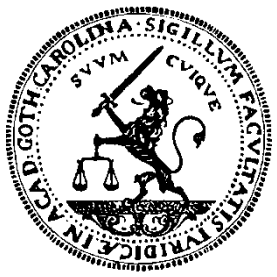

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Beyond the Right to Life: The Right to Live in Dignity in the European Convention on Human Rights

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Summary

What does the right to life entail? Is it simply a right to simply live, or does it include more? The Inter-American Court of Human Rights has responded to this question in the affirmative. The right to life does in fact include a right to live in dignity, a right to a dignified existence. As such, it requires the realisation of certain socio-economic and cultural rights in the context of the right to life. The European Court of Human Rights however, does not employ the same approach. Even though it does accept the interpretation of socio-economic rights in the context of the rights protected by the European Convention of Human Rights, albeit it does not read Article 2 of the Convention through these rights.

This thesis examines whether such an interpretation is possible. Going through the relevant jurisprudence of the Inter-American Court, a definition is reached on what the right to life in dignity is in the Inter-American context. Having taken that as a basis, the European aspect is examined, in relation to the right to life (Article 2), the prohibition of torture, degrading and inhuman treatment (Article 3) and the right to family and private life (Article 8). It is concluded that indeed, following the European Court's interpretative practice, the right to life can be interpreted as a right to life in dignity when interpreted under the light of Articles 3 and 8. However, such a development seems unlikely in the current state of things.

Preface

During autumn semester 2015-2016 I attended the "Human Rights and Cultural Diversity" course offered by the International Human Rights Law LL.M at Lund University. Throughout the duration of the course, I was amazed by the jurisprudential advancements of the Inter-American Court of Human Rights and perplexed by the stance of the European Court of Human Rights, that has in occasion taken progressive decisions, but in no way to the extent of the Inter-American Court.

At the same time, throughout this two-year program I have been thinking, that no human right always existed in the form that it exists today. Even the right to life, that today is self-evident, has had a progress in time. This seemed to me to be even more evident when comparing the two systems of human rights protection. And as such, I was led to the idea of writing about life in dignity in the European Convention on Human Rights. It has been an interesting trip, through wide jurisprudential waters. My supervisor, Alejandro Fuentes, has been guiding me through this journey, with his constructive advice and for that I would like to thank him.

I would also like to thank my friends for the brainstorming and proofreading they volunteered to do.

Last but certainly not least, I would like to thank my family and especially my mother for the support I have been given throughout these two years.

Abbreviations

ACHR	American Convention on Human Rights
Art.	Article
Arts.	Articles
ECHR*	Convention on the Protection of Human Rights and Fundamental Freedoms
e.g	Exempli gratia (for example)
CoE	Council of Europe
ECtHR	European Court of Human Rights
EU	European Union
etc	Et cetera
IVF	In Vitro Fertilization
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
i.d	Id est
Par.	Paragraph
Pars.	Paragraphs
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

*In the citations, when using ECHR, I am referring to the ECtHR following its official citations method.

1 Introduction

1.1 Overview

The right to life is the cornerstone of all other rights. It has been characterized as "the most fundamental of all rights,"[1] as the "supreme human right"[2] and as "the most basic right of all".[3] The right to life is "inherent" to all people.[4]

The right to life is not uniformly protected in all human rights protection systems. Whereas the death penalty is abolished in the European system with Protocol 13 to the ECHR,[5] it is not abolished in the ICCPR or the IACHR. Likewise, the IACHR provides that the beginning of life is traced in conception,[6] whereas none of the two other systems make such a reference.

With developments in all spheres of human existence, from the society itself to the conditions of living and human rights, the right to life has come to mean more than a mere right to exist in the Inter-American context. More specifically, the Inter-American Court of Human Rights has interpreted the right to life as a right to live in dignity or a dignified existence. In doing so, the IACtHR has attributed to the right to life certain socio-economic rights, such as the right to health, nutrition, housing etc. (e.g Yakye Axa, Sawhoyamaxa *See below* 2.2.2).

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[1] DOCUMENT A/2929 (United Nations General Assembly 1955) p. 29.

[2] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS : CCPR COMMENTARY (Kehl : Engel, cop. 2005, 2. rev. ed. 2005) p. 12; Office of the High Commissioner for Human Rights, CCPR General Comment No. 6: Article 6 (Right to Life) (1982).

[3] Korff Douwe, The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights § Human rights handbooks, No 8 (Council of Europe 2006).

[4] International Covenant on Civil and Political Rights (UN General Assembly, 1966) Art. 6.

[5] Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32) Art.4.1.

[6] Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances (Council of Europe, 2002).

The European Court of Human Rights, however, stands far from this interpretation and still examines the right to life *stricto sensu*, as a negative obligation of the State to not deprive anyone arbitrarily of their life and as a positive obligation to protect its citizens from other individuals' criminal activities (*See below* Chapter 3.1).

1.2 Research problem and question

The European Court of Human Rights has only in certain circumstances recognized the application of socio-economic rights as part of the application of other Convention rights. However, the developments in society, as well as human rights law have advanced to such a level as to recognize that the right to life is not merely a life to live, but more likely a right to a "life in dignity" or a "dignified existence". As such the realisation of certain socio-economic rights is of paramount importance in order to ensure complete protection of the right to life. Furthermore, the ECtHR has in *Pretty v. the UK* stated that Article 2 (the right to life) "is unconcerned with issues to do with the quality of living".[7] The fact that the European Court of Human Rights does not recognize a right to life in dignity in the context of Art.2's right to life diminishes the protection provided under said Article.

This thesis answers whether the right to life in the European context of human rights can be interpreted as the right to life in dignity, as recognized by the Inter-American Court of Human Rights.

1.3 Theoretical background

As a basis for the analysis of the right to life under the European system, I take the definition of the right to life as is defined by the following analysis of the right to life under the American system. More specifically, through the IACtHR's jurisprudence, I form a definition on what the right to life is

[7] *Case of Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002 par. 37.

in the Inter-American Court. Based on this definition and after analyzing the rights to life, family and private life and the prohibition of torture, inhuman, degrading treatment in the European system, I examine if an interpretation, including the elements of the right to life in the Americas, can be acceptable at a European level.

1.4 Methodology

For the purposes of this essay, I am using the standard legal dogmatic method that interprets the law as it is,[8] based on the interpretative tools provided for in the Vienna Convention on the Law of Treaties and employed by the European Court of Human Rights.[9] I am also using the comparative method[10] in examining the jurisprudence of the Inter-American Court and examining whether its findings can also be applied to the European Court.

The first chapter involving the analysis of the Inter-American jurisprudence is the theoretical basis on the subsequent analysis. More specifically, with the analysis of the Inter-American jurisprudence, I am forming a definition of the right to life in dignity. I have selected jurisprudence where the Inter-American court employed a wide, dynamic interpretation of the right to life. It is mainly dedicated to minority groups (e.g indigenous people) or people in disadvantageous positions (e.g children, elderly). The case law is setting the standards of the IACtHR in order for the life in dignity to be realized.

In the following chapter, I am analyzing the case law of the European Court of Human Rights. I am examining the standards set by the European Court and the interpretative tools it is using to deal with the rights prescribed in the European Convention on Human Rights. More specifically, I examine Articles 2, 3 and 8 of the European Convention under the jurisprudence of

[8] MARK VAN HOECKE, METHODOLOGIES OF LEGAL RESEARCH. [ELEKTRONISK RESURS] : WHAT KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? (Oxford : Hart, 2011. 2011) at 4.
[9] *See* 3.4.
[10] HOECKE, Methodologies of legal research. [Elektronisk resurs] : what kind of method for what kind of discipline? 2011, at 217.

the European Convention on Human Rights. Article 2 (the right to life) is the one examined in order to conclude if it can be interpreted as a right to life in dignity. It is of paramount importance to analyze this Article in order to ascertain where the ECtHR stands in regards to the right to life as of now.

I have chosen to interpret Art.2 under Art.3 and 8 for the following reasons. To begin with, Article 3 is selected because of the interpretative leaps the ECtHR has made in regards with this Article. The ECtHR has incorporated under Art.3 notions, such as human dignity. At the same time, again under Art.3, the ECtHR has interpreted the lack of certain socio-economic rights as inhuman or/and degrading treatment.

Art.8 is used because of its wide application by the ECtHR and its importance for the protection of socio-economic and cultural rights, as well as the fact that the ECtHR has stated in *Pretty v. the UK*, that issues concerning quality of life are examined under this Article (*See below* 3.1.2.1). Article 8 is further used because of the standards it sets for the right to private and family life to be respected. Under Art.8, the ECtHR has set the standards of respect for family and private life through the partial realisation of socio-economic rights.

In these chapters not only is the jurisprudence of the European Court analyzed, but also the interpretative tools that the Court employs. This way I am able to interpret Art.2 under the light of Arts.3 and 8 and as such conclude on whether Art.2 can be interpreted as to encompass living in dignity.

In doing so, the essay touches upon the nature of human and political rights. More specifically, it examines the character of rights as civil and political on the one hand and economic, social and cultural on the other. It looks into whether such a classification is at this point moot, or if there is still need to address human rights in such terms. It also examines the possibility for judicial claims of social, cultural, and economic rights.

1.4.1 Delimitations

I only deal with the Inter-American and the European system of human rights. For the purposes of this thesis, I refer to the Council of Europe European Convention on Human Rights and the European Court of Human Rights as the European system of human rights protection or European system. Similarly, I refer to the American Commission, American Convention on Human Rights, and the Inter-American Court of Human Rights as the American system of human rights protection, or the American system. In the chapter where I examine the jurisprudence of the IACtHR and the ECtHR on their own I might refer to them as "Court"; namely, in Chapter 2, "Court" refers to the Inter-American Court of Human Rights and in Chapter 3 to the European Court of Human Rights. Where both Courts are examined they are clearly distinguished.

The Inter-American system is selected due to the importance and the innovation of its decisions in relation to the right to life, especially in relation to marginalized people. The European system is chosen due to its importance to the human rights discourse, the gradual evolution of its jurisprudence in all aspects; it's effectiveness; and the fact that it covers more than fifty counties. The jurisprudence is selected based on two criteria. Firstly, the importance of the case in the area of jurisprudence. In this effect the factsheet of the European Court of Human Rights are employed. Secondly, especially cases referring to minority groups and people in disadvantageous positions (e.g refugees) are preferred.

I do not examine all the relevant cases of the two systems, since their findings are presented in the already selected case-law. No other system is examined due to space and time restrictions. Moreover, not only cases where a violation of the respective Articles was found are examined; cases are also used because of the principles set out by the Courts.

In relation to the right to life in dignity, certain domestic jurisdictions have taken decisions acknowledging it. For example, the Indian Supreme Court

in *Maneka Gandhi v. Union of India*[11] and *Francis Coralie Mullin v. the Administrator, Union Territory of Delhi*[12] interpreted the right to life as a right "to live with human dignity", including certain socio-economic rights to the right to life. However, these decisions are not examined, since the essay takes into consideration only the two regional systems and not domestic approaches to the issue. This however, could be a field for further investigation in the future. More specifically, the domestic jurisprudence could be examined in correlation with the international practice to conclude whether a customary character of a right to life in dignity can be traced.

1.5 Structure

In the first chapter, I examine case law of the Inter-American Court of Human Rights in relation to mainly the right to life. Based on this analysis I conclude to certain specific elements of the right to life that lead to an interpretation of the right to life under the Inter-American system. At the same time, I pinpoint the interpretative tools that the Inter-American Court is using in order to reach its decisions.

In the second chapter, I examine jurisprudence of the European Court of Human Rights. In the first subchapter, I analyze the way the right to life is interpreted under the European Convention on Human Rights, through the ECtHR's case law. In the second subchapter, I examine the prohibition against torture, inhuman and degrading treatment of Article 3 of the ECHR and on the third subchapter Article 8 again using the ECtHR jurisprudence. Each subchapter has an overview of the respective right under the European

[11] *Maneka Gandhi vs. Union of India* Supreme Court of India 1978.

[12] *Francis Coralie Mullin vs The Administrator, Union Territory of Delhi & ORS.*, 1981 AIR 746, Supreme Court of India 1981 The Court found that "The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. […] The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings".

Convention on Human Rights and the selected jurisprudence. In the end of the chapter, I analyze the case law of the ECtHR under these articles as a whole, after having made reference to the interpretative tools the Court uses. Cases that concern more than one of the aforementioned Articles are examined only once, under the chapter that is deemed more appropriate based on the violation found.

In the conclusion, I sum up what is previously analyzed and I make my final remarks in relation to the research question.

2 The right to life in the Inter-American Human Rights protection system

2.1 General information

The right to life is protected under Article 4 of the American Convention on Human Rights. According to Art.4, "[e]very person has the right to have his life respected". The right to life shall be protected by law. Furthermore, in the Inter-American context, the right to life is protected from the moment of conception.[13] Capital punishment is not forbidden under the Convention but it is subjected to stringent conditions, as for example as a punishment only for the most serious crimes, after a final judgment, by competent courts, according to certain legislation. No capital punishment can be imposed for political crimes, or to minors and capital punishment cannot be reinstated in countries that have abolished it.

The importance the Inter-American Court gives to the right to life can be seen from the *Mack Chang* case where the Court pronounced that

> the right to life plays a fundamental role in the American Convention because it is a prior condition for the realisation of the other rights. When the right to life is not respected, all other rights lack meaning.[14]

Certain aspects must be considered before examining the jurisprudence of the Inter-American Court. Firstly, economic, social, and cultural rights have been made justiciable by the Court's use of rules of interpretation. In *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* Advisory Opinion, the Court made clear

[13] The moment of conception was discussed in the case of *Artavia Murillo et al. v. Costa Rica. See* below 2.2.1.2.
[14] *Case of Myrna Mack Chang v. Guatemala*, Judgment (*Merits, Reparations and Costs)*, Inter-American Court of Human Rights 2003 par.152.

that when interpreting a treaty it shall not only consider "the agreements and instruments formally related to it […] but also, the system within which it is inscribed".[15] The Court describes this interpretation as an "evolutive interpretation" that is "consequent with the general rules of the interpretation of treaties embodied in the 1969 Vienna Convention" and therefore of the "living character" of human rights treaties that "must evolve over time in view of existing circumstances".[16] As the Court found in *Artavia Murillo*

> [i]n making an evolutive interpretation, the Court has granted special relevance to comparative law and has therefore used domestic norms or the case law of domestic courts when analyzing specific disputes in contentious cases.[17]

Secondly, the American Convention on Human Rights contains Arts.26[18] and 29.[19] The former requires that States take all necessary measures for the full realisation of the rights enshrined in the Convention. The latter

[15] Mónica Feria Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, 2007, at 443.

[16] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion*, Inter-American Court of Human Rights 1999 at par.114 in Tinta. 2007 at 443.

[17] *Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Inter-American Court of Human Rights 2012 at par.71.

[18] Article 26. Progressive Development: The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

[19] Article 29. Restrictions Regarding Interpretation: No provision of this Convention shall be interpreted as:
a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

prohibits the interpretation of the Convention in such a manner as to restrict the rights more than already provided for in the Convention itself.[20]

2.2 Jurisprudence

The right to life in the Inter-American context has been greatly developed by the Inter-American Court of Human Rights. In this section, I analyze IACtHR's relevant case law, firstly in relation to children and juvenile justice and secondly in relation to indigenous people.

The cases are chosen based on the conclusions the IACtHR has reached in relation to the right to life; and the interpretation of the IACtHR in such a way as to ensure the effective protection of human rights.

The cases clearly indicate both how the IACtHR interprets the right to life and the interpretative tools it uses to protect minorities and give effect to human rights. As such, they assist the formation of the definition of the right to life in *2.3* under which the right to life in the European context is examined in *4*.

2.2.1 Children and juvenile justice

The *Street Children* case (*See 2.2.2.1*), is selected because the IACtHR made reference for the first time to a "right to life in dignity". The *In Vitro Fertilization* case (*See 2.2.1.2*) is chosen because of the interpretation the Court employed in order to define the beginning of life.

[20] Tinta. 2007 at 444.

2.2.1.1 Case of the "Street Children" (Villagran-Morales *et al.*) *v.* Guatemala[21]

The case involved the murder of three underage boys and two young men by state officials. Four of the boys were abducted and subsequently killed and the fifth, Villagran-Morales, was murdered on the street.[22]

The Court examined Art.4 and the right to life.[23]According to the Court, "the right to life is a fundamental human right". Its exercise is "essential for the exercise of all other rights" and without it, they "lack meaning".[24] In the first time, the Court took such an approach it stressed out that

> in essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a *dignified existence*.[25](emphasis added)

In this context, States have the obligation to create such conditions as for the right to life not to be violated, as well as to ensure that its agents are not violating the right to life.[26]

The importance of this case for the issue at hand is undisputable. "In [this] milestone decision that usher[s] in a new era for international law on human rights",[27] the IACtHR for the first time inserts the notion of a "dignified existence" to the interpretation of the right to life. According to the Court, the right to life does not only entail living but is something more substantial that includes the right to live in dignity. It thus extends the meaning of Art.4 to encompass "conditions that guarantee a dignified existence". The

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[21]*Case of "Street Children" (Villagran-Morales et al.) v. Guatemala,* Inter-American Court of Human Rights 1999.
[22] Id. at. pars.76-121.
[23]The Court firstly examined the right to personal liberty prescribed in Art.7 of the Convention and it found that the article was violated for the four of the applicants. Id. at. pars.122-136.
[24] Id. at. par.144.
[25] Ibid.
[26] Ibid.
[27] Dignity and human rights BERMA KLEIN GOLDEWIJK, et al., DIGNITY AND HUMAN RIGHTS : THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Schoten : Intersentia ; Ardsley : Transnational, 2002. 2002) at 48.

Villagrán Morales case is the "*leading case* on the wide dimension or extent of the fundamental right to life, as comprising also the conditions for living with dignity",[28] that takes into consideration "cultural practices and religious beliefs".[29] The case "[made] clear […] that an obligation inherent within the right to life […] is that [S]tates commit to creating the conditions that guarantee an individual a dignified existence", which includes "at its minimum, […] a basic standard of living including access to essential food, shelter and medical care […]".[30]

The same findings were reached in *Juvenile Reeducation Institute v. Paraguay.*[31]

2.2.1.2 Case of Artavia Murillo et al. ("In vitro fertilization") *v.* Costa Rica[32]

The case concerned the prohibition of in vitro fertilization ("IVF") in Costa Rica.[33]In order to assess the prohibition, the Court interpreted the American

[28]Antônio Augusto Cançado Trindade, *The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights, in* MULTICULTURALISM AND INTERNATIONAL LAW (2009) at 479.
[29] Id. at.480.
[30] ELIZABETH WICKS, THE RIGHT TO LIFE AND CONFLICTING INTERESTS (Oxford ; New York : Oxford University Press, 2010. 2010) at 218.
[31] The case involved the death and injuries of underage inmates of a state-owned prison in Paraguay. The "Panchito López" Center (hereinafter "Center") in Paraguay was a state-owned prison, designated at first as a young offender's center, but due to its tactical advantages later converted into a high-security adult prison. The Center was thus relocated to a building designed as a private residence, which lacked the conditions necessary for incarceration. Consequently, juveniles residing in the Center were living under unsuitable conditions, which included but were not limited to lack of physical and psychological health care, education, hygienic conditions, nutrition, and education and resulted in sexual abuses and violence. The Center was overcrowded, many of the inmates were legally adults, and the guards of the Center were not adequate in numbers or in training. Clashes occurred frequently between the inmates and the guards. During the clashes, ten inmates died (nine because of a fire in the center and one from a shooting) and forty-two obtained injuries and burns. The Center was shut down on July 25th, 2001. The inmates were then transferred to adult prisons. Two more former Center inmates were stabbed and died while in prison. In its ruling, the Court found that in cases where incarceration is involved, a State has the obligation to provide the "minimum conditions befitting […] dignity as human beings". The Court concluded that they were not suitable for the prisoners to "live with dignity" and that, the State failed to adopt the positive measures necessary in order to guarantee that.[31] As such, the Court found a violation of Art.4. *Case of the "Juvenile Reeducation Institute" v. Paraguay,* Inter-American Court of Human Rights 2004.
[32] Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, 2012.
[33] The applicants were couples that could not conceive naturally and could not perform IVF in Costa Rica following an absolute prohibition of the procedure by the Constitutional Court in March 15, 2000.

Convention. More specifically, it concluded that "[t]he protection of private life encompasses a series of factors associated with the dignity of the individual […]" and it includes the decision to become a parent. The Court then proceeded in interpreting Art.4 of the American Convention. It concluded that

> the object and purpose of the expression "in general" is to permit, should a conflict between rights arise, the possibility of invoking exceptions to the protection of the right to life from the moment of conception.[34]

Thusly, the Court concluded that the embryo cannot be considered as a person in the context of Art.4 of the convention and conception takes place at the moment of the implementation of the embryo. Furthermore, "in general" in the context of Art.4 means

> that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible.[35]

The Court then assessed whether the restriction by Costa Rica was proportionate and concluded that it was not. As such, it found a violation of Arts. 5(1) (Right to Humane Treatment),[36] 7 (Right to Personal Liberty),[37]

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[34] Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, 2012 par.258.
[35] Id. at. par.264.
[36] Article 5. Right to Humane Treatment
1. Every person has the right to have his physical, mental, and moral integrity respected.
[37] Article 7. Right to Personal Liberty
1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is

11(2) (Right to Privacy)[38] and 17(2) (Rights of the Family),[39] in relation to Article 1(1) of the American Convention.

The Court, in this case, interpreted Art.4 in such a way as to take into consideration the rights of the future parents. The Article clearly refers to the "moment of conception" and the Court interpreted that moment in such a way as to allow greater freedom to people that wanted to perform IVF, in respect with their personality. The Court is not diminishing the protection under Art.4, but adjusts what the moment of conception is to modern-day criteria.[40]The interpretation of the Court is compatible with developments both in biomedicine and law.

2.2.2 Indigenous people

Understanding the specific characteristics of indigenous people is essential in order to comprehend the approach of the IACtHR in its jurisprudence. Although there is no uniform definition on who constitute indigenous people, albeit some common characteristics are accepted. One of the most authoritative definitions comes from the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R. Martinez Cobo, in his study on the Problem of Discrimination against Indigenous People. The definition reads as follows:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other

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entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

[38] No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

[39] The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

[40] *See contra Robert S Barker, Inverting Human Rights: The Inter-American Court versus Costa Rica, 47 U. MIAMI INTER-AM. L. REV. (2015); Álvaro Paúl, Decision-Making Process of the Inter-American Court: An Analysis Prompted by the'In Vitro Fertilization'Case, 21 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2014).*

sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

a) Occupation of ancestral lands, or at least of part of them;
b) Common ancestry with the original occupants of these lands;
c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
e) Residence on certain parts of the country, or in certain regions of the world;
f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.[41]

ILO Convention No. 169 defines indigenous people as

peoples in independent countries who […] on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest of colonization or the establishment of present state boundaries and who, irrespective of their

[41] UN Doc. E/CN.4/Sub.2/1986/7 in United Nations Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous People (2004).

> legal status, retain some or all of their own social, economic, cultural and political institutions.[42]

The common elements that can be traced from these definitions are the historical continuity of the populations, their close relation to the natural environment that they inhabit and their unique economic, social, cultural, and political system.

In this part cases concerning claims of indigenous people alleging violations of their right to life and their right to property are examined. In regards with the indigenous people jurisprudence *Yakye Axa* (*See 2.2.2.1*) is selected because the IACtHR is correlating the living conditions of the community with the right to life, as such incorporating socio-economic and cultural rights to the right to life. *Saramaka (See 2.2.2.2*) is used due to the fact that the IACtHR extended the same protection that international law awarded to indigenous people, to a tribal community, acknowledging at the same time the importance of their cultural identity. Finally, the case of *Awas Tingni* (*See 2.2.2.3*) is chosen because the IACtHR connected the right to property of the indigenous community to their survival.

2.2.2.1 Case of the Yakye Axa Indigenous Community *v.* Paraguay[43]

The Yakye Axa is an indigenous community residing in Paraguay. Due to State interventions, the community lost access to its ancestral land. The community then proceeded in filing a claim regarding their land ownership rights, which however was not duly reviewed. Consequently, the living conditions of the community deteriorated, with problems appearing in their nutrition and health.[44]

The IACtHR, in this case, reiterated the fundamental character of the right to life, since if it ceases to exist all other rights also cease to exist and which

[42] International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (1989) Art 1.
[43] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights 2005.
[44] Id. at. par.50.

does not allow for a restrictive approach to the right. It further reiterated that the right includes not only the right to not be arbitrarily deprived of one's life, but also that there are no conditions that impede access to a "decent existence".[45]

In this context, the Court enlisted as one of the State's obligations under Art.4 the creation of "minimum standard conditions […] compatible with the dignity of the human person".[46] This obligation includes a "duty to take positive, concrete measures […] toward fulfillment of the right to a *decent* life, especially in the case of persons who are vulnerable and at risk"[47] (emphasis added).

The Court proceeded in examining the conditions under which the members of the Yakye Axa Indigenous Community were living and especially those that affected children and the elderly. The Court thus concluded that by omitting to take measures that affected the community's way of living in an adverse way, Paraguay violated their right "of having a *decent life*" (emphasis added) and thus Art.4 of the IACHR.[48]

The Court for the first time, in this case, refers to positive measures that a State must adopt in the context of the right to life. The right to life is thus now not only a right to live a dignified life, but States must take positive measures in order to ensure that such a dignified life is achieved. As Judge Trindade puts it in his separate opinion

> the definitive return of the lands to the members of the Community Yakye Axa […] protects and preserves their own cultural identity and, ultimately, their fundamental right to life *lato sensu.*[49]

[45] Id. at. par.161.
[46] Id. at. par.162.
[47] Id. at. par.162.
[48] Id. at. par.176.
[49] Trindade, The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights. 2009 at 489

In *Yakye Axa*, the Court further stressed out that the rights of the indigenous peoples on their lands pre-existed any domestic legal system regulation and as such did not depend on its recognition.[50]

The same conclusions were reached in the *Sawhoyamaxa Indigenous Community v. Paraguay*.[51]In *Sawhoyamaxa*, the connection between the right to life and the indigenous' cultural identity was made even clearer.

Both cases have thus recognized the inclusion in the right to life of not only "minimum standard conditions" in general, but also of aspects that consider the cultural differences of indigenous people. Not only has the Court once more accepted the application of minimum living standards, including sanitation, access to health services etc. in the context of Art.4 but it also inserted an extra element; that of cultural identity.

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[50] Leonardo J. Alvarado, *PROSPECTS AND CHALLENGES IN THE IMPLEMENTATION OF INDIGENOUS PEOPLES' HUMAN RIGHTS IN INTERNATIONAL LAW: LESSONS FROM THE CASE OF A WAS TINGNI v. NICARAGUA*, 24 ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007) 615.

[51]The natural habitat of the Sawhoyamaxa, an indigenous community residing in Paraguay, was eventually sold to private actors, due to Paraguay's financial issues. The community was greatly dependent on their natural environment for their survival, by means of hunting, fishing, and gathering. The change in their natural environment led to a lack of means to support their living and to situations hindering for their health and ultimately their lives, with thirty members of the community dying because of the conditions. The community initiated proceedings claiming the ancestral land they have traditionally occupied as well as their recognition as a legal personality.

The Court reiterated the importance of the right to life and the obligation of the State not to adhere both the negative and positive obligations deriving from the right to life. The Court stressed out that in order to assess in which situations the State is actually responsible for lives being at risk, the difficulties presented in each different situation should be taken into consideration. Art.4 should not be construed as imposing an "impossible or disproportionate burden" to the State.

The Court examined the specific factual events of the present case. It concluded that Paraguay had not employed the necessary measures required in this situation. It did not act diligently, and when it did finally act the measures adopted were not "sufficient and adequate". It concluded that the deaths resulted from the inability of the State to take the necessary measures in order to prevent them. It further emphasized that the measures Paraguay already took were not sufficient in said situation, due to the emergency situation the Sawhoyamaxa Community were into. In this context, it stressed out that the American Convention on Human Rights is to be interpreted in a way as to ensure effective protection in practice. *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights 2006.

2.2.2.2 Case of Saramaka v. Suriname[52]

The case concerned the alleged violations of the rights to property, legal personality, and judicial redress of the Saramaka people, a tribal community in Suriname.[53] The issue arose when Suriname granted logging and gold-mining concessions to companies. As a consequence, of these activities, the natural environment of the Saramakas was altered, threatening even their "eviction" from their natural habitat.[54]

The Court firstly examined whether it could attribute to the Saramakas, a non-indigenous community, that had however many attributes similar to the indigenous and most importantly the special relation with the natural environment as a means to survival, as well as a vital element of their culture, the same legal protection offered to the indigenous communities. The Court indeed concluded that such a protection could be awarded even in the case of the tribal community of Saramakas, exactly because of their special relation with the natural environment.[55]

The Court then made use of Art.1 of both the ICCPR and ICESCR,[56] providing for the right to self-determination and 27 of the ICCPR,[57] and

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[52] *Case of the Saramaka People v. Suriname*, Inter-American Court of Human Rights 2007.

[53] The Saramakas are a tribe, forcefully moved by the colonizers from Africa to the current territory of Suriname. They have since inhabited that area and maintained a very close relationship with their land, to which they were dependent for their survival.

[54] Case of the Saramaka People *v.* Suriname, 2007 pars.66-76.

[55] Id. at. pars.78-86.

[56] Article 1:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[57] Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

concluded that Suriname "has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory".[58]

After examining the domestic legislation and regulations of Suriname, the Court concluded that it did not abide by its international obligations under Art.21 in conjunction with Art.2[59] of the ACHR towards the Saramaka tribal people.[60]

In regards to their right to property, the Court pointed out that it is not an absolute right and it is in fact subjected to limitations; the existence of a prior law prescribing the limitation, necessity, proportionality, and legitimate aim for a democratic society. In the case of indigenous people, however, there is an additional limitation, the survival of the tribal community. In the present case, in order for the concessions to be deemed legal three preconditions must have applied and namely effective participation of the indigenous/tribal community, the benefit-sharing with the community, and prior environmental and social impact assessments. The Court concluded that in the present case and in regards with both the logging and the gold-mining concessions, these preconditions had not been met and as such found a violation of Art.21 in conjunction with Art.1.1 of the Convention. [61]

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[58] Case of the Saramaka People *v.* Suriname, 2007 par. 96.

[59] Article 2. Domestic Legal Effects:
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[60] Case of the Saramaka People *v.* Suriname, 2007 pars.118-123.

[61] The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. The Court also examined the legal personality of the Saramaka people as an entity and the possibility that they have judicial redress. It concluded that by not recognizing the legal personality of the Saramakas, Suriname was violating Art.3 of the Convention,[61] because of the disadvantageous position in which the Saramakas were by not having a legal personality. Accordingly, the Court found that Suriname was also in violation of Art.21 in conjunction with Art.25, because, due to the

In *Saramaka* the IACtHR linked the right of the tribal community with their land to the community's existence, thus clearly connecting their ancestral land to their existence. It

> acknowledged the complexities involved in indigenous land claims and set out the *additional* requirements of effective participation, benefit-sharing and environmental and social impact assessment as preconditions for the state to be able to justify any such restrictions.[62]

The Court also recognized the

> capacity of judicial discourse to address ethno-cultural claims within the human rights canon from different angles, that is, the acknowledgment of group identity, the re-assessment of rights, process rather than result, and access to the judicial space.[63]

2.2.2.3 Case of Awas Tingni v. Nicaragua[64]

The Mayagna (Sumo) Awas Tingni is an indigenous community residing in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic coast of Nicaragua, that alleged a violation of their right to private property due to concessions granted by the State of Nicaragua to a private company.[65]

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lack of legal personality, the Saramakas could not have "adequate and effective legal recourses" against violations of their right to property. Id. at.185.

[62] Gaetano Pentassuglia, *Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence*, 11 INTERNATIONAL COMMUNITY LAW REVIEW (2009) at 199.

[63] Id. at. 196.

[64] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights 2001.

[65] The community is extremely reliant on their natural environment for their survival, as all their living activities involve the use of the land they inhabit. It entered into an agreement with the Maderas y Derivados de Nicaragua, S.A (MADENSA) for the management of the forest. MADENSA later entered into another agreement with MARENA, involving the "definition" of the communal lands. MARENA granted a concession to the SOLCARSA Corporation for the extraction of timber, in the territory used by the Awas Tingni. The concession was deemed unconstitutional by the Supreme Court of Justice of Nicaragua because the Regional Council of RAAN had not approved it and consequently SOLCARSA requested that approval. The approval was later granted and challenged to Nicaragua's Constitutional Court without however being overturned Id par.103.

The Court examined the alleged violations of Art.25 (right to judicial protection)[66] and Art.21 (right to Private Property).

In assessing the right to property, the Court used the travaux preparatoires of the American Convention and concluded that the ACHR does not limit itself only to "private property".[67] The Court then stressed out that the wording of international human rights treaties has an "autonomous" meaning and cannot be subjected to the meaning of domestic law. Furthermore, human rights treaties are "living instruments" that "must adapt to the evolution of times and, specifically, to current living conditions".[68] The Court employed, what it characterized an "evolutionary interpretation" for the right to property, and concluded that the right to property under the American Convention includes "the rights of members of the indigenous communities within the framework of communal property".[69]

The Court then examined the characteristics of indigenous communities. It gave special emphasis to the "close ties of indigenous people with the land"[70] which is "the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival".[71] For indigenous people, the relation with their natural environment is not a mere "matter of possession".[72] It is a "material and spiritual element which they must fully

[66] In regards with Art.25, the Court reiterated its previous findings. More specifically, it emphasized that Art.25 sets "the obligation of the States to offer, to all persons under their jurisdiction, an effective legal remedy against acts that violate their fundamental rights." This obligation applies not only to rights prescribed in the American Convention but also to national legislation. The inexistence of such a "simple and rapid remedy" constitutes "a transgression of the Convention". It also does not suffice that provisions providing for judicial protection exist, but they must be effective. The Court examined the existence of a procedure for the indigenous land titling and demarcation and concluded that such a procedure was non-existent. Moreover, it examined the administrative and judicial measures available and found that Nicaragua had not adopted the measures necessary. It thereby found a violation of Art.25 of the Convention in connection with Arts.1.1 and 2 of the Convention. Case of the Mayagna (Sumo) Awas Tingni Community *v.* Nicaragua, 2001 pars.111-139.
[67] Id. at. par.145.
[68] Id. at. par.146.
[69] Id. at. par.148.
[70] Id. at. par.149.
[71] Ibid.
[72] Ibid.

enjoy, even to preserve their cultural legacy and transmit it to the future generations". [73]

After examining both the customary law of the Awas Tingni and the Nicaraguan Constitution the Court found a violation of Art.21 and the right to property of the Awas Tingni indigenous community.[74]

The Court once again gave special emphasis to the cultural and spiritual elements of the indigenous community. More specifically, it took into consideration the link of the community with their territory as a cultural and spiritual element and emphasized that their maintenance was of great importance for the survival of the indigenous people. The Court "went into depth in an integral interpretation of the indigenous cosmovision, insofar as the relationship of the members of the community with their ancestral lands".[75] In the *Awas Tingni* case, the Court for the first time examined the rights of the indigenous community as collective rights of subjects of international law.[76]The Court interpreted the right to property as including the indigenous peoples' cultural rights.

2.3 Analysis

The Inter-American Court of Human Rights employs a wide interpretation in the right to life. The Court interprets the right to life *lato* and not *stricto sensu.* It concluded time and again that the right to life is not merely a right to exist. Its' true spirit goes beyond that and it encompasses certain conditions that would render one's existence dignified. Not just life, but *vida digna,* a dignified life.

For this dignified life to be achieved a State does not only have a negative obligation in regards to the right to life, *i.e the* duty to not arbitrarily deprive someone of his/her life. The Court is including the rights to health,

[73] Case of the Mayagna (Sumo) Awas Tingni Community *v.* Nicaragua, 2001 par.149.
[74] Id. at. par.155.
[75] Trindade, The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights. 2009 at 485
[76] Alvarado, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, (2007) at 612

education and adequate housing in the sphere of the right to life.[77] The obligations of the State are wider and positive. As Judges Cançado-Trindade and Burelli pointed out in their joint concurring opinion "the arbitrary deprivation of life is not limited […] to the illicit act of homicide. It extends itself likewise to the deprivation of the right to live in dignity". The Judges thus interpret the right to life to include not only a right to mere living but also social and cultural rights thus emphasizing the "interrelation and indivisibility of all human rights".[78] The Court stressed out that a State's obligations under Art.19 of the American Convention "include economic, social and cultural aspects that form part of the right to life".[79]

The State must ensure the existence of certain conditions that would allow the well-being of the population. That includes the realisation of socio-economic rights, such as the right to health. The Court has thus merged the civil right to life with socio-economic rights,[80] which are being accepted as progressively realizable rights.[81] Even though the Court made clear that such obligations cannot lead to an extreme burden or absolute duty of the State to provide certain conditions of living and has only used this interpretation in extreme situations of great vulnerability, albeit the fact remains; the Court has expanded the right to life to something wider and more qualitative than before.[82] The Court is thus constantly making use of an "indivisibility and interdependence of rights approach".[83]

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[77] MALCOLM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE : EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Cambridge : Cambridge University Press, 2008. 2008) at 388.
[78] Paloma Morais Correa, Poverty as a Violation of Human Rights: The Case of Street Children in Guatemala and Brazil [article] (2013) at 341.
[79] Tinta. 2007 at 448.
[80] Jo M. Pasqualucci, Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System, The [article] (2008) at 3.
[81] Office of the High Commissioner for Human Rights, Frequently Asked Questions on Economic, Social and Cultural Rights § Factsheet No. 33 (2008) at 13.
[82] Pasqualucci, Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System, The [article]. 2008] at 31.
[83] Tinta. 2007 at 437.

In the cases of indigenous people, the Court is making use of their cultural characteristics and is giving them legal value.[84] For indigenous people, access to[85] and preservation of[86] their ancestral land is a prerequisite for the enjoyment of further rights. The Court also stressed that the meaning given to the property rights of indigenous people are autonomous from a domestic interpretation of such rights and find their basis in international law.[87] As Judge Cançado Trindade put it in his separate concurring opinion,

> the right to life is […] viewed in its close and unavoidable connection with cultural identity […] which for indigenous peoples is closely linked to their ancestral lands. If they are deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very rights to life […][88]

In so doing, the Court employed an "integrated approach to human rights", in the sense that the enjoyment of social rights is necessary for the enjoyment of civil and political rights, thus engaging in a holistic review of human rights.[89]

Furthermore, the Court underlined the importance of protecting the "marginalized and easily victimized communities and individuals" and recognized the conditions that "intended to erase their dignity", thus establishing its role of a legal interpreter.[90] The Court thus stresses out the

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[84]Thomas M. Antkowiak, *Moiwana Village v. Suriname: A Portal into Recent Jurisprudential Developments of the Inter-American Court of Human Rights*, 25 BERKELEY JOURNAL OF INTERNATIONAL LAW (2007) at 271.

[85] *Maya Indigenous Communities of the Toledo District v. Belize*, Inter-American Court of Human Rights 2004 in *INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM*, 35 AMERICAN INDIAN LAW REVIEW (2011) at 297.

[86] *Mary and Carrie Dann v. United States of America*, Inter-American Court of Human Rights 2002 in AMERICAN INDIAN LAW REVIEW, (2011) at 304.

[87] Alvarado, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, (2007) at 614.

[88] Id. at.617.

[89]Correa, Poverty as a Violation of Human Rights: The Case of Street Children in Guatemala and Brazil [article]. 2013] at 346.

[90]Alexandra R. Harrington, *INTERNALIZING HUMAN RIGHTS IN LATIN AMERICA: THE ROLE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS SYSTEM*, 26 TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL (2012) at 11.

"respect of the dignity of the victims and their families"[91] and the right to life is examined in its societal context[92] while taking in consideration various policy areas.[93]

It is also important to pay attention to the way the Court is reaching its decisions. As mentioned above the Court is employing a "constructive" interpretation, under the light of Articles 19 and 26 of the American Convention.

The Court is also making use of other international legal materials extensively. In the case of *Street Children*, for example, the Convention on the Rights of the Child was used, and in the cases concerning indigenous people ILO Convention 169. The Court is thus treating international human rights law as a holistic system and not solely within the limits of the American Convention and "deepen[s] the role of international human rights law relative to indigenous communities".[94]

The practice of the Court further proves that economic, social and cultural rights are justiciable[95] and that the right to life is "protective and inclusive".[96]Another issue that must be noticed in regards to the effective protection of the right to life by the IACtHR is the non-pecuniary damages awarded to violations of the right to life victims that include a great variety of measures, such as public apologies, commemorating monuments etc.[97]

As Pentassuglia puts it *Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence* in the Inter-American jurisprudence

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[91] Id. at. 22.
[92]Alexandra R. Harrington, *Life as We Know It: The Expansion of the Right to Life Under the Jurisprudence of the Inter-American Court of Human Rights*, 35 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW (2013) at 318.
[93] Id. at.319.
[94] Pentassuglia, INTERNATIONAL COMMUNITY LAW REVIEW, (2009) at 216.
[95] Tinta. 2007 at 459.
[96] Harrington, LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW, (2013) at 341.
[97] Judith Schönsteiner, *DISSUASIVE MEASURES AND THE "SOCIETY AS A WHOLE": A WORKING THEORY OF REPARATIONS IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS*, 23 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (2008).

> Traditional human rights entitlements have been somewhat reread to accommodate minority needs and demands. Basic layers of protection affecting a minority's way of life and well-being have been progressively construed through wider notions of private life, family life and/or right to life to embrace key claims to identity, economic self-sufficiency and even environmental protection. In many ways, 'life' as a human rights concept has come to form a continuum in terms of legal meanings and levels of engagement with the minority experience. Property, participation, education, language, they all further general categories of human rights protection whose reach has been amplified to varying degrees and in different settings by the distinctive position of ethno-cultural groups or otherwise the reality of cultural diversity.[98]

2.4 Concluding remarks

The Inter-American Court of Human Rights in its jurisprudence, has expanded the right to life, from a right to just live to a right to live in dignity. In order to give effect to the right to a dignified life, the Court has included positive obligations of a State. These obligations extend to the realisation of certain socio-economic and cultural rights, as for example the right to health. In order to do so the Court employed a wide, holistic and constructive interpretation of the right to life, in order to give full effect to the right to life.

After considering all the above we can conclude to the following definition of the right to life in the Inter-American system; the right to life under the Inter-American Court of Human Rights is the right to live in dignified conditions that include a certain level of safety,[99] access to health-care[100] and sanitation,[101] education,[102] housing,[103] nutrition[104] and respect for

[98] Pentassuglia, INTERNATIONAL COMMUNITY LAW REVIEW, (2009) at 206.
[99] Case of "Street Children" (Villagran-Morales *et al.*) *v.* Guatemala, 1999;Case of the "Juvenile Reeducation Institute" *v.* Paraguay, 2004.
[100]Case of the Yakye Axa Indigenous Community *v.* Paraguay, 2005;Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006.
[101] Case of the "Juvenile Reeducation Institute" *v.* Paraguay, 2004.
[102] Ibid.
[103] Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006.

rooted cultural traditions[105] to the extent that an impossible burden is not set on the State.[106]

[104] Case of the Yakye Axa Indigenous Community *v.* Paraguay, 2005;Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006;Case of the Saramaka People *v.* Suriname, 2007;Case of the Mayagna (Sumo) Awas Tingni Community *v.* Nicaragua, 2001

[105] Case of the Yakye Axa Indigenous Community *v.* Paraguay, 2005;Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006;Case of the Saramaka People *v.* Suriname, 2007;Case of the Mayagna (Sumo) Awas Tingni Community *v.* Nicaragua, 2001.

[106] Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006 par.155.

3 The European Convention on Human Rights

In this part, I examine Articles 2 (the right to life), 3 (prohibition of torture, degrading and inhuman treatment) and 8 (the right to family and private life) of the European Convention on Human Rights. I firstly, provide general information on the Articles and examine the case law under these provisions. I then proceed to analyze the case law as a whole, while considering the interpretative tools employed by the ECHR. At the end of the chapter, there is a summary pointing out the most important findings of the Chapter.

3.1 Article 2-The right to life

3.1.1 General information

The right to life is protected under Art. 2 of the European Convention on Human Rights.[107] According to Art.2, "everyone's right to life shall be protected by law". The right to life is not provided with absolute protection under the ECHR. More specifically when deprivation of life is a result of an *absolutely necessary* use of force "in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained" or "in action lawfully taken for the purpose of quelling a riot or insurrection".

The text of the ECHR does not regulate the beginning of life. Nor is death penalty abolished by it, but with the subsequent 13th Protocol to the

[107] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art.2 "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Convention.[108] Art.2 confers both negative and positive obligation to the State in the sense that a State is both obliged to abstain from taking the life of its citizens and to investigate cases that concern an alleged arbitrary deprivation of one's life.[109]

3.1.2 ECtHR's jurisprudence

The case of *Pretty v. the United Kingdom,* is used due to the reference of the ECtHR to "quality of living" and its findings under Art.8. The case of *Osman* is used due to the ECtHR's reference to a State's positive obligations under Art.2. *Cyprus v. Turkey* is used due to the use of social rights in relation to the right to life. *Öneryildiz* and *Necheva* are also employed for the same reason, and they extend further the application of socio-economic rights.

All cases are related to the problem at hand since they examine States' positive obligations in relation to the right to life as well as the possible incorporation of socio-economic rights in the context of the right to life.

3.1.2.1 Case of Pretty v. the United Kingdom[110]

Mrs. Pretty was suffering from motor neuron disease and wanted to end her life, but due to her condition could not physically do it and wanted her husband to do it instead. According to British legislation, suicide is not criminally punishable but assisted suicide is.

The ECtHR examined the right to life and concluded that it has given emphasis to the obligation of the State to protect human life. In this context, the Court could not accept that the right to life includes either "a negative

[108] Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances. 2002] *See further* 3.2.2.1, 3.2.2.2.
[109] Korff Douwe, The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights. 2006] at 7.
[110] Case of Pretty v. the United Kingdom, 2002.

aspect" or a "quality of living" aspect and a choice of "what the person wants to do with his or her life".[111] It further stated that

> Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

The Court thus found that there was no violation of Art.2.

In relation to Art.3, the applicant alleged that the criminal prosecution that her husband would face if he assisted her committing suicide constituted inhuman and degrading treatment in part of the UK because it failed to protect her from her suffering. The Court stressed out that whereas it does apply

> a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony with Article 2.

The Court found that no such positive obligation derives from Art.3 and as such, there has been no violation.

In relation to Art.8, the Court stated that "the ability to conduct one's life in a manner of one's own choosing" that Art.8 guarantees "may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual". The Court further stated that

> [t]he very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance.

[111] Id. at. par.39.

As such, the Court found that not allowing the applicant to choose the way she finished what she considered as an "undignified and distressing end to her life" did amount to an interference under Art.8. However, it found that said interference was "necessary in a democratic society" "for the protection of the rights of others" since States are allowed to enact criminal legislation to ensure the protection of their population. As such, it found no violation of Art.8.

The case of *Pretty v. the UK* is important in relation to the issue at hand for various reasons. First of all, it stated that issues of "quality living" are not included in Art.2. However, this must be construed in the context of assisted suicide that this case involved. Furthermore, in subsequent cases (*See Necheva v. Bulgaria* at *3.1.2.5*), the Court clearly took the quality of living into consideration. Secondly, the Court clearly connected Art.2 and 3 and stated that Art.3 must be construed in accordance with Art.2.[112] Thirdly, the Court brought forth the notion of dignity under Art.8 and concluded that issues regarding the "quality of living" are traced within this Article.

3.1.2.2 Case of Osman v. the United Kingdom[113]

The applicants alleged a violation of Art.2 of the ECHR in the sense that the State, and more specifically the police, had failed to protect the life of Mr. Osman, who was murdered by his son's schoolteacher.[114]

The Court stated that the right to life as enshrined in Art.2 does not only entail the obligation of a State to refrain from intentionally and unlawfully depriving someone of their life, but it further entails the obligation to "take

[112] *See further Soering v. the UK* and *Al-Saadoon and Mufdhi v. the UK.*
[113] *Case of Osman v. the United Kingdom*, no. 87/1997/871/1083, ECHR 1998.
[114] Ahmet Osman was a student to the Homerton House School. He was a close friend with Leslie Green. The two boys and their families had received various threats from a teacher, Mr. Paget-Lewis. Mr. Paget-Lewis had shown relevant behavior in his previous positioning as well. He underwent psychological evaluations and was suspended. Meanwhile, he continued threatening the boys and their families, having in fact caused material damage to their properties. Both families addressed the police with the issue, which investigated the matter. Mr. Paget-Lewis ended up shooting fatally Mr. Osman, Ahmet Osman's father, injured Ahmet, and killed the headmaster's child.

appropriate steps to safeguard the lives of those within its jurisdiction".[115]In that sense, the State has a positive obligation to protect its citizens from the criminal activities of other individuals. A violation of Art.2 would entail that

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid the risk.[116]

After examining the line of events leading to the fatal shooting, the Court concluded that the police did not know, or could not have known that the lives of the Osman family were in danger. As such, the Court found that there had been no violation of Art.2 and the right to life.[117]

Even though the Court found no violation in regards to the right to life in the present case, albeit it is the first time that it made clear reference to *positive obligations* of a State under and the right to life. The Court further stated that any positive obligation should not pose an "impossible or disproportionate burden" to the State. However, "this does not amount to a blanket exception to duties under the right to life whenever the issue of funding is raised".[118]

The first time when the Court analyzed the positive obligations of a State in regards with Art.2 was the *Osman* case. Even though the Court did not find a violation, in that case, it "[…] identif[ied] and qualif[ied] the positive obligation of the State to protect individuals within its jurisdiction".[119] The Court has thus found that a State does have positive obligations under Art.2.

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[115] *Case of L.C.B v. the United Kingdom*, 14/1997/798/1001, ECHR 1998 at 36 in Case of Osman v. the United Kingdom, 1998.
[116] Case of Osman v. the United Kingdom, 1998 par.116.
[117] Id. at. par.122.
[118] WICKS, The right to life and conflicting interests. 2010 at 223.
[119] Stuart E. Hendin, Evolution of the Right to Life by the European Court of Human Rights, The [article] (2004) at 81.

3.1.2.3 Case of Cyprus v. Turkey[120]

The case involved the events following Turkey's military operation in Cyprus since 1974 and the violation of rights by Turkey ever since. More specifically, it involved the subjects of missing Greek-Cypriots, the property of displaced Greek-Cypriots, their right to hold free elections, the living conditions of Greek-Cypriots in Northern Cyprus and the situation of Turkish-Cypriots and Gypsies in Northern Cyprus.[121]

In regards to the living conditions of Greek-Cypriots, it was submitted that they did not have access to health services. The Court stated that it was possible that

> an issue may arise under Article 2 of the Convention where is it shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.[122]

It then reiterated that a State does not only have negative obligations in regards to the right to life but also positive, that is to "safeguard the lives of those within its jurisdiction".[123]The Court, however, concluded that in light of the facts of the present case, no violation occurred.

On the contrary, the Court found a violation of the procedural aspect of the right to life. More specifically, it pointed out that Art.2 is violated when a State fails to conduct an investigation in cases when individuals were last seen in life-threatening situations by State officials and their whereabouts are still unknown, as happened in the present case.[124]

Even though the Court did not find a violation of Art.2 in the substantive part, it concluded that "denial of health care" could amount to a violation of

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[120] *Case of Cyprus v. Turkey [GC] (just satisfaction),* no. 25781/94, Grand Chamber 2001.
[121] Id. at. pars.13-55.
[122] Id. at.par. 219.
[123] Case of L.C.B v. the United Kingdom, 1998 at 36 in Case of Cyprus v. Turkey [GC] (just satisfaction), 2001.
[124] Case of Osman v. the United Kingdom, 1998 par. 132.

Art.2. Seeing that the right to health is a social and economic right,[125]we can say that the Court has considered the incorporation of social rights in the context of the right to life.

The Court also examined an alleged violation of Art.3 of the Convention. It took into consideration the conditions that Greek-Cypriots in Northern Cyprus were facing. More specifically it noted that Greek-Cypriots were not allowed to "bequeath immovable property to a relative", there were no secondary-school facilities in Northern Cyprus for Greek-Cypriot kids which were not allowed to move to the south when 16 for males and 18 for females.[126]The Court concluded that this treatment was owned to the different ethnic, racial and religious origin of the Greek-Cypriots. It thus found that such a treatment was degrading and found a violation of Art.3 of the Convention.[127]

In *Cyprus v. Turkey*, the Court accepted that in principle health care provisions could be included in the ambit of the right to life.[128] The Court stated that it did not "consider it necessary to examine in this case the *extent* to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care". The use of the word *extent* can thus infer that such an obligation does, in fact, exist in the context of Art.2 to a degree, however, that is not yet defined.[129]

3.1.2.4 Case of Öneryildiz v. Turkey[130]

As a consequence of a methane explosion in a slum neighborhood of Istanbul eleven of applicant's relatives deceased.[131] The applicant brought

[125] Virginia A Leary, *The right to health in international human rights law*, HEALTH AND HUMAN RIGHTS (1994) at 41
[126] Case of Cyprus v. Turkey [GC] (just satisfaction), 2001 par.307
[127] Id. at. par.311
[128] DAVID J. HARRIS, et al., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford : Oxford University Press, 2009, 2.ed. 2009) at 46
[129] Id. at. 47
[130] *Case of Öneryildiz v. Turkey*, ECHR 2004
[131] The applicant was living in a slum neighborhood of Istanbul. The neighborhood was created illicitly; however, the State through the municipality of Istanbul was aware of its existence and allowed it. The living conditions of the neighborhood were dangerous and

the case to the attention of the domestic authorities, without avail, since the penalty imposed by the authorities was ludicrous and the compensation adjudicated to him was not paid.[132]

The Court reiterated that Art.2 does not include only negative obligations, in the sense of prohibition of the use of force by state agents, but also includes positive obligations, in the sense of safeguarding the lives of the people within their jurisdiction. This obligation applies in every activity public or not and includes industrial activities.

In relation to the positive obligations of a State under Art.2, the Court stated that they "entail […] above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[133] This applies in the ambit of dangerous activities as well and includes the right to information of the public.[134]

On the procedural level, the Court emphasized that Art.2 requires "an independent and impartial official investigation procedure that satisfies the minimum standards" of effectiveness and diligence.[135]

The Court also pointed out that the State has a wide margin of appreciation in this regard. However, in the present case the overall action of the State from the prior regulatory framework to the response of the State in view of the events, has not been satisfactory. As such, the Court found a violation of Art.2, in both a substantive and a procedural aspect.[136]

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the municipality was aware of that fact from various reports. In 1992, a methane explosion occurred in the neighborhood.

[132] Case of Öneryildiz v. Turkey, 2004 pars.9-43.

[133] Id. at. par.89.

[134] Id. at. par.90.

[135] Id. at. par.94.

[136] Id. at. par.110 and 118.

Öneryildiz extended the application of the positive obligations under Art.2 "in the context of the destitute who face special dangers due to their inadequate living conditions".[137]

With the case of *Öneryildiz,* it became apparent that the State's obligation to protect the lives of people within its jurisdiction is "extensive".[138] It was interpreted as to apply in cases of dangerous activities that the State did not respond appropriately as well. It thus expanded to include health care, safety, and environmental law.[139]The Court also for the first time examined the two aspects of the right to life, the substantive, and the procedural one, separately.[140]The State must adopt effective criminal legislation in protection of the right to life. [141]

Moreover, *Öneryildiz* extended the procedural obligation under Art.2 after the investigation level, to a prosecution level when necessary and certainly to the serious examination of a case with "careful scrutiny".[142]

The principles set in Öneryildiz were upheld and extended in natural disasters in *Budayeva v. Russia*,[143] where the Court also stated that when it

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[137] WICKS, The right to life and conflicting interests. 2010 at 219.
[138] ROBIN C. A. WHITE, et al., JACOBS, WHITE AND OVEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford : Oxford Univ. Press, cop. 2010, 5. ed. 2010) at 152.
[139] HARRIS, et al., Law of the European convention on human rights. 2009 at 67.
[140] Korff Douwe, The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights. 2006] at 61.
[141]HARRIS, et al., Law of the European convention on human rights. 2009 at 38.
[142] Id. at.51.
[143] *Case of Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008 The case concerned the deaths, injury, and loss of property of Mrs. Budayeva and the other applicants, following catastrophic mudslides, in Tyrnauz, Russia.[143]The applicants brought the case before domestic courts without any redress being given. The case brought before the ECtHR alleged a violation of Arts.2, 8, 13 of the European Convention and Art.1 of Protocol I. The Court reiterated that Art.2 includes a positive obligation to "take appropriate steps to safeguard the lives of those within its jurisdiction". This positive obligation includes a "primary duty" to adopt all the measures required in order to "provide effective deterrence against threats to the right to life" and all activities in a person's life, both public and private. This right is further interpreted in such a way as to include both substantive and procedural obligations from the State. When it comes to dangerous activities, the "special features of the activity in question" are of importance, especially when it comes to "potential risk to human lives". When it comes to the positive measures adopted in this regard, States have a wide margin of appreciation and no impossible or disproportionate burden must be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources". In the case of natural hazards and emergency relief, the State's responsibility goes as far as the "circumstances of a particular case point to the

comes to Art.2 and dangerous activities, the scope of the article overlaps with the one of the Art.8. As such, the principles set by the Court for environmental matters, effective private and family life can also be applied in regards to the right to life.[144]

3.1.2.5 Case of Nencheva and others v. Bulgaria[145]

The case involved the death of fifteen children and young adults (under 22 years) that died while being institutionalized in a State-dependent mental health facility.[146]The applicants contested a violation of *inter alia* Articles 2 and 3 of the Convention.[147]

The Court firstly stressed out that the Dzhurkovo center was a center under state supervision. Secondly, the State itself has not contested the seriousness of the conditions that included malnutrition, lack of medicine, clothing, linen and heating. These living conditions, according to the Court,

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imminence of a natural hazard that has been *clearly identifiable*" (emphasis added). When turning to the facts of the present case the Court found that, there has indeed been a violation of Art.2, because "there was no justification for the authorities' omissions" to adopt the measures required in order to avoid the danger in the applicants' right to life.

[144] Id. at. par.133.

[145] *Affaire Nencheva et Autres c. Bulgarie*, no 48609/06, ECHR 2013.

[146] All children died under unspecified conditions. Their medical records were not updated. During the period that the deaths occurred (1996-1997), Bulgaria's socio-economic conditions were extremely hard. The Dzhurkovo center was awarded approximately the equivalent of 0,80EUR per day per inmate. In addition, the center was stationed in a secluded area, where the nearest hospital was 40km away and there were no means to transfer sick kids. There was no adequate heating, because of the oil shortage. The center was being heated one hour in the morning and one in the evening and, therefore, the inner temperature was around 12-15 Celsius degrees. The nutrition conditions were extremely poor and where often based on voluntaries from the nearby villages. The hygienic conditions were extremely bad, seeing that the staff could not wash and dry the clothes or linen as often as necessary. The director of the facility and the municipal authorities made official complaints about the situation in the center, requested for additional resources, and warned the central authorities about the seriousness of the situation since September 1996, and finally, grants were provided in February and April 1997. At that point, five children had already died.

[147] Bulgaria raised an issue of exhaustion of local remedies. The Court ruled that in the present case the exhaustion of local remedies and the context of the case are closely related and as such found the case admissible. In regards to the procedural aspect of the right to life the Court stated that under Art.2, the State has an obligation to ensure the judicial or administrative response in case of life loss, as well as to take all appropriate measures to ensure that such a response is effective. It is not however required that one specific procedure is followed (i.e civil, criminal or administrative), as long as the procedure chosen corresponds to the graveness of the events and is effective. This cannot be construed as imposing an obligation to prosecute. However, at the same time, domestic Courts cannot leave unpunished unlawful interferences with the right to life.

endangered the lives of vulnerable children requiring specific and intense care.

The Court then pointed out that the authorities were made aware of the circumstances already three months before the first death occurred and did not act. These events were not, noted the Court, sudden, occasional and unexpected, but a regular occurrence.

The Court stated that since the State was aware of this situation, it had an obligation to take immediate, emergency measures in order to deal with the condition, regardless of the actions of the parents, as well as to provide an explanation for the deaths of the children.[148] As a result, the Court found a violation of Art.2 of the Convention.

In *Nencheva,* the Court concluded that Bulgaria's inaction in light of the conditions in the center amounted to a violation of Art.2. The Court referred to the specific situation in the center, that included unsuitable conditions of living, especially for physically and mentally ill children, and malnutrition. The State's inability to provide the appropriate living conditions and prevent the deaths of children was considered a violation of Art.2. We can thus see that in this case, the Court has included living conditions and aspects of social rights in its ruling. Even though, it was a case of life-loss of people dependent on the State, albeit the deaths occurred because of the extremely poor living conditions in the center, thus adding a consideration of social rights in the context of Art.2.

[148] The Court also analyzed the procedural process. More specifically, it pointed out that prompt investigations are required, and that regardless of the nature of the case, the State did not initiate proceedings for two years, and as a result material piece of evidence were destroyed and people deceased. The State did not conduct a thorough, effective investigation into the causes of the deaths and did not extend it to people other than three employers, when from the facts of the case it follows that the authorities could also be investigated. The Court thus found a violation of Art.2 in the procedural aspect as well.

3.2 Prohibition of torture, inhuman and degrading treatment

3.2.1 General information[149]

Closely related to Art.2 of the ECtHR is Art.3 thereof prohibiting torture, inhuman and degrading treatment.[150] Art.3 encompasses "one of the most fundamental values of a democratic society".[151] The Article prohibits torture, inhuman and degrading treatment. According to the definition, the European Commission of Human Rights provided in the *Greek* case, "[i]t is plain that there may be a treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment and inhuman treatment also degrading".[152] In *Chahal v. the UK,* the Court stated that "the Convention prohibits in absolute terms torture or degrading treatment or punishment, irrespective of the victim's conduct".[153]

The Article creates both negative and positive obligations for States. A minimum level of severity must have been attained in order for a behavior to fall into the ambit of Art.3, which depends according to the place, as well as all the factual circumstances of the alleged violation. The prohibition of torture, inhuman and degrading treatment is absolute in the sense that no exemption or derogation from the rule can apply. In this sense, no margin of appreciation is permitted.[154]

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[149] Reidy Aisling, The prohibition of torture A guide to the implementation of Article 3 of the European Convention on Human Rights § Human rights handbook, No. 6 (Council of Europe, 2003).
[150] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms. 1950] Art.3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[151] Reidy Aisling, The prohibition of torture A guide to the implementation of Article 3 of the European Convention on Human Rights. 2003] at 8.
[152] The Greek Case. (1969) at 168.
[153] *Case of Chahal v. the United Kingdom [GC]*, no. 22414/93, ECHR 1996 par.79.
[154] HARRIS, et al., Law of the European convention on human rights. 2009 at 70.

Apart from the positive and negative obligations in a substantive level, Art.3 also includes procedural obligations, in cases when, for example, the judicial authorities fail to initiate criminal investigations.[155]

3.2.2 ECtHR jurisprudence

Soering examines the way human dignity is affected by death penalty and the death row phenomenon, as well as the relation between Art.2 and Art.3. *Al-Saadoon* extends the previous findings of *Soering* and the relation between Art.2 and Art.3. In *M.S.S, Larioshina* and *Moldovan* the ECtHR includes certain and different socio-economic rights in the interpretation of Art.3.

These cases are used since they are incorporating socio-economic rights and Art.2 is interpreted in the light of Art.3 (*See below* 4 and *1.4 Methodology*).

3.2.2.1 Case of Soering v. the United Kingdom[156]

The case concerned the alleged violation of Art.3 due to the applicant's extradition from the United Kingdom to the United States of America where he would be subjected to the "death-row phenomenon".[157]The Court firstly made reference to the fact that the death penalty is not forbidden under Art.3.[158] More specifically, the Court examined whether it could apply an evolutive interpretation to Art.3, so that it could forbid extradition in countries that allowed the death penalty. Albeit it concluded that such an interpretation could not be applied, since the Contracting Parties had recently signed Protocol No.6 which prohibited death penalty, only in peace time and did not provide for a general prohibition. The Court then assessed the present circumstances of the case and especially whether the "death row

[155] WHITE, et al., Jacobs, White and Ovey, the European convention on human rights. 2010 at 177.
[156] *Case of Soering v. the United Kingdom*, no. 14038/88, ECHR 1989.
[157] Mr. Soering murdered his girlfriend's parents in Virginia, US.
[158] At that point, the death penalty was not abolished in the context of the Council of Europe. The death penalty was abolished in all circumstances with Protocol 13 to the Convention, in 2002.

phenomenon" that the applicant would be subjected to, could constitute a violation of Art.3 and found that it does.

In the case of *Soering*, the Court interpreted Art.3 under the light of Art.2. It considered the evolution of the law and State practice in regards with death penalty. Even though, it found that death penalty does not amount as "inhuman or degrading treatment" under Art.3, albeit it found that the death-row phenomenon does, thus providing an effective protection of the applicant's rights.

3.2.2.2 Case of Al-Saadoon and Mufdhi v. the United Kingdom[159]

The case concerned the extradition of two Iraqi nationals, accused of *inter alia* war crimes, back to Iraq, where they would face the death penalty.

The Court firstly emphasized that death penalty equals both physical pain and psychological anguish; that death penalty "negates fundamental human rights"[160]; and that in the Preamble of Protocol No.13 to the ECHR "the Contracting States describe themselves as

> convinced that everyone's right to life is a basic value in a democratic society and that the abolition of death penalty is *essential* for the protection of this right and the recognition of the *inherent dignity of all human beings* (emphasis added).[161]

The Court further stressed that in the 60 years since the ECHR was drafted there has been a considerable evolution leading to the complete *de jure* and *de facto* abolition of the death penalty. Taking into consideration the developments in both the Member-States' practice and the CoE "legislation",[162] the Court concluded that the second paragraph of Art.2 can no longer be construed as "act[ing] as a bar to its interpreting the words

[159] *Case of Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010
[160] Id. at.115.
[161] Ibid.
[162] Protocol No.6 to the ECHR prohibiting death penalty in peace time; Protocol No. 13 to the ECHR prohibiting death penalty in all circumstances.

"inhuman or degrading treatment or punishment" in Article 3 as including the death penalty".[163]The Court reiterated that a violation under Articles 2 and 3 can arise in cases of expulsion and expulsion when death penalty is a possibility respectively. When assessing the facts of the case it found that there had been a violation of Art.3 of the Convention and as such there was no need to examine Art.2.

In *Al Saadoon* the ECtHR connected Art.2 and the right to life with Art.3 and the prohibition of torture, inhuman and degrading treatment. In contrast to what the Court found in *Soering,* now it stated that the second paragraph of Art.2 cannot any longer limit the application of Art.3 in cases of death penalty. Its interpretation of the right to life in connection to Art.3 has thus evolved. In its analysis the Court clearly referred to the "inherent dignity of all human beings" and connected it with the protection of the right to life.

3.2.2.3 Case of M.S.S v. Greece and Belgium[164]

The case involved an asylum-seeker, M.S.S, who entered the European Union ("EU") through Greece and reached Belgium. In Belgium, he applied for asylum, but the authorities deemed that he could not be granted asylum there, since according to the Dublin II Regulation, he ought to have applied in Greece, his first point of entry. M.S.S was thus sent back to Greece, where he was detained for an extensive period of time in bad conditions.[165]

In assessing the situation of the applicant's detention, the Court reiterated its findings in previous cases. More specifically, Art.3 enshrines "one of the most fundamental values of democratic societies" and prohibits inhuman or degrading treatment regardless of the situation an individual is in.[166]The level of severity a treatment must have in order to pass the threshold of inhuman or degrading treatment is minimum and depends on the

[163] Case of Al-Saadoon and Mufdhi v. the United Kingdom, 2010 at 120 *See Case of Soering v. the United Kingdom, 1989* at 3.2.2.1.
[164] *Case of M.S.S v. Belgium and Greece [GC]*, no. 30696/09, ECHR 2011.
[165] Id. at. pars.9-53.
[166] *Case of Labita v. Italy*, no. 26772/95, ECHR 2000 at 119 in Case of M.S.S v. Belgium and Greece [GC], 2011 par.218.

circumstances of each case.[167] Degrading treatment was deemed as a humiliating treatment towards an individual, "showing a lack of respect for, or diminishing, his or her human dignity".[168]

In regards with detention, the Court reiterated that the State must "ensure that detention conditions are compatible with respect to human dignity" and that "the health and well-being" of detainees "are adequately secured".[169]

In assessing the present situation, the Court concluded that given the "absolute character" of Art.3 a State cannot invoke any special circumstances to absolve itself from its obligations.[170] It further concluded that these conditions of detention have a "profound effect" on a person's dignity and, therefore, found a violation of Art.3 of the Convention.

The Court then examined the alleged violation of Art.3 in regards with the applicant's living conditions. It stressed out that Art.3 can in no way be interpreted as obliging a State to provide housing to everyone.[171]Art.3 also does not impose any obligation on the State to provide financial assistance to refugees in order to maintain a certain standard of living.[172]However, the Court has not excluded the possibility that a State's obligation might arise

> for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.[173]

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[167] *Case of Kudla v. Poland*, no. 30210/96, ECHR 2000 at 91 in Case of M.S.S v. Belgium and Greece [GC], 2011.
[168] Case of Pretty v. the United Kingdom, 2002 at 52 in Case of M.S.S v. Belgium and Greece [GC], 2011 par.220.
[169] Case of Kudla v. Poland, 2000 at 94 in Case of M.S.S v. Belgium and Greece [GC], 2011.
[170] Case of M.S.S v. Belgium and Greece [GC], 2011 par.223.
[171] *Case of Chapman v. the United Kingdom*, no. 27238/95, ECHR 2001 at 99 in Case of M.S.S v. Belgium and Greece [GC], 2011.
[172] *Affaire Muslim c. Turkey*, no 53566/99, ECHR 2005 at 85 in Case of M.S.S v. Belgium and Greece [GC], 2011 par.249.
[173] *Budina v. Russia*, no. 45603/05, ECHR 2009 in Case of M.S.S v. Belgium and Greece [GC], 2011 par.220.

The vulnerable and underprivileged condition of asylum-seekers must also be born in mind. In the present case, Greece had already enacted legislation, which provided for the accommodation of asylum seekers and as such, Greece was obliged by its own legislation to act in a certain ways.[174]

In the light of the factual circumstances of this case, the Court found that the applicant was shown "a lack of respect for his dignity" and that his overall living conditions were in violation of Art.3 of the Convention.[175]

The Court connected human dignity with the living conditions in the Greek detention center. Accordingly, it found a violation of Art.3 because these living conditions were infringing on the applicant's dignity and constituted inhuman and degrading treatment. In *M.S.S v. Belgium and Greece,* the Court found a violation of Art.3 because of the general living conditions that amounted to inhuman and degrading treatment.[176]The Court thus took into consideration social and economic rights in assessing Art.3.

The same conclusions were reached in *S.D v. Greece*[177] and *A.A v. Greece.*[178]

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[174] Case of M.S.S v. Belgium and Greece [GC], 2011 par.250.
[175] Id. at. par.263.
[176] Gina Clayton, Asylum Seekers in Europe: M.S.S. v. Belgium and Greece [notes] (2011) at 765.
[177] *S.D v. Greece* concerned a Turkish national who had been subjected to torture and interrogation in Turkey because of his political opinions. After entering Greece in an irregular manner, he was arrested by the police and requested asylum, which was, however, not registered. He then applied for asylum in Germany, and even though it was not granted to him, albeit he stayed in Germany for four years. He used forged documents to try and enter Turkey but was arrested in Greece. Even though his asylum request was now registered, he was arrested pending deportation and was transferred to a detention center, firstly in Soufli and then in Attica. He was released after a decision by the Administrative Court since his asylum request was still pending. The Court examined the living conditions of the applicant both in Soufli and in Athens. In regards with Soufli it concluded that even if the room the applicant was living in was relatively clean and had warm water, nevertheless the fact that he was living in a hut without the possibility to get outside, make phone calls, with no blankets available, no clean sheets or sanitary products, was not even disputed by the government. In addition, he was detained for six days in Attica, without the possibility of even walking outside. Both conditions were unacceptable. In regards to the specific facts of the case, the Court also gave emphasis to the torture applicant was subjected to in Turkey and the physical and psychological effect that treatment had to him. It thus concluded, that applicant's long-term detention in such conditions, constituted degrading treatment under Art.3 of the Convention. (*Affaire S.D c. Gréce*, no 53541/07, ECHR 2009).

3.2.2.4 Case of Larioshina v. Russia[179]

In this case the applicant, Mrs. Larioshina, was claiming that the pension provided to her by the Russian state was not sufficient for her to live in dignity and thus constituted inhuman and degrading treatment.

The Court reiterated that the Convention does not guarantee socio-economic rights *per se*. However, in cases where the amount of support by the State, when an individual is fully dependent on the State, is so low that the physical and mental health of the person is put into jeopardy, an issue can be raised under Art.3 of the Convention. It did not however find a violation of Art.3.

Even though the Court stated that the ECHR does not guarantee socio-economic rights, albeit it also made clear that in cases when the person is totally dependent on the State and its physical and mental health is put in danger by the lack of resources, an issue in regards with Art.3 might arise. As such, the Court has considered the application of socio-economic rights in the context of Art.3 in regards to living conditions based on lack of resources.

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[178] In *A.A v. Greece*, A.A, a Palestinian national entered Greece illegally and requested asylum which was not registered. He was then put in detention and the prosecutor of Samos ordered his expulsion. A.A resubmitted an asylum request, which was now registered but denied. A.A filed a complaint with the ECtHR, for *inter alia* a violation of Art.3 of the Convention because of his living conditions in the detention center. The Court gave special emphasis on the living conditions of the detention center. It emphasized that the building was not suitable to accommodate this amount of people; the hygiene was "deplorable"; there was no possibility for leisure or meals; the sanitary installations were common for men and women, did not have doors and were covered in used water; in order to make phone calls the detainees had to bribe the guards; there was no health center or the possibility to be transferred to the hospital. The Court further invoked UN reports referred to conditions against human dignity. In regards with the present case, the Court concluded that due to the fact that the applicant was not duly transferred to a hospital as well his overall living conditions, Art.3 was violated. *Affaire A.A c. Gréce*, no 12186/08, ECHR 2010.

[179] Schoukens Paul, *The Right to Access Health Care: Health Care according to International and European Social Security Law Instruments*, (2008) at 45 in INTERNATIONAL HEALTH LAW: SOLIDARITY AND JUSTICE IN HEALTH CARE (den Exter A.P ed., Maklu. 2008).

3.2.2.5 Case of Moldovan v Romania[180]

The applicants complained before the ECtHR for a violation of *inter alia* Art.3 due to their living conditions.[181]

The Court firstly assessed Arts.3 and 8 of the Convention. In relation to Art.3, the Court reiterated that Art.3 in connection with Art.1 of the Convention "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals".[182] The Court then emphasized once more the important character of Art.3, according to which only a "minimum level of severity" needs to be attained in order for a situation to fall within the ambit of Art.3. Accordingly, the conduct and the level cannot be determined as a whole, but on a case-by-case basis. [183]

The Court further stressed out that in order for it to determine whether a certain conduct is degrading, it examines

> whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3,

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[180] *Case of Moldovan and Others v. Romania (Judgment No.2)*, nos. 41138/98 and 64320/01, ECHR 2005.

[181] After a bar brawl turned deadly, large scale events occurred in Hădăreni, Romania with dominant Roma population. More specifically, three Roma men, brothers Rapa Lupian Lăcătuş and Aurel Pardalian Lăcătuş and Mircea Zoltan began a fight with non-Rom Cheţan Gligor. Cheţan's son, Crăciun, who came to his father's aid, died in the conflict. Following the death of Cheţan Crăciun, the word spread in the village, and angry villagers gathered outside the house where all three men were hiding, demanding that they come out. When the men declined, the mob set fire to the house. The two brothers tried to escape, but were caught by the mob and beaten to death. The third man did not flee and was burnt alive in the house. The events continued for days, with Roma property being set on fire. The police were not acting to prevent the arsons, while police officers were reportedly a part of the events, either by directly participating or by inciting the acts.
When the case was brought to the Romanian courts, the compensations awarded to the victims were extremely low. At the same time, the people charged with the homicides of the three men faced very low sentences. Id at pars.15-78.

[182] Case of Moldovan and Others v. Romania (Judgment No.2), 2005 par.98.

[183] Id. at. par.100.

without that meaning that a violation cannot be found without this characteristic lacking.[184]

Turning to the events of the present case, the Court pointed out that they occurred before Romania was a party to the Convention and as such the homicide and arsons as such could not be examined. However, the consequences of these acts were still present in that day. It further stated that

> the applicants' *living conditions* in the last ten years, in particular the *severely overcrowded and unsanitary environment* and its detrimental effect on the applicants' *health and well-being*, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their *human dignity* and arousing in them such feelings as to cause humiliation and debasement".[185] (emphasis added)

Furthermore, the applicants faced discriminatory behavior by the domestic authorities. As previously found by the Court, racial discrimination can be a violation under Art.3 on its own and in this case, it is a mitigating factor. The Court thus concluded that:

> the applicants' *living conditions* and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their *human dignity* which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3 of the Convention[186] (emphasis added).

The Court once again found a violation of Art.3 because of the living conditions the applicants were under, that interfered with their "human dignity".

[184] Id. at. par.101.
[185] Id. at. par.110.
[186] Id. at. par.113.

3.3 The right to private and family life

3.3.1 General information[187]

The right to private and family life is protected under Art.8 of the European Convention on Human Rights, which reads:

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

Article 8 confers both positive and negative obligations. The Court has repeatedly found that the principles that apply to both are in a big extent similar.[188]

The article also sets the rules for any possible State interference. Namely, interference must be according to law, necessary for a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, protection of health or morals and protections of the rights and freedoms of others.

A certain margin of appreciation is granted to the States when assessing cases of private and family life that are correlated with the European consensus. More specifically, if the European consensus is wide, in the sense that there is common ground, then the margin of appreciation is narrow. On the contrary, when the European consensus is narrow, the margin of appreciation is wide. In this context, the Court has reiterated

[187] Kilkelly Ursula, Handbook No.1: The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights (2001).
[188] *Case of López Ostra v. Spain*, no. 16798/90, 1994 par.51.

repeatedly that the domestic authorities are in a better position to assess the situations presented before them since they have better access to the factual conditions.

When it comes to family life, the Court is more concrete. It

> extend[s] beyond formal relationships and the family based on marriage[189] and in some circumstances it can include potential or planned relationships,[190] as well as those whose ties are more social than biological in nature[191]

In assessing the notion of family life, the Court has taken into account the social changes and developments both in society and technology.[192]

When examining Art.8 the Court applies a twofold test. Firstly, it examines whether the allegedly violated right is a right protected under Art.8 and secondly whether it falls within the ambit of family or private life. The Court will then examine whether the alleged interference fulfilled the preconditions provided for in the second paragraph of Art.8.[193]

3.3.2 ECtHR's jurisprudence

The cases of *V.C v. Slovakia* and *Connors v. the United Kingdom* are chosen because of the ECtHR's approach to the cultural diversity issues as well as the inclusion of socio-economic rights in Art.8. *López Ostra* and *Hatton* insert environmental considerations in Art.8. *Sidabras and Dziautas* further includes social rights in the context of Art.8.

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[189] *Case of Johnston and Others v. Ireland*, no. 9697/82, ECHR 1986, *Case of Marckx v. Belgium*, no. 6833/74, ECHR 1979 in HARRIS, et al., Law of the European convention on human rights. 2009 at 372.

[190] *Case of Keegan v. Ireland*, ECHR 2006 and *Case of Kearns v. France*, no. 35991/04, ECHR 2008 in HARRIS, et al., Law of the European convention on human rights. 2009 at 372.

[191] *Case of X, Y and Z v. the United Kingdom [GC]*, no. 21830/93, ECHR 1997 in HARRIS, et al., Law of the European convention on human rights. 2009 at 372.

[192] HARRIS, et al., Law of the European convention on human rights. 2009 at 371.

[193] Roagna Ivana, Protecting the right to respect for private and family life under the European Convention on Human Rights (Council of Europe 2012) at 11.

Art.2 is also interpreted under Art.8 (*See below* at 4), due to the importance of this Article in the inclusion of socio-economic and cultural life as well as the "quality of living" considerations (*See above 1.4 Methodology*).

3.3.2.1 Case of V.C v. Slovakia[194]

(For the needs of this case, I refer to the examination by the Court of the substantive part of Art.3 of the Convention, since the Court pointed to its finding under Art.3 in the examination of whether the sterilization violated the substantive part of Art.8.)

The applicant alleged that her sterilization was a violation of Art.3, 8 and 14 of the Convention.[195] In examining Art.3, the Court once again emphasized the fundamental character of the prohibition for a democratic society. The Court pointed out that in relation to medical interventions[196]

> in order for a treatment to be "inhuman" or degrading", the suffering or humiliation involved must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment.[197]

Furthermore, the Court pointed out that human dignity is "the very essence of the Convention" and even in cases when a mentally competent adult

[194] *Case of V.C v. Slovakia*, no. 18968/07, ECHR 2011.
[195] The applicant, Roma by origin, gave birth by a Caesarean section in a public hospital in Slovakia to her second child. During the procedure, she was sterilized. According to the hospital authorities, the applicant herself asked for the sterilization. However, the applicant signed the forms after several hours of labour, without fully understanding the meaning of "sterilization" and while thinking (after the medical personnel's advice) that the alternative would be fatal. The applicant's medical file had the words "Patient is of Roma origin" on and the applicant was accommodated in a ward with only Roma women, prevented from using the facilities used by non-Roma women. Following her sterilization, the applicant faced psychological problems. At the same time, she was ostracised from the Roma community and she and her husband divorced. Id. at. pars.8-56.
[196] In regards to medical interventions, the Court stated, "a measure which is of therapeutic necessity from the point of view of established principle of medicine cannot in principle be regarded as inhuman and degrading". Id. at. par.103 However, the medical necessity must be proved and procedural guarantees must be in place.
[197] Case of Labita v. Italy, 2000 par.120 in Case of V.C v. Slovakia, 2011 par.104.

person refuses a lifesaving procedure, going against his/her will can amount to an interference to his/her personal integrity.[198]

The Court then turned to the specific facts of the case. It stated that sterilization is an important interference to one's reproductive health status that can have effects in not only one's physical but also mental health. Even though the procedure can be performed to a consenting, mentally competent adult, albeit the situation is different when this is not the case. The Court stated that it is not its position to make medical evaluations, it also stated that sterilization is not considered a life-saving operation and as such, the informed consent of the applicant was required. The procedure followed in the present case was "not compatible with the principles of respect for human dignity and human freedom embodied in the Convention".[199] Consequently, the Court found a violation of Art.3 in its substantive part.[200]

The Court reiterated,

> private life is a broad term, encompassing, *inter alia*, aspects of an individual's physical, psychological and social identity, such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings and the right to respect for both the decisions to have and not to have a child.[201]

It went on by stating that the purpose of Art.8 was to protect individuals from arbitrary interferences by the state and that any interference ought to be justified under the second paragraph of Art.8. At the same time, States are obliged to fulfill a positive obligation, by effectively respecting the rights under Art.8. For that reason, it is equally important that procedural safeguards are in place.

In regards with the facts of the case, the Court stated that the interference with the applicant's private and family life was not disputed. In relation to

[198] Case of V.C v. Slovakia, 2011 par.105.
[199] Id. at. par.112.
[200] Id. at. par.120.
[201] *Case of Evans v. the United Kingdom*, no. 6339/05, ECHR 2007 par.71 in Case of V.C v. Slovakia, 2011 par.138.

the sterilization *per se*, the Court referenced its findings on the violation of Art.3. It did however examine whether there had been a violation of the positive obligations under Art.8 that is to say that the State's legal system had the necessary "effective legal safeguards" in place.[202]

The Court concluded that the overall framework in relation to abortions in Slovakia was not satisfactory and as such found a violation of Art.8 in its procedural aspects.[203]

3.3.2.2 Case of Connors v. the United Kingdom[204]

The applicant alleged violations of Art.8 for his forceful eviction from the plot he owned.[205]

In assessing Art.8 the Court reiterated that

> an interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued.

The State is making an "initial assessment of necessity", with the Court however having the final evaluation.[206]

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[202] Case of V.C v. Slovakia, 2011 pars.139-142.
[203] Id. at. par.155.
[204] *Case of Connors v. the United Kingdom*, no. 66746/01, First Section 2004.
[205] Mr. Connors was a gypsy, living a traditional travelling lifestyle along with his family, before settling on a "gypsy site" in Leeds owned by the British authorities. He has lived there for 13 years. The applicant was granted permission to use said space by the Leeds City Council. In December 1998 however the Council issued a warning in regards to misbehavior of the applicant's children, son in law and visitors. The alleged misbehavior continued after the issuance of the warning. On January 2000, both families (the applicant's and his daughter's) were served an eviction note. Neither family left the spot. In March 2000, the Council initiated proceedings to evict them, for possession of the plots without the necessary license. The applicant subsequently requested a judicial review, which was rejected by the High Court in March 2000. In July, the Council was granted a warrant for the eviction, which was executed on August 1st. The applicant's caravan and possessions were removed and not returned to him for the days to follow. Mr. Connors supported that no guidance was provided to him as to where he and his family could reside afterwards and as a result his son was not able to continue school and his family was separated. Id at pars.6-80.

The Court then referred to the "margin of appreciation". According to the Court, States do enjoy a certain margin of appreciation, because they are in a better position to evaluate the factual circumstances before them. When the European consensus is wide on a matter, the margin of appreciation is narrower and *vice versa.* It varies according to the nature of the Convention right infringed, the "importance for the individual and the nature of the activities restricted" and the aim pursued. Therefore, the margin of appreciation will be narrower "when the right at stake is crucial to the individual's effective enjoyment of intimate or key rights". [207]

On the contrary, when it comes to economic and social policies, the margin of appreciation is considerably wider. More specifically, in cases involving housing, the Court has previously stated that it will accept the decisions of the national authorities, unless the decision is "manifestly without reasonable foundation".[208]

The Court at this point makes a clear distinction. It points out that it had indeed found so, but in the context of Art.1 Protocol I and not of Art.8,

> which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.[209]

Accordingly, when issues of economic and social policy arise under the scope of Art.8, the margin of appreciation is dependent on the specific facts of the case. In this case, procedural safeguards are of great importance, and what the Court will examine to assess the interference.[210]

In regards with the "vulnerable position of gypsies" the Court stated that

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[206] Case of Connors v. the United Kingdom, 2004 par.81.
[207] Id. at. par.82.
[208] Id. at. par.82.
[209] Id. at. par.82.
[210] Id. at. par.83.

> as a minority […] some special consideration should be given to their needs and their *different lifestyle* both in the relevant regulatory framework and in reaching decisions in particular cases […] To this extent, there is thus a *positive obligation* imposed on the Contracting States by virtue of Article 8 *to facilitate the gypsy way of life* (emphasis added).[211]

The Court then applied the aforementioned principles to the facts of the present case, concluded that the eviction did not follow the required procedural safeguards and as such found a violation of Art.8.[212]

The Court made important steps in including socio-economic and cultural rights in the context of Art.8. More specifically, it made clear reference to a "gypsy way of life", "different lifestyle" and positive obligations in order to "facilitate" both.

Moreover, the Court has accepted that in the issue of social and economic policies and more specifically housing, States have a wide margin of appreciation. This however means that the Court can still examine these policies, even in a lesser extent. This was apparent in the present case. The Court uplifted the importance of Art.8 and stressed out that in the case of Art.8 which concerns important aspects of a human entity, things are different. And it indeed found a violation of Art.8 for the applicant's eviction. We can thus conclude that there is a consideration of socio-economic and cultural policies in the context of Art.8.

3.3.2.3 Case of López Ostra v. Spain[213]

Mrs. Ostra alleged a violation of Art.8 and her private and family life, because of the State's failure to effectively regulate the function of a waste plant.[214]

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[211] Id. at. par.84.
[212] Id. at. par.95.
[213] *Case of López Ostra v. Spain*, no.16798/90, ECHR 1994.
[214] Mrs. Ostra and her family were living in the Spanish town of Lorca. The town had many tanneries, which had a plant for the "treatment of liquid and solid waste". The plant did not have the required license for activities that would cause nuisance, was unhealthy, noxious and dangerous. Moreover, it was close to a residential area. The plant

The Court stated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".[215] It further stated that whether there was a positive obligation of the State under Art.8 or whether it was "an interference by public authority", the principles applying are similar, and a "fair balance must be struck between the competing interests of the individual and of the community as a whole".[216] In this case, the State enjoys a certain margin of appreciation.

The Court examined whether the State's reaction to the nuisance caused by the plant was adequate. It found that it was not and subsequently found a violation of Art.8.[217] López Ostra is the first case before the ECtHR where the Court found a violation of Art.8 based on environmental issues.[218]

3.3.2.4 Case of Hatton and others v. the United Kingdom[219]

The applicants alleged that Heathrow airport's noise was infringing Art.8 of the Convention.[220] The Court reiterated that even though "there is no explicit right in the Convention to a clean and quiet environment", albeit "where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8",[221] that

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malfunctioned, with gas fumes, pestilential smells being released and the residents of that particular area had to be evacuated and relocated by the local authorities for three months. Following complaints by the residents, the plant eventually closed, but certain nuisances continue and can have drawbacks on the health of the nearby residents. Mrs. López Ostra brought proceedings before the domestic courts, alleging an interference with the peaceful enjoyment of her home, her physical and psychological integrity, her liberty and safety and asked for a cessation of the activities. Her request was rejected. She then brought proceedings before the Supreme and Constitutional Court of Spain, but both times her case was dismissed. Id. at. pars.6-29.

[215] Id. at. par.51.

[216] Ibid.

[217] Case of López Ostra v. Spain, 1994 par.58.

[218] Aalt Willem Heringa, *Private Life of the Protection of the Environment, Lopez-Ostra v. Spain*, 2 MAASTRICHT J. EUR. & COMP. L. (1995) at 201.

[219] *Case of Hatton and Others v. the United Kingdom*, no.36022/97, ECHR 2003.

[220] Mrs. Hatton and the other applicants were living in close proximity to Heathrow airport. Due to the noise, many of them had to move and others developed health issues.

[221] Case of Hatton and Others v. the United Kingdom, 2003 par.96.

> may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.[222]

In cases where State decisions affect environmental issues, the Court's assessment may be twofold; firstly, a control that the "merits of the government's decision" are compatible with Art.8 and secondly that through the decision process due regards was awarded to the "interests of the individual". However, it did not find a violation of Art.8 based on the facts of the present case.

3.3.2.5 Case of Sidabras and Dziautas v. Lithuania[223]

The two applicants were two former KGB agents that due to the Lithuanian legislation faced restrictions in their employment.[224] They brought the case to the Court for alleged violations of Art.8 in conjunction with Art.14 of the Convention, and Art.8 on its own.[225]

The Court reiterated that "private life is a broad term not susceptible to exhaustive definition"[226]It further referred to the case of *Niemietz v. Germany*, where it stated that "there appears […] to be no reason of principle why th[e] understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature".[227] In *Sceuten v. Germany,* the Court also stated that Art.8 "secures to the

[222] Id. at. par.98.
[223] *Case of Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004.
[224] Following its independence from the Soviet Union, Lithuania enacted legislation ("KGB Act") not allowing the employment of former employees of, *inter alia,* KGB to certain occupations both in the private and in the public sector. Lithuania declared its independence in 1990 and the legislation was enacted in 1998. The two applicants supported in domestic courts that they fell into the ambit of exceptions of the pertinent legislation. However, the domestic courts found otherwise.
[225] Case of Sidabras and Džiautas v. Lithuania, 2004 pars.10-32.
[226] *Case of Peck v. the United Kingdom,* no. 44647/98, ECHR 2003 par.57 in Case of Sidabras and Džiautas v. Lithuania, 2004 par.43.
[227] *Case of Niemietz v. Germany* no. 13710/88, ECHR 1992 par.29 in Case of Sidabras and Džiautas v. Lithuania, 2004 par.44.

individual sphere within which he or she can freely pursue the development and fulfilment of his or her personality".[228]

The Court reiterated that the "lack of access to the civil service as such cannot be the basis for a complaint under the Convention".[229]However, it distinguished the present case from merely access to civil service, but a ban for private employment as well. The Court found that such a ban is "far-reaching" and "does affect "private life"".[230]Moreover, the Court stressed out that "there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention".[231]

The Court then examined the facts of the present case. It pointed out that even though the ban was not absolute, it still "affected the[ir] ability to develop relationships with the outside world to a very significant degree"[232] and was a "possible impediment to […] leading a normal personal life".[233]As such, Art.8 is applicable in the case. The Court thus examined Art.8 in conjunction with Art.14.[234]

It further reiterated that States have a legitimate interest to regulate employment conditions in both the public and the private sector and that the Convention does not "guarantee as such the right to have access to a particular profession".[235] The Court examined the reasons why such a prohibition was put into place, and it found that the reasons were prescribed in the Convention.[236]It then examined whether the measure was

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[228] Brüggeman and Scheuten v. Germany, par.55 in Case of Sidabras and Džiautas v. Lithuania, 2004 par.43.
[229] *Case of Kosiek v. Germany*, no. 9704/82, ECHR 1986 par.35, *Case of Vogt v. Germany [GC]*, no. 17851/91, ECHR 1995 pars.43-44 in Case of Sidabras and Džiautas v. Lithuania, 2004 par.46.
[230] Case of Sidabras and Džiautas v. Lithuania, 2004 par.47.
[231] *Case of Airey v. Ireland*, no. 6289/73, ECHR 1979 par.26 in Case of Sidabras and Džiautas v. Lithuania, 2004 par.47.
[232] Case of Sidabras and Džiautas v. Lithuania, 2004 par.48.
[233] Id. at. par.49.
[234] Id. at. par.50 The Court reiterated that in order for a treatment to be discriminatory it does not have an "objective and reasonable justification" in the sense that it does not "pursue a legitimate aim" or "there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized".
[235] Id. at. par.52.
[236] Id. at.par.55.

proportionate and it found that it was not.[237]As such, it found a violation of Art.14 in conjunction with Art.8.[238]

In *Sidabras* the Court made the following very important distinction; it emphasized that nothing bans the Court from examining social and economic rights in the context of the Convention. The Court made that distinction in the context of the right to work. One could go so far as to say that it included figments of the right to work in the right to private and family life, by stating that restrictions to the private employment of a person owned to the loyalty to the State are disproportionate.

3.4 Analysis

Before proceeding to the analysis of the aforementioned articles, I shall refer to the interpretative rules followed by the ECtHR. At this point it should be born in mind that "all legal texts require interpretation"[239]"due to the inherent limits in language and the unpredictability and multitude of reality".[240]

The European Convention on Human Rights is an international law treaty, and as such is to be interpreted according to Art.31 of the Vienna Convention on the Law of Treaties.[241] The Vienna Convention is the

[237] The Court stated that it is acceptable for States to wish the employee's "loyalty" in State-related employment. However, the same cannot be said for private employment. In fact, "State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention".[237]Furthermore, the KGB Act was "lacking the necessary safeguards for avoiding discrimination and for guaranteeing adequate and appropriate judicial supervision of the imposition of […] restrictions".[237]The Court also took into consideration the time of enactment of the KGB Act, which was almost 10 years after Lithuania's declaration of independence from the Soviet Union id. at.pars.55-60.

[238] Id. at. par.62.

[239] Sondre Torp Helmersen, *Evolutive treaty interpretation: legality, semantics and distinctions*, 6 EUR. J. LEGAL STUD. (2013) at 164.

[240] Footnote 11 in id. at.164.

[241] Article 31 of the Vienna Convention on the Law of Treaties reads as follows: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in cone[ct]ion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in cone[ct]ion with the conclusion of

starting point for the Court's interpretation,[242] albeit its use can go only up to some extent.[243]

The Court has also employed the teleological interpretation that takes into perspective "the protection of individual human rights", as it found in *Soering v. the UK.*[244] Indeed, in *Soering* we can see the Court applying this principle, since it found a violation of Art.3 in relation to the death-row phenomenon and not death penalty *per se.*

In *Wemhoff v. Germany,* the Court emphasized that

> given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by parties.[245]

Moreover, "individual liberties need a broad interpretation, whereas restrictions on these liberties require a restrictive interpretation".[246]

In *Tyrer v. the UK*, the Court set the principle that "the interpretation of the Convention should be evolutive,[247] since the Convention is a living

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the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context:(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended".

[242] J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (Manchester : Manchester University Press, 1993. 1993) at 69.

[243] WHITE, et al., Jacobs, White and Ovey, the European convention on human rights. 2010 at 66.

[244] HARRIS, et al., Law of the European convention on human rights. 2009 at 5.

[245] Id. at.6.

[246] *Case of Klass and Others v. Germany*, no. 5029/71, ECHR 1978 in Rudolf Bernhardt, Thoughts on the Interpretation of Human Rights Treaties in FRANZ MATSCHER, et al., PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION : STUDIES IN HONOUR OF GÉRARD J. WIARDA = PROTECTION DES DROITS DE L'HOMME: LA DIMENSION EUROPÉENNE : MÉLANGES EN L'HONNEUR DE GÉRARD J. WIARDA (Köln : Heymann, cop. 1988. 1988) at 70.

[247] Added by the author: "An evolutive interpretation is an interpretation where a term is given a meaning that changes over time" in Helmersen, EUR. J. LEGAL STUD., (2013) at 162.

instrument to be construed in light of the present-day conditions".[248]A great example of this evolutive interpretation is the case of *Al-Saadoon.* When examined in relation to the prior case of *Soering,* we can see the Court adjusting its positions based on the evolution in both law and Member-States' practice.

However, in *Johnston v. Ireland,* the Court stated that "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[249]That was apparent in *Pretty v. the UK,* where the Court did not find that "a right to die" could be read through Art.3 and the right to life.

In *Artico v. Italy,* the Court stressed out that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[250] The Court thus inserted the principle of effectiveness for the interpretation of the Convention, in the sense that rights should be interpreted in such a way as to ensure their effective enjoyment.[251]

In *Stec v. the UK*, the Court found that "the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions".[252] Additionally, in *Leander v. Sweden,* the Court stated that "any interpretation […] must be in harmony with the logic of the Convention".[253]The "overall approach" of the Court "can perhaps best be summarized as an evolutive approach based upon its understanding of the object and purpose of the Convention".[254] The overall approach of the Court can be clearly seen in the cases of *Pretty, Soering and Al-Saadoon,* where the Court connected Arts. 2 and 3 by using the one to interpret the other.

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[248] *Case of Tyrer v. the United Kingdom*, no. 5856/72, ECHR 1978.
[249] Case of Johnston and Others v. Ireland, 1986 par.53.
[250] *Case of Artico v. Italy*, no. 6694/74, ECHR 1980 par.3.
[251] HARRIS, et al., Law of the European convention on human rights. 2009 at 15.
[252] Ibid.
[253] *Case of Leander v. Sweden*, no. 9248/81, ECHR 1983 par.78.
[254] WHITE, et al., Jacobs, White and Ovey, the European convention on human rights. 2010 at 81.

It is argued that the Court is at times, and more frequently employing an "integrated[255] or holistic[256] approach to human rights". According to this approach "civil and political rights have inherent socio-economic components" which "should open up the possibility of the implementation of social rights, or some of their components, through petition procedures of civil and political rights", which was apparent in *Sidabras.*[257]

In relation to positive obligation owed by the States under, for example Art.8 and environmental matters, they can be construed as either "the discovery of obligations that were always implicit in the guarantees concerned or as the addition of new obligations for [S]tates".[258]

In its interpretation, the Court includes the principles of proportionality[259] and the margin of appreciation.[260] Proportionality applies in cases of restrictions of the rights,[261] positive obligations,[262] non-discrimination cases,[263] and under Art.15.[264] The principle does not apply under Art.3 of the Convention that inserts an absolute prohibition.[265]

In reaching common "definitions", the Court is employing "comparative law techniques". If a common ground is reached, then that will apply.

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[255] Scheinin in " Economic and Social Rights as Legal Rights" in ASBJØRN EIDE, et al., ECONOMIC, SOCIAL AND CULTURAL RIGHTS : A TEXTBOOK (Dordrecht : Martinus Nijhoff Publishers, cop. 2001, 2., rev. ed. 2001) at 32.
[256] Leary, "Lessons from the Experience of the International Labour Organisation" in Alston, The United Nations and Human Rights: A Critical Reappraisal (Oxford University Press 1992).
[257] Virginia Mantouvalou, *Work and Private Life: Sidabras and Dziautas v. Lithuania*, 30 EUROPEAN LAW REVIEW (2005) at 276.
[258] HARRIS, et al., Law of the European convention on human rights. 2009 at 8.
[259] Id. at.10.
[260] Id. at.11.
[261] *Case of Handyside v. the United Kingdom*, no. 5493/72, ECHR 1976 in HARRIS, et al., Law of the European convention on human rights. 2009 at 10.
[262] *Case of Rees v. the United Kingdom*, no. 9532/81, ECHR 1986 in HARRIS, et al., Law of the European convention on human rights. 2009 at 10.
[263] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR 1968 in HARRIS, et al., Law of the European convention on human rights. 2009 at 10.
[264] Lawless v. Ireland in HARRIS, et al., Law of the European convention on human rights. 2009 at 10.
[265] *See* 4.1.

Otherwise, States have a "margin of appreciation".[266]According to this principle, a State has some extent of discretion when examining a case, since it is closer to the factual circumstances of the case and as such in a better position to evaluate them.[267]The margin of appreciation principle has been extensively used in Art.8 cases.[268]

Turning to the analysis of Article 2, the Court has made progress both in better regulating the negative part of the right to life (i.e not arbitrarily taking someone's life) and developed the positive obligations.[269]

One further important aspect of the Court's jurisprudence in relation to the right to life is that it attributes violations of the right to life in both a substantive and a procedural level.[270] In regards to the procedural aspects, a case might arise even when the alleged victim is not deceased for sure, as for example in the case of *Cyprus v. Turkey*.[271]

In both cases *Öneryildiz* and *Budayeva*, it becomes apparent that the Court is linking the right to life to environmental conditions. In fact, it is not enough to have merely adopted relevant legislation, but it must be effective, in the sense of not endangering human lives.[272]

In relation to Art.2 in the context of the *Soering* case, the ECtHR stressed out that

> [s]ubsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the

[266] WHITE, et al., Jacobs, White and Ovey, the European convention on human rights. 2010 at 69.
[267] Case of Connors v. the United Kingdom, 2004.
[268] HARRIS, et al., Law of the European convention on human rights. 2009 at 12 *See* 3.3.
[269] Hendin, Evolution of the Right to Life by the European Court of Human Rights, The [article]. 2004] at 109.
[270] HARRIS, et al., Law of the European convention on human rights. 2009 at 66.
[271] Id. at. 48.
[272] Korff Douwe, The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights. 2006] at 65.

> agreement of the contracting states to abrogate the exception provided for under Article 2(1),[273]

thus "informal[ly] amend[ing] […] the text of the Convention"[274]in relation to Art.2.

The case law of the Court in regards to the right to life is characterized as one of the "richest and most dynamic of all the Convention case-law"[275] and flexible[276]especially in relation to a State's positive obligations[277]

Although Art.3 introduces an absolute prohibition of torture, inhuman and degrading treatment albeit it is difficult to interpret.[278]The European Court of Human Rights has found time and again that certain living conditions in detention can give rise to a violation of Art.3. The Court has reiterated the importance of good living conditions for detainees for both one's physical and psychological well-being in various other cases, as for example in *Soering* and *Al-Saadoon*.[279]

The Court has examined the living conditions of detainees in detail. It concluded that certain conditions, as for example, unsanitary conditions, including dirty sheets, lack of toilets etc. could amount to degrading treatment.[280] It further found that not being able to have access to hospitals, can also be characterized degrading.[281] In the same manner, the lack of recreational activities, or even the ability to walk outside, was deemed as degrading treatment.[282] The lack of secondary schooling was also, in the specific circumstances of the case, considered a violation of Art.3.[283]

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[273] Case of Soering v. the United Kingdom, 1989 par.103.
[274] HARRIS, et al., Law of the European convention on human rights. 2009 at 16.
[275] Id. at.166.
[276] Hendin, Evolution of the Right to Life by the European Court of Human Rights, The [article]. 2004] at 109.
[277] Id. at.166.
[278] HARRIS, et al., Law of the European convention on human rights. 2009 at 111.
[279] *Affaire Tabesh c. Gréce*, no 8256/07, ECHR 2010.
[280] Affaire S.D c. Gréce, 2009;Affaire A.A c. Gréce, 2010.
[281] Affaire S.D c. Gréce, 2009.
[282] Ibid.
[283] Case of Cyprus v. Turkey [GC] (just satisfaction), 2001.

Thus we can see that, even though the Court does not accept socio-economic rights as a part of the Convention and it has emphasized that its findings were not to be construed as imposing to a State the obligation to provide everyone with e.g housing, albeit, in these situations the Court is taking in consideration adequate conditions of living, nutrition, health, and schooling, all of which constitute socio-economic rights.[284] In fact, it was found that when socio-economic conditions apply for Art.3, it could have extra-territorial effect.[285]

In reaching its conclusions, the Court invoked human dignity. These living conditions were not acceptable under Art.3 of the Convention because they were against the inherent dignity of human beings. In *Larioshina,* the Court referred to "living conditions below a certain minimum level".[286] We can conclude that the Court considered that these very conditions were necessary in order to respect one's dignity. Human dignity is thus being used as an interpretive tool for Art.3 of the Convention. It is used as a means to reach a conclusion on whether a certain conduct constitutes degrading and/or inhuman treatment or not.

> The Court, therefore, interprets dignity in a way which respects agency and individual choice […] In addition, the Court interprets dignity as demanding certain fundamentals which are key to respect for personhood.[287]

Article 8 is complex because of its wide ambit and there is a wide range for interpretation.[288] In relation to Art.8, the Court avoids to give specific definitions on what it entails. On the contrary, it rules on a case-by-case basis. "The lack of precision in Article 8(1) has allowed the case law to

[284] Clayton, Asylum Seekers in Europe: M.S.S. v. Belgium and Greece [notes]. 2011] at 765.
[285] Id. at.766.
[286]Schoukens Paul, The Right to Access Health Care: Health Care according to International and European Social Security Law Instruments. 2008 at 530.
[287] Natasa Mavronicola, *Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context*, 15 HUMAN RIGHTS LAW REVIEW (2015) at 741.
[288] HARRIS, et al., Law of the European convention on human rights. 2009 at 422.

develop in line with social and technical developments".[289] Besides, the Court itself found that "private life is a broad concept, incapable of exhaustive definition".[290] The Court has expanded the right to private life in a big part of human activities. This expansion "holds out a promise of protection of individual interests".[291]The margin of appreciation doctrine has assisted in this direction. And even though the Court respects States' margin of appreciation, albeit it requires that certain procedural safeguards are met.[292]

The Court made a "conceptual shift within Article 8", which "extends considerably the scope of the ECHR, including, in some cases, areas which had not been originally envisaged, i.e economic and social rights, environmental rights, etc."[293]This was evident in the case of *Sidabras and Dziautas v. Lithuania*, where the Court included a social right, the right to work, in the interpretation of Art.8.[294] It is a characteristic case of the State's positive obligations in order for the rights of the Convention to be fully enjoyed.[295]

The Court has thus "develop[ed] the interest protected to take into account changing circumstances and understandings without being confined by an established theoretical framework"[296]This is apparent from the Court's approach to environmental issues and their relation to Art.8,[297]as for example in *López Ostra.*

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[289] Id. at.361.
[290] *Case of Costello-Roberts v. the United Kingdom*, no. 13134/87, ECHR 1993 in HARRIS, et al., Law of the European convention on human rights. 2009 at 364.
[291] HARRIS, et al., Law of the European convention on human rights. 2009 at 365.
[292] Id. at. 363.
[293] Stephanie Lagoutte, *Surrounding and Extending Family Life: The Notion of Family Life in the Case-Law of the European Court of Human Rights*, 21 MENNESKER OG RETTIGHETER (2003) at 301.
[294] Mantouvalou, EUROPEAN LAW REVIEW, (2005) at 579.
[295] Heringa, MAASTRICHT J. EUR. & COMP. L., (1995) at 203.
[296] HARRIS, et al., Law of the European convention on human rights. 2009 at 422.
[297] López Ostra, in id. at.422.

Moreover, under "the protection afforded to the home" "a certain quality of life is assured".[298]

The Court did not specify which conditions were a violation of Article 8, but examined it as a whole.[299]This approach by the Court "will lead to a further fusion of freedom rights and social rights".[300]

3.5 Concluding remarks

The Court has made steps forward in the interpretation of the rights to life, private and family life and the prohibition of inhuman and degrading treatment. More specifically, it considered the inclusion of socio-economic rights in the right to life (*Cyprus v. Turkey*), the prohibition of degrading and inhuman treatment (*M.S.S v. Greece and Belgium*) and the right to private and family life (*López Ostra, Sidabras and Dziautas*). The Court has expanded the application of both Art.3 and 8 and has acknowledged the existence of positive obligations under all three Articles.

The Court did so by employing a teleological, evolutive, effective and holistic interpretation of the European Convention. This interpretation takes into account the fact that the European Convention aims to the protection of human rights; that the Convention is a living instrument; that the rights under the Convention ought to be protected effectively; and that the Convention ought to be read as a whole.

[298] Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 1995, at 273.
[299] Heringa, MAASTRICHT J. EUR. & COMP. L., (1995) at 203.
[300] Id. at.204.

4 Conclusion

This chapter is concluding on whether the right to life in the European context can be interpreted as a right to life in dignity as in the Inter-American, which according to the aforementioned analysis, is in fact possible. I employ the definition of the right to life in dignity as provided for in *2.3*, to examine whether the same characteristics can be traced in the European jurisprudence. I then argue that the interpretation of the right to life as a right to life in dignity, is indeed possible following the ECtHR's interpretative tools; I firstly argue based on the ECtHR's integrated and holistic approach, secondly based on the "effective protection of human rights" approach and thirdly on the "living instrument of the ECHR" approach; counterarguments are also touched upon, but rebutted. Finally, I reflect on whether such an approach will and should be employed.

At first sight, the meaning of Art.2 of the ECHR is very clear and does not need any further interpretation. However, as shown before in *Soering,* Art.2 can also be interpreted.

Going back to the definition of the right to life as provided for in the context of the Inter-American Court the right to live in dignified conditions includes a certain level of safety, access to health-care and sanitation, education, housing, nutrition and respect for rooted cultural traditions to the extent that an impossible burden is not set on the State. Based on this definition, I shall determine whether the same characteristics can be traced in the ECtHR's jurisprudence as analyzed in the previous chapter.

The European Court of Human Rights has indeed inserted these aspects in various occasions. The Court dealt with safety in the cases of *Öneryiliz* and *Budayeva* in the context of Art.3; access to health and nutrition in *M.S.S, S.D, A.A* and *Necheva*; education in *Cyprus v. Turkey*; housing in *Öneryildiz, Budayeva, Moldovan* and *Connors*; nutrition in *Nencheva;* the protection of cultural traditions was emphasized in *Connors,* where the

Court referred to the "gypsy way of life". The Court has thus included these socio-economic rights in its findings under Articles 3 and 8.

Turning to the first line of argumentation, the finding of the Court in *Leander* in relation to the ECHR's interpretation, that it should be read as a whole, is relevant in this context. Articles 3 and 8 are part of the European Convention and under their interpretation, socio-economic rights that are linked to human dignity are included.[301]

Consequently, Article 2 if read in the light of Articles 3 and 8, seeing that the Convention is to be read as a whole, will extend to include the socio-economic rights found in these articles and as such as a right to live in dignity, as defined above. Indeed, this would be an example of the ECtHR's integrated approach to human rights, as described in 3.4.

Secondly, as the ECtHR has repeatedly stated, the purpose of the Convention is the effective protection of human rights. As has been shown in the jurisprudence of the Inter-American Court and especially in relation to vulnerable groups, the right to life cannot be effectively protected, if its interpretation includes only the right not to be arbitrarily deprived of one's life. Especially for vulnerable groups (e.g mentally ill in *Necheva,* Roma in *V.C* and *Connors,* asylum seekers in *M.S.S, S.D and A.A* etc.), the right to life ought to include the realisation of further rights in order not to be violated. That was evident in the cases concerning indigenous people before the Inter-American Court of Human Rights. It was also evident in the case of *Necheva,* where the State ought to have provided better housing conditions, sanitation, nutrition and access to health care to mentally ill children under its protection.

As such, in order for the right to life to be effectively protected under the ECHR, the ECtHR must employ a wider interpretation of Art.2, as a right to life in dignity.

[301] *See* 4.3.

Thirdly, as the ECtHR has emphasized time and again, the ECHR is a living instrument, that must adapt with the passage of time. Perhaps, the right to life could be construed limitedly in the 1950s when the Convention was entered into force. However, two issues must be taken into consideration at this point. To begin with, modern societies have become much more demanding in what is required to ensure one's right to life. The Inter-American Court's jurisprudence is indicative of that. The construction projects in the cases concerning indigenous people, were threatening their right to life, because they were interfering with their way of life. Similarly, conditions have changed in the European context.

Additionally, and perhaps most importantly, the way human rights are interpreted nowadays in comparison to how they were interpreted when the European Convention entered into force, has evolved. More specifically, the distinction between civil and political rights on the one hand, and social, economic, and cultural rights on the other is not as clear as it used to be. In fact, it can even be said that it no longer has a meaning and that in order to ensure the effective protection of all human rights, the protection of social, economic and cultural rights ought to be incorporated in the judicial demand of civil and political rights.[302]

Furthermore, the division between positive and negative obligations of a State is also somehow blurry. The European Court has made that clear in the cases concerning Art.8 where it stressed out that whether it was a case of the State's "positive obligation" or of an "interference by the State", the principles applying are very much the same. It thus becomes apparent that not only society, but also the law has progressed in such a way that the right to life can be interpreted more extensively.

As the Court found in *Airey v. Ireland*,

> [it] can no longer ignore that the development of the economic and social rights greatly depends on the situation of the State and especially their

[302] *See* Mantouvalou, EUROPEAN LAW REVIEW, (2005).

> financial resources. On the other hand, the Convention must be read in terms of life today **[...],** and its field of application, it tends to a concrete and real protection of the individual. Or, if it provides essentially civil and political rights, many of them have economic or social extensions.[303]

As such, I conclude that if the right to life is interpreted in today's circumstances, it can indeed be one of the civil rights that has economic and social extensions, and as such life in dignity. For this to be achieved the States would have to extent their positive obligations under Art.2.[304]

Turning to the counterarguments, it could be argued that the European Court does not accept the interpretation of a right in the opposite way, or the "creation" of new rights. For example, in the case of *Pretty*, the Court did not find a "right to die", because such a right did not derive from the text of Art.2. This however is not the case before us. The Court would not be creating a *new* right, but merely expanding the protection sphere of an already existing one. By interpreting Art.2 and the right to life in a wider way, the European Court would be able to afford a better protection for the right. Its content would be expanded through the addition of human dignity and what it entails in its interpretation.

Another counterargument could be that the European Court does not adjudicate socio-economic and cultural rights. However, the Court itself has stated that even though the protection of socio-economic rights was not at first the purpose of the Convention, albeit that does not prohibit the Court from engaging with the examination of these rights.[305]

Finally, financial considerations of the States will be taken into view. The Inter-American Court has already made that clear.[306]However, I am not suggesting that a right to health, housing, food etc. should be realized under the right to life and a violation of them would automatically be a violation of the right to life. Of course, the State must have a "margin of

[303] Case of Airey v. Ireland, 1979 par.26.
[304] HARRIS, et al., Law of the European convention on human rights. 2009 at 48.
[305] Case of Sidabras and Džiautas v. Lithuania, 2004 par.47.
[306] Case of Sawhoyamaxa Indigenous Community *v.* Paraguay, 2006 par.155.

appreciation" in these matters. In cases of vulnerable groups though, special consideration must be given, that might also include the realisation of certain of the aforementioned rights in the context of Art.2 and the right to life. Financial figures and their achievement should not be used to the detriment of those in need of special protection. A careful consideration and regulation of financial policies could be formed in a way that would allow the right to life to be fully protected, without a burdensome situation for the State.

A development leading to a definition of the right to life as a right to a "dignified life" in the European system as in the Inter-American seems unlikely at this point. The reasons behind it are multidimensional. First of all, courts are reluctant to make decisions "about allocating resources".[307] At the same time, the reasons are also political. The ECtHR is only functional as long as its decisions are being followed by the Member-States. If it started imposing obligations that States considered unreasonable or burdensome, it is unlikely that they would follow them. As such the effectiveness of the Court would be severely injured.

Life evolves. Conditions change. The effective protection of human rights presupposes that the law is interpreted according to these changes. If the right to life does not enlarge to include something more, it will shortly not be able to cover all conditions that will fall into its ambit. It is important that it includes more, both in quantity and in quality; that it takes into consideration vulnerabilities and cultural characteristics. The real challenge is that the law evolves. For the right to life cannot be really protected any longer as it is; it needs to evolve as well.

[307] WICKS, The right to life and conflicting interests. 2010 at 222; Sandra Fredman, *Human rights transformed: positive duties and positive rights*, (2006).

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