The prohibition of torture and degrading treatment under the ECHR: Do courts have the legitimacy to set the standards of welfare state protection towards asylum seekers?

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Introduction

The aim of the paper is to examine the recent European Court of Human Rights (ECtHR or 'The Court') asylum-seeker cases of *MSS v Belgium and Greece,*[1] *and V.M. and others v Belgium*.[2] The cases deal with the problems facing a particularly large number of people who in search of a better life attempt to enter, in many cases illegally, countries that are member states of the European Union. From this perspective, the *MSS* and *V.M.* judgments can be added to the many pre-existing cases that are part of the Strasbourg case law and focus on various aspects of modern immigration and refugees. These cases have dealt with all aspects of immigration[3] including the prerequisites that must be met by the country that is exercising its jurisdiction (receiving state), for the transfer of the – not always welcome 'foreigner'- to a third state or the return to his/her state of origin.[4] This is a category of cases that raises substantive questions as to the rights of immigrants and refugees, but also the respective obligations of the state on the basis of a Convention of a 'special character',[5] the European Convention on Human Rights (ECHR), which is aimed towards the collective protection of human rights.

In the cases under discussion, the Strasbourg court found the respondent states to be in violation of Article 3 ECHR, which prohibits torture and inhuman or degrading treatment. In *MSS*, Greece was found to have violated Article 3 for the conditions of detention of the applicant,[6] but also for the fact that during the time he was waiting for his asylum request to be assessed by the Greek authorities,[7] he was not provided with material assistance. At the same time, Belgium was found to be in violation of the same

[1] (No. 30696/09, 21 January 2011).
[2] (No. 60125/11, 7 July 2015).
[3] For instance, *Saadi v United Kingdom* (No. 13229/03, 29 January 2008), *Saadi v Italy*, (No. 37201/06, 28 February 2008) and *Othman (Abu Qatada) v United Kingdom* (No. 8139/09, 17 January 2012).
[4] See for instance *Hirsi Jamaa v Italy* (No. 27765/09, 23 February 2012).
[5] *Nada v Switzerland* (No. 10593/08, 12 September 2012) § 196.
[6] It is without a doubt a foundational problem of Greece. See indicatively *Peers v Greece* (No. 28524/95, 19 April 2001), *Dougoz v Greece* (No. 40907/98, 6 March 2001), *B.M. v Greece* (No. 53608/11, 19 December 2013), *C.D. and others v Greece* (No. 33441/10, 19 December 2013).
[7] *MSS*, § 247-264.

article, because by implementing EU law (in this case the Dublin II regulation)[8] it transferred the applicant to Greece, thus exposing him to the illegal acts and omissions he was subjected to by the Greek authorities.[9] Furthermore, the Court held that both states were in violation of Article 13 ECHR, which requires the existence of appropriate and effective mechanisms that would have allowed the applicant to challenge his refoulment and potentially avert the violations he was subjected to and the danger to which he was exposed.[10]

In V.*M*., Belgium was found to have violated Article 3 for not ensuring that the applicants, a Roma family with underage children attempting to enter the EU from Serbia, were provided with adequate living arrangements between the time their appeal against the decision of their expulsion from Belgium was rejected and the time they were eventually transferred out of Belgium. The family was removed from the reception centre they had found refuge in, and were left homeless and destitute for three weeks.

This brief account of the findings of the judgments reveals that they have many interesting facets. These include the social policies of the host states in relation to the provision of shelter and material assistance for asylum seekers, the criteria which apply in cases of expulsion to a state that poses a risk to the safety of the individual, and most prominently the immigration policy structure of the EU and the 'safe third country' presumption that was the basis of this legal framework. These facets vividly reveal the problems from the implementation of Dublin II, but also the humanitarian aspect of these cases and the related notion of minimum standards of social provisions from the host state that asylum seekers can expect while their application is being assessed.[11]

However, the direction that we will follow in this study (and it is a direction that could be faulted for being too 'legalistic'), is different. What we are attempting here, is to set the substantive issue of human rights protection in these cases in the background, and focus our analysis on two points that are more theoretical in nature and emerge from the Court's judgments.

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[8] It is a web of Regulations and Directives in relation to the process of assessing asylum requests that member states have to follow. For more details see *MSS*, § 62-86. This has since been replaced with Dublin III.

[9] *MSS* 360.

[10] *MSS* at 390.

[11] See for instance, G. CLAYTON, «Asylum Seekers in Europe: M.S.S. v Belgium and Greece», Human Rights Law Review, 6/2011, pg. 758-773, V. MORENO-LAX, «Dismantling the Dublin System: MSS v Belgium and Greece», European Journal of Migration and Law, 1/2012, pg. 1-31, M. BOSSUYT, «The Court of Strasbourg acting as an asylum court», European Constitutional Law Review, 2/2012, pg. 203-245, M. DEN HEIJER, «Life after MSS: unfinished business», Netherlands Quarterly of Human Rights, 3/2013, pg. 236-240, M. GKLIATI, «Blocking Asylum: The status of access to international protection in Greece», Inter-American and European Human Rights Journal, 1-2/2011, pg. 85-117.

The first issue requires us to shift our attention from the European sphere to the broader system of international law, and more specifically to the realm of international state responsibility. What is particularly notable in MSS, is that for interrelated facts, the applicant complained against the conduct of two and not one, as is most often the case, states, both of which were found to be in violation of the ECHR. Therefore, what we have here is the rare, but not unprecedented instance of concurrent international responsibility of two or more states for substantially the same case. In the specific judgment of *MSS*, Greece was found in violation both through acts and omissions, of the right against inhuman and degrading treatment. Similarly, Belgium was found to be equally responsible due to the fact that, in violation of its 'non-refoulement' obligation,[12] it did not prevent the violations that the applicant was subjected to in Greece, and for which the Greek state was held responsible. There is in this way a form of trans-border, complementary, concurrent international responsibility. This is due to the fact that, at the time Belgium was exercising its (pseudo-) international jurisdiction, it did not prevent illegal acts that took place on Greek territory by Greek authorities. The correlation of the responsibility of these two states that we briefly attempted to explain above, raises a series of technical issues that we will develop in the main part of our analysis. These relate not only to the limits of exercising jurisdiction, its territorial and extraterritorial nature, but also to the distinction between negative and positive obligations in human rights protection, the correlation of these positive obligations with the principle of due diligence and the consequences the violation of this principle by state authorities has in terms of international responsibility.

The second aspect of the case we are attempting to analyse is more substantive in nature and deals with the obligation of the respondent states in these cases to provide, among others, shelter and food to the applicants, during the time their asylum request is under examination[13], or even after they have been officially expelled from the state and have initiated an appeals process. In *MSS*, the Court found that the fact that the applicant was homeless and in a state of extreme destitution, entails responsibility of the state for violation of Article 3.[14] Similarly, in *V.M.* the conditions under which the applicants had to live in after being expelled from the Belgian reception facilities reached the minimum level of severity required to constitute a violation of Article 3. The most theoretical issue under examination here is if, and to what degree, the ECHR can be expanded to include protection for inherently social rights and whether, as a consequence, it can to a certain extent dictate the social and welfare policy contracting parties to the ECHR are expected to follow. The realisation of a social welfare state in the form of providing food, shelter and financial assistance to special 'vulnerable' groups that the ECtHR required in these cases, falls under so-called 'second generation'

[12] In essence, not transferring the applicant to a state where there is a danger that his fundamental rights will be violated, such as the right to life or the right against torture.
[13] *MSS* 250.
[14] *MSS* 263.

rights, which are economic and social in character. Such rights, at least in this form, are largely outside the domain of the ECHR and therefore, the jurisdiction of the Strasbourg Court.[15] The inclusion of such rights into the Convention would in essence allow the Court to intervene and regulate the, primarily redistributive in nature, social policy that Council of Europe contracting parties follow, and therefore to determine on its own – in an arguably undemocratic manner – the socioeconomic model that contracting parties must subscribe to. Therefore such an interpretation of the prohibition of torture, which employs Article 3 as a tool for the indirect enactment of rights of such a nature, would be a blatant form of judicial activism, which is potentially outside (and this is perhaps the essence of the theoretical issue we are examining) the realm of positive obligations (under the light of the due diligence principle) of Article 3 and is instead an issue of social policy that can be progressively realised and is essentially of questionable justiciability. On the other hand however, when a specific social policy is absolutely indispensable for the protection of human life, in cases where without state providence human survival is in danger, one could argue that regardless of priority of socioeconomic policies, the state would be required to provide assistance, and the judiciary would therefore be permitted to find the lack of such assistance 'unconstitutional'. As we will further explain in our main analysis, in such cases, the dividing line between social policy (which the judiciary cannot question) and the responsibility of states to protect human rights with positive measures (through provisions for instance), is particularly thin.

In *MSS*, the ECtHR was particularly prudent in phrasing this aspect of its judgment. By following the rule of precluding issues that fall under social, redistributive in essence, policy from the ECHR, it connected Article 3 to the obligations emanating from the EU legal order that Greece had under Dublin II and the Directive relating to the reception of asylum seekers, as this was transferred into its domestic law.[16] Therefore, the Court pointed to EU law, thus avoiding to set the bar itself in relation to if, and when, extreme cases of poverty would translate into state obligations for social provisions in favour of vulnerable groups. However, in *MSS*, the Court's analysis pointed to an additional, ancillary in character, argument, which attempted to connect the obligation of protection through positive measures with the fact that the applicant belongs to a vulnerable social group that requires special state assistance.[17]

This, ancillary in *MSS*, argument based on the concept of the applicant's vulnerability then became the core justification for finding a violation of Article 3 in the *VM* judgment, as Belgium's obligations under EU law did not feature in the Court's reasoning. This evolution in the Court's findings in relation to social provisions for asylum seekers requires a closer analysis to determine whether 'vulnerability' is becoming an

[15] This will be examined in detail below.
[16] *MSS* 88.
[17] *MSS* 232.

autonomous ground to find a violation of Article 3 for the lack of material provisions to specific categories of individuals. The concept of vulnerability itself, however, and its use by the ECtHR is not the main focus of our argument.[18] As our title suggests, we are attempting to examine this development from the viewpoint of the principle of due diligence and its special character as an obligation of means. This entails that, by default, obligations under this principle are subjective and limited to requiring states to provide protection to the best of their ability, without guaranteeing a specific result. Therefore, we will attempt to question whether the court can in essence, set objective standards of protection, and dictate how a contracting party should prioritise its welfare policy.

Finally, in relation to the structure of this study, our arguments will be presented in the order the aforementioned issues were described above. First, we will provide a brief analysis of facts of the cases, and end our discussion with some final thoughts as a conclusion.

The main facts of the cases.

In *MSS*, the applicant left his birthplace of Afghanistan in 2008 and entered the EU through Greece, where, after being placed under detention for a week and not submitting an asylum request, he was ordered to leave the country. Subsequently, he fled to Belgium, where he lodged an asylum request. By applying Dublin II which provided for the criteria and mechanisms for ascertaining which member state is responsible for examining an asylum request,[19] and which stipulated that the state of first illegal entry from a third country into the EU is responsible for this decision, the Belgian authorities transferred the applicant to Greece. It is important to note that the Belgian authorities did not take into account recommendations from the Office of the High Commissioner of the United Nations to suspend the transfer of refugees to Greece, due to serious failures in the processes of granting asylum and also the tragic conditions of refugee reception there, nor did they take into account the applicant's objections, as he had already experienced the situation for asylum seekers in Greece.[20] Dublin II provided states with the discretion not to transfer any individuals who entered the EU illegally to the state of first entry, based on the so called 'sovereignty clause', and to examine the asylum request themselves. In spite of this, Belgium used its discretion and did not apply the clause in question, thus transferring the applicant to the state of first illegal entry into the EU.

[18] For a thorough examination of this issue see 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law', 11 International Journal of Constitutional Law (2013), p. 1056-1085.
[19] *MSS,* § 65.
[20] MSS, § 184 et seq..

Upon his return to Greece, the applicant was placed under detention is a small space with a large number of people, under particularly painful and inhuman living conditions. He was subsequently provided with a temporary card, until his asylum request was examined. Due to the lack of necessary means of sustenance, he settled in the center of Athens, where he was homeless. After a new attempt to leave the country and the anguish of his destitution, he was arrested and placed again under detention for a short amount of time in similar inhumane conditions. The procedure for granting him asylum was extended to more than a year, during which the applicant was homeless, unemployed, without any provisions, protection or aid from the Greek state and was in great danger as to his personal security.

In *V.M.*, a family of Serbian nationals of Roma heritage entered the EU through France and sought asylum. After their application was rejected the family travelled to Belgium where after lodging a new asylum application, the Belgian authorities ordered their transfer back to France under the Dublin II regulation. The applicants appealed this decision unsuccessfully and were subsequently expelled from the reception facility they were staying in. In the process of being transferred, they resorted to taking up residence in Brussels North railway station for three weeks, before they were returned to Serbia where their severely disabled child died.

These tragic events highlight the severe problems of immigration and the challenges of the European system in meeting the requirements of their reception. This framework creates a complicated set of responsibilities and obligations for states which we will begin to discuss below.

Concurrent responsibility and due diligence.

The first part of the paper deals with the international responsibility of more than one states in the same case, based on interlinked facts, but which lead to the attribution of different and separately identified violations of the ECHR. This part will firstly attempt to explain why this phenomenon occurs, secondly it will characterise the international wrongful acts of the two states in the same case as 'concurrent responsibility' and finally, underscore the role of the principle of due diligence,[21] which is the basis for the responsibility of the first state, but also the link with the wrongful acts and omissions of the second state.

[21] For a general introduction see, T. KOIVUROVA, «Due Diligence» Max Planck Encyclopedia of Public International Law, available at http://www.arcticcentre.org/loader.aspx?id=78182718-d0c9-4833-97b3-b69299e2f127 (last access 17 April 2014). See also, V.P. TZEVELEKOS, «Revisiting the Humanisation of International Law: Limits and Potential. Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation», Erasmus Law Review, 1/ 2013, pg. 73-74.

The analysis must begin from the obvious observation that *MSS* falls under the '*Soering*-type' cases[22] found in the case law of the ECtHR, that relate to the extradition, expulsion, deportation, or more broadly, the removal of an individual to a third country where there is high probability that he or she will be the victim of a violation of his or her fundamental human rights. This violation will either be perpetrated by organs of the receiving state (as is most often the case), or in some cases from individuals whose actions are not attributable to this state.[23] In *Soering*, the ECtHR found that the extradition of the applicant[24] could engage the responsibility of the sending state under the ECHR, if there are important and established reasons to believe that the applicant will in all likelihood face a genuine risk of being subjected to torture or inhuman or degrading treatment in the state he is extradited to.[25]

Two important elements arise from this analysis. The first one is the 'transnational' character of such cases which is tied to the issue of the extraterritorial application of the ECHR.[26] This element however, as we will subsequently discuss, is of minor importance when compared to the second and most important feature of such cases. The key to understanding these interconnected elements, and for the analysis that follows, is to stress the fact that, regardless of the form of extraterritoriality that arises in such cases, it is not related to *negative* violations of human rights that are directly attributable to the state that decided the expulsion, deportation or extradition. It is in fact the violation of a *positive* obligation[27] of the state to act preventatively and protect the individual from wrongful acts that are attributable to third persons who act outside its territory.

Limits to the length and the overall direction of this article do not allow us to examine the first element, the element of extraterritoriality, in more detail, nor will we exhaustively focus on the reasons we believe that the criterion of effective control, that the ECtHR has established as a prerequisite for the extraterritorial jurisdiction and the subsequent finding of international responsibility of the state, has been applied in an

[22] *Soering v United Kingdom*, (No. 14038/88, 7 July 1989) § 86.
[23] It mostly relates to violations of Article 3 ECHR or Article 2 that protects the right to life. See Dougoz.. More recently the ECtHR broadened the circle of rights that fall under the Soering case law including in extreme cases the right to a fair trial under Article 6 ECHR. See *Othman (Abu Qatada) v United Kingdom*.
[24] To the USA in this instance, where he would remain imprisoned until ultimately face the death penalty.
[25] *Soering,* § 90-91, *Saadi*, § 127.
[26] LAWSON, R.A., «Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights», in *The Extraterritorial Application of Human Rights Treaties*, (ed. COOMANS, F./ KAMMINGA, M.T.) Antwerp: Intersentia, 2004, pg. 83-123.

[27]For instance see MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004). See also the analysis provided in the next paragraph of this article.

erroneous manner.[28] In any case, for those who agree with this criterion and consider effective control a precondition for responsibility, this control exists in the cases we are discussing. In 'refoulement' cases, the individual is under the control, and therefore the jurisdiction (according to this view), of the state that has the discretion to proceed or not with the transfer of the individual. For those of us who believe that the criterion of effective control should not be a precondition for the existence of extraterritoriality, this issue is to a large extent irrelevant with the category of cases we are attempting to examine. This is due to the fact that, in *Soering*-type cases there is an obvious transnational element, since the consequences of the decision on refoulement occur outside the territory of the state that made this decision. However, the refoulement decision itself, to extradite, deport etc., which paves the way for the human rights violations to occur, does not take place outside the territory of the state, but inside it. As a section of legal scholarship opines on the issue,[29] extraterritoriality in this case is subverted by the fact that, during the decision on refoulement, the individual is present in the state that makes the decision. With this in mind, we would classify such cases as instances of 'pseudo-extraterritoriality'. This element however, is directly connected with the second and more important issue we are attempting to address, the distinction between positive and negative obligations. In any case, for the first element, even in cases of clear extraterritoriality, the ECtHR has explained that the criterion of effective control is not applicable.[30]

In the category of cases under examination, the ECHR demands from the state not to place the individual in a danger that is the consequence of his or her transfer and delivery to the jurisdiction of a third state. The responsibility of the 'sending' state is indirectly linked to events that have not yet occurred, but are likely to occur. Moreover, if they occur, they will take place outside its territory, on the territory of a third state, and be attributable to the organs of that state. The sending state is placed under criticism because it allowed (or, to be more precise, did not avert) the extradition, deportation etc., and this in turn allowed for the human rights violations to occur. Therefore, the obligation of the 'sending' state, does not reside in not causing the wrongful result. It is not a negative obligation, but instead relates to an obligation to prevent a potential violation from third persons that are outside its jurisdiction (therein lies the pseudo-extraterritorial element), regardless of whether these actions by third persons are attributable to the host state or not. In other words, the state that decides to extradite a person to a third state, could potentially be in violation of its positive

[28] V.P. TZEVELEKOS, "Deconstructing and Reconstructing the Theory of Effective Control as a Condition for the Exercise of Jurisdiction for Extraterritorial Human Rights Breaches. Direct Attribution of Wrongfulness, "State Fault" and Concurrent Responsibility." (under publication, 2014) *European Journal of Human Rights*.

[29] M. Milanović, *Extraterritorial Application of Human Rights Treaties: law principles and policy* (Oxford University Press, 2011), pg. 8-9.

[30] *Ilaşcu and others v Moldova and Russia* (No. 48787/99, 4 July 2004) § 331.

obligation to act preventatively and prevent the potential violation that this person could experience from third persons. It is therefore a case of third party effect with an obvious transnational aspect.

State obligations, particularly in human rights law, are not limited to obligations of not causing a violation of fundamental human rights. States can be held responsible for violations, even if they did not directly cause these violations themselves. More specifically, in cases of lack of due diligence, state responsibility is triggered when they failed to take the appropriate positive measures they had at their disposal to ensure the enjoyment of these rights. The positive obligation to protect rights from threatened violations that are either caused directly by third states or simply take place on their territory, falls under this scheme.

Therefore, based on the above, what we are arguing, is that in *Soering* type cases, under which the case in question is classified, there is a transnational element from which (and mistakenly in our opinion) the question of extraterritoriality emanates. Directly connected with the transnational character of this category of cases is the second element that we pointed out, which in a way 'binds' the obligations of a positive nature of the first state, with the wrongful acts and omissions of the second. In this way the two states are linked as to the violations that the one and the same 'common victim' is subjected to. The facts in question are directly attributed to a certain state, while at the same time and under the same scheme, concurrent responsibility arises from lack of diligence which is attributed to the state or states that ought to, and had the capability to, prevent the result from occurring. This therefore, leads to the concurrent responsibility of more than one states for the same wrongful result, but the legal basis of this wrongfulness differs for each state that is involved. In the case of *MSS*, Belgium is not responsible for the violations that the applicant was subjected to outside its territory, in this case, the territory of Greece. It is responsible because even though it knew of the imminent danger[31] and was in a position to prevent it, it allowed for the violation of the applicant's rights to occur outside its territory, in another state. This failure is tantamount to a violation of its own positive obligations to protect rights, under the principle due diligence. This principle, under specific circumstances which will be briefly developed below, links Belgium's responsibility with the responsibility of Greece, which is in this case the perpetrator of the violation. Therefore, we have one case, one victim, two perpetrators, each of them independently responsible, Greece for causing the wrongful result, Belgium for not preventing it as it ought to.

[31] *MSS*, § 349.

The system that is developed is, in more detail, as follows. The receiving state causes a violation of a right through acts or omissions. The term 'causes' is selected here deliberately and relates to causality, a negative violation of human rights from a wrongful act which is attributable[32] to the host state. The same state, apart from directly causing the violation itself, could also simply be 'tolerating' it, when it is caused by third persons or general situations (like in the case of MSS, the extreme poverty the applicant faced), thus violating its obligation to be diligent. Next to the host state, directly related but independently responsible (even though through the same case), is potentially the sending state. It is not responsible for causing the violation, but because it failed to prevent it (as it ought to, when it knew and had the capability), by declining to transfer the victim to the host state which is 'directly'[33] responsible for the violations.

What is potentially created in this way in every instance where a transnational, pseudo-extraterritorial element exists as in MSS, is a chain of complementary, concurrent international state responsibility, where every state is responsible for its own 'part' in the sequence of positive and negative obligations. This responsibility is structured on the same case, the same facts and same victim, but independent (but usually due to the common facts, interconnected) forms of responsibility. This in turn leads to, completely distinguishable, yet interrelated, violations that engage the international responsibility of every state that is a link in this figurative chain. Consequently, Belgium is responsible because, even though it could, it did not prevent the violations that the applicant was subjected to in Greece. Greece is responsible firstly, because through acts of its organs, it violated the applicant's Article 3 ECHR rights. Secondly, due to the omissions of its organs, it did not prevent the violation of Article 3 ECHR due to a general (and thus not attributable to the state) situation, namely the extreme state of poverty that the applicant had to face. Finally, if the Greek state had transferred the applicant to his state of origin, Afghanistan, we would be able to add another link in the chain of states involved in this case. The Greek state would have violated, in similar terms as Belgium, its obligation of due diligence, which intends to prevent the violations to which potentially the applicant would be subjected to in Afghanistan. Afghanistan would then have the obligation not to cause, but also to prevent violations of the applicant's fundamental rights.[34] It is important to note, however, that apart from Article 3 ECHR, Belgium and Greece were also found to be in violation of Article 13, which provides for the right to an effective remedy before a national authority for every individual whose Convention rights are violated. The lack of this possibility in Belgium, did not allow the applicant to prevent his transfer to Greece. The same situation in Greece meant that the

[32] Atrribution is a prerequisite for the international responsibility of the state. International Law Committee *A/56/83*, *Responsibility of States for Internationally Wrongful Acts*, 12-12-2001, Article 2. See also Articles 4 et seq...

[33] Conversely, one could argue that the sending state is 'indirectly' responsible, based on the notion of indirect responsibility «encourue par un sujet de droit du fait du comportement d'un autre sujet de droit». J. SALMON, *Dictionnaire de Droit International Public* (Bruylant/AUF, 2001) pg 996.

[34] *MSS*, § 294-295.

applicant had no means to refute a possible deportation to his state of origin during his asylum proceedings, where there was danger he would be subjected to treatment that would be in violation of Article 3 once again.[35] Essentially in this case, Article 13 is the mechanism, a tool that the state had, to fulfil its pseudo-extraterritorial obligation of diligence, with the aim of preventing the violation, by not transferring the applicant to a state where it was highly likely for him to be subjected to violations of his most fundamental rights. We can therefore conclude that in this chain, we have as many links as the number of states involved in what is basically the same situation. This situation requires them either not to cause the wrongful result directly, or to prevent it or, more generally, to correct it.

The fundamental element required in order to fully understand this figurative chain of obligations and responsibilities is the distinction (and the interchange) between positive and negative obligations. In the second case we have the classic archetype of objective international responsibility due to the wrongful act that is attributable to the state. The state is obliged to *not* (hence the negative dimension of the obligation) violate the rule. Regardless of its intentions, what counts is the *result*. If the state caused a violation, through acts or omissions that are attributable to it, the state is responsible. Conversely, the positive obligations of the state, require it to act preventively or in order to prevent the wrongful conduct of third persons, whose acts are not attributable to it. Precisely due to the fact that this conduct is not attributable to it, it is not responsible for the wrongful conduct of the third person. However, it is responsible for the 'negligence' that is attributable to it, more specifically, the violation of its obligation to be as diligent (in order to prevent or stop wrongfulness) as was required. The principle of due diligence[36] is the basis of the 'third party effect' of human rights in international law.[37] On this basis the right itself has a new direction, a new aim, as it is transformed from a negative to a positive obligation to prevent and stop. It results in subjective[38]

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[35] *MSS*, § 294-321.

[36] In relation to the principle of due diligence see P. MAZZESCHI, *« Due Diligence » e responsabilità internazionale degli stati*, (Giuffré, 1989), and R. P. BARNIDGE, «The Due Diligence Principle under International Law», *International Community Law Review*, 1/2006, pg. 81-121. The principle has been recognised by the ICJ in the case of Η αρχή έχει αναγνωριστεί και από το Διεθνές Δικαστήριο της Χάγης στην υπόθεση *Pulp Mills on the River Uruguay*, *Argentina v Uruguay*, Judgment of 20 April 2010.

[37] Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, (ser. C) No. 4 (1988) (July 29, 1988) § 172.

[38] P.M. DUPUY, *Le fait générateur de la responsabilité internationale des États*, *RCADI*, vol. 188, 1986, σελ. 102-103 και R. P. MAZZESCHI, «The Due Diligence Rule and the Nature of the International Responsibility of States», *German Yearbook of International Law*, 1992 (35). pg. 18-21 pg 49-50. The only (implicit) reference made by the ILC Norms on State Responsibility to due diligence is found in Article 14(3) which refers to the temporal dimension of the obligations to prevent and according to which, the wrongful act for failure to prevent is a continuous one.

international responsibility because it is an obligation of result, not of means.[39] The state is not asked to guarantee that the wrongful result will not occur, but to activate, as far as possible, those means at its disposal which are suitable to realise the goal of preventing and stopping any wrongful conduct that is not attributable to it. As far as the means are concerned, the state has the discretion to select the one that it prefers between equally fruitful means. If the state is found to have acted diligently, then regardless of whether the wrongful result occurred or not, it cannot be held responsible, due to the fact that it fulfilled its duties under the aforementioned principle. The state's diligence is assessed based on the circumstances. More specifically it is based on what was necessary and what it could do, on the means at its disposal, as well as other related parameters, such as whether or not based on the facts of each separate case, it was in a position to know and predict the imminent danger of a human rights violation. The degree of required diligence in international law is not therefore the same for all states, nor is it objective. It depends upon the ad hoc conditions of every case and also upon the subjective capabilities of each state and what could reasonably be asked of it.

Therefore, returning to the outline of concurrent international responsibility that derives from MSS and is examined here, and summing up the points presented, in transnational cases of international law violations, one state can be objectively responsible for a negative violation of its obligations, while other states can potentially incur subjective responsibility, because they did not prevent, as they could have and ought to, the wrongful result that was directly caused from or in another state.

Do Social rights emanate from the ECHR? Between due diligence and redistributive social policy.

The principle of due diligence, as it was briefly outlined as to its nature and function above, is central to the second issue at hand. In *MSS*, the Greek state was found to be in violation of Article 3, because it remained indifferent to the hardship that the applicant was subjected to, while he was living in a state of extreme poverty. In order for this conviction of Greece to have been averted, the Greek authorities should have shown diligence by providing a speedy response to the asylum request. Moreover, they should have provided food and shelter to the applicant and by extension, to every individual in a similar situation. This approach was also followed in *VM*. Here, Belgium was found in

[39] *See* also A. TUNK, «La Distinction des Obligations de Résultat et des Obligations de Diligence», *La semaine juridique (Juris-classeur périodique)*, 1945 (449) as well as J. COMBACAU, «Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse», σε *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, (ed. BARDONNET D., *et al.*) Pedone, 1981, pg. 181-204. See also ICJ, Case concerning application of the convention on the prevention and punishment of the crime of genocide, *(Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, §430.

violation of Article 3 for ceasing to provide material support to the applicants, after their expulsion from Belgium had been ordered and their appeal against this decision was rejected.

This approach, however, could be said to raise a series of important objections. Firstly, if we assume that the ECtHR is permitted to set the bar for socioeconomic obligations, the main question is whether a state, its society and economy can manage such expenditures. Such obligations place a significant burden on the various mechanisms of redistributive financial policy that can exist in a state. These mechanisms are themselves subject to the existence of adequate funds that come from the public treasury, a state's own revenue from taxation or from various forms of international assistance given to the state to fulfil these duties.[40] The second question is whether these standards of social policy can be established on the basis of individual rights, by an international judicial body. More broadly, is this is a matter for the judiciary to decide or do issues such as these, that relate to clearly redistributive policies, fall under the sole competence of the democratically elected organs of the state that have a degree of flexibility in deciding how to implement their international obligations in relation to socioeconomic rights? [41]

The ECtHR has repeatedly avoided engaging with such issues, by recognising that it is out of its remit to interpret the Convention in a way that would allow it to dictate the social policies of the contracting parties.[42] However, the classic distinction between first generation (civil, political) and second generation (social, economic) rights has not obstructed the ECtHR from applying the convention in a manner that would allow protection for rights that are social in nature.[43] In the past, as will be examined in more detail below, the ECtHR had alluded to the fact that, especially in relation to Article 3

[40] Nolan Aiofe and Dutschke Mira, 'Article 2(1) ICESCR and states parties' obligations: whither the budget?' (2010) 3 *European Human Rights Law Review* 280, 284.

[41] See also M. BOSSUYT, «Belgium condemned for inhuman and degrading treatment due to violations by Greece of EU asylum law: MSS v Belgium and Greece», *European Human Rights Law Review,* 5/2011, pg. 582-597 (592).

[42] *Botta v Italy* (No. 153/1996/772/973, 24 February 1998),*Sentges v Netherlands* (admissibility, No. 27677/02, 8 July 2003). In *Sentges*, the applicant was lodging a complaint against the Netherlands, because the national healthcare system did not provide her son who suffered from severe disabilities with a robotic arm. The ECtHR, referring to the jurisdiction of each state to decide its own social policy stressed that '[t]his margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources [...]. In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court.'

[43] *Airey v Ireland* (No. 6289/73, 9 October 1979) §26. See also *Budina v Russia* (admissibility No. 45603/05, 18 June 2009), BOSSUYT, «Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations», *Human Rights Law Journal*, 2007 (28), pg. 321-332 (321).

ECHR, it could to a limited degree, decide upon the aid that a state is expected to offer vulnerable social groups. However, it had not proceeded to an in depth examination of the issue, thus depriving us from a position that would be clear and consistent in its case law.

In order to fully understand the ECtHR's position, generally and also specifically in the cases of *MSS* and *VM*, we must first attempt to provide clarifications of a theoretical nature, in relation to how social welfare 'rights' can derive from civil rights. Using this theoretical framework, the paper will subsequently attempt to discuss three separate issues. The first two of these arise from the cases themselves, while the third from the various scholarly commentaries. The first related issue is if indeed, with these cases, the ECtHR is introducing standards of social / redistributive policy in an arbitrary way. The second question relates to the due diligence that a state must show especially in relation to vulnerable groups. The third, which is an issue emanating from theory and not the Strasbourg case law in question, relates to the results that absolute rights (those that cannot be restricted, or in international law terms, jus cogens) can develop in the light of due diligence.

Theoretical categorization: Respect, protect, fulfil and the grey areas.

As a starting point, it is important to mention that the ECtHR is correct, when it argues that there is no 'water-tight' distinction between the various classes of rights. Although the convention primarily focuses on the protection of civil and political rights, it inevitably enters into the realm of social rights, while in many cases, the measures that it calls for the states to adopt affect their budget.[44] The indivisible nature of rights means that the states are not limited to the negative type of protection, that traditionally is synonymous with civil and political rights, requiring the state to refrain from interfering with individual liberties, nor is it limited to the traditionally classified *status positivus* of social rights and the welfare state. Conversely, both civil and political, and social rights develop a common 'net' of protection, which is in fact the basis of their indivisibility. This common net has been further analysed in the theory into the tripartite obligation to respect, protect and fulfil.[45]

Firstly, the obligation to respect has a negative dimension. The state is required to remain neutral, to abstain from causing violations. When applied to social rights this

[44] I.E. KOCH, «The justiciability of Indivisible Rights», *Nordic Journal of International Law*, 1/2003 3-39 (27).

[45] A. EIDE, «Economic, Social and Cultural Rights as Human Rights», in *Economic, Social and Cultural Rights* (ed. A. EIDE, C. KRAUSE, A. ROSAS) Springer, 2001, pg 9. See also O. DE SCHUTTER, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) pg. 242 et seq..

'respect' requires the state not to intervene in the individual's freedom to proceed to those activities that allow her to freely manage her resources in a way that satisfies her basic needs.[46] Using an example in the area of healthcare for instance, the state should not prevent anyone who wishes to, from buying a clean water filter.

On a second level, apart from respecting, the state is obliged to protect human rights, regardless of their civil or social nature. This obligation is related to the principle of due diligence in international law which has been discussed in detail above, on the basis of which the state is required, through positive measures that aim to prevent and stop, to protect rights when these are threatened by third parties (third party effect) or broader situations and occurrences.[47] The implementation of the obligation to protect in social rights does not differ greatly from the protection that a state has to demonstrate with regards to civil and political rights. To illustrate this with a simple example in relation to the right to education, the state has the obligation to protect through positive, legislative, judicial and other measures, the access to educational facilities, when this is obstructed by a third party.

The third element of this tripartite distinction requires the state to ensure the gradual fulfilment of the right. This obligation can take many forms, requiring the state to develop the required mechanisms and means for providing public services. As an example, the state must ensure the effective functioning of schools or hospitals in relation to the rights to education and healthcare respectively. On an international level, using the example of the right to water, this third dimension of human rights obligations has been further 'disaggregated into the obligations to facilitate, promote and provide'.[48] Facilitation is achieved through the adoption of positive measures that will offer the individual the general assistance required for her to enjoy the rights. Promotion aims to educate the rights holder on how to enjoy the right to the greatest possible degree, while the dimension to 'provide', requires the state to proceed to the provision of specific material assistance to the rights holder. This last duty applies especially to specific individuals or social groups that do not have sufficient means or sufficient resources that would enable them to enjoy the right without state assistance.[49] This includes individuals who are "particularly vulnerable or disadvantaged", [50] and are

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[46] C. SCOTT, «The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of The International Covenants on Human Rights», *Osgoode Law Journal*, 1989 (27), pg. 769-877 (834).
[47] S. SCHEURING, «Is There a Right to Water under International Law?», *UCL Jurisprudence Review* 2009 (15), pg. 147-171 (152).
[48] UN, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (*E/C.12/2002/11*, 20 January 2003) § 25.
[49] General Comment No. 15.
[50] Ssenyonjo Manisuli, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) at 25.

unable to realise these rights for themselves for reasons that "are beyond their control".[51]

The characteristic of this third dimension of fulfilling rights is that it calls upon the state to proceed to provide material supplies. The degree to which the state ought to fulfil this obligation relies on its financial capabilities and the socio-economic model it has selected to adopt.[52] For this reason, the International Covenant on Economic, Social and Cultural Rights recognizes that socioeconomic rights are to be realized progressively, based on the capabilities of each state.[53] Therefore, from the viewpoint of progressive fulfilment, rights like the right to food, shelter, education, health and work require the states to get actively involved in their realization, by developing related policies, to the degree they are able to. These are in essence, the rights that derive from a welfare state. Therefore, two characteristics of the obligation to fulfil require attention. Firstly, this is a dynamic obligation. It changes and evolves depending on specific social circumstances and needs. For this reason it is realized progressively by the states.[54] Here the consideration of 'maximum *available* resources' is also crucial. Available resources include 'human, organisational and scientific resources'[55] or international development aid[56] the state has at its disposal. In assessing the degree of realisation of socioeconomic rights in a specific state and the availability of maximum resources, attention is also paid to 'central government expenditure and revenue, balance of payments, development assistance and external debt'.[57] These parameters are used as indicators to assess the expectations of each state in fulfilling these obligations. It is important to note, therefore, that "a state is not required to take steps beyond what its available resources permit. The implication is that more would be expected from high-income states than low-income states".[58]

On a second level, the 'fulfil' aspect requires states to proceed to the adoption of institutional measures and national strategies that prove that the state is taking concrete measures in the direction of fulfilling rights. What remains vague however, is what the minimum standard of protection is, as this is examined in relation, not only to the capabilities of each state, but with the choices it has made as to its economic model. As the CESCR has clearly stressed, 'the rights recognized in the Covenant are susceptible

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[51] Ibid.
[52] UN, Committee on Economic, Social and Cultural Rights, General Comment No.3 (1990): The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant), (*E/1991/23*, 14 December 1990). S. FREDMAN, «Human Rights Transformed: Positive Duties and Positive Rights», *Public Law*, 2006, pg. 498-520 (505-508).
[53] International Covenant on Economic, Social and Cultural Rights (1966), Article 2 §1.
[54] O. DE SCHUTTER, *International Human Rights Law*, ό.π. σελ. 465.
[55] 'Article 2(1) ICESCR and states parties' obligations: whither the budget?'at 284.
[56] Ibid
[57] http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.1990.19.En?Opendocument at [48].
[58] Ssenyonjo at 62.

of realization within the context of a wide variety of economic and political systems provided only that the interdependence and indivisibility of the two sets of human rights […] is recognized and reflected in the system in question'.[59] Thus, these criteria differ greatly between states, making these rights questionable as to their justiciability when viewed through the classic theory.[60] When they are viewed, however, from the perspective of the aforementioned tripartite distinction, they become justiciable at least for the first two dimensions, thus ensuring that they do not become merely aspirational.[61]

This division of the substance of the right into three separate categories that each create a different set of obligations for the state, has not gone without criticism in the literature. As Craven argues,[62] the tripartite typology also inevitably divides the victims into categories. If the act of deprivation of resources cannot be tied to an act of an official (the respect dimension), or a third party or situation (the protect dimension), the victim is left with the much weaker fulfil dimension which is largely non-justiciable and meant to be progressively realised.[63] This leads to a situation whereby for instance, a homeless person who experienced a forced state eviction has a stronger legal claim against his homelessness than an individual who was not made homeless in this way.[64] The victims under the tripartite construct are therefore in this manner (and arguably unfairly) indirectly divided into those who can attribute their situation of deprivation to external factors (that trigger state obligations towards them) and those who are themselves 'responsible' for the situation they are in. The former arguably have more powerful tools to address their situation while the latter have to depend on the state providing them with protecetion through the progressive realisation of the right to housing. Thus, in the context of our discussion, it is crucial to examine where and how the ECtHR locates the obligation to provide material assistance to asylum seekers as this in turn informs the specific obligations that the state is required to uphold and very importantly, their justiciability.

The tripartite typology however, manages to bridge the apparent gap between civil and political rights on the one hand, and social rights on the other, and it succeeds in reinforcing the idea that rights are interconnected and indivisible.[65] Civil and political rights develop a financial or even a redistributive dimension (for instance the cost for establishing and running correctional facilities in order to achieve public order) under

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[59] UN, Committee on Economic, Social and Cultural Rights, General Comment No.3 (1990): The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant), (*E/1991/23*, 14 December 1990) [8].
[60] V. DANKWA, C. FLINTERMAN, S. LECKIE, «Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights», *Human Rights Quarterly*, 3/1998, pg. 705-730 (715).
[61] I.E. KOCH, «Dichotomies, Trichotomies or Waves of Duties?» *Human Rights Law Review* 1/2005, pg. 81-103 (81).
[62] The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights pg 43/258
[63] Ibid
[64] Ibid pg 15.
[65] I.E. KOCH, «Dichotomies, Trichotomies or Waves of Duties?» (82).

the prism of the obligation to fulfil the right, while social rights have a dimension which simply demands of the state not to obstruct the individual from their enjoyment.

Between these two dimensions, of the welfare state on the one hand, and the state that is called to minimize its authority and remain neutral or, in essence, 'absent' on the other, there is an intermediate dimension of the state as protector. This dimension under international law is derives from the principle of due diligence. It is obvious, as the example of establishing correctional facilities mentioned above illustrates, that the second and third dimension of safeguarding rights are related.[66] Apart from the framework of achieving progressive realization of public order policy, such facilities are also a means for the realization of human rights protection, such as protection of the right to life by third persons who in engage in criminal activities (third party effect). Protection and fulfilment converge to the degree that both require the state to take measures, initiatives and create policies, which will in many cases come at a certain financial cost. As Ssenyonjo confirms, the obligation to protect also "entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals and groups will be able freely to realise their rights".[67] This is clearly an obligation that bears a striking similarity to the fulfil duty under the tripartite distinction. Thus, in both categories the state will be called upon to make use of its limited resources.[68] The measures that a state will take in light of the obligation to protect (due diligence) could very well not have any particular financial cost (for instance the enactment of a law that criminalises racist conduct), and even if they do have such a cost, these measures would not necessarily be 'welfare state' measures in nature (such as establishing correctional facilities)- as opposed to the example of *MSS*, where due diligence was translated into social policies that amounted to provisions for shelter, clothing and food.

What we therefore can observe is that there is a 'common space' between fulfilment and protection, especially when the means required by the latter require public spending. Both these dimensions require action to be taken by the state and supplies that affect the public budget. This overlap is most obvious when, amongst the means that the state is asked to adopt in light of due diligence, material provisions are included, as was the case in *MSS* and *VM*. This assessment of priorities requires the state to decide where the necessary funds will be taken from and where they will be distributed as dictated by the duty due diligence. In opposition to fulfilment which refers to a broader strategy or direction for the realization of objectives, the 'protect' dimension is the response to a

[66] I.E. KOCH, «The justiciability of indivisible rights», (26).
[67] Ssenyonjo pg 24.
[68] As KOCH notes, the element of protection also may require state resources 'The obligation to protect a given right does undoubtedly imply more budgetary implications, since it requires positive measures, such as the active protection against eviction or other threats from third parties'. I.E. KOCH, «The Justiciability of Indivisible Rights», (13).

specific harm that threatens the right. In the case of third party effect, the danger has in most cases a clear cause and source. In more general circumstances, like in that of *MSS* and *VM*, the cause and the source are less distinguishable and as a result the thin line between the exact cause that calls for protection and the broader agenda of progressive realization becomes equally difficult to discern.[69]

There are however also differences. The third dimension, apart from the largely vague element of non-justiciable progressive realization, is related to broader political choices that a society makes as to the economic model it follows, depending on whether expenditures in education or even free education are seen as a priority for instance, over publicly provided healthcare. Conversely, the second dimension requires the state to respond not to a general socio-political situation, but with the aforementioned reservation (in which the case of *MSS* falls under), an ad hoc danger. Furthermore, the dimension of protection in opposition to the dimension of fulfilment, requires from the state (and this the role the judiciary plays) to use measures available to it in order to satisfy, to the degree this is possible the aim that emanates from a right. This points to the *subjective* character of due diligence and requires evaluation of the priorities in relation to the distribution of funds. Especially in relation to means (regardless if they are social in nature or not) that have a financial cost, the criterion of state capability to meet these costs is critical. The example of so-called 'failed states' would be a good illustration of the argument we are attempting to make here.[70] For instance, could one consider a state like Somalia responsible for ineffectual protection from piracy around its shores, when it is not in a position to operate judicial mechanisms and corrective facilities? In spite of their differences however, especially in relation to the fact that under due diligence the state is required to act in any way that it is able to and provide whatever is possible, the question of whether we apply the dimension of fulfilment or the dimension of due diligence is one that is particularly difficult to answer, and not without important consequences. The line that distances the two is a thin one and allows in essence for wholly social rights to become justiciable and enjoy protection under the second dimension of the aforementioned tripartite distinction, when in fact they fall under the third, mostly political and aspirational dimension of progressive fulfilment.

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[69] In relation to the element of protection as a response to a specific danger see 'The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.' UN, Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The Right to Food (art. 11), (*E/C.12/1999/5*, 12 May 1999) § 15.

[70] See for instance, D. THURER, «The "Failed State" and International Law», *International Review of the Red Cross,* 1999 (836), available at http://www.icrc.org/eng/resources/documents/article/other/57jq6u.htm (last accessed 17 April 2014).

MSS and VM are a clear example of this, since the danger that threatens the applicants and activates due diligence is part of a broader social phenomenon, that of immigration. Immigration and the reception of asylum-seekers require social provisions that in essence are part of social policymaking and are redistributive in nature. This is part of social policy conducted on the basis of the obligation that states have, to fulfil social rights. Here, in our opinion, the limits between protection and fulfilment become so difficult to tell apart that they are in essence indistinguishable. However, the question of which dimension will be selected remains critical. From a legal perspective fulfilment remains nebulous. But from the perspective of due diligence (the protection dimension) there is an obligation for the state to act –obviously within reasonable limits. Apart from examining whether (a social in this case) measure is capable of bringing about the desired result, it must also be feasible to provide. Even if on the basis of due diligence and based on the specific facts of a case, it is held that social provisions are required, this obligation 'expires' firstly if the state is unable to respond to it, taking into account its financial situation, but moreover, especially in the case of social policy, its socioeconomic model. The direction this model has, is of prime importance. The manner in which the choices and priorities that have been set in a society as to where it is necessary to distribute public funds, which needs will be covered, and most importantly, who will benefit from this distribution, is crucial.

This is due to the fact that resources within a state are by definition limited. What is not limited is the list with the positive duties a state has, which all involve public money expenditure. It might be that due diligence obligations are of means, meaning that the a state only need to protect to the extent that it can, but it is obvious that if priority is given to "x" protective aim (such as providing shelter and food to asylum-seekers), that aim will limit a state's capacity to apply protective means/policies in other areas (human trafficking, deforestation, national security or even social policies such as education and health) that also require protection, due diligence and public money spending. The money spent for "x" protective policy, are money that cannot be spent for (protective) policy "z". Or, standards in (protective) policy "z" will be underfinanced to the extent that policy "x" is financed. This means that positive duties find themselves in a course of latent conflict. To resolve that conflict it is necessary to establish priorities and set the standards of protection by which a state needs to abide. The Court has taken this into account in its case law, recognising that contracting parties enjoy a wide margin of appreciation in deciding the "allocation of scarce resources"[71] to the many individuals they have positive obligations towards.

[71] *McDonald v United Kingdom* (App. No. 4241/12, 20 May 2014) §58. See also *Velyo Velev v. Bulgaria* (App. No 16032/07, 27 May 2014) where the ECtHR held that prisoners have a right to access *existing* educational facilities under Article 2 Protocol 1 ECHR, and not a right to require the state to allocate funds to the creation of educational facilities if these do not exist.

The test of a state's subjective capabilities in relation to three separate arguments: the creation of 'objective' social policy standards due to the EU legal order.

After this theoretical parenthesis, the broader question that needs to be answered, is if and to what degree the Strasbourg Court is at fault, when under the guise of protection and due diligence, it required the states prioritise the allocation of social policy funds to immigrants and asylum-seekers. This of course would entail, as discussed above, that such funds would be denied from other forms of social policy and the welfare state, especially in states with grave financial problems, which have drastically lowered their welfare state expenditures and standards of social policy by adopting austerity measures.

In the past the ECtHR has recognized that it is out of its remit to put in place huge financial burdens on contracting parties. In the seminal case of *N v UK*[72] and others relating to similar facts that have followed it,[73] the Court held that the United Kingdom was not in violation of Article 3 when it deported an asylum seeker that suffered from AIDS, due to the fact that in his state of origin he would be provided with a significantly lower standard of healthcare. The ECtHR stressed on this occasion, that while obligations of a social nature emanate from many of the rights protected under the Convention and require funds from the state, the ECHR is primarily directed towards the protection of civil and political rights.[74] The difference in the level of healthcare provided between the two states was not a sufficient reason according to the ECtHR, to create an obligation for the state to provide free and limitless care to all who do not have a legal right to reside in the state.[75] A different interpretation of the convention would create a particularly heavy burden on the contracting parties.[76] In *Chapman v UK*,[77] a case dealing with the issue of homelessness, the ECtHR expressed its concern for the difficulties the applicant was facing, it added, however, and correctly in our opinion, that Article 8 of the ECHR does not guarantee a right to free shelter, due to the fact that such a decision is a political one, and therefore does not fall under the courts' jurisdiction.[78]

There have been cases however where the court had implied that it would show greater willingness to intervene into the social policy of a contracting party under specific circumstances. In the case of *Larioshina v Russia*[79], the applicant was arguing that her rights under Article 1 of the First Protocol (protecting the right to property) were

[72] ECHR, *N. v United Kingdom* (No. 26565/05 , 27 May 2008).
[73] See for instance *Tatar v Switzerland* (App. No 65692/12, 14 April 2015).
[74] *N.*, § 44.
[75] *N.*.
[76] *N.*.
[77] ECHR, *Chapman v United Kingdom* (No. 27238/95, 19 January 2001) § 98.
[78] ECHR, *Chapman v United Kingdom* (No. 27238/95, 19 January 2001) § 98.
[79] ECHR, *Larioshina v Russia* (admissibility, No. 56869/00 23 April 2002).

violated due to the fact that she was receiving a particularly minuscule pension and because she had not received a benefit she was entitled to. Although the case was ultimately found to be inadmissible, the ECtHR diverted from its usual path, which would not allow it to replace the national authorities and decide on the level of financial aid that must be available in a welfare system, and noted that a wholly inadequate amount for a pension and similar benefits could, under circumstances, create a responsibility for the state under Article 3.[80] Especially in relation to pensions, the ECtHR had relied on the right to property to find a violation, in the case of *Asmundsson*.[81] The applicant had been the victim of a serious accident in the workplace and had been receiving disability pension for twenty years, until the financial difficulties that Iceland had to face, forced to government to drastically decrease the number of people who receive such pensions. Examining the proportionality of such a practice, the court held that in spite of broad state discretion on such issues, the aim of dealing with financial difficulties did not justify the extreme and disproportionate burden placed on the applicant. However the Court clarified that if the pension had been simply lowered, it would have been compatible with the Convention.[82] In other words, despite of what has been discussed in relation to the redistributive results of social policy (regardless of the legal base it stems from), and the reluctance with which the court traditionally deals with such requests, it seems to imply that when the demand of basic social policy is insurmountable or even 'congenital' with the protection of human life itself, the core of Articles 2 and 3 is impinged, then there is an 'objective' (of sorts) responsibility of the state to act, a fact that allows the Court to proceed to a quasi-constitutional examination.

In *MSS* and more directly in *VM*, however, the ECtHR employed Article 3 to require states to proceed to social provisions in favour of the applicants, such as providing shelter. In essence, it made a right of a clearly social nature justiciable, using a political right as a basis, thus proving the correctness of the theory of unified, interconnected and indivisible rights, through the tripartite obligation to respect, protect and fulfil. The obligations that arise from the civil right against inhuman treatment, are translated by the court into positive obligations of a social character that require from the state to be vigilant, in a way that will have a significant financial cost, in order to provide shelter and food to the applicant. The practical question is whether through such an interpretation, the Court establishes too heavy a burden for the states, something that in the cases we mentioned above indicatively, it had rightfully in our opinion, avoided to do.[83] The most important theoretical question, is whether, even if one is to accept that due to the nature of the applicant's needs, that stem from a broader social phenomenon (immigration / refugees) and a situation (extreme poverty) that has not been caused by a third party (third party effect), it is feasible to examine Article 3 in a way that includes social benefits, that are justiciable in the light of positive obligations and the principle of

[80] ECHR, *Asmundsson v Iceland* (No. 60669/00 30 March 2005).
[81] ECHR, *Asmundsson v Iceland* (No. 60669/00 30 March 2005).
[82] *Asmundsson*, § 45.
[83] M. BOSSUYT, «Belgium Condemned for …», (591).

due diligence. Additionally, it is vital to answer if the court proceeded to test, as it ought to, the capability of the state to fulfil this obligation mentioned above, according to which the standards of due diligence are subjective, with the state having an obligation to activate the means at its disposal, to the extent and degree it is capable of so doing.

Making the standards of social provisions objective. The starting point with MSS.

The answer is that initially with *MSS*, in relation to social provisions, the ECtHR did not to proceed to conduct such a test, however, in this specific circumstance it was right not to do so. In essence, through *MSS*, the Court made the protection asylum seekers could expect 'objective', by placing common minimum standards of protection on all states (that are members of the EU), regardless of their subjective capabilities. Therefore, not only did the decision broaden the application of Article 3 to an extreme degree, through the inclusion of redistributive and socioeconomic provisions on the basis of due diligence, but also, in opposition to the subjective nature of the obligations that stem from it, it established objective social protection standards, regardless of the subjective capabilities of each state in particular. The progressive realization[84] of a social right on the basis of available resources and choices of the state was in essence transformed into an *objective* obligation of providing material assistance on the basis of a positive interpretation of Article 3.[85]

If things are so, it is important to clarify why we argue that in this instance the court was correct in proceeding to making these standards 'objective'.

On one level, the UN Committee on ESOC Rights, has stressed that even in periods of a severe lack of funds due to economic crisis or other reasons, vulnerable groups can and must be protected through 'low cost' programmes.[86] The Committee underlined that even if a state is in a situation where its available resources are 'demonstrably inadequate',[87] the obligation remains in place for the state, and lack of resources cannot be used as a justification in order for it to avoid the enactment of programmes and national strategies for the effective protection of social rights, which in any case, as mentioned above, develop multi-dimensional results, which are not exclusively aimed at providing material assistance. We acknowledge however, that this argument is weak, as it mostly refers to progressive realisation and not protection.

[84] International Covenant on Economic Social and Cultural Rights, Article 2.
[85] Such a demand is questionable as to its realization in practice, especially in states such as Greece, which welcomes a disproportionately large number of asylum seekers, as was noted by judge Rozakis in his concurring opinion to the judgment. See *MSS*, concurring opinion of judge Rozakis.
[86] General Comment No. 3, §12.
[87] CESCR 1990

The main response however is that this position of the Court was allowed if not 'dictated' to it by the states. In essence all the ECtHR did in *MSS* was to demand these standards of positive treatment by relying on EU law and the mechanism of Dublin II, which develops legal consequences in the domestic legal order of the states. Therefore, while under other circumstances, in light of due diligence and on the basis of positive protection under the aforementioned tripartite distinction, the ECtHR should have assessed what the capabilities of the state are, it overrode this stage of examination of the case. This examination, with regard to social provisions would have allowed the ECtHR to assert what the state in question could, and therefore what it should, have offered the applicant. In the case at hand, while referring to Article 3, the ECtHR stressed that this "cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home…Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living".[88] The basis used to justify the standards of Article 3 in this case, was Greek law[89] which, in this instance, was union law incorporated into the Greek public order.[90] It is therefore, the national legislation which is derived from the EU legal order that dictated, according to the Court, this treatment and created duties to the state for the provision of material support.

While such an interpretation is, without a doubt, understandable, and also desirable from a humanitarian standpoint, it is bound reproduce the weaknesses that critics attach to Dublin II and which the CJEU has recognised.[91] Making the standards objective for all the ECHR contracting parties that are bound by the EU legal framework of the minimum standards of social policy that the asylum seeker can expect, creates an obvious and disproportionate burden for the member states in the south, which are the main points of entry for immigrants and asylum seekers. However, it is a decision the basis of which is found in the EU legal order and, if the EU order prefers to offer a higher level of protection from that potentially required by the ECHR (on the basis of the aforementioned subjective test and the practice of the Court not to get involved into issues that are of a clear social or redistributive nature), it can easily be 'absorbed' by the latter and under the basis of complementarity, it can improve the standards of positive conduct on the basis of article 3 objective.

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[88] *MSS*, § 249.

[89] Presidential Decree 220/2007, Transposing the Reception Council Directive 2003/9 EC, regarding the minimum requirements for the reception of asylum-seekers. The Presidential Decree provides among others for a responsibility of the host state to offer shelter, food and clothing, medical and psychological support and access to language courses for minors.

[90] Directive 2003/9, which is provided in *MSS* § 250.

[91] The CJEU seemed to partly take these problematic aspects of Dublin II into account by recognizing that an over-burdened system could in practice face enormous operational problems that will have serious consequences in the reception of immigrants. CJEU, *C-411/10*, §81. At the same time, it noted that such a great number of incoming immigrants creates a disproportionate burden when compared to other member states and therefore this could make the state incapable to respond to the required levels of protection and assistance § 87. See also *MSS* concurring opinion of Judge Rozakis.

While as we mentioned, making the standards objective in this case was appropriate, in subsequent cases with similar facts, the Court proceeded to set similarly objective standards but based on a different justification. This justification was partly introduced in *MSS* as an auxiliary reasoning next to the requirement for provisions of material supplies to asylum seekers under EU law. In *VM*, however, it seems to have become an independent basis in itself for increasing the obligations under the principle of due diligence of the contracting party.

Vulnerable social groups: From MSS to VM

As noted above, apart from this argument, according to which it is the 'more generous' EU legal order that makes the levels of positive protection and social policy objective and not the ECHR, the Strasbourg Court attempted to proceed to provide a further justification, based on the applicant's 'membership' to a vulnerable social group. Thus, in *MSS* the seeds were planted for an interpretation of Article 3, that allows for the duty of due diligence to be expanded for specific categories of vulnerable individuals.

In more detail, with *MSS*, the Court also examined whether the state of poverty of certain individuals like the applicant can raise problems under Article 3. After it stressed that the need for special protection of refugees is an issue for which there is broad consensus on the global and European level, the Court concluded that it can be considered that there is a violation of Article 3 when the applicant is entirely dependent on public assistance and faces indifference by the authorities, while he or she is in a state of destitution or need that is incompatible with human dignity.[92] Therefore, based on Dublin II, the ECtHR held that the authorities in Greece did not adequately take into account how vulnerable the applicant was as an asylum seeker. They should therefore be considered responsible for the conditions the applicant faced for many months, due to their inaction.[93] These conditions, when combined with the protracted period of uncertainty the applicant was facing, and the complete lack of any prospects of improvement of this situation, reached the level of severity required to find a violation of Article 3 ECHR.[94] The Court also seemed to take into account the fact that the long period during which the applicant was destitute was the result of the Greek authorities' neglect to examine his asylum request within reasonable time.

[92] *MSS*, § 253.
[93] *MSS,* § 263.
[94] *MSS*,

The Court therefore held, that apart from the objective standards of Dublin II discussed above, the Greek authorities are liable due to their negligence to respond to the asylum request, thus prolonging the time during he was in the aforementioned state of destitution.

As has been noted in scholarship,[95] in relation to the critical criteria, the ECtHR in *MSS* held that there is a violation of Article 3 in cases where:

1. the applicant faces an extreme condition of destitution that is incompatible with human dignity, while the state is indifferent or neglectful for her case,

2. she is in a situation of complete dependence on the state to cope with these extreme conditions,

3. she belongs to a specific vulnerable social group.

This construct as it was developed in MSS, arguably lacked clarity. As Peroni and Timmer note, "it is not quite clear whether all asylum seekers are to be considered vulnerable, or just the ones who arrive in Greece. What is clear, however, is that the Court's analysis in *M.S.S*. challenges simplistic conceptions of group vulnerability, making room for more textured and complex formulations."[96]

If we attempt to separate for a moment, the issue of the standards of social provisions from this conceptual construct of the Court, one could argue that in *MSS*, in a similar vein to the aforementioned case of *Asmundsson*, it is not the Court's intention to dictate how the system will work on the level of social provisions. It merely wishes to avert the complete exclusion of some categories of people from such a system. Once again however, the ECtHR's attempt to define the social groups that deserve special protection raises questions.

In his partly dissenting opinion, judge Sajo had noted that the ECtHR's requirement for protection of those who are wholly dependent on public aid, a requirement that includes an obligation to prevent 'serious deprivation through appropriate government-provided services', [97] is a stance that is invasive to the social and economic model of the contracting party. As the judge stressed, 'this position, of course, would be perfectly compatible with the concept of the social welfare state and social rights, at least for a constitutional court adjudicating on the basis of a national constitution that has constitutionalised the social welfare state'.[98] The fact that Greece was convicted by the

[95] G. CLAYTON, pg 758-773 (769).
[96] http://icon.oxfordjournals.org/content/11/4/1056.full?keytype=ref&ijkey=AWPScB2I6KeQjw6
[97] *MSS*, dissenting opinion of Judge Sajo.
[98] Sajo

Court for remaining inert, allowed judge Sajo to opine that such a finding would be more appropriate for a legal order that has provided for a welfare state in its constitution. The result was according to Sajo that there is but little distance between the Court's position and the existence of a 'general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable".[99] His opinion went even further to note that even if the Court is attempting to interpret Article 3 in a way that requires states to adopt to a larger or lesser extent welfare state mechanisms, the criterion of state passivity required to find a violation of Article 3, leaves all those vulnerable social groups whose adverse situation is not due to actions or omissions of the state, without protection.[100] Therefore, we would reach the improper conclusion that the mentally disabled for instance would not be entitled to state support 'as their vulnerability is attributable to Nature and the conditions causing their suffering and humiliation are not attributable to the passivity of the State'.[101]

This idea of vulnerability in *MSS* was further developed in subsequent asylum seeking cases, however, in an arguably inconsistent manner. In *Tarakhel v Switzerland*, a couple with six children entered the EU through Italy and eventually took up residence in Switzerland. Their asylum request in Switzerland was rejected on the grounds that it should be dealt with by the Italian authorities under the Dublin II regulation, and their removal to Italy was ordered. After a series of failed appeals, the applicants turned to the Court arguing that their removal would breach their Article 3 rights as there was danger that their family would be separated and that the Italian reception facilities were unfit to adequately host families.

In *Tarakhel* therefore, the Court was called to decide whether the expulsion of the applicants to Italy would violate their rights under Article 3. After asserting that there was "broad consensus at the international and European level concerning this need for special protection"[102] of migrants and asylum seekers, the court further stressed in reference to the fact that the applicants were a family from Afghanistan travelling with underage children, that "it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant".[103] In relation to the minimum level of severity required to establish that ill treatment has occurred, the court held that the assessment of which level would be considered minimum is relative depending firstly, on the overall circumstances of the cases and secondly, and this is critical for our discussion, on their status as asylum seekers, which the court viewed, after referring to *MSS*, as a particularly underprivileged and vulnerable population group.[104] Again, the court did

[99] Sajo
[100] Sajo
[101] Sajo
[102] Tarakhel [97].
[103] Tarakhel [99].
[104] Tarakhel 118.

not strictly determine who could 'qualify' to be included as a member in such a group.[105] Furthermore, it seems that the reception conditions in the receiving state are equally important in assessing whether the asylum-seeker will be considered vulnerable.[106] Thus vulnerability seems to be comprised of many facets that relate to both subjective factors (the specific circumstances of the asylum seeker) and objective ones (are the conditions in the receiving state objectively adequate to host these asylum-seekers based on their circumstances). The Court distinguished the circumstances in this case from *MSS*. In *Tarakhel*, the deficiencies of the Italian asylum reception system were not found to be on par with those in Greece, and thus halting all deportation of asylum seekers to Italy could not be justified.

The lack of clarity as to who would be considered a member of a vulnerable group is intensified by the fact of its inconsistent application throughout the Court's case law. In the similar asylum-seeker case of *A.S. v Switzerland* for instance, the applicant appealed against his transfer to Italy, his state of first entry into the EU, on the basis that he was suffering from post-traumatic stress disorder and had relatives in Switzerland who would create a more stable environment for him to live in and convalesce. In this case, the Court, found these circumstances not be exceptional, and thus the inherent vulnerability of the applicant did not suffice to find that his removal to Italy would violate Article 3. Therefore, one could deduce that there exist different degrees of vulnerability[107] that shape the Court's response to the asylum seeker's claim.

Until *VM and others v Belgium*, however, the weight that would be placed on the applicant's vulnerability to justify the existence of an obligation to provide material support was unclear. In *MSS*, the Court went to great pains to demonstrate that it was outside its remit to interpret the Convention in a way that would allow for the recognition of socioeconomic obligations on contracting parties through Article 3. The applicant's vulnerability was mentioned as an auxiliary justification for the court's finding of a violation, as the minimum standards of material supplies were provided for under EU law.

In *VM*, however, the Court used this *MSS* 'precedent' to base the violation of Article 3 solely on the vulnerability of the applicants as asylum seekers, a vulnerability that (with reference to *Tarakhel*) was exacerbated by the fact that they were travelling with underage children one of which was severely disabled.[108] The Court concluded that the Belgian authorities must be considered to have failed in their obligation not to expose the applicants to conditions of extreme poverty as they were left in the street, without resources, without access to sanitation, and no means to meet their basic needs. Thus, their treatment reached that level of severity that would entail a breach of Article 3.

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[105] Pashou
[106] Pashou
[107] http://strasbourgobservers.com/2015/07/16/a-s-v-switzerland-missed-opportunity-to-explain-different-degrees-of-vulnerability-in-asylum-cases/
[108] VM 153

While from a humanitarian standpoint this approach by the Court is commendable, the strict legal analysis we have attempted thus far in the paper allows us to highlight some potential problems that emanate from this outcome. The court did not rely on the reception directive to find a violation since at the time it did not apply to the applicants. Since the order for their transfer to France had been made, Belgium no longer had responsibility to provide them with material support as per the directive.[109] Since EU law was not the driving force behind this reasoning, has the Court in essence allowed for the provision of socioeconomic rights to all groups that satisfy this, still to a large extent nebulous, concept of vulnerability? Would this open the door for other groups the Court has identified as vulnerable, such as individuals suffering from mental disabilities, Roma, and people living with HIV, to make use of Article 3 as a vehicle to secure a position of priority to other groups in need of special assistance through material provisions by the state? Once again the court emphasised that the extreme conditions of destitution that the applicants faced were partly attributed to the fact that the Belgian authorities did not speedily examine the applicants appeal against the decision of their removal even at a time where the Belgian asylum-seeker reception system was admittedly overstretched.[110] Judge Kjolbro, in his dissenting opinion however questions this approach.

As he argues:

> A foreigner cannot, by wilfully disobeying an order to leave a country and deciding to stay in the country illegally, create a de facto situation where the country in question has a positive obligation under Article 3 of the Convention to provide for the foreigner's material needs, including accommodation, health care, clothing and food, in the same way as foreigners who are lawfully resident in the country. That would, in my view, amount to creating an independent right to social and economic rights under Article 3 of the Convention.[111]

But even if we accept that the applicants' suffering was tied to Belgium's negligence, this again allows us to reiterate the points from Judge Sajo's dissenting opinion in *MSS* as well as those scholars who identify inherent problems in the application of the tripartite typology in relation to socioeconomic rights. If vulnerable individuals are suffering for reasons that cannot be attributed to the state, they seem to lack a justiciable avenue to seek protection, thus falling under the obligation to progressively fulfil socioeconomic rights. Conversely, in cases where their suffering can to some degree be attributed to state passivity, they are automatically placed in the front of the proverbial queue of individuals requiring material assistance by the state.

[109] VM 84
[110] VM
[111] VM dissenting opinion Judge Kjolbro [7].

Thus, it is safe to deduce that the Court's reasoning, that vulnerability 'increases' the expectations under the duty of due diligence, it introduces a system of prioritisation and 'hierarchy' of individuals that seek material assistance from the state and thus, it overrides the democratically decided system of allocation of resources. Essentially this construct of the vulnerability criterion enables the Court to dictate the socioeconomic priorities of the contracting parties and again, by creating objective standards of protection, does not take into account that the obligation under the principle of due diligence is one of means. A decision that sets objective standards for protection of asylum-seekers that indirectly apply throughout the Council of Europe[112] means that low-income states (which are arguably, as we mentioned before, also the ones receiving the greatest amount of asylum-seekers) are expected to allocate a disproportionate amount of their resources to the reception of asylum-seekers in comparison to other states, and are thus much more susceptible to be found in breach of their duties under the convention.

The absolute character of Article 3.

Finally, we consider that it would be worthwhile and interesting to mention a third issue and more specifically a mistake that in opposition to theory, the Strasbourg court did not make in relation to MSS.[113] The mistake relates to the conceptual inflation of the concept of *jus cogens*, the absolute nature in international law that is attributed to certain but not many rules, one of which is the prohibition of torture under Article 3.[114] What this absolute character entails is that it excludes the proportionality test, since for no reason is it permissible to restrict such a right. This however, relates to the negative aspect (respect) of absolute human rights. In the case of positive obligations under the principle of due diligence, regardless of the moral weight of the rule (which relates to its absolute character), the questions is not what the state cannot do, but what it is obliged to do. The state cannot guarantee that the illegal result will not occur. It is only required to do whatever it can to prevent or address this illegality. In other words there is a conflict in terms to demand a result not to occur in an obligation that in essence by its nature is one of means.

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[112] With MSS it was unclear whether the standards set were expected to apply only to contracting parties of the ECHR that were bound by the EU reception directive, or whether they would also be expected to apply in the non-EU members of the ECHR as well.

[113] See for instance, L. LAVRYSEN, «M.S.S. v. Belgium and Greece (2): The Impact on EU Asylum Law» (2011), available at http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece (last accessed 30 July 2014).

[114] ECHR, *Al-Adsani v United Kingdom* (No. 35763/97, 21 November 2001). The case is an ideal illustration of this, not only because the ECtHR recognises the absolute nature of Article 3(§ 59), but also because it avoids to conceptually 'inflate' jus cogens, as it did not find a conflict between this and state immunity, which does conflict and as an exception overrides access to justice (§ 66).

What can be asked from the state is to give priority to the positive protection of this right. The ECtHR has explained that there is room for proportionality on positive obligations when it is required to weigh the suitable positive means against the ramifications these will have in relation to their cost and the public interest or the conflicting rights of others.[115] If one were to add the additional element that absolute rights trump others in instances where there is conflict, such a test of proportionality will obviously not be applicable, providing ipso jure, priority to the positive means of protection of the absolute rule.[116] What this would entail is that when the means to fulfil the aim of protecting the absolute right are social provisions, which by the nature require a trade-off, in essence a choice that has to be made, the sacrifice of one aim in favour of another, priority must be given to the absolute right. Perhaps, this proves that in fact, the ECtHR went a bit far, by connecting in this case, social provisions with Article 3. One could reasonably claim that if the state budget does not cover the applicant's needs first, it cannot distribute funds to any other policies. What will occur if the applicant's needs are in conflict with the respective needs of other vulnerable social groups and the resources do not suffice? In any case, and this is the essence of the argument here, even if the 'absolute' priority is the positive protection of the absolute right, this, in its positive form, remains subject to the subjective capabilities of the state. The absolute character of the right does not negate the nature of the positive obligation which is one of means, not result.

Conclusion

With this article, we have attempted to analyse, two theoretical, systemic in nature and important we believe legal issues that emanate from asylum-seeker cases of the Strasbourg Court.

Firstly, we believe that the case of *MSS* can be classified under the category of pseudo-extraterritorial cases and is indicative of a 'model' of international state responsibility

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[115] *Saadi v Italy*. See also H. BATTJES, «In Search of a Fair Balance: the Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed», *Leiden Journal of International Law* 3/2009, pg. 583-621 (600 και επ.).

[116] The ECtHR however, does not seem to accept such a position, by asserting that even when it comes to *jus cogens* rules, the positive dimension of the obligation is subject to restrictions in the light of proportionality. «[i]t was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations, the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.», *Saadi v Italy*, § 120.

that potentially arises from this category, where a degree of complementarity is developed as to the facts (which are transnational in nature) and concomitantly, the primary state obligations. One state has an obligation to prevent the violation that another state causes or tolerates. When the violation is caused by the state the responsibility is objective, as it emanates from a negative state obligation. All that counts is that there is an illegal result. In the case of prevention, the responsibility is subjective, emanating from a positive state obligation. It is not the outcome that counts, but the means, if these were suitable and mainly feasible, in essence, available to the state. In order to ascertain this, courts are called to examine, apart from what was necessary, what the state could have reasonably been required to do, and to what degree it could pragmatically have responded to this necessity. The latter question relates to the examination of the subjective state capabilities. The existence of a common victim and same facts in this type of cases in more than one states, has the result that a concurrent responsibility of the states may develop, each for a different violation on the basis of the alternation between consecutive positive and negative obligations. This construct explains why in *MSS* responsibility existed both for Belgium and Greece.

Our second point of examination is more closely related to the substance of the cases, even though behind it lie fundamental and demanding theoretical questions. By asking the states to offer social welfare as a means to protect the applicant, the Court intruded into issues of redistributive policy. The funds that have to be provided there will inevitably be deprived from somewhere else. Originally, in *MSS*, the ECtHR was particularly cautious. Its humanitarian teleology and the sympathy of its members are obvious and based not so much on an ideology, but on more solid legal arguments. In VM however, the court's approach seems to go too far in a direction that is perhaps outside its allocated area of judicial discretion.

If our arguments seem to be cynical, one should consider our main position. We do not attempt an analysis based on emotion nor do we argue against setting objective standards of social policy when, as an exception, human life is directly threatened. Nor do we underestimate the suffering of modern immigration and refugees and more specifically the conditions the applicants had to face under the admittedly tragic circumstances that form the facts of the cases under examination. However, social provisions require redistribution and diversion of funds to a specific direction instead of another, perhaps more, perhaps less important in the eyes of the beholder. An analysis that does not take this into account is in our opinion simplistic. Our argument is not that asylum-seekers should be excluded from the enjoyment of their socioeconomic rights, but instead, we have attempted to question whether the European Court of Human Rights is the appropriate forum to determine the priorities in the allocation of a state's limited resources on the basis of the ECHR.

The Court stressed that individuals like the applicants in the cases at hand are in need of protection. While the *MSS* judgment is particularly cautious, and acknowledges that the ECtHR cannot act in a redistributive manner by determining the social policy of the contracting parties, in *VM* it seems this restraint was abandoned.

It seems therefore that in a case where the EU's attempts to 'outbid' the ECHR in standards for social provisions for asylum-seekers were not be present, the Court proceeded to construct, new criteria to preserve the undoubtedly noble in intentions, but perhaps maximalist as to the social provisions, precedent of *MSS*. The impact of this decision to other vulnerable social groups and their expectations for fulfilment of their socioeconomic rights is at the moment unclear. We will see how the story unfolds in Strasbourg.