2007, 22 septembre 2008, 6 mai 2013, 1^{er} juin et 5 octobre 2015.

³⁴¹ Protocole n. 14,