6

Change Unopposed

The Court's Embrace of Positive Obligations

This chapter explains why and how states' positive obligations deriving from the prohibition of torture and inhuman or degrading treatment emerged rapidly in the late 1990s and the early 2000s, using the theoretical framework presented in the Introduction and Chapter 3. This change episode deserves such close attention because this was not an insignificant instance with little to no consequences. Rather, the introduction of positive obligations fundamentally reshaped what this prohibition entails. What is also interesting to observe is that, despite its wide practical implications, this change went through without any noticeable opposition and was quickly internalised. What explains this?

The idea of positive obligations was conceived long after the time when the European Convention was drafted and adopted. It goes without saying that the drafters of the European Convention did not have positive obligations in mind when formulating Article 3. Positive obligations differ from the types of obligations they discussed, which included primarily physical ill-treatment and torture, as explained in Chapter 4. Positive obligations are resource-intensive obligations, and they require states to undertake measures that go beyond simply noninterfering or refraining from violating rights.[1] Instead, they call for active state involvement in fulfilling rights and protecting vulnerable groups against acts perpetrated by state agents or private actors.

For example, this is what the Court has established in *A* v. *the United Kingdom,* where the Court found that the United Kingdom failed to protect a minor from his step-father's physical abuse and thus violated its positive duties.[2] While positive obligations bring forth a protective shield for the victims, as we see in this example, they are certainly not boundless.[3]

[1] Steven Greer, "The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?," *UCL Human Rights Review* 3 (2010): 5.

[2] *A* v. *the United Kingdom*, application no. 25599/94, ECHR (September 23, 1998).

[3] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford and New York: Hart Publishing, 2021), 128.

The European Court leaves states some margin in fulfilling them.[4] As Natasa Mavronicola explains, the logic behind these obligations is not that states have to guarantee that torture and ill-treatment will never occur; rather, it simply means that states should adopt effective legal frameworks and "reasonable" and "adequate" measures.[5] While these obligations' definition and applicatory scope continue to be fleshed out in the case law, their existence is not questioned, and they are not contested. They are now part and parcel of the European (and international) anti-torture jurisprudence.

Despite their significance and prevalence, as we saw in Chapter 3, positive obligations were not put in place via a formal amendment procedure; instead, the European Court introduced them by means of several important rulings.[6] Their rapid introduction via the Court's jurisprudence was a judicial innovation that brought about a foundational change in the way the norm against torture and inhuman or degrading treatment is understood and applied. In this chapter, we will discover the legal reasons and the sociopolitical drivers behind the creation of positive obligations. In what follows, I will first explain why we need positive obligations by drawing from expert interviews I carried out in and around the Court. I will then turn to discussing why these obligations came to the surface in the late 1990s and the early 2000s by relying on the results of my large-N analysis of the Court's jurisprudence, insights from interviews, and secondary sources.

Legal Reasons behind Positive Obligations

The introduction of positive obligations under Article 3 was one of the subjects that I discussed with my interlocutors. I talked to seventeen judges, eight Registry officials, and eleven lawyers and representatives working for various civil society organizations. No matter their background, all thirty-six interviewees agreed that positive obligations have served to enhance human rights protection in practice. Some told me that their creation was logical and necessary.[7] Others told me that the Court was motivated by the conviction that human rights protection should be holistic without and any blind spots.[8] Without positive obligations,

[4] Ignacio de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine," *German Law Journal* 7, no. 6 (2006): 611–23.
[5] Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 152.
[6] Sandra Krahenmann, "Positive Obligations in Human Rights Treaties" (Geneva, Graduate Institute of International and Development Studies, 2012), 20.
[7] Interview 16; Interview 27; Interview 28; Interview 32.
[8] Interview 2; Interview 5; Interview 7; Interview 9; Interview 32; Interview 33.

said one judge from a Western European country, "we would have a partial picture about what rights imply and how they can be violated."[9] Another judge with a similar background acknowledged that positive obligations helped "bridge the arbitrary distinction" between political and civil rights on one side and social rights on the other.[10] Other judges insisted that we need positive obligations to make the Convention "more meaningful and effective and not simply a declaration,"[11] and to "create the conditions for people to enjoy their rights."[12] Indeed, positive obligations serve such a supplementary function, as seen in the cases of obligations to provide legal protection and to carry out an effective investigation discussed in Chapter 5. They facilitate the successful realization of negative obligations, and they create suitable conditions for individuals to enjoy their rights and seek redress when these rights are violated. Therefore, some positive obligations can be considered as the preconditions or natural extensions of negative obligations, as one former judge told me.[13]

Despite their recent appearance, positive obligations are now an integral part of the European human rights regime and not the subject of any visible contestation. As one judge from a Western European country expressed, "it is difficult to imagine human rights protection today without the concept of positive obligations, in much the same way as it is difficult to imagine the eradication of discrimination without the use of affirmative action."[14] A human rights lawyer working for an international civil society organization explained their value in the most succinct way: "positive obligations are one of those very useful concept laws which allows human rights lawyers to make creative arguments, which now helps to push the boundaries for protection that is offered and essentially change the way things operate."[15]

When asked about the legal sources of positive obligations, the majority of the judges interviewed pointed to the Convention itself. Three judges argued that positive obligations are derived from the evolutive interpretation of Article 3,[16] while four other judges explained their

[9] Interview 2.
[10] Interview 9.
[11] Interview 11.
[12] Interview 16.
[13] Ibid.
[14] Interview 10.
[15] Interview 28.
[16] Interview 5; Interview 6; Interview 15.

development as rooted in a reading of Article 3 together with Article 1.[17] Article 1 obliges state parties to ensure all the Convention rights are protected within their jurisdiction; indeed, the Court often relies on Article 1 when prescribing positive obligations.[18] The logic here is that Article 1 lays down a horizontal obligation requiring member states to secure all the other obligations under the Convention.[19] It obliges states to take appropriate steps and adopt a proactive approach to protect the Convention rights.[20] These steps may include preventing violations, protecting victims, or providing effective remedies, which is what most of the positive obligations require.[21]

The legal logic underpinning positive obligations can be illustrated with an example. When establishing the Turkish government's responsibility to protect Nahide from her husband's abuse, the Court read Article 1 and Article 3 together. Engaging these two provisions at the same time, the Court pronounced that states should enact measures to protect individuals from inhuman or degrading treatment, even if such treatment is committed by private actors. The Court also emphasised that such protection is especially required for children and other vulnerable groups, such as victims of domestic violence.[22]

While this overview explains the legal reasons, it does not reveal the conditions that made the inception of positive obligations possible: Why were such obligations all swiftly brought to light in the late 1990s? To provide an answer to this question, I turn to the framework of analysis discussed in the Introduction and Chapter 1.

The framework is composed of one necessary condition and three contributing factors. The framework advances that, for courts to engage in audacious interpretations, they need a wide discretionary space and little to no interference or negative feedback from states. There are also three other contributing factors that facilitate audacious behaviour. These are changes in societal trends, the principles or precedents introduced in other legal instruments or by other legal bodies, and civil society campaigns. Let us now examine how these sociopolitical factors simultaneously aligned in the late 1990s.

[17] Interview 4; Interview 7; Interview 8; Interview 10.
[18] Article 1 reads as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."
[19] Interview 4.
[20] Interview 10.
[21] Interview 4; Interview 8; Interview 10.
[22] *Opuz* v. *Turkey*, application. no. 33401/02, ECHR (June 9, 2009), §159.

Sociopolitical Reasons behind Positive Obligations

I The Inception of the New Court with a Wider Discretionary Space

According to my framework, the creation of the new Court was the most important factor in bringing positive obligations to bear on the norm against torture and inhuman or degrading treatment. With the structural reorganization initiated by Protocol 11, the old Court was remodelled into the *de facto* Supreme Court of Europe and began to stand on firmer ground. For the first time, the Court enjoyed high levels of authority and autonomy without the need to compromise on either. Having secured this status, the new Court could now adopt an even more progressive approach without confronting resistance from member states. The new Court had an unprecedented willingness to accept novel claims and tended to find states in violation at a greater rate compared to the old Court, as the analysis presented in Chapter 3 showed.

In this chapter, I present additional evidence from my large-N analysis explaining why the institutional transformation of the Court was the necessary condition. I argue that the critical event that enabled this institutional transformation was the adoption of Protocol 11 in 1994 and its entry into force in 1998.[23] Hence, from its inception in 1994 and onward, Protocol 11 signaled to both the old Court and the European Commission of Human Rights (the Commission) that the new structure of the European human rights regime would be different.

Let us imagine a scenario in which Protocol 11 had never been adopted or enforced, with the Commission remaining a quasi-judicial filtering mechanism and the Court a part-time judicial body without compulsory jurisdiction. In so doing, we will see that, without Protocol 11, the foundational change that occurred in the late 1990s would not have been straightforward or maybe even possible.

First, consider the role of the Commission as a gatekeeper.[24] The Commission followed stringent criteria when declaring cases admissible and referring them to the Court (see Figure 6.1). The percentage of inadmissibility decisions fell after the adoption of Protocol 11 in 1994, which

[23] Laura García-Montoya and James Mahoney, "Critical Event Analysis in Case Study Research," *Sociological Methods and Research* (2020) https://doi.org/10.1177/0049124120926620.

[24] Karen J. Alter, "The Evolution of International Law and Courts," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford University Press, 2016), 600.

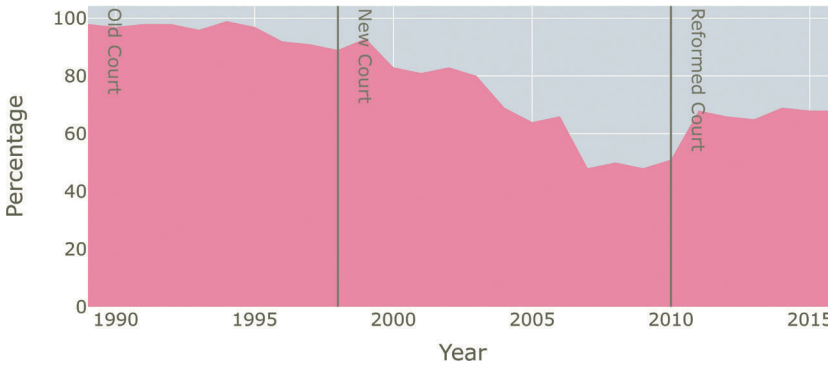

Figure 6.1 Inadmissibility decisions as a percentage of all cases lodged under Article 3

intensified when the Protocol went into force in 1998. In 1993, 96% of the cases brought under Article 3 were declared inadmissible by the Commission, and in 1998 this number decreased to 89%. The new Court had significantly lower rates of inadmissibility decisions. The inadmissibility rate is below 70% on average; in 2007 and 2009, only 48% of cases were declared inadmissible. The rate of inadmissibility decisions is not an insignificant detail. It indicates an interpretive body's willingness to review complaints that meet technical requirements for admissibility.[25]

While admissibility screening is a useful tool to weed out unfounded applications, when applied too strictly, it may also discard well-founded complaints. Recent research shows that some of the cases declared inadmissible by the European Court are, in fact, legally valid claims.[26] Looking at the difference between the admissibility screening done by the Commission, we can deduce that the new Court is more permissive than the Commission. It is also plausible to assume that if Protocol 11 had not abolished the Commission in 1998, the Commission would have continued to apply stricter standards for admissibility decisions – perhaps finding some of the complaints concerning positive obligations inadmissible.

[25] European Court of Human Rights, "Practical Guide on Admissibility Criteria," available at www.echr.coe.int/documents/admissibility_guide_eng.pdf.

[26] See, for example, Janneke Gerards, "Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning," *Human Rights Law Review* 14, no. 1 (2014): 148–58.

Second, and relatedly, the data also demonstrates the importance of the timing of referrals to the Court. The Commission referred to all the important cases in which the Court would establish positive obligations in 1997 – after the adoption of Protocol 11 in 1994 but just before its entry into force in 1998. The list of cases includes *A* v. *the United Kingdom* (positive obligation to provide legal protection/remedy), *Kurt* v. *Turkey* (positive obligation to inform the family of disappeared persons), and *Assenov and Others* v. *Bulgaria* (obligation to investigate). From 1994 and onward, once it became clear that the Commission's role as the gatekeeper was nearing its end, it appears that the Commission became more audacious with its referrals.

Third, Protocol 11 also influenced the Court's behaviour. The late 1990s were not the first time the Court reviewed complaints invoking positive obligations. Figure 6.2 portrays violation (above) and no violation (below) rulings concerning claims invoking positive obligations during the period under study.[27] At first look, we see that the complaints concerning the violation of states' positive obligations under Article 3 had come before the Commission and the old Court earlier, in the late 1970s and the early 1980s. Yet, the Commission and the old Court did not consider these complaints as constituting violations of, or falling under, Article 3. The second cluster of complaints came afterward in the late 1990s, and there we see some violation decisions, which increased at a higher rate around the mid-2000s. This implies that the Commission and the old Court were, at first, categorically against positive obligation claims and this orientation changed in the period after 1998.

We can assess the old Court's approach to positive obligations under Article 3 in the period before 1998 qualitatively by looking at some of its judgments involving positive obligation claims. For example, in *Guzzardi* v. *Italy* (1980), the applicant complained about his living conditions in Asinara, an island where the applicant was obliged to reside for three years by a court order. This island was inhabited mostly by prison staff and their families.[28] In addition to limited movement and work opportunities, the applicant had to live in a building, which he described to be "dilapidated"

[27] Some of the no-violation decisions in the late 1970s and early 1980s were only given by the Commission. That is, the Commission passed a judgment and never referred it to the Court. For example, in *Bonnechaux* v. *Switzerland*, the Commission did not find the applications' complaint about detention conditions and failure to provide medical care to constitute a violation. *Bonnechaux* v. *Switzerland*, application no. 8824/78, European Commission of Human Rights (December 5, 1978). However, the case was not referred to the Court.

[28] *Guzzardi* v. *Italy*, application no. 7367/76 ECHR (November 6, 1980)

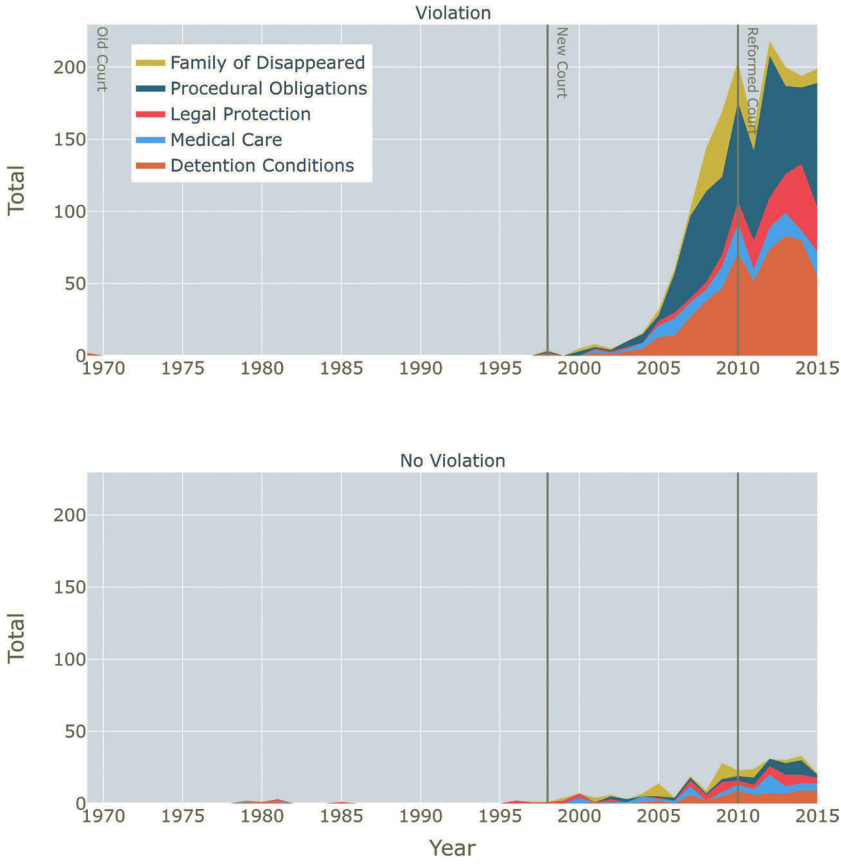

Figure 6.2 Distribution of violation and no violation rulings invoking positive obligations

and "almost uninhabitable."[29] At another point, the applicant complained about the substandard "health and sanitary conditions in the inhabited zones."[30] The Commission found that the applicant's claims did not fall under Article 3, and the Court agreed.[31] Without elaborating further, the Court unanimously found that the living conditions were "unpleasant or

[29] Ibid., §31.
[30] Ibid., §42.
[31] Ibid., §50.

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even irksome," but that they did not "attain the level of severity" to constitute a violation of Article 3.[32]

Similarly, the Court showed a lack of sensitivity toward complaints invoking positive obligations under Article 3 in *X and Y* v. *the Netherlands* (1985).[33] This case concerns the sexual abuse of a girl with mental disabilities. The girl had been living in a privately run home for mentally disabled children since 1970. On the night of December 14, 1977, the girl was raped by the director's son-in-law, who lived on the premises. Following this traumatic incident, the girl had a mental breakdown. Since the incident took place after the girl's sixteenth birthday, she was legally considered an adult, and she had to be the one bringing the complaint. However, she was unable to do so because she was severely traumatised. When the authorities rejected the complaint lodged by her father on her behalf, her father took the case before the Commission and then, finally, the Court. He complained that the traumatic experience his daughter endured amounted to inhuman and degrading treatment.[34] Furthermore, he added that the state was responsible even if the act was perpetrated by a private actor. The Commission did not find the Netherlands in violation of Article 3, arguing that there was not much for the government to do.[35] The Court did not even discuss the claim under Article 3 because it had already found a violation of Article 8.[36] This was a unanimous decision. Needless to say, this case would be decided differently by today's standards or by the standards of the late 1990s.

The *X and Y case* typifies the Commission's less inclusive approach and the old Court's forbearing attitude in the period before 1998 when both institutions had narrow discretionary space. This decision is coloured by two trends associated with the Commission and the old Court: unwillingness to find a violation for abuse perpetrated by private actors and to impose resource-intensive positive obligations on states. From these trends, we can reasonably conclude that the old Court and the Commission would not have had the audacity to bring out several positive obligations in rapid succession in 1998, as the new Court did. This, however, does not imply that the old Court and the Commission would have never introduced positive obligations. They may well have, but it would probably have taken them much longer. It is also likely that the change

[32] Ibid., §107.
[33] *X and Y* v. *the Netherlands*, application no. 8978/80, ECHR (March 26, 1985).
[34] Ibid., §33.
[35] Ibid., §33.
[36] Ibid., §34.

they would have generated might have been less consequential. Due to their overriding preference for forbearance, they would have introduced fewer positive obligations of a less controversial nature. This would include, for example, procedural obligations or obligations to provide acceptable detention conditions.

In Sections II, III, and IV, I will turn to other contributing factors outlined in the framework, namely norm change's congruity with changing societal trends, legal principles promoted by other instruments or institutions, and civil society campaigns.

II Congruity of Positive Obligations with Societal Trends in the Aftermath of Eastward Expansion

The late 1990s was a transformative moment due to the alignment of several sociopolitical factors.[37] A wave of human rights euphoria coalesced in the post–Cold War period that lasted until the advent of the War on Terror.[38] That euphoria had two main drivers: One was the increasing number of countries that were either liberal democracies or perceived as transitioning to democracy. To belong to this group, states had to make explicit commitments to human rights. Even illiberal countries were gradually acquiescing to the international human rights regime. The other driver was the proliferation of human rights in two directions: the introduction of new rights and legal instruments and the unprecedented salience of the human rights discourse. New legal rights were introduced through legislation or judicial decisions at the domestic and international levels. In this regard, the UN played a key role by introducing new mandates for special procedures or establishing new treaty bodies.[39] The implications of this proliferation went beyond the human rights community as human rights language gained more traction in public discourse, with the emergence of new rights (e.g., right to water or right to clean environment)[40] and new

[37] Michael P. Scharf, "Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in Times of Fundamental Change," *Cornell International Law Journal* 43 no. 3 (2010): 439–69.

[38] Tim Dunne and Marianne Hanson, "Human Rights in International Relations," in *Human Rights: Politics and Practice*, ed. Michael Goodhart, 3rd edition (Oxford: Oxford University Press, 2016), 61–76.

[39] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2013).

[40] Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge and New York: Cambridge University Press, 2021); Madeline Baer, *Stemming the Tide: Human Rights and Water Policy in a Neoliberal World* (Oxford University Press, 2017); John H.

rights movements (e.g., those concerning sexual minorities or persons with disabilities).[41]

At the regional level, following the Eastward expansion (i.e., accession of formerly communist countries to the European human rights regime), European societies were primed and ready to bridge the gap between negative and positive obligations in the late 1990s.[42] "Timing was ripe," as one judge explained.[43] The introduction of positive obligations was the natural next step in Western Europe, where the rule of law standards were already well-established, according to one human rights activist.[44] Positive obligations would serve a supplementary function in protecting rights and upholding the rule of law in Western Europe. Yet, these obligations were even more necessary for Eastern European countries that had to be introduced to a strong rule of law tradition.[45] One judge from an Eastern European country divulged that having just gone through a regime change, Eastern European countries needed to be introduced to positive obligations.[46] Another judge from the same region even claimed that positive obligations appeared to be "the only solution to change the mentality of the [Eastern European] states."[47] These obligations would teach them how to establish a holistic and effective human rights protection system by, for example, directing them to take appropriate steps to prevent continuous violations and to provide effective remedies to the victims.

According to another judge, positive obligations were proposed to patch up Europe's increasingly diversified social fabric after the Eastward expansion.[48] Upon welcoming new member states, the Court started reviewing cases coming from both well-established democracies and those still in transition. Positive obligations were ideal tools to strengthen the rule of law tradition in both old and new members alike.[49] A judge

Knox and Ramin Pejan, eds., *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018).

41 Bob Clifford, "Introduction: Fighting for New Rights," in *The International Struggle for New Human Rights*, ed. Bob Clifford (Philadelphia: University of Pennsylvania Press, 2011), 1–13.

42 Interview 27; Interview 7.

43 Interview 9.

44 Interview 27.

45 Robert Harmsen, "The European Convention on Human Rights after Enlargement," *The International Journal of Human Rights* 5, no. 4 (2010): 33.

46 Interview 11.

47 Interview 13.

48 Ibid.

49 Interview 16.

from a Western European country explained the essentiality of positive obligations as follows:

> Again, this is a process of evolution. You must also, however, remember that the early and mid-1990s saw the Convention being signed by many Central and East European countries which had previously been within the Soviet Bloc. The Court was suddenly faced with several countries which, even if they had abandoned torture or inhuman or degrading treatment as a direct tool, still had a deficient legal and administrative system which did not enable the proper investigation of instances of inhuman or degrading treatment, or where such treatment was endemic in certain institutions like asylums and care homes. This, if not solidified, must certainly have precipitated the development of positive obligations in this field.[50]

In a similar vein, another judge confirmed that the Court launched positive obligations in response to pervasive problems such as appalling conditions at detention centres, elderly care homes, or mental institutions in new member states.[51]

To better understand this exigency argument, let us examine the logic behind the creation of procedural obligations, which were discussed in Chapter 5. According to my interlocutors, procedural obligations are necessary to hold domestic authorities fully accountable and to teach the importance of due diligence. Procedural obligations help address evidentiary problems embedded in the majority of the complaints brought under Article 3. Since the Court does not carry out its own investigations and must rely on the findings presented by the parties involved, any procedural deficiency could have a serious consequence.[52] As one judge told me, it is an arduous effort to prove whether substantive violations indeed took place.[53] When the responding states fail to supply the Court with relevant medical reports, detention records, or any other documents that could be relied upon as proof, the victims cannot substantiate their claims.[54] This puts the victims at a disadvantage and prevents the Court from arriving at a conclusion with certainty. States' failures to help the Court establish facts do a disservice to the victims. Therefore, by invoking procedural obligations, the Court may at least find violations for not duly investigating or not providing effective remedies.

[50] Interview 10.
[51] Interview 11.
[52] Interview 15.
[53] Interview 12.
[54] Ibid.

A look at the jurisprudence also shows that this development was directly informed by emerging social needs in European societies, especially in the aftermath of Eastward expansion. My analysis of the case law reveals that the majority of the violation rulings concern countries such as Turkey and Russia – where the Court had already identified the lack of effective investigation as a systematic problem in its previous case law.[55] This list includes several formerly communist Eastern European countries such as Ukraine, Romania, Bulgaria, and Moldova, where domestic legal and administrative systems have clear deficiencies that prevent proper investigations, as one judge underlined.[56]

The Court was not alone in promoting procedural obligations and due diligence. Political bodies of the Council of Europe aided the Court in this mission. The Parliamentary Assembly of the Council of Europe expressed its support by commending the Court "for the extensive case law it has developed on impunity, in particular by imposing on member states the positive obligation to investigate serious human rights violations and to hold their perpetrators to account."[57] Similarly, the Committee of Ministers highlighted the importance of following procedural steps to fully realise the obligations deriving from the Convention. The Committee emphasised that the obligation to implement judgments may go beyond simply paying compensation to the victims (just satisfaction). It may also require "in exceptional circumstances the re-examination of a case or a reopening of proceedings."[58]

Moreover, the Committee relied on the Court's case law when defining the duty to investigate in its *Guidelines on Eradicating Impunity for Serious Human Rights Violations.* According to these guidelines, "States are under a procedural obligation arising under Article 3 of the Convention to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred."[59] It is not insignificant

[55] Interview 20.

[56] Interview 10.

[57] Parliamentary Assembly of the Council of Europe, State of Human Rights in Europe: The Need to Eradicate Impunity, *Resolution 1675(2009)*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17756&lang=en.

[58] Committee of Ministers of the Council of Europe, on the Re-examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights, *Recommendation No. R(2000)2* (January 19, 2000), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06

[59] Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights

that both the Parliamentary Assembly and the Committee of Ministers encouraged the Court to develop positive obligations. The fact that they took up the promotion of positive obligations also attests to the claim that this was indeed in line with the emerging needs of European societies, also acknowledged by the political institutions of the Council of Europe.

III Legal Principles and Jurisprudence in Support of Positive Obligations

When introducing positive obligations, the Court did not need to put up too much of a fight. The ideational foundations of positive obligations were already established by voices within academia and the human rights community before the Court ventured into progressively introducing them under Article 3. Philosopher Henry Shue opposed the separation of negative and positive rights, arguing that the distinction between these two groups of rights is built upon false premises.[60] According to Shue, negative rights (rights to security) include a positive dimension, namely prevention.[61] Correspondingly, the fulfilment of positive rights (rights to subsistence) requires correlative duties, such as the full guarantee of security.[62] Similarly, Philip Alston and Gerard Quinn dispute this dichotomy by arguing that some civil and political rights, such as the right to a fair trial, cannot be realised without state involvement.[63]

This idea reverberated within the UN, too. Asbjorn Eide, the former Special Rapporteur on the Right to Adequate Food as a Human Right, fleshed out the connection between negative and positive obligations. He introduced a tripartite typology to categorise obligations in his 1987 *Right to Food as a Human Right* report, which included obligations to respect, protect, and fulfil.[64] Eide's typology intended to abolish the dichotomy of positive and negative rights, and show that the protection of rights

Violations, *CM/Del/Dec(2011)1110/4.8-app5/* (March 30, 2011), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cd111

[60] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1st edition, 1980, 2nd edition, 1996).

[61] Shue, 39.

[62] Ibid., 37.

[63] Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no. 2 (1987): 184.

[64] Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden and Boston: Martinus Nijhoff Publishers, 2009), 14.

requires not only noninterference but also specific measures designed to ensure rights' complete fulfilment. This idea was also invoked in several UN instruments. For example, Article 2 of the Convention against Torture (CAT), which entered into force in 1987, obliged each state party "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[65] Similarly, the Human Rights Committee's General Comment No 31, adopted in 2004, stated that refraining from violating rights is not sufficient.[66] States must also protect individuals from acts perpetrated by private persons or entities. Finally, the UN General Assembly underlined the need for state obligations to respect and "take appropriate legislative and administrative and other appropriate measures to prevent violations" in Resolution 60/147 – *Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims of Gross Violations*.[67]

Other international tribunals and legal instruments also played their part in acknowledging and promoting positive obligations. The UN Human Rights Committee was the first judicial body to refer to states' obligation to investigate in *Bleier* v. *Uruguay* in 1982.[68] The Committee said, "the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities."[69] Six years later, the Inter-American Court of Human Rights issued the *Velasquez Rodriguez* ruling, highlighting state obligations to "prevent, investigate, and punish any violation of the rights recognised by the convention."[70] Thus, in its first-ever judgment, the Inter-American Court of Human Rights lodged the duty to investigate and inform the family of disappeared persons.

Traces of the main logic behind positive obligations, and the duty to investigate in particular, can also be found in Article 12 of the CAT and in 1992 General Comment 20 on Article 7. Article 12 obliges each state party to "ensure that its competent authorities proceed to a prompt and

[65] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

[66] UN Human Rights Committee (HRC), "General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," CCPR/C/21/Rev.1/Add.13 § (2004).

[67] UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," Resolution 60/147 (2005).

[68] *Bleier* v. *Uruguay,* Communication No. R. 7/30 (March 29, 1982).

[69] Ibid., §13,3.

[70] *Velasquez Rodriguez*, Judgment of July 29, 1988, IACtHR (Ser. C) No. 4 (1988), § 166.

impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[71] General Comment 20 states, "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. (…) Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."[72] Hence, when the Court began systematically prescribing positive obligations, the idea did not sound alien or out of the ordinary. Positive obligations were quickly internalised, and their recent addition to the European human rights system went almost unnoticed.[73] The African Commission followed suit and recognised positive obligations in the *Ogoniland Case* in 2001.[74]

The existing legal principles concerning positive obligations also prepared the grounds for the *Opuz* v. *Turkey* judgment, where the Court found Turkey in violation of Article 3 for not taking the necessary steps to protect Nahide from domestic violence.[75] The Court specifically referred to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the CEDAW Committee's General Recommendation no. 19, which prohibits gender-based violence. In addition, the Court invoked the relevant jurisprudence of the CEDAW Committee as well as the Inter-American Court and Commission. The Court then turned to the UN General Assembly Declaration on the Elimination of Violence against Women (1993). Invoking this declaration, the Court expressed that states have an obligation to "exercise due diligence to prevent, investigate, and…punish acts of violence against women, whether those acts are perpetrated by the State or private persons."[76]

Finally, the Court cited the Committee of Ministers' 2002 Recommendation.[77] This recommendation requires the Council of Europe

[71] UN General Assembly, *Convention against Torture.*

[72] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, March 10, 1992.

[73] Interview 16.

[74] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)* v. *Nigeria*, communication no. 155/96, African Commission on Human and People's Rights (May 27, 2002).

[75] *Opuz* v. *Turkey*, § 72–91.

[76] Ibid., § 76–79.

[77] Committee of Ministers of the Council of Europe, *Recommendation Rec(2002)5* (April 30, 2002).

member states to "classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas."[78] Building upon this strong international legal framework, the Court found the Turkish government's unwillingness or inability to protect Nahide to be a violation of Article 3. In so doing, the Court brought victims of domestic violence in Europe under the protection of the prohibition of torture.

As we see in Nahide's case, an ample supply of legal principles and precedents existed prior to and during the time when the Court acknowledged various positive obligations under Article 3. This arguably facilitated the process and granted the Court legitimacy to launch such a foundational change. In this regard, one judge spoke to me about the importance of the CAT in propelling the Court's progressive interpretation.[79] Another judge said: "I have no doubt that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Committee for the Prevention of Torture (CPT) (….) were important catalysts in this delicate process of norm evolution."[80] They added that the Court often relies on the CPT's reports as evidence.[81] A former judge confirmed this and maintained that the CPT reports make up for the Court's inability to carry out fact-finding.[82] Another judge divulged that if the CPT and other UN mechanisms had not ventured into new fields, judges would not be aware of the existence of new developments.[83]

Similarly, a judge from Western Europe underscored the importance of hard and soft law materials regarding the prohibition of torture and ill-treatment. They explained that "European prison rules, first introduced in the 1990s and renewed in 2007, for example, had an impact on the way such things are viewed."[84] They emphasised that "the Minimum Standards of the Treatment of Prisoners were introduced" in this period too.[85] They then ventured into arguing that "in the 1990s, a lot of these materials were created

[78] *Opuz* v. *Turkey*, § 82.
[79] Interview 1.
[80] Interview 10
[81] Ibid.
[82] Interview 16.
[83] Interview 11.
[84] Interview 15.
[85] Ibid.

and discussed, and this had an impact on the interpretation. We have an interpretative rule that says that we have to interpret the Convention in harmony with the international trends."[86] In their view, these instruments were decisive in changing the way the norm against torture and inhuman or degrading treatment was understood in the 1990s.

IV Active Promotion by Civil Society Groups

In the late 1990s and 2000s, civil society organizations operating in Europe used strategic litigation to bring various issues to light.[87] This list includes gross human rights violations perpetrated during counterterrorism operations in the southeast of Turkey and in Chechnya, or racial discrimination against the Roma in Central and Eastern Europe.[88] Civil society participation has been extremely important in highlighting large-scale and concealed violations that take place with impunity.[89] Different civil society groups have been actively involved in court proceedings by providing legal representation and advice to the individual applicants, or by submitting *amicus curiae* briefs. Interights, Amnesty International, the Open Society Justice Initiative (OSJI), the European Roma Rights Center (ERRC), and the Kurdish Human Rights Project (KHRP) played a particularly prominent role in drawing public attention to Article 3 violations.

In addition to addressing such urgent questions, several of these organizations have slowly worked on bringing out positive obligations and developing legal standards around them. Believing that rights cannot be fully realised without positive obligations, they have pushed for the adoption of positive obligations from different angles.[90] For example, the Geneva-based Association for the Prevention of Torture (APT) has been active in preserving already established international standards and advocated preventive measures.[91] Interights, a defunct London-based NGO, had been an adamant supporter of preventing violence against women, believing that "rights that are implemented best are the rights for men."[92] In

[86] Ibid.
[87] Laura Van den Eynde, "An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 31, no. 3 (2013): 279–80.
[88] Interview 16; Interview 34; Interview 35; Interview 36.
[89] Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Oxford and Portland: Hart Publishing, 2011), 8.
[90] Interview 27; Interview 28; Interview 31; Interview 32.
[91] Interview 31.
[92] Interview 27.

order to realise this objective, Interights submitted third-party observations in support of Nahide's claims and called for providing legal protection for vulnerable groups such as domestic violence or rape victims in *Opuz v. Turkey*. Meanwhile, the OSJI has worked to alleviate the treatment of Roma people in Central and Eastern Europe. They highlighted the need for measures to eradicate systemic discrimination and extensive remedies for the victims.[93] Redress and Liberty have focused on a large selection of issues, including anti-terror legislation, excessive use of force, violence against women and the LGBT community, and the development of rules in custodial settings.[94]

These organizations have benefited from three working methods: specialization, transfer of issue area expertise, and utilization of standards developed in other legal regimes (cross-fertilization). They have developed thematic or country-based specializations over the years, which made them more attuned to the deterioration of international standards or human rights situations in domestic contexts. For example, Interights would be the leading organization dedicated to ending violence against women, whereas the OSJI would pay closer attention to discrimination, and Amnesty International would follow up on the cases of enforced disappearances or grave human rights violations.[95]

Transfer of expertise was another asset that helped civil society organizations increase the collective impact of their work. By transferring their expertise and skills to another issue or region, they have readily developed working strategies to address human rights violations. For example, European human rights groups first developed their expertise in the systemic mistreatment of communities throughout "the Troubles in Northern Ireland" in the 1970s. Then, this expertise was transferred to cases about the Kurdish conflict in Turkey and the Chechen conflict in Russia, as human rights lawyers who had worked for these causes disclosed in interviews with me.[96] The lawyers who represented the Northern Irish cases also offered advice to Kurdish and Chechen victims. They became part of the same litigation network, either providing legal representation to the victims or training local lawyers.

Finally, to bolster their arguments, civil society organizations have often relied upon existing principles in other treaties or standards

[93] Interview 28.
[94] Interview 32.
[95] Interview 26; Interview 27; Interview 28.
[96] Interview 34; Interview 35; Interview 36.

developed domestically or internationally.[97] This is a strategy intended to legitimise their arguments and to enlighten the Court about principles that might be of assistance when interpreting a provision. This leads to another unexpected but welcome outcome. When such organizations refer to the existing or emergent principles or standards developed by the jurisprudence of other courts, it helps disseminate those principles across different legal regimes. Cross-referencing human rights jurisprudence harmonises international standards and strengthens human rights protections across the board.[98] In this regard, civil society organizations act as pollinating bees that help diffuse legal principles.

Kurt v. *Turkey* – where the Court first acknowledged states' positive obligation toward the relatives of disappeared persons – illustrates how these key working methods helped them promote positive obligations. Koçeri Kurt, the victim's mother, brought the complaint, alleging that state authorities had been implicated in her son's disappearance.[99] It might be unusual to hear that such a complaint would fall under Article 3. It might sound even more unusual to extend the victimhood status to the relatives of a disappeared person under this prohibition.

However, this was the way the Inter-American Court of Human Rights and the UN Human Rights Committee approached enforced disappearance cases prior to *Kurt*. For example, in *Velasquez Rodriguez* v. *Honduras*, which concerned a large number of disappearances in Honduras in the early 1980s, the Inter-American Court underscored the need for an "effective search for the truth by the government."[100] Later on, in the case of *Bamaca Velasquez* v. *Guatemala*, the Inter-American Court established that the victim and his relatives had a right to obtain information about "the violations and the corresponding responsibilities from the competent state organs," and that states have a duty to investigate and prosecute.[101] The UN Human Rights Committee applied a similar logic in the *Mariam, Philippe, Auguste and Thomas Sankara* v. *Burkina-Faso* – a case about Thomas Sankara, the assassinated President of Burkina Faso. Sankara's wife brought the case before the Committee. The case concerned the events that took place during the 1987 *coup d'état* in Ouagadougou. The Committee concluded that "the family of a man killed in disputed

[97] Interview 31; Interview 32; Interview 33.
[98] Ezgi Yildiz et al., "New Norms in Old Regimes: Judicial Strategies for Importing Environmental Norms," *Unpublished Manuscript*, 2022.
[99] *Kurt* v. *Turkey*, § 14–18.
[100] *Velasquez Rodriguez* v. *Honduras,* § 177.
[101] *Bamaca Velasquez* v. *Guatemala*, Ser. C No. 91, IACtHR (2002) § 75.

circumstances have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara or the precise location where his remains were officially buried. Thomas Sankara's family has the right to know the circumstances of his death."[102]

Relying on this jurisprudence, Koçeri Kurt lodged her complaint before the European Court. She was represented by Françoise Hampson and Aisling Reidy, lawyers affiliated with the Kurdish Human Rights Project (KHRP) – a London-based NGO that engaged in strategic litigation to highlight human rights violations in the Kurdish conflict in the 1990s and early 2000s. The KHRP was established by Kerim Yıldız,[103] who is a lawyer of Kurdish origins. He had the idea of establishing the KHRP when he was a student at the University of Essex, and he shared this idea with his professor Kevin Boyle, who was a Northern-Irish human rights activist and a barrister. With the support of the late Boyle, the KHRP was established and came into the network of professors and activist lawyers working in Essex and London. Yıldız then connected the KHRP with the Diyarbakir Human Rights Association (DHRA), a local NGO based in the primarily Kurdish-populated city of Diyarbakır. The DHRA would help this network by not only monitoring human rights violations in the region but also by referring select exemplary cases to the KHRP.[104]

The Essex-KHRP-DHRA triangle acted as a strategic litigation network.[105] They used the Court as a forum to raise awareness about the gross violations committed by the Turkish government during counter-terrorism operations in the southeast of Turkey. The network had local and international partners. The DHRA (a domestic NGO) cooperated with the KHRP (a London-based NGO) and a network of activist lawyers in Essex and London. This triangle ceased to exist when the KHRP was closed. However, some of the lawyers and academics working for the KHRP established the European Human Rights Advocacy Centre (EHRAC), based at Middlesex University in London. The EHRAC began working in partnership with Memorial, an NGO based in Moscow. The EHRAC-Memorial partnership focused on bringing cases against Russia

[102] *Mariam, Philippe, Auguste and Thomas Sankara* v. *Burkina-Faso,* communication no. 1159/2003, U.N. Doc. CCPR/C/86/D/1159/2003 (2006) §12.2

[103] Not related to the author of this book.

[104] Interview 35.

[105] This strategic litigation network carried the characteristics of activist networks that Margaret E. Keck and Kathryn Sikkink describe in their seminal work. Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998).

and advocating for the implementation of court decisions. The EHRAC also assisted lawyers in Russia, particularly in the South Caucasus, and concentrated its efforts on strengthening the capacity of local NGOs.[106]

The Essex-KHRP-DHRA triangle – a network specialised in flagging the systematic violations committed against the Kurdish population in Turkey – helped Koçeri Kurt successfully present her complaint before the European human rights system. The case was brought before the Commission by Professors Kevin Boyle and Françoise Hampson in 1994 and then referred to the Court in 1997.[107] This time, Professor Françoise Hampson, Aisling Reidy, Osman Baydemir, and Kerim Yıldız represented Koçeri Kurt. When preparing this case, the legal counsel relied on legal principles developed in the context of similar gross human violations in Latin America. In particular, they urged the Court to consider this matter in line with the jurisprudence of the Inter-American Court and the UN Human Rights Committee and to recognise Koçeri Kurt's own victimhood under Article 3.[108] They argued that "the next-of-kin of disappeared persons must also be considered victims of, *inter alia*, ill-treatment."[109] State authorities had been responsible for her son's disappearance, which caused her extreme suffering. State authorities' failure to investigate her allegations and provide her with reliable information exacerbated her distress and anguish. Thus, the government was directly responsible for not only her son's disappearance but also for the suffering she endured as a result.[110]

Upon reviewing the case, the Court could not find evidence to rule that the applicant's son had been a victim of ill-treatment.[111] It could establish, however, that the authorities had failed to conduct an effective investigation and provide the necessary information regarding the circumstances surrounding her son's disappearance.[112] More importantly, the Court found the applicant to be "the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face

[106] For more, see European Human Rights Advocacy Center (EHRAC) www.mdx.ac.uk/our-research/centres/ehrac. Similarly, the Russian Justice Initiative, registered as an NGO in Utrecht, cooperated with the Nazran-based organization Pravovaia Initsiativa and the Moscow-based Legal Assistance-Astreya to bring cases concerning violations in the North Caucasus.

[107] *Koçeri Kurt* v. *Turkey*, application no. 24276/94, European Commission of Human Rights (December 5, 1996), §2.

[108] *Kurt* v. *Turkey,* § 84.

[109] Ibid., §130.

[110] Ibid.

[111] Ibid., §107–116.

[112] Ibid., §133–34.

of her anguish and distress."[113] Thereby, the Court determined that states have a positive obligation to inform the relatives of disappeared persons, which was first introduced by the Inter-American Court – a development dubbed as "Latin-Americanization of the European system."[114]

Transnational human rights groups had an important role in establishing this obligation and in documenting Koçeri Kurt's victimhood. The KHRP legally represented the applicant, and the DHRA provided her with the initial help and (possibly) referred her case to the KHRP.[115] When the national authorities dismissed her requests for further information regarding the detention of her son, she sought help at the DHRA, where she submitted a statement explaining the circumstances surrounding her son's disappearance.[116] This statement was later presented before the Commission as evidence.[117] The Commission found that the statement, which the DHRA provided, had evidentiary value and used it to corroborate the applicant's testimony.[118] Finally, Amnesty International submitted an *amicus curiae* brief and furnished the Court with further observations in relation to the existing legal principles concerning enforced disappearances.[119]

The *Kurt* ruling generated a momentous change: introducing states' obligation to duly investigate and inform the relatives of victims. More importantly, it extended the victim status to the relatives of the disappeared persons.[120] This ruling opened the door for other victims like Koçeri Kurt, who could seek remedies for the suffering they endure due to the disappearance of their family members.

This precedent also helped activists bring complaints over the European governments' involvement with the CIA's extraordinary rendition operations. The first of these was *El-Masri* v. *The Former Yugoslav Republic of Macedonia.*[121] Khaled El-Masri's rendition story was an illustration of one

[113] Ibid., §134.
[114] Christina M. Cerna, "The Inter-American System for the Protection of Human Rights," *Florida Journal of International Law* 16, no. 1 (2004): 202.
[115] Interview 34; Interview 35; Interview 36.
[116] *Kurt* v. *Turkey,* §17.
[117] Ibid., §34.
[118] Ibid., §50.
[119] Ibid., §71.
[120] Interview 16. The Court would limit this status only to close family members in subsequent case law. See, for example, *Çakıcı* v. *Turkey*, application no. 23657/94, ECHR [GC] (July 8, 1999).
[121] *El-Masri* v. *The Former Yugoslav Republic of Macedonia,* application no. 39630/09, ECHR [GC] (December 13, 2012).

of the darkest War on Terror practices. He was kidnapped in Macedonia, where he was held incommunicado and ill-treated, then handed over to the CIA agents who transferred him to a secret detention facility in Afghanistan, where he was tortured. He spent more than four months in a small cell, not knowing where he was and what his fate would be, until they released him somewhere near the Albanian border. El-Masri's case, which was represented by lawyers affiliated with the OSJI, immediately became high-profile.[122] The UN Office of the High Commissioner for Human Rights (OHCHR), Interights, Redress, the International Commission of Jurists, and Amnesty International all intervened in the written procedure as third parties.[123] They advocated for the society's right to know the truth about secret detention and rendition program, by relying on the principle set in *Kurt* v. *Turkey*.[124] These appeals clearly resonated with the reformed Court, which then argued that the case was highly significant "not only for the applicant and his family but also for other victims of similar crimes and the general public, who had the right to know what had happened."[125]

Let us remember that this major legal victory was only possible due to a collaborative international effort that we first saw in *Kurt* and then in *El-Masri*.[126] Several specialised civil society organizations brought together their expertise and invoked existing and emerging legal principles. This strategy was replicated in various other cases. For example, in *Assenov and Others*, the European Roma Rights Center and Amnesty International called for the Court's acknowledgment of procedural obligations.[127] Interights intervened in *M. C.* v. *Bulgaria* to highlight states' obligation to provide legal protection to rape victims.[128] In each case, careful arguments were made so that the Court would have a chance to develop positive obligations and bring new groups of victims under the protection of Article 3. Civil society organizations' increased participation

[122] Ibid., §2.
[123] Ibid., §10.
[124] Ibid., §179.
[125] Ibid., §191.
[126] The *El-Masri* decision strikes a different tone than *Kurt* v. *Turkey*, as it has a much broader application and scope. It concerns not only the relatives of the disappeared persons but also society at large. In so doing, it effectively extends the application of the principle set in *Kurt* and refines its morphology. Yet, it was the *Kurt* ruling that changed the existing paradigms by making it possible to bring a claim on behalf of the relatives of disappeared persons in the first place.
[127] *Assenov and Others* v. *Bulgaria,* application no. 90/1997/874/1086, ECHR (October 28, 1998).
[128] *M.C.* v. *Bulgaria,* application no. 39272/98, ECHR (December 4, 2003).

not only provided hope for victims like Koçeri Kurt and Khaled El-Masri, but also helped normalise the sudden appearance of positive obligations in international jurisprudence.

Conclusion

This chapter has explained why the norm against torture and inhuman and degrading treatment dramatically expanded in the period after 1998. Relying on the framework of analysis explained in the Introduction and Chapter 1, it has assessed the conditions that made the Court audacious enough to effectuate these resource-intensive obligations. First, the new Court, as a full-time court with compulsory jurisdiction, came to enjoy a wide discretionary space. This attribute conferred it with more judicial courage to issue audacious rulings across the board and recognise a range of important positive obligations under Article 3. Second, there was a growing need for positive obligations in European societies, especially in the aftermath of the Eastward enlargement. Positive obligations were necessary for both the Western and Eastern European countries alike. They served a supplementary role for rights protection in Western Europe and played a crucial role in inducting Eastern European countries into a rule of law tradition. Last but not least, creating positive obligations was less likely to raise eyebrows because they were already established in the jurisprudence of other courts and were actively promoted by civil society groups.