COMBATING HOMOPHOBIC AND TRANSPHOBIC BULLYING IN EDUCATIONAL SETTINGS: THE ROLE OF HUMAN RIGHTS LAW AND POSITIVE OBLIGATIONS.

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Abstract

Bullying is a problem of a quasi-universal nature that affects children and youth around the world. Given the pervasiveness or bullying as a phenomenon, the United Nations Human Rights monitoring bodies and human rights agencies have paid increasing attention to the phenomenon of bullying in recent years. The truth is, however, that bullying is not yet considered as a human rights violation by any human rights treaty. Regional human rights courts are yet to pay bullying the attention it deserves and there is not available case-law on the matter.

This thesis is based in the premise that despite lack of an explicit recognition either by human right treaties or international human rights case law, bullying is in fact a human rights problem. Throughout the five chapters forming this work, I explore how there are enough human rights legal standards that could be applied and/or expanded to provide effective protections to children and youth who are victims of bullying. Moreover, this thesis aims at providing solutions on how effective human rights litigation could provide protections to victims of homophobic and transphobic bullying.

This thesis is a comparative exercise and explores two regional jurisdictions, the European and Inter-American system of human rights, as well as a domestic jurisdiction, this is British Columbia in Canada.

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Table of contents

Introduction

For many adults bullying is considered as something meaningless, events that everyone experiences during school, a rite of passage.[1] Others might recognize bullying as a problem but not one that would require the intervention of the State, certainly not a phenomenon that is grave enough to be considered as a human rights problem. Then, there are those who see in bullying a serious problem which hampers with children's rights and development but fail to recognize homophobia as a matter of importance and related to bullying.[2]

This thesis explores all of these issues which give rise when examining the problem that bullying is from a legal perspective. Chapter 1 sets the foundation regarding what we know about bullying, how does bullying manifest and why should it concern us. I also elaborate on the concept of homophobic and transphobic bullying, how it is different than regular bullying and why it matters. As Chan has stated homophobic bullying is the "universal and the most fundamental sexual orientation problem affecting all children and adolescents from all ages around the world".[3] This section also explores the United Nations human rights monitoring bodies characterization of bullying as a human rights problem.

Chapter 2 starts with the premise that bullying is a problem and that the State has a responsibility to stop it. In order to establish such responsibility, I turn to the doctrine of positive obligations in order to link the responsibility of the State to acts where state parties have not intervened as perpetrators. In cases of peer-to-peer bullying the perpetrators will be

[1] UNGA A/71/213. 'Protecting Children from Bullying'. 26 OF July 2016 Par. 90
[2] UNESCO, Review of Homophobic Bullying in Educational Institutions, Prepared for the International Consultation on Homophobic Bullying in Educational Institutions Rio de Janeiro, Brazil, December 6-9, 2011. P 11.
[3] Phil CW Chan, *Protection of Sexual Minorities Since Stonewall: Progress and Stalemate in Developed and Developing Countries* (Routledge 2013). 14

children. In such cases two very important questions arise: Could the State be held responsible for actions of private parties, and if so, what is the extent and scope of such obligations?

Considering that under the existing human rights framework is not enough to demonstrate State responsibility in order to prove a human rights violation, but also it needs to be proven that the alleged action violates a recognized human right, Chapters 3, 4 and 5 explore this question. I start in Chapter 3 considering the implications of characterizing bullying as a violation on the prohibition of degrading treatment, given that actions of bullying are capable of causing grave harm to a person's moral and physical well-being as well as cause extreme humiliation before his/her/their own eyes and the eyes of others and harm the dignity of children and youth. In Chapter 4, I explore how certain aspects of the vulnerability of children could enhance protections provided by the State under the notion of private life. I will analyze what protections might be afforded to children victims of bullying thought the positive obligations giving rights under the protection of private life.

While the findings in chapters 3 and 4 aim to be applicable in all cases of bullying, I want to go further in Chapter 5 and explore what are the implications discriminatory intent carries in regards of the State's positive obligations to protect LGBT children from bullying. Considering research shows that children belonging to a minority or vulnerable groups are often times targeted because of their minority status,[4] I consider important to examine more in depth the State's positive obligations to prevent and treat discriminatory violence against children. Throughout Chapter 5 I will look at discrimination through the lens of stigma and explore the idea that a substantive equality approach is needed to combat stigma. I have chosen to explore protections in cases of homophobic bullying and not other types of discriminatory bullying given the dichotomy expressed by MacDougall regarding LGBT children who as children are

[4] UNGA (note 1) 32.

perceived as vulnerable in need of protection but as sexual minorities they are stigmatized and labeled as "deviants", the kind of persons children need protection from. [5]

This thesis is a comparative analysis, I have chosen the jurisdictions of the European Court of Human Rights and the Inter-American Court of Human rights for the first part of the analysis concerning positive obligations in general as a doctrine, and in particular in cases concerning the prohibition on degrading treatment and violations to one's private life. For the final chapter concerning discrimination, I have chosen the jurisdiction of Canada, this is mainly for two reasons: Canadian jurisprudence on non-discrimination is quite extensive, even at the time of the case studied here; Second, the Canadian case under study here explicitly considers bullying as a rights violation, something that has not been explicitly recognized in the international human rights framework. In this sense Canadian jurisprudence could provide new standards to be applied both by the ECtHR and the IACtHR.

Ultimately what I intent with this thesis is to show that: A) Bullying is a human rights concern, B) It is inherent in the positive obligations of States, according to international human rights law, to prevent and address bullying and C) There are enough elements in the existing human rights case-law, especially of the ECtHR and the IACtHR, that could extent the protection of the States to cover and address situations of homophobic and transphobic bullying.

Before moving on to the chapters I want to address briefly the thesis limitations. First while there is a great body of soft law concerning bullying and homophobic bullying in particular characterizing it as a human rights violation, currently no human rights treaty explicitly says bullying is a human rights violation. There is neither case-law under the regional jurisdictions chosen, which have fully examined a case of bullying as a convention rights violation yet. In this regard, I have tried to extend the interpretation of the positive obligations of the State by

[5] Bruce MacDougall, 'The Legally Queer Child' (2003) 49 McGill LJ 1057.1057.

looking at case-law that might relate to: harassment, children rights, violence perpetrated by private parties or the protections afforded to vulnerable or sexual minorities.

Second, I have limited this research to State responsibility in cases of peer-to-peer bullying. I have left out other kind of bullying that can come from teachers, school staff, administrators or parents. This, while recognizing the fact that bullying can be perpetrated by a great number of actors. I have also left out "cyber-bullying" as I consider it implicates a different kind of rights and obligations from the State outside of the scope of this thesis.

While I tried to give brief mentions to the rights of the bully (the perpetrator) this is another area that could be explore more in depth in further research. I also left out the rights of the parent's or guardian's and possible conflicts that might give rise *vis a vis* the rights of the child.

Chapter 1 : Rethinking Bullying as a human rights violation.

This chapter will provide an introduction to the definition of bullying taking into consideration definitions by social sciences as well as legal definitions. Because my thesis will be centered on how characterizing general cases of bullying as a human rights problem aim to specifically benefit victims of homophobic and transphobic bullying. I will also provide an introduction to how homophobia translates into bullying, the impact hate-based bullying has on LGBT children and why it is important to address this issue. The second part of this chapter will provide guiding questions for the upcoming chapters of this thesis regarding how bullying can be addressed as a human rights issue.

1.1. What is bullying?

Dr. Dan Olweus, a researcher and professor in psychology from Norway, is the person literature recounts as first having coined the term "bullying" as related to school harassment of children and youth after the publication of his book "Aggression in the schools: Bullies and whipping boys.[6]" during the 1970's. According to Olweus "a student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students."[7] Jorge C. Srabstein building on the work of Olweus has defined bullying as a "multifaceted type of abuse characterized by the exposure of a student to intentional and repeated physical and/or emotional abuse."[8]

[6] Dan Olweus, *Aggression in the Schools: Bullies and Whipping Boys.* (Hemisphere 1978).
[7] Dan Olweus, 'Bullying at School: Basic Facts and Effects of a School Based Intervention Program' (1994) 35 Journal of Child Psychology and Psychiatry 1173.
[8] Jorge C Srabstein, 'The Global Implications of Bullying and Other Forms of Maltreatment, in the Context of Migratory Trends and Psychiatric Resources' (2015) 24 Child and Adolescent Psychiatric Clinics. 800.

Bullying is a form of harassment that happens in the educational settings. Harassment entails exposure to social stress where victims are subjected to negative behaviors such as offensive remarks, persistent criticism, actions directed to intimidate and humiliate, excessive teasing, spreading gossip and rumors, all of which often result in isolation of the victim from the social group.[9] Bullying could also manifest as verbal harassment such as name calling, gossip, teasing, mocking or threats; bullying can also be physical like pushing, hitting or beating.[10] A Study carried in the United States which gathered data from three national surveys in 2014 reported that reports that the most common forms of bullying include: (a) verbal insults, name-calling and nicknames; (b) hitting, direct aggression and theft; and (c) threats, rumor-spreading and social exclusion or isolation.[11]

Because of the variety of forms bullying can take it is hard to pin point what it actually is, however, according to Olweus there are at least three core characteristics of bullying: A) the repetition and constancy of the attacks, and B) the harming effect on the victim and C) the notion of power imbalance in the relationship between the bully and the victim.[12]

While peer violence among children can happen in different places, research has shown that school settings is the predominant place where children interact and it is also the place where peer-to-peer violence is more likely to occur.[13] Although school bullying can happen between teachers or school staff and pupils at schools, for the purpose of this research I will focus on the type of bullying that happens among peers, meaning other pupils. I will not explore either the subject of cyberbullying as different sets of rights and actors come into play when

[9] ibid; ibid.
[10] Phil CW Chan, 'Psychosocial Implications of Homophobic Bullying in Schools: A Review and Directions for Legal Research and the Legal Process' (2009) 13 The International Journal of Human Rights. 145.
[11] R Matthew Gladden and others, 'Bullying Surveillance among Youths: Uniform Definitions for Public Health and Recommended Data Elements'.
[12] Ståle Einarsen, Helge Hoel, Dieter Zapf, and Cary Cooper, eds. *Bullying and Harassment in the Workplace: Developments in Theory, Research and Practice* (CRC Press 2010). 25.
[13] UNICEF, Hidden in Plain Sight: A statistical analysis of violence against children, New York, 2014. 113

addressing the issue. Researchers suggest that boys are more likely to become bullies that girls and that boys are more prone to use physical violence while girls are more likely to engage in psychological or emotional bullying. [14] The reasons as to why children engage in bullying behavior are as divers and I could not provide an exhaustive list, however, research has also shown that children who bully do it out of frustration, anger or do it to gain social status.[15] It has also been shown that a history of abuse by caregivers may lead children to become bullies.[16]

1.2. What is Homophobic and Transphobic bullying and why does it matter?

To analyze how human rights standards would be applicable to cases of bullying related to the harassment of a particularly vulnerable group, in the last chapter of this thesis, I will give special focus to the kind of bullying suffered by Lesbian, Gay, Bisexual and Transgender (LGBT) children and youth.

Homophobic and transphobic bullying is the kind of bullying and harassment motivated because of perceived or actual sexual orientation or gender identity. According to a UNICEF report "Negative societal attitudes towards those who are LGBT are often a contributing factor leading to such victimization."[17] Homophobic bullying puts pressure on sexual and gender minority children to change their behaviors to conform to gendered stereotypes and to perform accordingly, interfering with the development of their personal identity. [18] Homophobic

[14] Ibid. 120.
[15] UNGA (n 1) 10.
[16] UNICEF (n 13) 119.
[17] UNICEF (n 13) 129.
[18] UNICEF (n 13) 129.

bullying has been considered as a form of gender-based violence as it is often perpetrated as a result of gender norms and stereotypes and committed in order to perpetuate them.[19]

Homophobic and transphobic of bullying is especially problematic for LGBT children and youth for two main reasons. First, for every child school is a space for development of an identity where one experiences the so called "formation years." For LGBT youth these are the years of discovery of their sexual orientation or gender identity, a process that might be difficult as it is without the need to worry about being teased or harassed by peers.[20] In this sense LGBT children and youth are especially vulnerable to the impact of bullying upon their lives ,bullying therefore can have deeply serious repercussions on their identity as adults.[21] Second, homophobic and transphobic bullying is different from that kind of bullying related to race, gender or religion. Those who suffer from harassment because of the previously mentioned characteristics will have little difficulties disclosing the nature of the harassment as compared to Sexual and gender minority students. LGBTQ students who suffer from school bullying because of their sexual or gender minority status will have a harder time finding a sympathetic environment where they feel safe to disclose the nature of the harassment.[22] A third element worthy of consideration is that bullying in LGBT children and youth has been connected by extensive research to suicidal behaviors,[23] this puts LGBT children and youth at a higher risk of committing suicide.

[19] UNESCO, Review of Homophobic Bullying in Educational Institutions, Prepared for the International Consultation on Homophobic Bullying in Educational Institutions Rio de Janeiro, Brazil, December 6-9, 2011. 16

[20] Nigel Warner, Evelyne Paradis and Björn van Roozendaal (2007) Suicidality among lesbian, gay, bisexual and transgender youth. Report by ILGA-Europe to the Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe. 8

[21] Chan (n 10). 144-145.

[22] Warner et al (n 20) 10

[23] See: Daniel E Bontempo and Anthony R D'Augelli, 'Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior' (2002) 30 Journal of Adolescent Health. 364-374; Richard T Liu and Brian Mustanski, 'Suicidal Ideation and Self-Harm in Lesbian, Gay, Bisexual, and Transgender Youth' (2012) 42 American Journal of Preventive Medicine. 221-228; Anna S Mueller and others, 'Suicide Ideation and Bullying Among US Adolescents: Examining the Intersections of Sexual Orientation, Gender, and Race/Ethnicity' (2015) 105 American Journal of Public Health. 980-985. Ann P Haas and others, 'Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations' (2010) 58 Journal of Homosexuality. 10–51; Egale, "What You Should Know About LGBTQ Youth Suicide in Canada -," September 27, 2013.

In cases of homophobic and transphobic bullying heterosexual and cisgender assumed privilege comes into play. It is often that those who commit acts of homophobic harassment or bullying select their victims on the perception of weakness associated to those who are gender non-conforming.[24] Anyone who does not fit into to the traditional binary roles of masculinity and femininity regardless of their gender identity or sexual orientation is oftentimes targeted. It is also because of this fact that students who do not identify as LGBT but are perceived as such are also susceptible to becoming victims of bullying.[25]

According to Philip Chan homophobic bullying is a "universal and the most fundamental sexual orientation problem affecting all children and adolescents from all ages around the world".[26] LGBT students have been reported to suffer at least three times as much harassment in comparison to non-LGBT students.[27] In a 2012 survey carried out in 28 European countries, more than 80% of adult respondents who identified as LGB or T said that they had been called negative comments because of their sexual orientation or gender identity in schools.[28] The International Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Youth & Student Organisation (IGLYO) in a 2013-survey reported that over two thirds of LGBTQ respondents who had been victims of homophobic bullying felt less confident and more than 53% felt depressed.[29] In Canada a 2008 study by the CAMH Centre for Prevention Science, found that 33% of male students in grades between 9 -11 had been harassed verbally in relation to their actual or perceived sexual orientation and/or gender identity.[30] In the United States a survey carried out by GLSEN in 2015 found that of those who participated and identified as LGBT or

[24] Chan (n 3). 17.
[25] UNESCO, *Out in the Open: Education Sector Responses to Violence Based on Sexual Orientation and Gender Identity/Expression* (UNESCO Publishing 2016). 74-76.
[26] Chan (n 3). 14.
[27] UNESCO (n 25).74-76
[28] European Union Agency for Fundamental Rights. (2013). EU LGBT Survey, European Union Lesbian, Gay, Bisexual and Transgender Survey: Results at a glance.
[29] IGLYO. The impact of homophobic and transphobic bullying on education and employment: a European survey. (2013). Note that targeted countries for this survey were: Croatia, Denmark, Ireland, Italy and Poland.
[30] David Wolfe, Debbie Chiodo and M Ed, *Sexual Harassment and Related Behaviours Reported Among Youth from Grade 9 to Grade 11* (2008). 4

T 57.6% "felt unsafe at school because of their sexual orientation, and 43.3% because of their gender expression."[31]

1.3. Homophobic bullying and its relation to suicide attempts.

One of the most serious consequence of homophobic bullying is the correlation that exists between bullying and its link to suicidal ideation (i.e. considering committing suicide.) In the case of homophobic and transphobic bullying, this has also been linked to making suicide plans, carrying out suicide attempts and other self-harming practices among LGBT youth.[32] A 2015 American study that looked into suicidal behaviors, which examined bullying and its relationship to gender, race and sexual orientation determined that "being bullied is associated with higher odds of suicide ideation"[33] and that "despite differences in the likelihood of being bullied, sexual minority youths were more likely to report suicide ideation."[34]

A study by the International Lesbian, Gay, Bisexual, Trans and Intersex Association from 2007 reported that while being lesbian, gay or bisexual does not affect in itself the psychological or physical health of the individual, living in a homophobic environment can become a risk factor and a health hazard.[35] Isolation, anxiety disorders and depression are all known consequences of bullying that have been related to the elevated suicidal behaviors of LGBT youth.[36] The Williams Institute conducted a survey in 2014 with transgender and gender non-conforming

[31] GLSEN, The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools (2015). 12
[32] Liu and Mustanski (n 23). 221-228.
[33] Mueller and others (n 23). 983.
[34] ibid. 980.
[35] Warner N, ET AL. (n 20) UNESCO (n 25).
[36] Haas and others (n 23). 20.

adults and found out that over half of the participants who had experienced bullying at school reported lifetime suicide attempts.[37]

Threats, bullying and discrimination have been linked to create mental health problems for sexual and gender minority children and subject them to minority stress. Transgender youth are at both a greater risk of being bullied and a greater risk of attempting suicide.[38] A 2017 report by Human Rights Watch which recounts testimonies of Trans youth in the United States identifies that having a diverse gender expression which challenges established gender norms for men and women is one of the major factor for the targeting of trans youth.[39]

One of the effects bullying has on sexual and gender minority children and youth is that in order to avoid being bullied, LGBTQ children and youth may find the need to hide their minority status and "pass" as part of the main-stream. However, this situation has the counter effect of creating additional stress for them, creating internalized homophobia or transphobia and leads to severe mental health problems.[40]

1.4. Recognition of bullying as a concern by the United Nations Human Rights bodies.

The United Nations has recognized that bullying has a negative impact on the rights of children and constitutes a global concern.[41] Given the universality of the problem great attention has been given by international bodies in recent years to the phenomenon of bullying. A 2006

[37] Ann Haas, Phillip Rodgers and Jody Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Finding of the National Transgender Discrimination Survey* (2014). 2-3.
[38]Mitchell, and J. G. Kosciw. "The relation between suicidal ideation and bullying victimization in a national sample of transgender and non-transgender adolescents." 134 in Peter Goldblum and others, eds, *Youth Suicide and Bullying: Challenges and Strategies for Prevention and Intervention* (Oxford University Press 2014). 134-147.
[39] Human Rights Watch. "Like walking through a hailstorm" Discrimination against LGBT Youth in US Schools. 19-36
[40] Meyer, ILAN H., DAVID M. Frost, and S. H. E. I. L. A. Nezhad. "Minority stress and suicide in lesbians, gay men, and bisexuals." Youth suicide and bullying (2014): 177-187.
[41] UNGA (n 1) Par. 1.

global report on violence against children, by the then Independent Expert for the United Nations on Violence against Children Paulo Sérgio Pinheiro, had stressed on the effects of bullying in children and youth. According to Pinheiro "research shows that children who are bullied are likely to experience problems with their health and their psychological well-being, including feelings of low self-esteem, anxiety, depression and helplessness."[42]

In 2011, for example, The Committee on the Rights of the Child adopted General Comment No. 13 on the Convention on the Rights of the Child, it explicitly mentions bullying as a form of physical and psychological violence against children.[43] Former Secretary General to the United Nations Ban Ki-moon himself framed homophobic bullying as a "grave violation of human rights" in 2011.[44] In 2015 the Secretary-General on Violence Against Children Marta Santos Pais stated in a panel discussion that bullying is a "serious concern" for children all over the world.[45]

In 2014 the General Assembly of the United Nations recognized via a resolution that both bullying and cyber-bullying "can have a potential long term impact on the enjoyment of the human rights of children and negative effects on children affected by or involved in bullying".[46] Additionally, the resolution calls upon Member States to "to take all appropriate measures to prevent and protect children, including in school, from any form of violence, including forms of bullying, by promptly responding to such acts, and to provide appropriate support to children affected by and involved in bullying."[47]

[42] UNGA (n 1) Par. 40.
[43] UNGA (n 1) Paras. 21-22.
[44] Ki-moon, B. Ending sexuality based violence. Paper presented at a panel discussion on ending violence and criminal sanctions based on sexual orientation and gender identity, New York, NY (2011, December 8).
[45] Press release. UN envoy calls for concerted efforts to eliminate bullying in all regions. http://www.un.org/apps/news/story.asp?NewsID=52292#.WObUUNI1_IU
[46] UNGA A/RES/69/158 on Protecting Children from Bullying, 18 December 2014.
[47] UNGA (n 46)

1.5. Is bullying a human rights problem?

Notwithstanding all the attention provided to bullying by the UN and related agencies, currently there is no legally binding international instrument that characterizes bullying as a human rights violation. Therefore, is bullying wants to be characterized as a human rights problem, we need to examine what are the rights, already recognized by international human rights bodies, that are hampered by incidents of bullying. In the upcoming chapters I will elaborate on the different ways in which bullying can be characterized as a human rights violation given its elements, which include humiliation, harms to one's bodily integrity and the vulnerability of the victims. I believe bullying can be characterized as a violation to the right of the child to be protected from being subjected to degrading treatment and a violation to the right of the child to be protected and respected in their private life. Because I also want to explore how human rights standards on anti-discrimination can apply, I will also look at homophobic and transphobic bullying through the lens of a discrimination claim. These three claims will be explored more in depth in chapters 3 to 5.

Before moving forward into arguments regarding the characterization of bullying as a human rights issue, I want to address why it is important to do so. In simple terms we can define legal rights as entitlements given by the State to a person. Human rights are entitlements that a person has because his or her condition as a human, they are not given by the State but rather recognized. This recognition carries with it an obligation to respect and guarantee their enjoyment.

To recognize bullying as a human rights issue would elevate this problem from the conception that bullying is a "non-issue" or "something every child goes through." It would recognize bullying as a serious problem of a quasi-universal prevalence in schools, worthy of the State's attention and treatment. As a consequence, to recognize bullying as a violation of human rights

would expand the level of government protections necessary to safeguard the rights hampered by bullying, and enhance the State's obligations to secure a safe school environment for children and youth.

Second, because bullying is a phenomenon capable of harming a person's mental health, self-esteem, identity and self-determination, the remedies which a human rights approach could provide to a claim of bullying are better suited than those of tort law or criminal law. A human rights approach is not primarily fault-based but seeks to provide remedies to the victims of human rights violations.

Third, looking at bullying as a human rights problem would bring the issue to the competence of human rights bodies which would better balance the compelling interest at stake. In peer-to-peer bullying this would consider both the rights of the victim and the aggressor. Whether the focus of criminal law is often how to deal with a breach of the law, taking little to no regard to the rights of the victim and other parties involved, and torts law would look to provide damages to the victim but without dealing with the causes or consequences of the bullying, a human rights claim would take into consideration the rights of the victim, the bully and possibly the parents or guardians involved.

Fourth, if we look at bullying through the frame of discrimination, in the sense that certain pupils suffer from school harassment because of their belonging to a minority or vulnerable group, a human rights approach of substantive equality would not only look at the differential treatment bullied pupils experience, but would examine the root and structural causes of the problem and would aim to promote measures designed to overcome the problem.

Finally, considering that the most serious incidents of bullying may hamper the dignity of the victim, I want to cite Andrew Clapham who has suggested that concerns regarding human dignity have four aspects:

> "(1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for each individual's self-fulfillment, autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied."[48]

A human rights approach to dealing with the phenomenon of bullying, which in the most extreme cases is capable of harming the victims' dignity, would require the State to address each and every single one of the points Clapham mentions.

1.6. Conclusion

This chapter started with establishing a general definition of bullying and what are the actions and behaviors that can be classified as bullying. By looking at the physical, emotional and psychological effects and repercussions of bullying, I wanted to highlight the impact bullying has on children and youth in order to determine which rights might be violated by actions of bullying. I continued with a brief look at what homophobic and transphobic bullying is, and why is different to other types of bullying in order to determine why is important to address it.

Because the gravity of the phenomenon, great attention has been given to combating bullying in the international community. The United Nations human rights bodies and related agencies are a great example. Campaigns, publications, statements, have been developed in recent years

[48] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006). 545-546

in order to stop bullying in general and special emphasis has also been given to homophobic and transphobic bullying. Notwithstanding the attention provided by the UN as an institution, there is currently no international human rights binding instrument that recognizes bullying as a human rights issue.

It is the argument of this thesis that framing bullying as a human rights violation is a key element in combating bullying. In order to characterize bullying as a human rights violation, in upcoming chapters I will look at what are the rights violated as a consequence of acts of bullying. I will explore bullying in general as a violation to the right of the child to be protected from degrading treatment and a violation to the right of the child to be protected against any form of physical or mental violence in their private life. I will also look specifically at homophobic and transphobic bullying through the lens of a discrimination claim, in order to determine which current human right standards are applicable.

Chapter 2 : The Positive Obligations Doctrine.

2.1. Introduction.

Human rights law neither at the domestic, nor at the international level was originally conceived to deal with rights violations committed by private parties or non-state actors.[49] The original idea behind the international human rights framework was to prevent States from violating the rights of those under their jurisdiction and prevent atrocities similar to those that happened during WWII. This mainly refers to the negative undertaking of human rights, protecting the individual from harm caused by the State and its agents.[50]

In this thesis, I am focusing on peer- to-peer bullying but I want to remain mindful that bullying can happen at the hands of very diverse perpetrators amongst them state and non-state actors. Teachers, school staff, administrators, parents, and even occasional visitors can become bullies in the educational setting. One of the major challenges to characterize bullying as a human rights violation, is how to find the State responsible when bullying is committed by private parties.

In cases where bullying happens in a public school or educational institution at the hands of school administrators or teachers proving the State responsibility is easier. Actions at the hands of public employees can be attributed directly to the State. The situation is more complex in cases where the State is only partially or not involved at all in the funding or administration of

[49] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights.* (New York: Routledge, 2012) 204.
[50] Martin Nicolas Montoya Cespedes "The Inter-American Court of Human Rights' Positive Obligations Doctrine: Between Unidirectional influence and judicial dialogue" in Yves Haeck, Oswaldo-Rafael Ruiz-Chiriboga and Clara Burbano Herrera, eds, *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia Publishers 2015).766; Frédéric Sudre, 'Les Obligations Positives Dans La Jurisprudence Européenne Des Droits de l'homme' (1995) 23 Revue trimestrielle des droits de l'homme. 363-384

the educational institution, and when the ill-treatment does not happen at the hands of public employees.

In order to hold States accountable for the acts of private parties, human rights bodies have expanded the doctrine of positive obligations to establish indirect responsibility to the State.[51] In cases of bullying committed by pupils or any other private persons, we need to turn to the positive obligations doctrine and examine the standards which would allow us to characterize bullying as a human rights violation, in order to determine if the State can be held responsible for failing to comply with any given positive obligation. In this chapter I will look at developments from both the ECtHR and IACtHR jurisprudence on positive obligations and analyze how they might be relevant for cases of bullying.

2.2. The Scope and Content of Positive Obligations.

International human rights law distinguishes three different types of obligations that every right entails: obligation to respect, obligation to protect and obligation to implement or fulfill.[52] The obligation to respect is the most basic notion of human rights, States ought to refrain from actively committing rights violations against individuals within their jurisdiction. This is known as the negative obligation because it primarily requires non-action. [53] In this thesis my main concern is how to find State responsibility for actions of bullying perpetrated by non-state actors, for this reason, while recognizing the great importance of negative obligations, I will not examine them further as they fall outside the interest of my research.

[51] Xenos (n 49). 204
[52] Nesa Zimmermann, 'Legislating for the Vulnerable Special Duties under the European Convention on Human Rights' (2015) 25 Swiss Review of International and European Law. 548-549.
[53] Martin Nicolas Montoya Cespedes "The Inter-American Court of Human Rights' Positive Obligations Doctrine: Between Unidirectional influence and judicial dialogue" in Yves Haeck, Oswaldo-Rafael Ruiz-Chiriboga and Clara Burbano Herrera, eds, *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia Publishers 2015).766.

The European Court of Human Rights categorizes State's obligations under the European Convention as negative and positive obligations.[54] Positive obligations gather the obligations to protect and fulfill to the point that sometimes they overlap. According to Akandji-Kombe the obligation to protect requires "the State to protect the owners of rights against interference by third parties and to punish the perpetrators." [55] While the obligation to fulfill or implement as stated by Lavrysen requires positive actions from States to the point that they "facilitate the individual's enjoyment of a human right."[56]

2.2.1. Standards developed by the European Court of Human Rights.

In order to provide an effective protection of Convention rights the ECtHR developed the positive obligations doctrine where States are not only responsible for actions of their agents but for also failing certain duties to protect against rights violations committed by non-State actors.[57] The Positive obligations doctrine is first mentioned in the context of the right to education of Article 2 of Protocol 1 in the *Belgian Linguistics case*.[58] Most often quoted, perhaps, are the cases of *Marckx*[59] and *Airey*[60] which developed the doctrine of positive obligations under Article 8 and Article 6. *Marckx* provides an initial explanation and a building block to the ECtHR's positive obligations doctrine under Article 8 in the following terms:

> "although the object of [Article 8] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to

[54] Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights' [2007] Human rights handbook. 5
[55] ibid.
[56] Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', 69 , in Yves Haeck, Eva Brems, eds. *Human Rights and Civil Liberties in the 21st Century* (Springer, Dordrecht 2014). 73.
[57] Xenos (n 49). 204
[58] *Case relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium* ECtHR (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64).
[59] *Marckx v Belgium* ECtHR (Application no. 6833/74).
[60] *Airey v Ireland* ECtHR (application No. 6289/73).

abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life."[61]

The principle of effectiveness was clearly stated in *Airey*, a case concerning the violation of Article 6 due to the lack of available legal aid to a vulnerable woman seeking a judicial separation from her abusive husband in the State of Ireland. The ECtHR stated in *Airey* that the European Convention is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[62] Mowbray argues the European Court of Human Rights has read positive obligations in a number of substantive articles in order to ensure that the protection of said right to be practical and effective.[63] This opinion is shared by Lavrysen who states that "(t)he principle of effectiveness or the need to provide effective protection, has since *Marckx* judgment been the primary rationale for the development of positive obligations under almost every Convention article."[64]

The ECtHR has also justified the existence of positive obligations based in the general obligation "to secure" Convention rights of Article 1.[65] When this happens, the ECtHR considers the text of the substantive right in conjunction with the general obligation "to secure" under Article 1 to justify any given positive obligation.[66]

According to Lavrysen "(t)he court itself has never attempted to develop a classification of positive obligations, but has nonetheless regularly distinguished between two types of positive

[61] *Marckx v. Belgium* (n 59). §31.
[62] *Airey v. Ireland* (n 60). § 24
[63] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury Publishing 2004). 221.
[64] Lavrysen, 'Protection by the Law' (n 56). 78.
[65] See: *A v The United Kingdom* ECtHR (100/1997/884/1096); *Z and Others v the United Kingdom* [2001] ECtHR (Application no. 29392/95); *MC v Bulgaria* ECtHR (Application no. 39272/98); *O'Keeffe v Ireland* ECtHR Application (35810/09).
[66] Ursula Kilkelly, 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations' N. Ir. Legal Q. 61 (2010): 258 and Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' [2013] 162 in Brems, Eva, and Janneke Gerards, eds. Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights. 162.

obligations: substantive and procedural ones."[67] Substantive positive obligations often relate to the existence of the necessary regulatory measures, either administrative or legislative, that would reduce the risk of a violation of a person's rights. Procedural obligations relate to the responsibility of the State to investigate, punish and provide an effective remedy to human rights violations.[68]

As stated before, positive obligations have allowed human rights bodies to expand the scope of protection of human rights beyond the actions committed by State agents and directly attributable to the State. A core idea behind the doctrine of positive obligations is that the true enjoyment of human rights does not mean merely not to be violated or to be redressed by the State, but also for the State to prevent unlawful interferences even if these come from non-state actors.[69] In this sense the positive obligations doctrine has allow human rights bodies such as the ECtHR and the IACtHR to provide protections against the actions or omissions of non-state parties. As Xenos states "(w)hen a private party violates a human right of another individual, the liability of the State is sought over its failure to protect the victim in the given circumstances."[70]

2.2.2. The Case of A. v. the United Kingdom.

An example of this protection against acts of non-state actors is the case of *A. v. the United Kingdom.*[71] The ECtHR considered if the State could be held accountable for the alleged violation of Article 3 for the ill-treatment of a 9-year-old boy who was beaten with a garden cane by his step farther. The accounts of ill-treatment against A. started in 1990 when his mother's partner subjected the child and his brother to domestic abuse, the man was given a

[67] Lavrysen, 'Protection by the Law' (n 56). 47.
[68] Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights.* (Cambridge: Antwerp: Intersentia, 2016) 48.
[69] Xenos (n 49). 22
[70] ibid. 23
[71] *A. v. The United Kingdom* (n 65).

caution by the police for hitting the children. In 1993 it was reported to the Social Services that A and his brother had been hit by his now step-father with a stick. The man was charged with causing bodily harm in 1994, but defended himself in court by claiming he had acted within "reasonable chastisement", at the time this was a legitimate defense in the United Kingdom, and A's step-father was found not guilty of the criminal charges. A. filed a complaint to the European Commission and alleged that the State had failed to protect him from ill-treatment in violation of Articles 3 and 8 of the ECHR in conjunction with Article 14, he also claimed that he had been denied an effective remedy in violation of Article 13.

The ECtHR considered that the United Kingdom had breached its positive obligation of protecting A's physical integrity given that the law, which was supposed to provide effective deterrence against ill-treatment, did not provide A with adequate protection. This was supported by the fact that an incident that caused actual bodily harm and constituted a violation of Article 3 could be justified as "reasonable chastisement."[72] Although there was also a claim of a breach of Article 8 (private life) the ECtHR did not consider it necessary to examine it, given that it had found a violation of Article 3. Kilkelly highlights the role that positive obligations had in the case of *A. v. UK*:

> "In its judgment, the Court set out the positive obligations under Article 3 of the Convention by reading it together with the duty under Article 1 of the ECHR to "secure" Convention rights to everyone. On this basis, the Court ruled that Article 1 obligation requires states, "to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment proscribed by Article 3, including such treatment administered by private individuals""[73]

[72] ibid. § 22-24
[73] Kilkelly (n 66). 258

When dealing with a human rights claim concerning bullying it is important to know the scope of protection afforded by positive obligations because in a great number of cases the perpetrators will be non-state actors. In cases of peer-to-peer bullying the actions which cause harm, whatever right they might allegedly violate, will ultimately be caused by other pupils. The State could be found responsible through the positive obligations doctrine, where the conduct of non-state agents can be seen as the result of the State failing its positive obligations.[74] It is through the positive obligations doctrine that the scope of convention rights can be extended to cover the relations between individuals and not only acts and omissions of state-agents, through the so-called "horizontal effect."[75] Akandji-Kombe states that:

> "The state becomes responsible for violations committed between individuals because there has been a failure in the legal order, amounting sometimes to an absence of legal intervention pure and simple, sometimes to inadequate intervention, and sometimes to a lack of measures designed to change a legal situation contrary to the Convention."[76]

It is important to note that the protection afforded by positive obligations for the acts and omissions of non-state actors is not limited to Article 3, by now the ECtHR has recognized positive obligations in regards to almost all Articles of the convention. In the context of Article 8 positive obligations have been recognized as well ever since the case of *X and Y v. The Netherlands.*[77] In the case of *M.C. v Bulgaria,*[78] examined below, the ECtHR re-states its view established in the *X and Y* judgment regarding Article 8 positive obligations: "(P)ositive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures *even in the sphere of the relations of individuals between themselves*."[79] Lavrysen notes that because non–state actors are not

[74] Akandji-Kombe (n 54).14.
[75] ibid.
[76] ibid.15.
[77] *X and Y v The Netherlands* ECtHR (Application no. 8978/80).
[78] *M.C. v. Bulgaria* (n 65).
[79] ibid.§ 150 (emphasis added)

obliged by international human rights law to respect the rights of others it is important for the State to act in compliance with its positive obligations.[80]

2.2.3. Standards developed by The Inter-American Court of Human Rights.

The due diligence standard which requires the State to prevent, investigate, punish and remedy rights violations, is said to have been first developed in the field of human rights by the Inter-American Court of Human Rights (IACtHR) in the case of *Velázquez-Rodríguez v. Honduras.* [81] The due diligence standard is not, however, native to human rights law and can be traced as being part of the general principles of international law, set by the International Law Commission to determine States' responsibility for failure to comply with its international obligations.[82] As stated by Bourke-Martignoni, "omissions and other failures by states to take positive measures to fulfil their international obligations will, if these breaches are attributable to the state, amount to internationally wrongful acts."[83] The due diligence standard can even be traced further back to nineteenth century arbitration cases[84] and to the writings of Grotius, and Pufendorf.[85]

2.2.4. The Case of Velázquez-Rodríguez v. Honduras.

The IACtHR developed its positive obligations doctrine by applying the due diligence standard to the field of human rights ever since its first contentious case in *Velázquez-Rodríguez v.*

[80] Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights.* (n 68). 119-120
[81] *Velásquez-Rodríguez v Honduras.* Inter-American Court of Human Rights. Judgment of July 29, 1988.
[82] International Law Commission, Responsibility of States for Internationally Wrongful Acts, Text adopted by the Commission at its fifty-third session in 2001, Annexed to UN General Assembly Resolution 56/83 of 12 December 2001.
[83] Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' Brill, 2008. 49. 9
[84] Bernhard Hofstötter, 'European Court of Human Rights: Positive Obligations in E. and Others v. United Kingdom' (2004) 2 International Journal of Constitutional Law. 530.
[85] See: Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill 2017) 39; Bourke-Martignoni (n 69). 47-62

Honduras.[86] While the accounts on the case were directly attributable to the State and not related to the abuse of children, nonetheless, it is important to examine the case here as it serves as the foundation upon which the Inter-American Court has built its positive obligations doctrine.

Velázquez-Rodríguez is a case dealing with the forced disappearance of a Honduran student in 1981. Around that time (between 1981 and 1984) approximately 100 people had disappeared in the country in a similar systematic manner by "agents who acted under cover of public authority."[87] This fact meant that the rights violations could be attributable directly to the State under international law rules.

The Inter-American Court considered forced disappearances as a grave violation of multiple rights guaranteed by the American Convention, and found a violation of the victim's personal integrity (Article 5) because of actions amounting to cruel and inhuman treatment contrary to his dignity, physical and moral integrity.[88] The Court also found a violation of the right to liberty (Article 7), and given that 7 years had passed since his disappearance, the Court presumed Mr. Velasquez-Rodriguez dead and found a violation of the right to life (Article 4).

The Inter-American Court started the analysis of the case by stating the negative obligations of the State when direct responsibility can be attributed to the State powers. As stated by the IACtHR:

> "Any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention."[89]

[86] *Velásquez-Rodríguez v. Honduras* (n 81).
[87] ibid.Par 182
[88] ibid.Par 162.
[89] ibid.Par 169.

The IACtHR then elaborated on the hypothetical of human rights violations committed by private parties or non-state actors. Despite the fact that State responsibility was already proven, The Inter-American Court stated that the responsibility of the State is not limited to the obligation not to infringe convention rights, or to acts directly linked to State agents. In addition, acts that cannot be directly linked to the State, executed by non-state agents, can result in State responsibility, not by the act itself, but if it can be shown that there is a *lack of due diligence* to prevent or respond to the human rights violation.[90] In the words of the Inter-American Court:

> "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[91]

Article 1.1 of the American Convention sets on the State the fundamental duties *to respect and ensure* convention rights. Both obligations to respect and ensure have to be linked to a specific right and cannot be violated by itself. In regards to the duty to respect, the Inter American Court determined that "(a)ny impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention."[92]

As concerns to the positive obligation to ensure, the Inter-American Court recalled that State parties to the American Convention must adapt their legal and institutional frameworks in order

[90] ibid.Par. 172.
[91] ibid.Par. 172.
[92] ibid.Par. 164.

to ensure the free and full exercise of convention rights.[93] Linked to the obligation to ensure the exercise of Convention rights are also the positive obligations to prevent, investigate and sanction human rights violations, and if applicable to provide remedies.[94] The application of the diligence standard often means that the mere existence of legislation prohibiting certain conducts is not enough to effectively ensure the enjoyment of convention rights. [95]

The ECtHR has rarely explicitly referred to the due diligence standard in its decisions, however it is part of its jurisprudence, from several of the Court's judgments we can discern that the standard has been applied across different contexts and concerning different articles, for example Article 2, Article 3 and Article 8.[96] To some scholars, the ECtHR applies the positive obligations doctrine as a synonymous of the due diligence standard applied by the IACtHR.[97] However there appear to be some slight differences. As noted by Hofstötter "(i)n its emphasis on due diligence, the language employed by the Inter-American Court of Human Rights is similar to the law of state responsibility and, in this respect, differs slightly from the conception of the European Court of Human Rights." [98]

2.3. Conclusion.

Through the positive obligations doctrine States can be held responsible not only for the actions of their agents but for the actions of non-state agents as well. Both the European Court of Human Rights and the Inter-American Court have recognized the existence of positive

[93] ibid.Par. 166.
[94] ibid.Par. 166.
[95] Laurens Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 7 Inter-American and European Human Rights Journal. 99-100; Lavrysen, *Human Rights in a Positive State : Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights.* (n 68). 119.
[96] See e.g. *E and Others v the United Kingdom* ECtHR (application no. 33218/96); *Z. and Others v. the United Kingdom* (n 51); *Osman v The United Kingdom* ECtHR (87/1997/871/1083); *M.C. v. Bulgaria* (n 51).
[97] See: Sjöholm (n 85); Hofstötter (n 84). 530.
[98] Hofstötter (n 84). 530.

obligations in their jurisprudence. Both the ECtHR and the ACtHR have found that in order to truly guarantee the enjoyment of convention rights, the State's positive obligations ought to be expanded beyond the acts and omissions of State-agents. It is through the positive obligations doctrine that the rights violations caused by peer-to peer bullying could be litigated if there is indirect responsibility on part of the State for failing to protect, investigate, address or remedy children's rights.

The foundations for positive obligations in the jurisdictions studied in this chapter vary and yet are similar. Both courts have justified positive obligations under the general obligations of Article 1.1 in the American Convention and the general obligation "to secure" Convention rights of Article 1 in the ECtHR. The Strasbourg Court has also turned to the principle of effectiveness established in *Airey* to justify positive obligations, while the ACtHR has found in the standard of due diligence, a notion coming from international law, a way to develop its positive obligations doctrine and require certain positive measures from the States.

It is by now widely accepted that the States have a duty to take active measures to guarantee the enjoyment of human rights in practice. This is particularly important for claims concerning bullying. Because peer-to-peer bullying concerns pupils causing each other harm, the due diligence standard provides the possibility to demand further actions from the State in preventing, but also investigating, punishing and addressing bullying.

Having established the core content and the foundations of positive obligations, the upcoming chapters will deal with specificities of positive obligations with respect to bullying that arise under the prohibition of degrading treatment and the protection of bodily integrity and private life. I will once again examine cases from the ECtHR and the IACtHR in order to draw comparisons on their standards which would benefit a human rights claim regarding bullying.

Chapter 3: Humiliation, debasement, moral and physical harm: Bullying as degrading treatment.

3.1. Introduction.

Making the claim that homophobic and transphobic bullying amounts to a human rights violation brings with it some challenges. First and foremost, human rights claims are often raised against the State for actions caused by its agents but when the bullying is committed by peers, meaning private individuals and most likely underage children, how does one make a clear relation to responsibility from the State?

The previous chapter elaborated on the doctrine of positive obligations aiming to serve as an introduction to the framework applicable to cases of peer-to-peer bullying. The analysis demonstrated that regional human rights tribunals are ready to expand the protection of human rights against violations by private actors through doctrines like positive obligations (in the case of the ECtHR) and due diligence (in the case of the IACtHR).

The second problem comes with the necessity to show that bullying amounts to a human rights violation. Whether in the European Convention of Human Rights, the American Convention, or the Canadian Charter of Rights and Freedoms, if bullying cannot be said to have violated a right, the claim will fail even if the State can be held responsible via the positive obligations doctrine.

In this chapter I will examine how the element of humiliation, which is present in most cases of bullying, could serve to characterize this phenomenon (or at least some individual cases) as a violation on the prohibition of degrading treatment covered by Article 3 of the ECtHR.

Contrary to the previous chapter where I tried to lay out the general notions of the positive obligations doctrine, in this chapter I will look closer to the positive obligations that give rise to a (possible) violation of the prohibition of degrading treatment. I will compare the standards used by the ECtHR to the one's applied by the Inter-American Court, namely the due diligence standard developed in the case of *González and others v. Mexico*.[99] In this case the Inter-American Court thoroughly elaborated on the due diligence standard in the context of ill-treatment and violence against women at the hands of non-state agents.

3.2. The ECHR's prohibition on inhuman and degrading treatment.

Article 3 of the ECHR contains an absolute prohibition of Torture or Inhuman or Degrading Treatment or Punishment. While the text of the Convention does not offer a definition of the three actions covered by it, through the years, the case law of the ECtHR has provided us with a better understanding of each of the elements encompassed in the actions prohibited by Article 3. For example, the ECtHR has stated that there is a difference in the level of severity necessary to reach the threshold of each of the prohibited acts.[100]

Degrading treatment is the least severe of the three acts covered by Article 3. When analyzing degrading treatment, the Court had chosen to focus on the element of humiliation attained, debasement, feelings of fear and anguish.[101] According to Grabenwarter these elements are key features the Court has highlighted in the past during its examination of degrading treatment as

[99] *González et al ('Cotton Field') v Mexico* Inter-American Court of Human Rights. Judgment 16 November 2009.
[100] See: *Đorđević v. Croatia* ECtHR Application no. 41526/10.) § 95
[101] David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2014). 261

opposed to severe psychical and psychological pain which is taken into consideration for inhuman treatment, or intent in cases of torture.[102]

In *Đorđević*,[103] the Court re-stated its case law on the differences between inhuman and degrading treatment. In the words of the ECtHR "(t)reatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either *actual* bodily injury or *intense* physical and mental suffering." [104] In contrast the element of humiliation is key when considering treatment as degrading: "(t)reatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[105]

Not every action that causes humiliation or raises such feelings in the applicant will necessarily lead to a violation of Article 3. As Rainey, Wicks, and Ovey point out "(w)here humiliation is present the level of severity would appear to require that humiliation is severe." [106] Grabenwarter highlights that in order to determine the degree of severity the prohibited conduct has attained, the ECtHR takes into consideration the specific context and circumstances of the case, alongside the vulnerability of the victim.[107] To determine the victim's vulnerability the Court has observed his/her specific circumstances for example regarding age, sex, or mental health status.[108]

[102] Christoph Grabenwarter, *The European Convention on Human Rights: A Commentary.* (Munich: Beck; Oxford: Hart, 2014) 36
[103] *Đorđević v. Croatia* (n 100).
[104] ibid. § 95 (emphasis added)
[105] ibid.
[106] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2014). 176.
[107] See: Grabenwarter (n 102). 36; *Costello-Roberts v the United Kingdom* ECtHR (Application no. 13134/87); *Đorđević v. Croatia* (n 100); *M.C. v. Bulgaria* (n 65); *O'Keeffe v. Ireland* (n 65).
[108] i.e. *O'Keeffe v. Ireland* (n 51).§14; Grabenwarter (n88) 36

Because incidents of bullying are repetitive but with different levels of severity, I must note that that while inhuman treatment requires actual bodily harm or intense mental or physical suffering, this is not the case when considering degrading treatment. In *Campbell and Cosans,*[109] a case concerning the alleged violation of Article 3 for the possibility of corporal punishment to be administered upon two young pupils in a Scottish school, the ECtHR considered that the mere threat of being subjected to a conduct prohibited by Article 3 could be in breach of said article.[110]

> "As to whether the applicants' sons were humiliated or debased in their own eyes, the Court observes first that a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word."[111]

The Court ultimately found that the level of severity necessary to reach the scope of protection of Article 3 was not reached. However, from the judgment it is clear that physical violence is not required in cases of degrading treatment. This is helpful to know for cases of bullying that might not carry incidents of physical violence but still have severe implications when it comes to emotional and psychological distress.

Bullying often carries with it continuous incidents of emotional and physical violence. In the most extreme cases physical attacks related to bullying can be severe enough to cause actual bodily harm. Even the kind of bullying that is considered strictly as a form of psychological abuse and is limited to verbal and emotional harm has been proven capable of causing damage.

[109] *Campbell and Cosans v the United Kingdom* ECtHR (Application no. 7511/76; 7743/76).
[110] ibid. § 26
[111] ibid.§ 30

The effects of bullying in children's moral well-being is well documented. Data show that bullying has a severe effect on the children and youth who suffer from it during their school years and has very serious consequences on their self-esteem even after they have left school.[112] Even if bullying related incidents might seem small, due to their repetitive nature these incidents – when taken together – can have serious effects on the victims' well-being, their sense of self-worth and touch upon their dignity. Children who have suffered from incidents such as being locked in lockers, being urinated on, spitted on, called by discriminatory remarks, are obviously vulnerable to being harmed upon their dignity and humiliated before others and in their own eyes. In some cases, the intensity of the bullying will be able to reach the minimum level of severity necessary to trigger the application of Article 3 and attract protection under the prohibition of degrading treatment.

3.3. Lessons from Ill-treatment case law.

3.3.1. The Case of Đorđević v. Croatia.

A case particularly relevant in the context of bullying is that of *Đorđević v. Croatia*.[113] This case involves an adult man in his mid-30's who lived with physical and mental disabilities to the point of lacking legal capacity, and the harassment that was inflicted upon him and his mother by underage children.

In 2010, Mrs. Radmila Đorđević filed an application on her own and her son's behalf to the ECtHR against the State of Croatia alleging a violation of Articles 3, 8, and 13 in conjunction with Article 14. Mrs. Radmila Đorđević and her son Mr. Dalibor Đorđević were both Croatian citizens and lived in Zagreb close to a primary school. Mrs. Đorđević and her son had been

[112] See: Bontempo and D'Augelli (n 23) 364-374; Liu and Mustanski (n 23). 221-228.
[113] *Đorđević v. Croatia* (n 100).

suffering from constant harassment at the hands of pupils from the nearby school. Mr. Đorđević had been a victim of both verbal and physical harassment for about two and a half years. The harassment started with low-level incidents which later escalated. The children, most of them unidentified, had shouted at him, thrown snowballs at him, pushed him whenever he left his residence. Mr. Đorđević had been burned in his hands with cigarettes and hit against a park's iron railing. The children had also disturbed the applicants' home by being loud outside their windows and shouting in Serbian. The children had once covered the applicants' porch with snow and spitted on their windows. According to Mrs. Đorđević the harassment was motivated because her son was a person with disabilities and by the fact that they were both of Serbian origins.

Mrs. Đorđević had complained to the Government authorities more than one occasion but her concerns were not addressed. She had complained to the school, the social services, the police, the Ombudswoman for Persons with Disabilities, but effective measures to stop the harassment were not offered to her. Both the Ombudswoman and the State Attorney were of the opinion they had no jurisdiction over the matter. The Police were of the opinion that they could not enforce the law given that the aggressors were 14 years old and under the age of criminal liability.

The adverse impact the incidents of harassment have had on Mrs. Đorđević's physical and mental health were proven through medical examination. The Court concluded that the incidents of harassment needed to be considered as a continuing situation, and determined that the level of severity necessary to reach the scope of Article 3 was reached in regards of Mr. Đorđević.

The Court recalled its standard on positive obligations under Article 3, which require the State to take measures to ensure people under their jurisdiction are not subjected to ill-treatment even

in relations between individuals. [114] In its analysis on positive obligations the Court considered the difficulties in policing modern societies, the resources it must take to implement measures and the general unpredictability of human nature,[115] and re-stated that the scope of positive obligations cannot be interpreted in a way which imposes "an impossible or disproportionate burden on the authorities."[116] The Court was of the opinion, however, that in the face of "real and immediate risk" of ill-treatment and especially when the individual at risk is identified, the State is obliged to take the necessary reasonable measures within its power to avoid the risk or further risk.

> "*For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment* of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." [117]

In *Đorđević*, the ECtHR examined the breach of positive obligations in two aspects. First, the State has an obligation to provide an effective response, second it bears the obligation to prevent any further abuse.

> "The present case concerns the issue of the State's positive obligations in a different type of situation, outside the sphere of criminal law, where the competent State authorities are aware of a situation of serious harassment and even violence directed against a person with physical and mental disabilities. It concerns the alleged lack of an adequate response to such a situation in order to properly address acts of violence and harassment that had already occurred and to prevent any such further acts." [118]

[114] ibid. § 138.
[115] ibid. § 139.
[116] ibid. § 139.
[117] ibid. §139 (emphasis added).
[118] ibid.§143.

In regards to the obligation to prevent further acts of harassment, the ECtHR noted in *Đorđević* that after authorities had been made aware of the situation, a positive obligation arise to "assess the true nature of the situation complained of, and to address the lack of a systematic approach."[119] In regards to the obligation to provide an effective response, the ECtHR was of the opinion that the police had carried out no concrete actions after the report was filed, the Court was also struck by the lack of actions from the social services authorities who were among the first authorities aware of the problem.[120]

These two aspects of the state's positive obligation, *i.e.* the obligation to provide an effective response and the obligation to prevent any further abuse, are quite important for bullying cases. States might find themselves under a positive obligation to prevent bullying once the authorities have been notified of ongoing incidents and a victim has been identified. Moreover, authorities might be under the responsibility to provide an effective response to the victim, this would entail an investigation and tailored measures to address the situation which, just as in *Đorđević*, might require an interdisciplinary intervention including the provision of social services. It is interesting, however, that this intervention might not require the involvement of the criminal justice system.

The general positive obligation under Article 3 states that in order to protect everyone from torture and ill-treatment States should "provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[121] It is rare for the ECtHR to specify what these "reasonable steps" mean but the *Đorđević* judgment provides us with a well detailed notion of these measures. Amongst others, the judgement mentions the following obligations:

[119] ibid. §148.
[120] ibid. §148.
[121] ibid. § 138.

to take measure to prevent further abuse,[122] to take steps to ascertain the extent of the problem,[123] to assess the true nature of the situation complained,[124] to take an immediate reaction from the authorities to prevent future harassment,[125] effective monitoring mechanisms in order to recognize and prevent further harassment,[126] to take concrete actions such as policy decisions to tackle a systematic approach on the ill-treatment of vulnerable people with disabilities, the involvement of the social services, counselling for the victim, and consultations with child behavior experts on how to address the specific problem.[127] All of these I consider appropriate *ad hoc* measures that could be used to address incidents of bullying. I believe the *Đorđević* case is a great parameter from where potential jurisprudence on bullying cases could draw further inspiration.

Another important point in *Đorđević* is that the Court noted that while grave acts capable of breaching Article 3 would normally require the application of criminal law, in the instant case, the central issue was not whether or not criminal provisions to prevent the harassment of people with disabilities existed, but rather "(t)he alleged lack of an adequate response to such a situation in order to properly address acts of violence and harassment that had already occurred and to prevent any such further acts."[128] I consider three factors weighed in the Court's decision to center the analysis of the case on this matter.

First was the fact that the alleged perpetrators were children below the age of 14 years old, this meant that under the Croatian national system they could not be prosecuted under criminal law. The Court clearly stated that "acts of violence in contravention of Article 3 of the Convention would normally require recourse to the application of criminal-law measures against the

[122] ibid. § 147.
[123] ibid. § 147.
[124] ibid. § 148.
[125] ibid. § 109
[126] ibid. § 148.
[127] ibid. § 148.
[128] ibid. § 143.

perpetrators."[129] However, in this case requiring criminal sanctions for children under the age of 14 would not have been the most human rights friendly approach.

The second factor centered on the incidents. Even if the children were above the age of criminal liability, "none of the acts complained of in itself amounts to a criminal offence." [130] Just like it could happen in cases of bullying, the incidents of harassment that Mr. Đorđević had suffered considered in isolation were not severe enough to require criminal law sanctions. Given the particularity of the case the Court considered the incidents of harassment in their entirety, a fact that is extremely important to consider given the continued nature of incidents and micro aggressions in cases of bullying.

The third factor is the vulnerability of the perpetrators. This factor is not mentioned in the judgment but given the vulnerability of the aggressors as children, this might have played a role in the Court's decision of not requiring other non-criminal sanctions against the perpetrators of ill-treatment. It is possible that the Strasbourg Court did not examined whether civil or tort law would be a possibility for the applicant also because of this reason. I can only speculate here to what extent the children's rights and vulnerability played a role in the balancing exercise *vis a vis* Mr. Đorđević's, but the Courts requirement of experts and social services to treat the children in concern[131] instead of other forms of punishment for the perpetrators might give us a hint.

3.3.2. O´Keeffe v. Ireland.

[129] ibid. §141.
[130] ibid. § 142.
[131] ibid. § 148.

In the case of *O'Keeffe v. Ireland*[132] the Strasbourg Court considered that positive obligations under Article 3 take a different level of importance when it comes to the well-being of children in primary education. The case is important in the context of bullying because it relates to the enhanced obligations to protect children from ill-treatment in the educational setting. Despite the fact that the perpetrator of the ill-treatment in the case was a teacher, the case is about a non-state actor, and the standards applied in the case could be extended to protect against ill-treatment caused by pupils.

The case of O´Keeffe involves the rape and sexual assault of a pupil at a national school in Ireland by a teacher. It must be noted that despite the alleged incidents happening at a "national school" the involvement of the State authorities in everyday activities and administration of such schools, was limited. These functions were relegated to the Catholic Church as main administrator of over 94 percent of Schools in Ireland at the time. The State had also a limited role of financial support.

In 1996 Mrs. O'Keeffe was contacted by the police in regards to an ongoing investigation against LH, her former music teacher. LH was at the time being charged with criminal offences against former pupils in a period of over 10 years. Mrs. O'Keeffe came to know that before she had become a victim in 1973, the school administration had received complaints of sexual abuse by LH in 1971 and had not acted upon them. Moreover, in 1973 after similar allegations were raised, LH had resigned from the School, but later continued his professional career elsewhere carrying with him a conduct of abuse against pupils.

Mrs. O'Keeffe decided to start criminal procedures against LH about 23 years after the rape incidents. In 2002 the applicant received compensation from criminal injuries, and damages from LH in 2006. The Supreme Court of Ireland dismissed a claim for damages against the

[132] *O'Keeffe v. Ireland* (n 65).

government in 2008, after failing to find vicarious liability by the actions committed by LH, who was not considered and employee of the State. O'Keeffe then decided to turn to the ECtHR claiming that the State had failed to protect her against ill-treatment, namely sexual abuse, and that she was left without and effective remedy. She based her arguments in Articles 3, 8, 13 and 14 of the Convention and Article 2 of Protocol 1.

Relying on the positive obligations doctrine the majority of the Grand Chamber found that there was a violation of Article 3. The majority determined that although the unique circumstances of the educational system in Ireland, in which the State had limited control, the government could not defer its responsibilities in education to private parties. The Court re-stated its case law on positive obligations and Article 3. The absolute prohibition of Article 3 taken together with the obligation to secure Convention rights in Article 1, requires States to ensure protection against torture, and cruel, inhuman and degrading treatment. The Court then seemed to expand on the meaning of those positive obligations in due of the victim's vulnerability at the time the incidents had taken place and the importance of primary education.

The majority determined that in case of children and other vulnerable persons the State has an obligation to provide effective protection. This protection requires the State to take reasonable steps to prevent ill treatment "which the authorities had or ought to have had knowledge." [133] The majority of the Grand Chamber considered that given the importance and nature of primary education as a "public service" State authorities had a duty to protect children *"who are especially vulnerable and are under the exclusive control of those authorities.*"[134] The majority stated that Article 3 carries with it "*an inherent obligation of government to ensure their protection from ill treatment, especially in the primary education context*."[135] This obligation

[133] ibid. § 144.
[134] ibid. § 145 (emphasis added).
[135] ibid. § 150 (emphasis added).

required the State to become aware of the risk of abuse and set mechanisms for detection and reporting of ill treatment. These mechanisms of protection were not available in Ireland at the time of the breach of such obligations.

> "In sum, having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary-education context, through the adoption, as necessary, of *special measures and safeguards."*[136]

It is in this respect that Gallen argues that the Court parts from its previous jurisprudence, which required State authorities to act only in the face of real and immediate risk. Gallen implies that too much weight was given to government reports which revealed prosecutions for sexual offences against children in Ireland, indicating that this was a present problem at the time O'Keeffe was a pupil.[137] According to Gallen "(t)he majority's approach to the positive obligations under Article 3 constructed a broader connection between harm and state obligation than the standard of a 'real and immediate risk' in Osman v United Kingdom."[138] The mere existence of the reports could not on their own constitute the presence of *real and immediate risk* which is required under the Osman test.[139]

The Osman Test concerns the knowledge of real and immediate risk for the State to act preventing such risk. The test was first applied by the ECtHR in the context of positive obligations under Article 2 in the case of *Osman v. the United Kingdom*[140] but has since also

[136] ibid. § 146 (emphasis added)
[137] James Gallen, 'O'Keeffe v Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 The Modern Law Review. 158-160.
[138] ibid.
[139] ibid.
[140] *Osman v. The United Kingdom* (n 96). § 116.

been applied in the context of Article 3.[141] The test is applied in order not to impose impossible or disproportionate burden on the State when positive obligations are required.

To date it is still not clear what the scope of this inherent obligation to protect children from ill-treatment in primary education is. Uitz argues that:

> "Taken together with the risk assessment which requires national governments to predict and thus prevent potential future violations of Convention rights, and the unwillingness of the majority to distinguish between private and governmental actors, this understanding of positive obligations inherent in the nature of a public service (public primary education, in the case at hand) clearly requires further elaboration."[142]

Uitz also points out that the *O'Keeffe* decision might have great impact in litigating cases in the context of bullying and other actions against children at the hands of non-state actors:

> "With school children suffering from bullying in public schools, and attempting suicide, it is hardly questionable that the well-being, physical integrity and in some cases even the life of school children is imperiled by the lack of adequate legal frameworks, preventive mechanisms and even awareness in some member states. Since the victims of bullying often happen to belong to protected minorities, they are by definition even more vulnerable than the average pupil. Also, as bullying often takes place outside school premises, through internet and social media, a case like this would serve as an opportunity to clarify the obligations of the state in a setting with strong horizontal dimensions."[143]

Again, I can only speculate here, at least until there is a new case that clarifies these emerging positive obligations in the context of primary education, but if they are broad enough to cover relations between pupils this would be the most helpful for a case concerning bullying.

[141] See: *Đorđević v. Croatia* (n 100) § 139; *Georgel and Georgeta Stoicescu v Romania,* ECtHR (Application no. 9718/03) § 51; *Milanović v Serbia* [2010] ECtHR (Application no. 44614/07) § 84; *Begheluri and others v Georgia* ECtHR (Application no. 28490/02) § 118.
[142] Renáta Uitz, 'ECHR BLOG: Guest Post on Grand Chamber Judgment in O'Keeffe v Ireland' *O'Keeffe v. Ireland Brings Closure to Some, Uncertainties to Othe*rs, (12 February 2014) < http://echrblog.blogspot.hu/2014/02/guest-post-on-grand-chamber-judgment-in.html >.
[143] ibid.

3.3.3. The Case of González and others v. Mexico.

Article 5 of the American Convention on Human Rights is the equivalent to Article 3 of the European Convention and also contains in the provision's second paragraph the prohibition of torture and other cruel, inhuman, and degrading treatment. It is interesting to note that the drafting of the first paragraph of Article 5, unlike the European provision which is formulated as a prohibition, establishes an autonomous right to personal integrity.[144]

Antkowiak points out the similarities between the IACtHR and the ECtHR standards in the area of the prohibition on torture and other cruel, inhuman, and degrading treatment.[145]

> "The Inter-American System's approach toward torture and other cruel, inhuman, and degrading treatment has often followed that of the European Court of Human Rights. Perhaps most importantly, the two Tribunals share the view that progressing standards for the protection of personal integrity require more rigorous safeguards of States and "greater firmness" of courts in finding violations."[146]

In the case of *González and Others v. Mexico*,[147] the IACtHR thoroughly examined the scope and content of positive obligations in regards to Article 5 of the ACHR. This case is helpful to compare the extent of the State's positive obligations as they relate to the actions of non-state agents, in particular the duties to prevent and investigate. As I pointed out in the review of the *O'Keeffe* case, the traditional view is that the positive obligations of the State in preventing rights violations amongst private parties cannot be unlimited at the risk of imposing an excessive and impossible burden upon the States. *González* is helpful as it clearly establishes the different moments where positive obligations are traditionally required from the State.

144 Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017). 22
145 ibid. 103
146 ibid. 22
147 *González et al. ('Cotton Field') v. Mexico* (n 99).

Also known as the Cotton Field case, *González* deals with the disappearances of three women, two of them children, who disappeared in the border town of Juarez between September and October 2001. Their bodies were found on November 6, 2001. Although the perpetrators of the abductions and eventual murders were never identified, it was implied by the Inter-American Commission on Human Rights that State agents might have been involved, however there was not enough evidence to support this theory.[148] In this sense, the Cotton field case relates to the State responsibilities for actions committed by non-state actors.

The duty to prevent as understood by the Inter-American Court, requires States to "have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints."[149] These preventive measures include a wide scope of actions, for example the promotion of human rights protection by all means necessary, including those of a political, legal, administrative and cultural nature.[150]

In *González*, the Inter-American Court identified two moments where prevention was key for ensuring the protection of convention rights. The first moment, before the disappearances of the three women, and the second one before their bodies were found and confirmed death. In the first moment, the Inter American Court referred to the test developed by the ECtHR in *Osman* regarding the presence of "real and immediate risk"[151] and argued the State could not be held responsible for the disappearances because there was no indication they were in immediate danger. The Court did noted that given the knowledge of the level of vulnerability

[148] ibid. Par 242.
[149] ibid. Par 388.
[150] ibid. Par 252.
[151] ibid. Par 280.

of women and especially those from poor communities, the State could have implemented measures to prevent discrimination against women as early as 1998.

In regards to the second moment, the IACtHR stated that from the moment the women were reported missing, the State authorities were aware the women were in a situation of real and immediate risk. From that moment, the State had an obligation to act in due diligence to prevent their murder or ill-treatment. In this respect the State was in obligation to conduct an immediate search which required prompt action from State authorities such as the police and prosecutors, who needed to take all the necessary measures in order to find the disappeared person.[152] The Court determined State had failed its duty to pursue an investigation to find the victims alive.

The Inter-American Court mainly focused on the State's procedural positive obligations during the investigation of the disappearances in order to establish State responsibility. The Court concluded:

> "The irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence, violate the right of access to justice and to effective judicial protection, and the right of the next of kin and of society to know the truth about what happened. In addition, it reveals that the State has failed to comply with ensuring the rights to life, personal integrity and personal liberty of the three victims by conducting a conscientious and competent investigation"[153]

The State of Mexico was found responsible of failing to fulfil its obligation of due diligence to carry out an effective investigation after the women had been reported missing. It was proven that the government authorities had limited their role to noting the disappearances of the women without carrying further investigations. The State was found responsible for violating

[152] ibid. Par 238.
[153] ibid. Par 388.

the three women's right to life (Article 4.1), personal integrity (Article 5.1 and 5.2) and personal liberty (Article 7.1), in conjunction with the general obligation to guarantee contained in Article 1.1 of the American Convention, as well as the obligations established in Article 7(b) and 7(c) of the Convention of Belém do Pará.[154]

The due diligence standard analyzed extensively by the ECtHR in the context of violence against women[155] could be applicable to cases of harassment and school violence. Following the example of the IACtHR in *González,* in which the Court noted when an intervention from the State is required, I could think of two different moments where States could be under a positive obligation to prevent and address bullying. The first moment is when the State has knowledge that bullying is a problem in any given school, school district, or school system. Positive obligations, just like in the context of violence against women, could require some sort of a policy to address the systemic problem. In words of the IACtHR this could include "measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights." [156] The second moment could be when a victim is identified. The State might then be under a positive obligation to investigate the ill-treatment, prevent further harm, and address the recovery of the victim.

From a comparative analysis it is interesting to note that when analyzing the obligation to prevent human rights violations, both the ECtHR and the IACtHR take greatly into consideration the risk assessment. In fact, in *González* the judgement's footnotes and Judge Garcia-Sayan's concurring opinion make it clear that the IACtHR takes example of the ECtHR's standard of risk assessment stablished in *Osman v. the United Kingdom*.

[154] ibid. Par 282.
[155] *Bevacqua v Bulgaria* ECtHR (Application No. 71127/01); *Opuz v Turkey* ECtHR (Application No. 33401/02); *Valiulienė v Lithuania* ECtHR (Application no. 33234/07).
[156] *González et al. ('Cotton Field') v. Mexico* (n 99). Par 252.

While it is understandable that the *Osman* test is a necessity as States cannot be held unlimitedly responsible for the acts of private parties, I wish to consider how much of a limitation it is for cases of bullying. How often are these incidents reported to school authorities? How about incidents concerning really young children incapable of reporting? Moreover, in cases of homophobic bullying what happens if the victim does not want to speak about the underlying causes of the ill-treatment?

3.4. Conclusion.

As stated in the introduction, in order to characterize bullying as a human rights violation it is not enough to demonstrate that the State can be held responsible for the harm caused by private parties', we also need to prove that a recognized right is hampered by the actions bullying entails. In this chapter I have explored how the humiliation factor, which is a characteristic present in most cases of bullying, could play a role in claiming an infringement of the prohibition of degrading treatment under Article 3 of the ECHR and Article 5 of the ACHR.

If the humiliation experienced by a victim of bullying is severe enough to trigger the State's protection in cases of degrading treatment, then the State would need to act in due diligence to protect children from such treatment. The due diligence standard developed in the field of human rights by the Inter-American Court of Human Rights requires States to prevent, investigate, punish and redress human rights violations. This approach was endorsed by the ECtHR as well.

The ECtHR established in *O'Keeffe* that the positive obligations required from the State to protect children from ill-treatment are enhanced due to different factors, amongst them, the vulnerability of children and the importance of primary education as a social service. These

two elements are capable of expanding the regular obligation to have a legislative framework to protect children from ill-treatment (which most States probably have) into one which requires effective reporting mechanisms in order to prevent, investigate, sanction and address incidents of ill-treatment in the form of bullying.

Đorđević is perfect case from where we can draw examples of positive measures that the State could apply to cases of bullying. The judgement provides us with an unusually extensive list of measures that could be taken in cases of harassment in order to provide an effective protection. The case of *Đorđević* is also helpful because it allows us to examine the reasoning of the Court in cases of ill-treatment where the perpetrators are children.

The *O´Keeffe* judgment might carry with it some positive developments in regards to risk assessment for litigating cases of bullying. The decision considers that the special vulnerability of children and the importance of primary education can potentially play a role in overturning, at least in part, the *Osman* test and widening the scope of the positive obligations required from the State to protect children. For the time being however this is only a speculation.

In the next chapter I will explore what are the standards regarding positive obligations a claim concerning vulnerability and private life that may apply to cases of bullying. I have chosen to focus in private life given the fact that not all cases of bullying might be severe enough to trigger protection under Article 3 of the ECHR or Article 5 of the ACHR. Such cases might find a beacon of hope in the protections afforded by Article 8 of the ECHR which could be seen as another potential strategy for litigation.

Chapter 4 : Addressing vulnerability through positive obligations to protect the right to bodily integrity and private life.

4.1. Introduction.

Bullying carries with it continuous incidents of emotional and physical violence. In some cases, the intensity of the bullying will be able to reach the level of severity necessary for it to be considered as degrading treatment and reach the scope of protection guaranteed by the ECHR or the ACHR. However, for those cases that do not reach the gravity necessary to be considered as degrading treatment, protections under the concept of private life are an alternative. In this chapter I wish to consider how the situation of vulnerability of children, and in particular LGBT children, who are victims of bullying puts them in a position in which they are more susceptible to invasions upon their private life as understood by the ECHR and the ACHR.

The following analysis will center on instances of bullying that affect LGBT children's private life, for example invasions on their moral and physical integrity. First, I will identify the distinctions between incidents covered by Article 3 from incidents covered by Article 8. Then, to grasp a better understanding of the protection due to victims of peer-to-peer bullying, I will focus on positive obligations required under Article 8 to protect private life. As part of the comparative analysis I will look briefly at the Inter-American Court of Human Rights' Advisory Opinion 24 on Gender identity, equality and non-discrimination for same-sex couples, which provides a comprehensive explanation of the IACHtR's understanding of the private life provision in the American Convention. Throughout the chapter I will explore if, and how vulnerability plays a role in the characterization of bullying as a human rights violation. I will analyze what are the judicial consequences vulnerability has on human rights case law.

4.2. Vulnerability as a legal tool.

According to Peroni and Timmer, vulnerability is an emerging concept within the case law of the ECtHR.[157] The Strasbourg Court has turn to the concept of vulnerability in order to provide effective protection of Convention rights. Taking in consideration the work of Martha Fineman, who considers vulnerability as a part of the human condition, an aspect that is both universal and constant and not something attached to a specific group,[158] Peroni and Timmer see the ECtHR's understanding of vulnerability as a duplicity, as something particular and at the same time universal. [159] This understanding of vulnerability does not mean that some people are vulnerable and others are not, but rather recognizes the specificities of people's vulnerabilities.[160]

The use of vulnerability as a legal tool by the ECtHR has often resulted in a change in the scope and content of positive obligations which are required from the State vis-a-vis vulnerable groups (such as children). This is true (but not limited to) claims related to Article 8 violations.[161] As stated by Peroni and Timmer "the Court's recognition of positive obligations towards members of particularly vulnerable groups has often involved "special consideration to" or "special protection of" their "specificities" and needs."[162]

The ECtHR has recognized the vulnerability of children throughout its case law in a great variety of contexts.[163] In the next sections I want to consider the idea that the vulnerability children experience when becoming victims on an infringement on their private lives would

[157] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056.
[158] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale JL & Feminism 1.
[159] Peroni and Timmer (n 157). 1085
[160] ibid.
[161] ibid. 1076
[162] ibid.
[163] See: i.e. *Tyrer v the United Kingdom* ECtHR (application No. 5856/72); *Costello-Roberts v. the United Kingdom* (n 107); *M.C. v. Bulgaria* (n 65); *O'Keeffe v. Ireland* (n 65).

require enhance protections from the State, even if the perpetrators of such interferences are private parties. I also want to keep in mind, throughout the analysis, that the vulnerability of LGBT children and youth in particular puts them at a greater risk of self-harm and suicidal behaviors when becoming victims of intrusions such as bullying.

4.3. Bullying as an infringement on private life.

Described by some as the "(l)east defined and most unruly of the rights enshrined in the convention."[164] Article 8 contains the general protection for private life. Article 8 is the first on the list of qualified rights within the ECtHR. Article 8 consist of two equally important parts. The first part refers to the right to be respected in one's private and family life, home and correspondence, while the second paragraph establishes the possibility of restrictions.[165]

From the text of the convention it is clear that none of the four concepts covered by Article 8(1) are defined. According to Harris, O'Boyle & Warbrick the content of the four concepts covered by Article 8 is a matter of interpretation, the ECtHR tends to be generous in defining them and does not seem to be bound to the interpretations of domestic courts.[166] Kilkelly also notes that "(t)he meaning of the four concepts protected by Article 8 para. 1 is not self-explanatory and the Court has avoided laying down specific rules as to their interpretation."[167] The four concepts have been interpreted by the ECtHR in an evolutive manner. For example, "family life" has been considered to apply to gay couples[168] or single parents[169] beyond the

[164] In Harris, David, et al. Harris, O'Boyle & Warbrick: Law of the European convention on human rights. Oxford University Press, USA, 2014. Citing Justice Stanley Burton in *Wright v Secretary of State for Healt*h (2006) EWHC. 522.
[165] Ursula Kilkelly, 'The Right to Respect for Private and Family Life, A Guide to the Implementation of Art. 8 of the European Convention on Human Rights' Human Rights Handbooks 48. (2003) 6.
[166] Harris and others (n 101). 522.
[167] Kilkelly (n 165). 10.
[168] i.e. *Oliari and Others v Italy* ECtHR (Application no. 18766/11 and 36030/11).
[169] i.e. *Gözüm v Turkey* ECtHR (Application no. 4789/10).

traditional view of family. Just recently, the Court found that Internet instant messages are covered by the notion of "correspondence".[170]

The ECtHR has recognized that "private life" within the meaning of Art. 8 is broad and not susceptible to an exhaustive definition.[171] Article 8 covers aspects such as one's name, gender identification, sexual orientation and sex life. It also extends to cover the right to personal development and personal autonomy.[172] The Court has considered that the notion of private life is not restricted to the inner circle of a person's life, thus, Article 8 also covers the right to lead a "private social life" [173] and the possibility for the individual to develop his/her social identity, as well as the right to establish and develop relationships with other human beings and the outside world. [174]

Bullying as a phenomenon is capable of damaging the victim's sense of self-worth and dignity. Bullying can lead to children becoming isolated of their school environment or to being ostracized by others.[175] Bullying during the formative years, could hamper with a person's development of their identity, this is particularly true in cases of LGBT children and youth who become aware of their sexual orientation or gender identity throughout these formative years.[176] Bullying is also capable of harming a child's personal and moral integrity to the point that children, and specially LGBT children, who are victims of bullying are more likely to attempt against their lives. [177]

[170] *Bărbulescu v Romania* ECtHR (Application no. 61496/08).
[171] *Costello-Roberts v. the United Kingdom* (n 93) § 36.
[172] *Van Kück v Germany* ECtHR (Application no. 35968/97) § 69.
[173] *Bărbulescu v. Romania* (n 157) § 70.
[174] *Van Kück v. Germany* (n 159) § 69.
[175] UNICEF, Position Paper No. 9: Eliminating Discrimination and Violence against Children and Parents Based on Sexual Orientation and/or Gender Identity, November 2014, p. 3.
[176] Ibid.
[177] Ibid.

In the case *Đurđević*[178], a case partly dealing with school bullying, the Court restated that: "(t)he physical and moral integrity of an individual is covered by the concept of private life. The concept of private life extends also to the sphere of the relations of individuals between themselves."[179] When a violation of rights does not seem to reach the minimum level of severity necessary to fall within the scope of what is protected under Article 3, the Strasburg Court has turned to examine if a violation of Article 8 has occurred. For those cases of bullying that do not reach the gravity necessary to be consider under the protection of Article 3 there is an alternative in Article 8. The ECtHR case law has stated that "the protection afforded by Article 8 to an individual's physical integrity could be wider than that contemplated by Article 3 and that, accordingly, the applicant's complaint could be examined under the former as well as the latter provision."[180] According to Kilkelly many areas that touch upon children's lives have been dealt with under the umbrella or Article 8. "Article 8 is by far the most litigated provision from a child's perspective."[181]

While there are clear differences between the provision in Article 3 and Article 8, depending on the nature of an applicant's complaint and in regards to issues concerning bodily integrity in particular, there might overlaps. A reading of the case law of the ECtHR, regarding Article 8 and Article 3 claims, seems to confirm this. In occasions, such as in *Dorđević v. Croatia*[182] or *A. v. the United Kingdom*[183], the ECtHR has considered that once the level of severity necessary to trigger protections under Article 3 was reached, it was not necessary to examine the first applicant's claim under Article 3. In other occasions, like in the case of *M.C. v Bulgaria*[184], the Court has examined the case under both Article 3 and Article 8. It is not fully

[178] *Đurđević v Croatia* ECtHR Application no. 52442/09.
[179] ibid § 105.
[180] *Costello-Roberts v. the United Kingdom* (n 107). § 34.
[181] Kilkelly (n 66). 248.
[182] *Đorđević v. Croatia* (n 100).
[183] *A. v. The United Kingdom* (n 65).
[184] *M.C. v. Bulgaria* (n 65).

clear what is the determining factor for the Court to decide if Article 8 ought to be consider once an allegation of an Article 3 violation has been admitted. In *M.C. and A.C. v. Romania*[185], a case concerning a homophobic attack in the Bucharest metro, the Court stated that

> "owing to the interplay of the above provisions (Article 3 and Article 8), issues such as those in the present case may indeed fall to be examined under one of these two provisions only – with no separate issue arising under any of the others – or may require simultaneous examination under several of these Articles. This is a question to be decided in each case in the light of its facts and the nature of the allegations made."[186]

4.4. Article 8 Positive Obligations

Like many other rights in the European Convention, Article 8 has been interpreted not only to have a negative aspect to it – the prohibition of arbitrary interference with private life – but also positive obligations have been recognized by the Strasbourg Court ever since *Marckx*.[187] According to Kilkelly "(i)n certain circumstances, therefore, the Convention will require the State to take steps to provide individuals with their Article 8 rights and it may also require them to protect persons from the activities of other private individuals which prevent the effective enjoyment of their rights."[188]

It must be noted that sometimes there are difficulties in identifying if a particular case gives raise to positive or negative obligations under Article 8. As explained by the Court:

> "the boundaries between the State's positive and negative obligations under Article 8 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck

[185] *MC and AC v Romania* ECtHR (Application no. 12060/12).
[186] ibid. §105.
[187] *Marckx v. Belgium* (n 45) §31.
[188] Kilkelly (n 165). 21.

between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."[189]

Harris, O'Boyle & Warbrick notice that the difficulties in identifying whether a claim concerns positive or negative obligations has few practical ramifications. However, if the claim gives rise to a positive obligation there will be no examination under Article 8 (2).[190] Contrary to the test applied by the ECtHR in cases of negative obligations, the question regarding positive obligations as they relate to Article 8 is not if the intervention of the State is in accordance with the law, pursues a legitimate aim, or if it is necessary in a democratic society in line with a proportionality standard.[191]

In cases concerning positive obligations and actions of third parties, the margin of appreciation enjoyed by the State allows it to formulate how to guarantee and secure respect for private life. In doing so, there will be an assessment as to how these positive measures could negatively affect other people's rights.[192] The margin of appreciation is also one of the reason as to why the ECtHR rarely details what are the necessary steps in order to guarantee the effectiveness of Article 8. In the past, positive obligations under Article 8 have taken very different forms depending on the context, often the Court has found that lacunae or gaps in the legislation leave the rights of petitioners unprotected, and has requested additional measures from the State in order to effectively securing the rights of the Convention.[193]

Xenos notes that when there is not an issue of interference the fair balance inherent in the limitation test of Article 8(2) is considered in an abstract. The fair balance is not considered against a legitimate aim but rather the democratic limit of the scope of the Convention. [194]

[189] *H v Finland* ECtHR (Application no. 37359/09) § 43.
[190] Harris and others (n 101). 532.
[191] Kilkelly (n 165). 25.
[192] Harris and others (n 101). 534
[193] i.e. *X and Y v. The Netherlands* (n 77); *M.C. v. Bulgaria* (n 65); *Đorđević v. Croatia* (n 100).
[194] Xenos (n 49). 128

> "(A) wide margin of appreciation is accorded to the State to decide on the allocation of its limited resources and the assessment of the funds that are available to that group and other groups of vulnerable individuals. The State's margin of appreciation is, in essence, the manifestation of the democratic limit of the Convention when human rights protection (in the non-interference context) involves numbers that cannot legitimately be handled by the unelected judiciary, let alone the international judge. And conversely, therefore, no such margin can be said to exist when a manageable number of individuals are involved." [195]

In regards to Article 8 positive obligations, the element of vulnerability plays a role in the balancing exercise the Court sets against competing interests. This does not mean that the outcome will be favorable due to the vulnerability of the alleged victim but adding vulnerability to the other factors of the case could reduce the margin of appreciation and increase the chances of protection.[196]

4.5. Lessons from Private life cases.

The cases examined below aim to show the complexity of marking the lines between what is protected under Article 3 and under Article 8. In the case of *Đurđević v. Croatia*[197], (not to be confused with *Đorđević*) the ECtHR considered that the complaint made by Danijel Đurđević, a 15-year-old Roma student, regarding bullying at school could fell within the scope of protection of both Article 3 and 8. Sadly for this study, this part of the application was ultimately found manifestly ill-founded depriving us of an in-depth analysis of the decision. However, the judgment does provide us with extensive elements worthy of consideration, especially in regards to school violence and bullying.

[195] ibid. 164
[196] Peroni and Timmer (n 157). 1076-1080
[197] *Đurđević v. Croatia* (n 178).

In the case of *Dorđević*, examined in the previous chapter under Article 3, the ECtHR decided to examine the claim of Dalibor Đorđević (a person with disabilities suffering from harassment by children) solely under Article 3. In contrast, in regards to his mother Mrs. Radmila Đorđević, who also had suffered from harassment but to a lesser degree (and no physical violence), the Court examined her claim solely under Article 8.

Given that these Croatian cases were not fully explored by the Court or not enough reasoning about Article 8 positive obligations was given, I also wish to add to this part the case of *M.C. v Bulgaria.*[198] While this case concerns rape and sexual abuse of a minor, an act much more serious than bullying, the judgment provides great understanding of the Court's development of positive obligations under Article 8.

4.5.1. The Case of Đurđević v. Croatia.

The case of *Đurđević v. Croatia*[199] decided by the ECtHR in 2011 concerned three different claims against the State of Croatia. For the purposes of this research, I am only interested in the claim of Danijel Đurđević regarding the alleged harassment and violence he had suffered at school.

Mr. Đurđević was a 15-year old, Croatian national of Roma ethnicity. The applicant claimed that he had been constantly insulted and beaten up by other pupils at the school he attended because of his Roma origin. The applicant sustained he had suffered from multiple head injuries over a lengthy period of time.[200] He also sustained that as a consequence of the ill-treatment he suffered from headaches, belly and back pain and had permanent eye damage. The applicant

[198] *M.C. v. Bulgaria* (n 65).
[199] *Đurđević v. Croatia* (n 178).
[200] ibid. §100.

alleged that the lack of adequate measures to protect him from violence and the ill-treatment he had suffered amounted to a breach of the positive obligations of the State under both Article 3 and 8.

The Court considered the applicants claim could be examined under both Article 3 and Article 8.[201] The ECtHR accepted that the alleged actions of bullying could fall within the scope of protection of Article 8, as they threatened the applicant's bodily integrity an aspect covered by private life. Furthermore, the Court considered that other aspects of the complaint pertain to the sphere of private life within the meaning of Article 8.[202] The Court mentioned that besides the moral and physical integrity of the individual, "the concept of private life extends also to the sphere of the relations of individuals between themselves."[203] This could indicate that relations amongst pupils or children's development in their school environment might be covered by Article 8.

The ECtHR considered the obligations arising from Article 8 required the State to protect the private life of individuals even in the sphere of private relations.

> "While the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves"[204]

While the Court accepted that the claim made by the applicant could be serious enough to fall within the scope of both Article 3 and 8, the Court noted that the complaint was not stated clearly, the applicant had only made vague allegations of the facts. The applicant for example,

[201] ibid. § 108.
[202] ibid. §105.
[203] ibid.
[204] ibid. § 106

was not able to name the pupils who bullied him. Despite stating that some of the insults he had suffered were because of his Roma ethnicity, he could never specify the discriminatory nature of those insults. Despite claiming he had been beaten in several occasions between March and December 2009, the medical reports did not detect any injuries. The applicant was also unable to prove that the eye damage, which the Court considered severe, was connected to the incidents of violence at the school.[205]

All of these facts ultimately led the Court to consider the claim as manifestly ill founded. This is the most unfortunate considering that if the claim had been admitted, whether a violation would have been found or not, it would have provided us with a better understanding on the States positive obligations in cases of bullying or school violence. In the same line of thought, because this part of the claim was found manifestly ill-founded we cannot determine which Article the Court would have eventually considered better suited for a complaint made on school violence and bullying and why.

Despite being declared manifestly ill-founded, the level of information the decision concerning the bullying of Danijel Đurđević provided is great. For instance, the Court considered the element of the vulnerability of the applicant, stating that because at the time of the events he was 15 years old "may be considered to fall within the group of "vulnerable individuals" entitled to State protection." [206]

The ECtHR also makes it clear that appropriate measures to protect children from violence perpetrated by other pupils at school do not necessarily demand criminal provisions. [207] This is in line with the reasoning in *Đorđević* where the Court considered that the harassment

[205] ibid. § 113-117
[206] ibid. §108.
[207] ibid. §101.

perpetrated by children upon the applicant did not require criminal provisions.[208] On that note, the Court also addressed the issue of sanctions or school discipline, indicating that school discipline falls within the ambit of Article 2 of Protocol 1 and under certain circumstances school sanctions might require Article 3 and/or Article 8 protections. [209] This is an important fact to consider if we think about the rights of the bullies. In cases of peer-to-peer bullying like the victim the perpetrators will also be children, also vulnerable and also entitled to rights. Sanctions to punish bullying behavior cannot infringe neither Article 3 or 8.

Finally, there are indications that the Court was looking forward to differentiate between in-school and out-of-school incidents of violence. For example, between paragraphs 114-116 the Court wonders if the sustained blows to the applicant´s head, the time when he was hit by an iron bar and the time when he suffered from eye damage where incidents of violence at school. It could be that the Court was trying to find other elements of private life affected by the bullying. As the ECtHR has stated in the past, the mere action of sending a child to school touches upon their private life. [210]

4.5.2. The Case of Đorđević v. Croatia.

In *Đorđević*, the ECtHR considered that the claims of harassment made by the first applicant Mr. Dalibor Đorđević, could fall within the scope of protection of both Article 3 and Article 8. It ultimately decided to examine the first applicant's claim under Article 3 and no further explanation was given as to why Article 8 was left out.[211] This part of the judgment was examined in the previous chapter.

[208] ibid. § 143.
[209] ibid. §103-104.
[210] *Costello-Roberts v. the United Kingdom* (n 107). § 36.
[211] *Đorđević v. Croatia* (n 100).§ 93.

Another important part of the judgment, for the purposes of this thesis, is the decision concerning the second applicant Mrs. Radmila Đorđević. Like her son, Mrs. Đorđević had suffered from ongoing harassment from a group of children who were pupils of the school nearby her home. She had also claimed that the harassment was partly motivated because of her Serbian origin. Unlike her son, however, the ECtHR decided to examine her claim under Article 8 and not Article 3. The ECtHR considered that Ms. Dorđević had not been exposed to the same level of harassment her son was, therefore, the level of severity necessary to trigger protections by Article 3 was not reached. An element that the Court took into consideration when deciding which article to apply seems to be the fact that Ms. Dorđević had not been exposed to physical violence.[212] The Court, however, did find that Ms. Đorđević's moral integrity covered by Article 8 had been affected.[213]

There are two other elements beyond the lack of severe damage to Ms. Đorđević's bodily integrity that might explain the Court's decision to apply Article 8. One is that most of Ms. Đorđević's complaints dealt with acts by children against her home. The judgment recalls Ms. Đorđević was complaining about the children smashing objects on her balcony, having her flower beds torn up, and urinating in front of her door. Ms. Đorđević had to call the police because of excessive noise close to her house and, on a separate occasion, because the children were banging on the outer wall of her flat and making a very loud noise, furthermore, the children were constantly in front of her building which upset her son.

The second fact the Court considered, was that the harassment on her son and the disruption to her daily life had an adverse effect upon the applicant's private and family life. These are two aspects also protected by the notion of private life. The ECtHR's decision in the case of Mrs. Đorđević might be helpful to consider for cases of bullying where there is an intrusion on one's

[212] ibid.§ 97.
[213] ibid.

personality that might seem mild and yet affects private life, think for example constant name-calling, mockery or threats; or when it touches upon aspects other than bodily integrity for example the ability of children to develop relations with others and the outside world.

4.5.3. The Case of M.C. v Bulgaria.

The Scope and extent of positive obligations under Article 8 has been explored in the case of *M.C. v. Bulgaria.*[214] In this case the Strasbourg Court applied positive obligations when examining the actions the Bulgarian authorities had taken during the investigation concerning the rape of a 14-year-old young woman by two men, and the lack of sufficient protections afforded by the State. While not explicit in the judgment from a close reading it seems that the Court applies the due diligence standard examined in Chapter 2 in the context of private life.

In 1998 M.C. claimed before the ECtHR that she was raped separately by two men in a period of less than 24 hours after she went to a dance club with them. M.C. claimed that because of her young age, sexual inexperience and physical condition she was not able to fight back or resist either of the incidents, yet the law and practice in Bulgaria gave prevalence to the element of "resistance" when prosecuting cases of rape. M.C. argued that most cases that were prosecuted were those in which it could be proven that the victim fought back, did not know the attacker or could present witnesses. M.C. complained to the ECtHR that both the law and practice in Bulgaria failed to provide her with effective protections against acts of rape and sexual abuse. The applicant claimed that requiring proof of physical resistance led to certain acts of rape remained unpunished.

The Court considered the nature of the complaint could be examined under both Article 3 and Article 8. In principle Article 8 positive obligations would require effective deterrence against

[214] *M.C. v. Bulgaria* (n 65).

grave acts such as rape, in the instant case this would call for effective criminal law provisions.[215] Both Article 3 and Article 8 would require such provisions to be applied in practice through an effective investigation and prosecution. [216]

When examining if the State had complied with its positive obligations, the Court first considered the State´s duty to prevent. The ECtHR determined, that States have a positive obligation to take measures to protect those under their jurisdiction from being subjected to ill-treatment contrary to Article 3 even if the ill-treatment is administered by private individuals.[217] A similar obligation to adopt measures for the effective respect of private life gives rise under Article 8. [218] There was no question in the instant case that there was a criminal statute in Bulgaria which punished rape, however, the ECtHR considered it necessary to examine whether the impugned law and practice were flawed to the point that represented a breach to the procedural positive obligations under Article 3 and 8.

The ECtHR reiterated that Article 3 also gives rise to the positive obligation to carry out an official investigation whether or not the alleged perpetrators of the rights violation are State agents. Article 8 *may* also carry the necessity of such investigation, as well as a closer examination on the *effectiveness* of criminal investigations.[219] In determining the effectiveness on the investigation, the Court considered that the requirement of physical resistance was no longer present in the statues of other European countries which in cases of rape gave more importance to the lack of consent. This narrowed the State's margin of appreciation. The Court

[215] ibid.. § 150.
[216] ibid. § 153.
[217] ibid. § 149.
[218] ibid. § 150.
[219] ibid. § 151.

determined that the Bulgarian statute was too rigid and left certain cases of rape *unpunished* jeopardizing the effective protection of the individuals' sexual autonomy.[220]

The Strasbourg Court determined that the positive obligations set upon the State under Article 8, required it to implement effective criminal law provisions that provide effective deterrence against acts such as rape, this was especially true in the case of children and other vulnerable populations.[221] In the instant case, the authorities had failed to attach enough weight to the particular vulnerability of young persons, including the psychological factors experienced by minors in cases of rape, which might prevent them from "resisting". It was ultimately found that the authorities had "felt short" on their positive obligations in view of the modern standards to apply effectively criminal law in regards of rape cases resulting in a violation of both Article 3 and 8. [222]

The *M.C.* judgment shows the interplay of Article 3 and Article 8 positive obligations in ECtHR's decisions. It is possible that the factor that determined the Court to examine the case both under Article 3 and 8 was the fact that rape is an aggression against one's physical integrity and sexual autonomy, an integral part of private life. [223]

In regards to the vulnerability analysis, it is important to note that the ECtHR did not questioned whether or not there was a criminal provision punishing rape, (there was) the question was rather if the provision was effective enough so for the State to discharge its positive obligations under Article 8 considering the particular circumstances of the applicant. Xenos has noted that "(i)n most circumstances a regulatory framework can be imposed as a core content of positive obligations under paragraph 1 of the Convention rights. Regulations of human rights standards

[220] ibid. § 157 – 166.
[221] ibid. §150.
[222] ibid. §185.
[223] ibid. §166.

to educate the behavior of private parties or to condition the operation of their activities are the first and foremost basic content of positive obligations"[224] One of the effects of taking the victim's vulnerability into consideration under international human rights standards, however, is that it changes the scope and the content of positive obligations required from States.[225] This has resulted in a number of cases the general provision of Article 1 of the ECRH has been found insufficient to prove applicants with a particular vulnerability with effective protection, [226] *M.C.* is an example of that, consider also the case of *O'Keeffe*, examined in the last chapter under Article 3. In Both cases the ECtHR determined that the mere existence of provisions punishing sexual abuse (*O'Keeffe*) or rape (*M.C.*) was not enough. The State needed to take notice of the special circumstances of vulnerability of the victims – both children – and take additional measures.

It must be noted that rape is a grave violation to one's bodily integrity and sexual autonomy, its nature is quite different than bullying. However, I do believe that the principle of taking into account the victim's vulnerability could be transferable to other violations to private life. In cases of children and youth who are bullied because they are LGBT or are perceived as LGBT, a general regulatory framework such as a general policy against bullying at schools might not be enough to cover their specific situation of vulnerability. The State would need to take into consideration the particular position these vulnerable children are in, in order to effectively comply with its positive obligation of protection and prevention.

[224] Xenos (n 49). 107.
[225] Peroni and Timmer (n 157) 1076.
[226] Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights.* (n 68) 112-117.

4.6. Private life and vulnerability as understood by the American Convention.

On May 2016 the Republic of Costa Rica requested an advisory opinion on the compatibility of its domestic laws concerning Articles 11.2 (Private life), 18 (Right to a name) and 24 (Right to equal protection) in regards to the rights of LGBT persons. More specifically the right of transgender persons to change their names to match their gender identity and the extension of property rights for same-sex couples. In this section I will examine the Court's reasoning concerning the first question. Advisory Opinion 24 on Gender identity, equality and non-discrimination for same-sex couples[227] is a great source for a better understanding of the private life provision in the American Convention on Human Rights. The standards stated in the advisory opinion are highly relevant for human rights law concerning the rights of LGBT persons, including children.

Article 64.1 and 64.2 of the American Convention on Human Rights give the Inter-American Court the faculty to interpret the American Convention or other human rights treaties applicable to the American States. A State may request the Court's opinion to verify if domestic legislation is in compliance with the American Convention or other human rights treaties. Pasqualucci notes that "(t)he Court's advisory jurisdiction to interpret the American Convention provides a means to resolve uncertainties and contradictions in the text of the Convention".[228] The interpretation of a substantive provision of the Convention aims for a uniform understanding of the meaning and extension of such provision, so Member States comply with their

[227] Advisory Opinion 24 on Gender identity, equality and non-discrimination for same-sex couples, OC-24/17, Inter-American Court of Human Rights (IACrtHR), 24 November 2017, available in Spanish at: http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf

[228] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012). 47.

Convention obligations. The Court cannot, however, "(u)se its advisory jurisdiction to order the State to reform its laws. This power is reserved for the Court's contentious jurisdiction."[229]

Article 11 of the American Convention on Human Rights contains the "Right to Privacy". The first paragraph of the provision recognizes the right to have one's dignity recognized and honor respected, while the second paragraph is drafted in a way that resembles Article 8 of the ECtHR without the limitations clause.

> **Article 11. Right to Privacy**
>
> 1. Everyone has the right to have his honor respected and his dignity recognized.
>
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
>
> 3. Everyone has the right to the protection of the law against such interference or attacks.

While the notion of "Privacy" is more limited than that of "Private life," Article 11 has been interpreted in an expansive and evolutive manner and actually covers most of the aspects covered by Article 8 of the ECtHR, one notable exception is that of bodily integrity. Because Article 5 of the ACHR covers both humane treatment concerning physical, mental, and moral integrity and also contains the prohibition on torture cruel, inhuman, or degrading treatment or punishment within the first two paragraphs, when the Inter-American Court examines a case concerning harm upon one's moral or physical integrity, the Court is more likely to consider and eventually rule on a violation of Article 5.1 rather than turning to Article 11, the private life provision. This is true even if the harm does not reach the severity necessary to be considered as torture, or any of the other prohibited treatments in Article 5.2.[230]

[229] ibid. 58.

[230] See: Antkowiak notes that Article 5.1 contains an autonomous right to personal integrity different from the prohibition on torture. in Antkowiak and Gonza (n 144) 106, 127. Note that Burgorgue-Larsen and Amaya Úbeda share the opinion that Article 5 contains two different categories of treatment, one that is absolutely prohibited (Article 5.2) and one that is not (5.1) in a way that is not explicit under the ECHR. in Laurence Burgorgue-Larsen and Amaya Úbeda

Advisory Opinion 24 provides an elaborate explanation of the American conception of private life. As understood under the American Convention, private life is "a space of freedom exempt and immune to abusive or arbitrary interference by third parties or by public authorities"[231] The protection to the right to private life is not limited to the right to privacy. Private life also covers a series of aspects connected to a person's dignity, for example, the capacity to develop one's personality, aspirations, determine one's identity and personal relations. The notion of private life - the Court elaborates - covers aspects of social and physical identity such as the right to personal autonomy, personal development, the right to establish and develop relations with others and with the outside world. [232]

Considering the right of transgender persons to change their names, the Court stated that the idea of self-determination as an essential aspect of human dignity.[233] Self-determination is linked to the notion of personal autonomy or the capacity of each person to be free and autonomous, and to develop the life project one desires in accordance with one's values, beliefs and convictions. [234]

The IACtHR case law has recognized the right to an identity is covered by the protection of private life and the right to develop one's personality. [235] The right to an identity can be understood as attributes and characteristics which allow for the individualization of a person in society. The right to an identity comprehends different sets of rights for different people and under different circumstances. [236] States and society ought to recognize people's right to an identity and guarantee each person's individuality.[237] The Court recognized that people should

de Torres, *The Inter-American Court of Human Rights: Case-Law and Commentary.* (Oxford; New York: Oxford University Press, 2011). 370.
[231] Advisory Opinion 24 (n 227) Par 86 (translation my own)
[232] Ibid. Par 87.
[233] Ibid. Par 88.
[234] Ibid. Par 88.
[235] Ibid. Par 89.
[236] Ibid. Par 90.
[237] Ibid. Par 91.

be capable exteriorizing themselves according to their most intimate convictions. In this sense, the Court noted gender identity as one of the most essential aspects of an individual.[238]

The Court recognized gender identity as the individual and internal experience of gender as each person feels it, which may or may not correspond to the sex assigned at the time of birth. [239] Gender identity is protected by the American Convention under Articles 7 and 11.2. Gender and sexual identity is linked to the concept of freedom, right to private life and to the possibility of every human being to self-determine and freely choose the options and circumstances that give meaning to their existence. [240] Important for the subject of this research is that the Court noted that lack of recognition of gender identity could lead to the violation of other human rights, for example torture, maltreatment, sexual violence, discrimination, exclusion and bullying. [241]

Given that gender identity is an essential element of one's identity, it is of vital importance that it obtains recognition from the State, especially in order to guarantee the full and effective enjoyment of the human rights of transgender persons. [242] Not having documentation that legally recognizes one's identity could leave person without proof of their legal existence causing an interference upon their rights. [243] The lack of mechanisms to change one's name according to one's perceived self-identity is an interference in the right of people to choose and change their own names as they please.[244] States have a positive obligation not only to protect the right to a name but to establish the necessary measures to facilitate the registry of names.[245]

[238] Ibid. Par 91.
[239] Ibid. Par 94.
[240] Ibid. Par 98.
[241] Ibid. Par 134.
[242] Ibid. Par 98.
[243] Ibid. Par 98.
[244] Ibid. Par 111.
[245] Ibid. Par 107.

Taking into consideration the right to private life (Article 11.2) and all the above-mentioned notions that are covered by it, the right to personal liberty (Article 7), the right to a legal personality (Article 3), and the right to a name (Article 18), the Inter-American Court recognized the right to gender identity and the right to have one's identification documents to match that gender identity. The recognition of such rights means that, in line with Article 1.1. and Article 2 of the American Convention, States have a positive obligation to respect and guarantee to every person, the possibility of registering, changing, rectifying their name in their identification records and documents as well as other essential elements of one's identity such as references to sex or gender, without interference by public authorities or third parties. [246]

Advisory Opinion 24 is a landmark in many fronts, but above all that is a great source for understanding the complexities of the notion of private life under the American Convention. As noted in the analysis of the ECtHR cases being able to prove an infringement not only on one's personal integrity but other aspects of private life could mean protections both under Article 3 and 8 of the European Convention. Advisory Opinion 24 provides us with a long list of aspects related to the private life of LGBT persons.

The IACtHR also considered throughout its analysis of Advisory Opinion 24 the vulnerability of LGBT persons in the American States who suffer from violence and discrimination in most ambits of life whether public or private. [247] Given the nature of the decision, concerning sexual minorities, the Court made sure not to left out LGBTI children and youth out of its analysis the Court noted in regards the vulnerability of LGBTI Children and youth the importance in protecting their mental integrity:

[246] Ibid. Par 115.
[247] Ibid. Par 39-49.

> "The discrimination suffered by LGBTI persons is highly damaging to the right to the mental integrity of these persons (Article 5.1 of the Convention), because of the particularities of discrimination based on sexual orientation, which in a good number of cases becomes evident to the person during a difficult stage of psychological evolution such as puberty, when they have already internalized the prejudiced even within the core family. This does not occur in other forms of discrimination, for which the person knows the discriminating motive from his childhood and is supported by his family with the whom they even share it. This contradiction in values in which the adolescent finds him/herself is particularly harmful to their psychic integrity at the time of the development of their personality that makes his/her identity and life project, which sometimes leads not only to self-harming behaviors but it is even the cause of adolescent suicides." [248]

4.7. Conclusion.

For cases of bullying that are not severe enough to be considered as degrading treatment an alternative would be to claim a violation of private life on account of an invasion of physical and moral integrity or a sense of identity. As it was stated, protections afforded by Article 8 are wider than those afforded by Article 3. It is also helpful to consider that Article 8 positive obligations are similar to those under Article 3 to the point that there might be overlaps depending on the particular circumstances of the case.

In instances where the claim includes aspects of private life, for example when the incidents of bullying affect aspects such as children's personal development or the ability to develop relations with others or the outside world, there might be an opportunity for litigation under both Article 3 and Article 8. This opens the possibility for enhanced protections.

[248] Advisory Opinion 24 (n 227). Par 48 (Translation my own)

As stated by Peroni and Timmer vulnerability as a legal concept is an unexplored one, while the ECtHR has used the concept of vulnerability particularly in cases involving the rights of children. This is especially true in cases of Article 8 violations where adding vulnerability to the facts in consideration tends to have the effect of enhancing positive obligations afforded by the State and narrowing the margin of appreciation.

As seen from the comparative case study the right to "Privacy" in the ACHR currently covers most aspects considered by the ECHR under the notion of Private life. Just like the European Court, the Inter-American Court has recognized gender identity and sexual orientation and identity as essential aspects of private life. The list of notions Advisory Opinion 24 recalls could provide some grounds to allege an infringement of private life in a potential case of bullying particularly for LGBT children. Furthermore, a lesson can be drawn from the fact that in Advisory Opinion 24, the IACtHR called upon States to comply with their positive obligations in Article 1.1 of the ACHR to secure the rights of transgender persons including children. This mandate includes a wide scope of actions, not merely legal but also those of a political, administrative and cultural nature.

In the next Chapter I will examine how discrimination and stigma could play a role concerning the positive obligations that States have because of actions of non-state parties in the context of ill-treatment and in the setting of education.

Chapter 5 : Addressing stigma and discrimination through human rights law.

5.1. Introduction.

> "All children are at risk of bullying, but those in vulnerable situations, who face stigmatization, discrimination or exclusion, are more likely to be bullied both in person and online."[249]

In this thesis I demonstrate how human rights law can be applied to cases of bullying as a human rights violation. One approach (as stated in the first two chapters) is to link State responsibility to the actions of the perpetrators via the positive obligations emerging from the prohibition of degrading treatment or the protection of private life. In cases where bullying is the consequence of discrimination, however, the protections afforded under the prohibition on degrading treatment or respect for private life might not be enough. Research has shown that while all children might be subjected to bullying those that are victims of social exclusion or those who belong to minority groups are at a greater risk.[250] A human rights-based approach would need to address not only the consequences but also the *causes* of discrimination.

In the previous chapter I addressed how the vulnerability of children could serve as a legal argument to afford them enhanced protections under the protection to private life. Children's vulnerability seems to be inherent because of their age and their dependency on others to exercise their rights. The Vulnerability of LGBT people on the other hand seems to be circumstantial, based on contexts of stigma and discrimination historically enrooted in most societies. In this chapter I want to analyze how anti-discrimination law can be used to break patterns that exacerbate stigma and discrimination against LGBT people. I wish to address how

[249] UNGA (n 1) par 32.
[250] UN General Assembly, Rights of the child: note / by the Secretary-General, 29 August 2006, A/61/299.

human rights law can apply to circumstances where bullying is directly related to stigma and discrimination and examine if positive obligations could play a role in combating this kind of discrimination.

5.2. Bullying and Stigmatization.

Link and Phelan define stigma as the co-occurrence of labeling, stereotyping, separation and exclusion which results in discrimination [251] They state that stigmatization "allows the identification of differentness, the construction of stereotypes, the separation of labeled persons into distinct categories, and the full execution of disapproval, rejection, exclusion, and discrimination."[252]

Thornberg states that the bullying process carries with it the creation of stigma "in which the bullying was considered the natural thing to do, and was justified by dehumanizing and blaming the victim"[253] According to Crocker, Major and Steel "stigmatized individuals possess (or are believed to possess) some attribute characteristic that conveys a social identity that is devalued in a particular social context."[254] Children who identify as LGBT or are perceived as such find themselves in an interesting intersection. On the one hand children are generally perceived as vulnerable and in need of protection. On the other hand, LGBT people are often characterized as "deviants", and "predators", the kind of people children need protection from.[255] In this sense the stigma attached to their LGBT identities, could serve both as a justification and a cause for bullying.

[251] Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 Annual Review of Sociology. 363-364
[252] ibid. 367.
[253] Robert Thornberg, 'School Bullying as a Collective Action: Stigma Processes and Identity Struggling' (2015) 29 Children & Society. 315-316.
[254] J Crocker, B Major and C Steele, 'Social Stigma. Handbook of Social Psychology' (1998) 2 T 504. 504-553.
[255] Bruce MacDougall, 'The Legally Queer Child' (2003) 49 McGill LJ. 1057.

The Inter-American Commission on Human Rights has noted the harmful effect of bullying, discrimination and stigma in LGBT children and youth:

> "If bullying is tolerated, a strong social message is sent to LGBT persons that the open expression of their orientations or identities is not accepted. The corollary of this message is the promotion of anti-LGBT feelings among children and teachers, the fostering of bullying and discrimination, and the reinforcement of stigma and feelings of shame and inferiority among LGBT persons."[256]

While the State cannot sanction stigmatization, it can take positive measures to prevent prejudice and reduce the vulnerability of stigmatized groups, positive measures can also combat exclusion aiming to reduce stigma. In a number of cases concerning Article 14 claims the ECtHR has examined the stigma and historical prejudice that vulnerable groups have suffered. The ECtHR has done this in order to determine if differential treatment is discriminatory or if it is justified.[257] In cases concerning the discrimination of Roma pupils, the ECtHR has considered the vulnerability of Roma children against a background of prejudice and stigma. [258] However, the Court has felt short of requiring measures from the State to combat such stigma.

5.3. Substantive equality, non-discrimination and positive obligations under Article 14.

Article 14 of the ECtHR provides protection against discrimination in the enjoyment of the rights guaranteed by the Convention. Because Article 14 can only be applied in regards to other Convention rights[259] and not in a broader spectrum of other social issues where discrimination

[256] Inter-American Commission on Human Rights. Violence against lesbian, gay, bisexual, trans and intersex persons in the Americas. OEA/Ser.L/V/II. Rev.2.Doc. 36, 12 November 2015, Par 325.
[257] i.e. *Kiyutin v Russia* ECtHR (Application no. 2700/10); B*ayev v Russia* ECtHR (Applications nos. 67667/09); *Alekseyev v Russia* ECtHR (Applications nos. 4916/07, 25924/08 and 14599/09).
[258] Peroni and Timmer (n 157). 1065.
[259] Rainey, Wicks and Ovey (n 106). 570.

can also be present, this is generally considered a limitation on the equality provision, and the protection afforded by Article 14 has been referred to by legal scholar as "less than satisfactory"[260], or "weak."[261] Protocol 12 was drafted given the limitations attached to Article 14.[262] For the limited number of States that have ratified Protocol 12 the non-discrimination clause is extended beyond the ambit of Convention rights. Article 1 of Protocol 12 sets a general prohibition of discrimination in "the enjoyment of any right set forth by law."[263] There is a great amount of overlap between the provision in Article 14 and Article 1 of Protocol 12 as the latter is not to replace the former but to complement it.

According to Jacobs, White & Ovey positive obligations are part of Article 14: "(i)t is also inherent in the scheme of the Article that contracting parties are obliged to take steps to prevent discrimination falling within the ambit of the Article."[264] In *Thlimmenos v Greece*[265], for example, The ECtHR advanced a substantive equality approach and determined the existence of a positive obligation to treat people under significantly different circumstances differently if there is a reasonable justification.

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (…) The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[266]

[260] Aileen McColgan, 'Women and the Human Rights Act' (2000) 51 Northern Ireland Legal Quarterly. 433
[261] Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (2017) 4 Oslo Law Review. 151.
[262] Harris and others (n 101) 819.
[263] Rainey, Wicks and Ovey (n 106) 592.
[264] Robin CA White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP Oxford 2010). 568
[265] *Thlimmenos v Greece* ECtHR (Application no. 34369/97).
[266] ibid.§44.

Since the *Thlimmenos* judgment it can be said that Article 14 covers two types of discriminatory practices, Barnes recognized this as: "(i) actions that treat "differently without an objective and reasonable justification persons in relevantly similar situations" and (ii) actions that fail to take into account differences resulting in a discriminatory effect."[267]

Scholarship notices there is a relatively recent shift by the ECtHR from a formal equality perspective to a substantive equality one specially in regards to positive obligations. Sjöholm, for instance, notes that:

> "Depending on the degree and form of positive obligations it could be argued that these types of positive obligations coincide with substantive equality, particularly in combination with declaring certain groups as being vulnerable and thus extending the scope of state's positive obligations. In these situations, the states must adopt more far reaching measures to ensure the effectiveness of rights."[268]

Peroni and Timmer also state that the ECtHR has embraced substantive equality in recent years by recognizing positive obligations in the context of Article 14 in cases involving vulnerable groups.[269] In the context of education, for example, important cases have presented the Court the opportunity advance substantive equality regarding the discrimination of Roma Children.[270]

A substantive model of equality aims to eliminate disadvantages, and to examine how the presence of prejudice, stigma and exclusion reflect in structural inequality.[271] Sandra Fredman notes, "instead of aiming to treat everyone alike, regardless of status, substantive equality focuses on the group which has suffered disadvantage."[272] In one of her most recent works,

[267] Kristen Barnes, 'Adjudicating Equality: Antidiscrimination Education Jurisprudence in the European Court of Human Rights' (Social Science Research Network 2017). 215-216.
[268] Sjöholm (n 85) 168
[269] Peroni and Timmer (n 147) 1076
[270] See: *DH and Others v The Czech Republic* ECtHR (Application no. 12060/12); *Horvath and Kiss v Hungary* ECtHR (Application. No. 11146/11); *Oršuš v Croatia* ECtHR (Application no. 15766/03); *Sampanis and others v Greece* ECtHR (Application no 32526/05).
[271] Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies. 224
[272] Sandra Fredman, *Discrimination Law.* Oxford University Press, 2011. 26

Fredman proposes a formula in which substantive equality takes a four-dimensional approach. This formula advances substantive equality by redressing disadvantage; addressing stigma, stereotyping, prejudice, and violence; enhancing participation; and achieving structural change by accommodating difference.[273]

In cases of bullying for example, an application of Fredman's four-dimensional approach would focus on the disadvantaged group, namely LGBT children; recognize the stigma associated with their identity and aim to transform the structures that perpetuate that stigma taking into consideration the voices and experiences of people from the disenfranchised group.

Given that Article 14 cannot be claimed as a stand-alone provision in the following two parts I will analyze how substantive equality under Article 14 is applied in the context of Article 3 and Article 2 of Protocol 1 and if those existing positive obligations could be beneficial to a claim because of bullying.

5.4. Positive obligations in the case of discriminatory ill-treatment.

5.4.1. M.C. and A.C. v. Romania.

In *M.C. and A.C. v. Romania*[274] the ECtHR referred to the existence of a positive obligation under Article 14 in conjunction with Article 3 and/or Article 8 to investigate ill-treatment with an underlying homophobic motivation.[275] The applicants were two Romanian nationals who had been attacked by a group of six men and a woman inside a metro after attending the 2006 annual gay march in Bucharest. The attackers had punched and kicked the applicants in their

[273] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law. 727.
[274] *M.C. and A.C. v. Romania* (n 185).
[275] ibid. §105.

heads and faces. During the attack, which lasted for about two minutes, the perpetrators kept shouting "You poofs go to the Netherlands."[276]

The applicants filed a criminal complaint the same night stating that the assault had been motivated because of their sexual orientation. Due to an institutional reorganization of the police, the applicants' case file had been moved from one police station to another and was not logged by the Metro Police office until April 2007, almost year after the attacks. Once the investigation started the initial phases were conducted as expected, however, soon after there were long periods of delay or inaction. In 2011, five years after the incidents, it was determined that the investigation should come to an end as the attackers remained unidentified.

The applicants alleged before the ECtHR a violation of Articles 3, 6, 8 and 14 of the Convention and under Article 1 of Protocol No. 12, because of the deficiencies by the Romanian authorities to carry out the investigation, and failure to adequately investigate acts of violence motivated by homophobia. The applicants also complained about the "lack of adequate legislative and other measures to combat hate crimes directed against the LGBTI minority." [277]

The ECtHR found a violation of the procedural obligations under Article 3 read together with Article 14. The Court considered that when investigating violent incidents, such as ill-treatment, the authorities have an obligation to pursue all reasonable steps to conduct an investigation to uncover discriminatory motives. [278] The Court considered that the failure to carry a rigorous investigation regarding prejudice-motivated crimes "would be tantamount to official acquiescence to, or even connivance with, hate crimes". [279]

[276] ibid. §9.
[277] ibid. §47.
[278] ibid. §113.
[279] ibid. §124.

From the judgment one could infer that the violation regarding Article 14 concerned the lack of differential treatment from the authorities, this is to say, that the authorities should have gone beyond their regular positive obligations under Article 3 and also focused their efforts to investigate and possibly punished hate-based discriminatory intent. [280] Following the substantive equality principle established ever since *Thlimmenos*, the Court considered that "failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention." [281]

In *M.C. and A.C* the discriminatory treatment arises not from treating hate-motivated ill-treatment differently, but precisely from not recognizing how the discriminatory aspect makes it different worthy of taking a more stringent approach. "Treating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights." [282]

The *M.C. and A.C* case shows the importance of advancing substantive equality in ill-treatment cases. The positive obligation under Article 14 in conjunction with Article 3 to investigate discriminatory motives in ill-treatment cases could be applicable to cases of bullying. Admittedly the *M.C. and A.C* case concerns a hate-crime, referring to acts of a much more serious nature than bullying. However, in both cases there are elements that are undeniably the same: i.e. ill-treatment perpetrated by private parties and the need to consider difference.

If there is suspicion that bullying is motivated by hate or prejudice, positive obligations under Article 14 would require the State to investigate more rigorously such claim regarding the discriminatory aspect. The application of Article 14 could also expand to the other aspects of

[280] ibid. §124.
[281] ibid. §113.
[282] ibid. §113.

the due diligence standard to protect against ill-treatment, that is, to punish or sanction the discriminatory motivation, redress the victim of discrimination, and also importantly, take appropriate measures to prevent the discrimination. The case of Azmi Jubran examined below is a perfect example of the comprehensive measures State authorities could take in cases of discriminatory bullying.

5.5. ECtHR jurisprudence on equality in education, the role of positive obligations.

The right to education was included under Article 2 of Protocol 1 of the ECHR. The right to education as drafted in the Convention guarantees access to the educational system as established by Contracting State Parties. There is no obligation to provide, fund or subsidize education.[283] Article 2 of Protocol 1 applies to all the forms of education that are provided or regulated by the State, this includes primary, secondary and higher education. As well as it extends to private schools and universities.[284] Article 2 of Protocol 1 regulates rights applicable to both pupils and parents. The second sentence regulates parent's rights to be respected in their religious and philosophical convictions. According to Harris, O'Boyle and Warbrick this is primarily "a protection against indoctrination by the State."[285]

Claims regarding Article 2 of Protocol 1 in conjunction with Article 14, have imposed on States a series of emerging positive obligations in recent years. The ECtHR has utilized both articles in order to advance substantive equality in cases related to the education of Roma pupils, [286]

[283] *Case relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium.* (n 58).; White and Ovey (n 264). 508
[284] i.e. *Sahin v Turkey* ECtHR (Application no. 44774/98); Harris and others (n 101) 907
[285] i.e. *Folgerø and others v Norway* ECtHR (Application no. 15472/02); Harris and others (n 101) 913.
[286] See: *D.H. and Others v. The Czech Republic* (n 270); *Horvath and Kiss v. Hungary* (n 270); *Oršuš v. Croatia* (n 270); *Sampanis and others v. Greece* (n 270).

most notably, by recognizing the positive obligation "to avoid the perpetuation of past discrimination."[287] These positive obligations require the State to take action or introduce measures taking into account the difference of particularly vulnerable individuals or groups in order to achieve substantive equality.[288]

In the following section I will look at the cases of *D.H. and Others v. The Czech Republic*[289] and *Horvath and Kiss v. Hungary.*[290] While both *D.H* and *Horvath and Kiss* relate to State action and structural deficiencies which had a disparate impact on a particularly vulnerable group, a few lessons could be drawn that are applicable to bullying, as both decisions are part of a series of judgments that keep advancing the ECtHR's jurisprudence on substantive equality in education.

5.5.1. D.H. and Others v. The Czech Republic.

In *D.H* the ECtHR re-stated that under certain circumstances and in order to correct inequality differential treatment may be needed under Article 14.[291] The applicants of the case were 18 Roma students from Ostrava (Czech Republic), they alleged a violation of Article 2 of Protocol 1 together with Article 14. The applicants claimed that by being assigned to special schools, they had received an inferior quality of education as compared to non-Roma children, this had the effect of depriving them of better secondary education and vocational opportunities.[292] Their misplacement amounted to discriminatory treatment as they had been treated less favorably than other children in a comparable situation without a reasonable justification.

[287] *Horvath and Kiss v. Hungary* (n 270) § 116.
[288]. Barnes (n 267). 237
[289] *D.H. and Others v. The Czech Republic* (n 270).
[290] *Horvath and Kiss v. Hungary* (n 270).
[291] *D.H. and Others v. The Czech Republic* (n 255) § 175.
[292] ibid § 135.

The Government's submission was that the applicants' placement in special schools was based on their scoring of psychological tests and not because of their ethnic origin. [293] The Government further stated that a legitimate aim was pursued by adapting the curriculum to the specific needs of the children. [294]

When examining the case, the ECtHR recalled that "(r)acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities' special vigilance and a vigorous reaction" [295] authorities have an obligation to combat racism using all available means. [296] Furthermore, the ECtHR stated that under certain circumstances in order to correct "factual inequalities" the State might need to treat certain groups differently. [297]

Given that the tests were designed for the non-Roma majority children, the Court considered that there was at least a risk that the test were biased and the special characteristics and particularities of Roma children were not considered in the evaluation of results. These circumstances would call for the existence of procedural safeguards that would ensure the State to take notice of the special needs of children belonging to a disadvantage group. [298]

5.5.2. Horvath and Kiss v. Hungary.

The ECtHR further explained the positive obligations emerging from Article 2 of Protocol 1 in *Horvath and Kiss v. Hungary,*[299] another case concerning the segregation of Roma Children in education. The applicants in this case also claimed that their misplacement in a remedial school

[293] ibid. § 147.
[294] ibid.§ 149.
[295] Ibid. § 176.
[296] Ibid. § 176.
[297] Ibid. § 175.
[298] Ibid. § 207.
[299] *Horvath and Kiss v. Hungary* (n 270).

for pupils with mental disabilities amounted to discrimination in the enjoyment of their right to education. The ECtHR determined that the word "respect" in Article 2 of Protocol 1 is not limited to a negative undertaking, it may also require positive obligations on the part of the State in order to ensure compliance with the Convention. [300]

The Court considered that structural deficiencies, which hampered with the right to education of groups that have suffered from past discrimination, may require positive measures from the State in order to overcome these inequalities. Given the vulnerability of Roma children, the Court found that the State had a special positive obligation "*to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests."*[301]

> "In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures . . . These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services."[302]

The Court determined that the Expert panel which conducted the tests did not provide the necessary guarantees against misplacement of Roma children in remedial schools leaving the applicants without adequate protection. The Court considered that the State had failed its positive obligation to provide guarantees "to undo a history of racial segregation in special schools."[303] and found a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

[300] i.e. ibid § 103; *Campbell and Cosans v. the United Kingdom* (n 105) § 37.
[301] *Horvath and Kiss v. Hungary* (n 270). § 116
[302] Ibid. § 104.
[303] Ibid. § 128.

Uitz states that "the most significant novelty the *Horváth and Kiss* judgment brings is the Court's analysis on the nature and extent of the state's positive obligation to prevent a well-established, lasting and systemic violation of human rights in the context of education."[304] The ECtHR considered that in cases relating to education, where a group has suffered from discrimination in the past and has remained victim of structural disadvantages, the State needs to provide positive measures to address this kind of discrimination *in order to prevent it*.[305]

As noted before both the *D.H* and *Horvath and Kiss* decisions are seminal cases advancing the ECtHR's jurisprudence on substantive equality in education. In the *D.H case,* the ECtHR refers to "factual inequalities" as an impediment to the Roma children's right to education. These factual inequalities are not the product of the law in question but rather the product of a history of prejudice, stigma and discrimination. In *Horvath and Kiss* the Court further explains what the necessary actions to correct these factual inequalities might imply. Referring to the vulnerability of Roma pupils and the history of discrimination of Roma as group, the Court finds that the State has a positive obligation to undo discrimination past, this might require affirmative action measures.[306]

According to Timmer the novelty in *Horvath and Kiss* is that unlike the previous Roma school segregation cases[307] the Court requires a substantive positive obligation to "avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests."[308] In the past the Court had required procedural obligations from the State, for example "safeguards that would ensure that, in the exercise of its margin of appreciation in the education

[304] Renáta Uitz, 'ECHR BLOG: Horváth and Kiss Judgment on Roma Education: Misdiagnosis of Roma children in Hungarian public education is found to amount to discrimination,' <http://echrblog.blogspot.com/2013/02/horvath-and-kiss-judgment-on-roma.html>.
[305] *Horvath and Kiss v. Hungary* (n 270).§ 104.
[306] Alexandra Timmer, 'Horváth and Kiss v. Hungary: A Strong New Roma School Segregation Case' Strasbourg Observers (06 February 2013) available at: https://strasbourgobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/.
[307] See: *D.H. and Others v. The Czech Republic* (n 270); *Horvath and Kiss v. Hungary* (n 270); *Sampanis and others v. Greece* (n 270); *Oršuš v. Croatia* (n 270).
[308] *Horvath and Kiss v. Hungary* (n 270) § 116.

sphere, the State had sufficient regard to their special needs as members of a disadvantaged group"[309] but this judgment goes beyond that.

For the time being the Court has made it very clear that this positive obligation to "avoid the perpetuation of past discrimination" in education applies in the context of racial and ethnic discrimination, but these obligations could be expanded beyond that. In other contexts, the Court has considered the history of discrimination of other groups, for example people with mental disabilities, people living with HIV as well as LGBT people.[310] Discrimination against LGBT people has been considered by the ECtHR in claims regarding Article 14, and strict scrutiny has been applied when examining State's justifications for limiting their rights. Furthermore, the Court has consistently rejected justifying arguments based on stigma and prejudice.[311] However, there are limited cases in which the Strasbourg Court has required differential treatment for LGBT persons in order to comply with Article 14,[312] and this has certainly not happened yet in the field of education. Taking into consideration the vulnerability of LGBT people as a group the Court could expand its current standards and require substantive positive obligations under Article 2 of Protocol 1 to protect LGBT pupils from stigma and discrimination associated with bullying in an effort to undo discrimination past and factual inequalities.

5.6. Bullying as Discrimination: The Case of Azmi Jubran.

The Canadian case of Azmi Jubran[313] provides a clear example of how the discrimination aspect could play a role in cases of bullying and how Fredman's substantive equality four-

[309] *Oršuš v. Croatia* (n 270) § 182
[310] *Kiyutin v. Russia* (n 257) § 63
[311] *Case of Bayev v Russia* (n 257); *Alekseyev v. Russia* (n 257); *Kiyutin v. Russia* (n 257).
[312] See i.e. *M.C. and A.C. v. Romania* (n 185); *Identoba and others v Georgia* ECtHR (Application no. 73235/12).
[313] *School District No 44 (North Vancouver) v Jubran* [2005] BCCA 201.

dimensional approach could be applied. While it might be considered an old case, Jubran is still considered a landmark decision in bullying jurisprudence in Canada. In the case, the British Columbia Supreme Court clearly states School Boards have an obligation to act within reason to create an environment free of discrimination.[314]

From 1993-1998, Mr. Azmi Jubran attended Handsworth Secondary School in North Vancouver. During this time, he suffered from ongoing harassment, was taunted, punched, pushed, spitted on, urinated on, and was even physically assaulted. Through his high school years Mr. Jubran was called several things amongst others "dork", "geek", and often "gay", and "faggot." Mr. Jubran had made clear to his classmates that he did not identify as gay and it is not a controverted fact of the case, that the students who teased Jubran used homophobic slurs against him well knowing that he was not gay, for the bullies "gay" was just another word of insult.[315]

In 1996 when Mr. Jubran was in grade 10, and because of the harassment he was subjected to, he filed a complaint with the Human Rights Tribunal of British Columbia[316] for "discriminating against him regarding an accommodation, service or facility customarily available to the public because of his sexual orientation" [317] Mr. Jubran argued that employment sexual harassment legislation could appropriately be applied to his case. Jubran considered that the type of behavior he had suffered was analogous to harassment in the workplace.[318] Furthermore, Jubran considered that the liability of the School Board relied on

[314] Elizabeth Meyer, *Lessons from Jubran: Reducing School Board Liability in Cases of Student Harassment* (2006) annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. Vol. 23. 1
[315] *Jubran v Board of Trustees* (BCSC) BCHRT 2002. Par. 36 & *School District No. 44 (North Vancouver) v. Jubran* (n 313). Par 20.
[316] "The B.C. Human Rights Tribunal is an independent, quasi-judicial body created by the B.C. Human Rights Code. The Tribunal is responsible for accepting, screening, mediating, and adjudicating human rights complaints" information available in http://www.bchrt.bc.ca/tribunal/about-us/index.htm.
[317] Section 8 of the Human Rights Code, R.S.B.C. 1996.
[318] *Jubran v. Board of Trustees* (n 315). Par. 76

the School Board's failure to supervise students and enforce the school's code of conduct which prohibited discrimination. [319]

The School Board argued that it could not be held vicariously liable for the actions of students, in any case it could only be held liable for the actions of staff and teachers. Having taken the actions they deemed as necessary once they had become aware of the bullying in 1994, the School Board also argued that it was not the job of the Tribunal to second guess those decisions.[320]

Given that the B.C. Human Rights Code did not contain a definition of harassment, the B.C. Human Rights Tribunal examined the Human Rights Codes of Manitoba, Ontario, Newfoundland and the Yukon and determined harassment was a prohibited conduct. Relying on Canadian[321], American and English jurisprudence the B.C. Human Rights Tribunal concluded that sexual harassment was considered a type of sex discrimination, but harassment can happen on the basis of other prohibited grounds of discrimination as well: "(h)harassment can occur on the basis of any prohibited ground of discrimination and is not restricted to the employment context." [322]

The Human Rights Tribunal found that the actions of harassment against Mr. Jubran coming from his fellow students had a harmful, insulting and demining effect and constituted an unwanted intrusion upon Jubran's dignity.[323] The Tribunal considered that once it was proven that there was a case of discrimination, it was on the School Board to prove that it took measures that "constitute a bona fide and reasonable justification."[324] The B.C. Human

[319] Ibid. Par. 77-78
[320] *Jubran v. Board of Trustees* (n 315). Par 82-84
[321] Janzen v. Platy Enterprises Ltd. (1989), 10 C.H.R.R. D/6205
[322] *Jubran v. Board of Trustees* (n 315). Par 92.
[323] Ibid. Par. 169
[324] Ibid. Par. 161

Rights Tribunal dismissed Jubran's initial arguments that tort law principles were applicable to his case. This notion was incorrect due to the fact that human rights legislation main objective is not to place fault but to find remedies. Relying in Canadian jurisprudence[325] the B.C. Human Rights Tribunal determined that School Boards have a duty to maintain a positive school environment for all persons served by it.[326]

Also relying on human rights jurisprudence, the Tribunal determined that two were the key elements to determine the responsibility of the school even if the perpetrators of the bullying were not faculty or staff of the school: A) the importance of the education of young people is a compelling State interest, and B) the State's obligation to guarantee an environment free of discrimination. [327]

While the B.C. Human Rights Tribunal considered that "there is no evidence that the school condoned harassing conduct, or turned a blind eye to it," [328] it also found that "(a)lthough the administration's strategy of disciplining individual offenders was effective vis-a-vis those individual students, it was not effective in reducing the harassment Mr. Jubran was experiencing on a regular basis." [329] After analyzing the parties' arguments the Tribunal concluded the School Board had fallen short in addressing homophobia and homophobic harassment with its students or take specific measures designed to combat this issue. [330]

The School Board appealed the case. On judicial review, the Supreme Court of British Columbia chamber's judge overturned the Human Rights Tribunal decision based on an error

[325] Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825
[326] *Jubran v. Board of Trustees* (n 315).Par 103.
[327] "Schools are an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it." In Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at Par 42.
[328] *Jubran v. Board of Trustees* (n 315).Par. 136.
[329] Ibid. Par. 138.
[330] Ibid. Par. 158.

of law. The chamber's judge considered that Mr. Jubran did not identified himself or was perceived by his bullies as gay. Justice Stewart was of the opinion that the B.C. Human Rights Tribunal's decision was based on an incorrect interpretation of the B.C. Human Rights Code, which granted protection to a person against discrimination "because of the sex or sexual orientation of that person or class of persons"[331]

The case reached the Court of Appeals for British Columbia, which had to consider two questions: Must a person who complains about discriminatory harassment on the basis of sexual orientation actually be homosexual or perceived by his harassers to be homosexual? and is the School Board responsible where the conduct of students violates the code?[332]

Justice Levine, considered based in existent jurisprudence that human rights legislation aims at "the removal of discrimination" and to "provide relief for the victims of discrimination."[333] Justice Levine established that the purpose of the B.C. Human Rights Code was:

> "to promote and foster human dignity and equality, to prevent discrimination prohibited by the Code, and to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code. One of its purposes is also to provide a means of redress for those persons who are discriminated against contrary to the Code."[334]

As Jubran's complaint fell within the objectives of the B.C. Human Rights Code, Justice Levine sided with the Human Rights Tribunal in that Jubran's harassers had violated his dignity and fostered an environment in which he could not fully participate in school life. [335] Justice Levine considered that, in cases of discrimination under human rights legislation, more weight should be given to the *effect* rather than the *intent*, or "subjective component," to rule on discrimination. Therefore, it did not matter whether Jubran was or was not gay. Neither was it

[331] *Board of School Trustees of School District No 44 (North Vancouver) v Jubran et al* [2003] BCSC 6. Par 13-14
[332] *School District No. 44 (North Vancouver) v. Jubran* (n 313). Par. 1.
[333] O'Malley v. Simpsons-Sears Ltd. (1985), Ontario Human Rights Commission, 547
[334] *School District No. 44 (North Vancouver) v. Jubran* (n 313). Par 36
[335] Ibid. Par 47

relevant how others perceived Jubran or if their intent was homophobic. Justice Levine concluded the grammatical interpretation made by the Chamber's judge was too narrow and inappropriate in the light of the purpose of human rights legislation. [336]

Regarding the second question, Justice Levine considered that although the school had taken disciplinary actions vis-`a-vis individual students, this was not effective in reducing the harassment of Mr. Jubran. Justice Levine further referred to the B.C. Human Rights Tribunal's decision which listed potential actions the school could have taken to address not just bullying but homophobic bullying.

> "Although Handsworth's administration did turn their minds to Mr. Jubran's situation, and discussed different approaches to dealing with it, *the School Board did nothing to address the issue of homophobia or homophobic harassment with the students generally, nor did it implement a program designed to address that issue*. Neither Mr. Rockwell nor Mr. Shaw were given any guidance or direction by the School Board on how to deal with the situation. *I find that the administration had inadequate tools to work with, and insufficient training and education to deal with the harassment*. *The School Board did not seek assistance from those with particular expertise in the field of harassment, homophobic or otherwise, until Mr. Jubran filed his human rights complaint*. By that time, Mr. Jubran was in his fourth year of high school at Handsworth, and the harassment he was experiencing was continuing."[337]

5.7. Lessons from Jubran.

One of the most important lessons of the *Jubran case* is that harassment jurisprudence developed extensively in the field of employment law could be applied in cases of bullying. This factor opened the possibility for Jubran to argue that he was being denied reasonable accommodation in the provision of services. Jette notes that by the time *Jubran* was litigated "Canada had already demonstrated a willingness to adapt human rights principles to address

[336] Ibid. Par 54-56
[337] *Jubran v. Board of Trustees* (n 315). Par. 138.

novel claims of discrimination and harassment when the identity and experience of the complainant does not fit neatly into one of the protected grounds."[338]

The ECtHR has yet to consider harassment as a different kind of discrimination and as seen in the case of *Đorđević* rather examines harassment cases under Article 3 and/or Article 8. The idea of classifying harassment as a form of discrimination different from direct or indirect discrimination is not stretch. Harassment is considered under EU equality directives as a stand-alone form of discrimination.[339] Considering the overlaps between bullying and harassment, it would be helpful for litigation in cases of bullying if/when the Strasbourg Court starts to consider harassment as discrimination.

Jubran is also important as it highlights the obligation of school administrators to keep a school environment free of discrimination, for which positive measures might be necessary. According to Meyer, *Jubran* is a landmark case which provides a deep insight in actions and steps schools can take to accommodate student's specific needs.[340] The original decision from the B.C. Human Rights Tribunal makes a clear list of steps the school board could have taken to address homophobic bullying and harassment.

Another point is that The ECtHR has recognized that under certain circumstances differential treatment might be required under Article 14 to correct inequality, so the idea of accommodating difference, as seen in *Jubran*, could be bridged under the positive obligation under Article 14 in conjunction with some other Article probably Article 3 or 8. In cases of

[338] Maura A Jette, 'Sticks and Stones: Jubran v. Board of Trustees and the Relationship between Homophobic Harassment and Sex Discrimination' (2003) 2 Journal of Law & Equality 286.
[339] Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[340] Elizabeth J Meyer, 'Teachers, Sexual Orientation, and the Law in Canada: A Human Rights Perspective' (2010) 83 The Clearing House: A Journal of Educational Strategies, Issues and Ideas. 94

bullying this reasoning would lead to the average protections provided by the State under Article 3 or 8 and enhance protections necessary to accommodate difference under Article 14 where the bullying is product of discrimination.

5.8. Conclusion.

The ECtHR has embraced promoting substantive equality by looking at the wider context of prejudice, stigmatization, and discrimination certain vulnerable groups experience. One way in which the ECtHR advances substantive equality is by requiring positive obligations from the State under Article 14 claims. For instance, the positive obligations under Article 14 in conjunction with article 3 have required the State to conduct an effective investigation into underlying discriminatory motives in ill-treatment allegations.[341]

In Chapter three it was shown that bullying could amount to ill-treatment and that States are under a positive obligation to protect children from such treatment specially given their vulnerability and the importance of primary education. If there is suspicion that bullying is motivated by hate or prejudice the State might also have a positive obligation to investigate the discriminatory aspect of bullying. The Article 14 positive obligations might also be expanded to the substantive aspect requiring the prevention, sanction and remedy of the discrimination.

In the field of education, while analyzing Article 14 claims together with Article 2 of Protocol 1 the ECtHR has recognized that "the State has specific positive obligations to avoid the perpetuation of past discrimination."[342] Despite the fact the cases studied *D.H* and *Horvath and Kiss* concern State action and structural deficiencies amounting to indirect discrimination, the positive obligation to undo past discrimination could be expanded to actions of private parties. This could be justified by the necessity to protect pupils from systemic inequality

[341] *M.C. and A.C. v. Romania* (n 185).
[342] *Horvath and Kiss v. Hungary* (n 270). § 116.

whether this is the product of State action or private parties. Positive obligations under Article 14 could be enhanced by examining the vulnerability of pupils belonging to certain minority groups. In cases of homophobic bullying, for instance, the history of discrimination and stigma against sexual minorities could trigger the substantive positive obligation to prevent, sanction and remedy discriminatory bullying in order to correct factual inequality. The State could be responsible from a violation of Article 14 for failure to take the necessary actions to protect against discriminatory bullying.

In *Jubran*, for example, the liability of the school was found partly due to the importance of the context of education as a compelling State interest and the obligation of the State to provide an educational environment free of discrimination. Given the objectives of Canadian human rights legislation of providing remedy to the victims of discrimination, to transform structures of inequality and change broad patterns of discrimination, it was determined the School Board had fallen short in taking actions specifically tailored to address homophobic bullying.

For the time being it is only speculation if the European Court of Human Rights would be willing to provide enhanced protections under Article 2 of Protocol 1 in conjunction with Article 14 to cases of homophobic and transphobic bullying, but I do believe that there are already recognized standards that could apply.

Concluding remarks.

UN human rights monitoring bodies have characterized bullying as a human rights problem in broad terms, for example as a violation to children's right to education, personal development or personal integrity (just to name a few). Moreover, there is a great amount of UN reports and soft-law recommendations that aim to tackle the problem of bullying as a universal concern, however, to date there is not a single human rights treaty that explicitly mentions bullying as a human rights violation.

The first part of this thesis aimed at understanding how current standards applied by the ECtHR, the IACtHR in cases related to degrading treatment or violations against private life could be extended to cover cases of bullying. It was found that positive obligations giving rise from the prohibition on degrading treatment or the protection of private life have been interpreted by both the ECtHR and the IACtHR to cover rights violations perpetrated by private parties. In this sense cases of peer-to-peer bullying could be covered as well, and the State would be under a positive obligation to protect children, prevent the violation of their rights, investigate, sanction and remedy (if possible) rights violations such as bullying.

The scope of such positive obligations will be related to the specific circumstances of the case, the infringed rights given rise to them, but also the vulnerability of the victim. The concept of vulnerability as a legal argument has been used by the ECtHR to enhance protections for people or groups the Court considers vulnerable and broaden the scope of positive obligations.

Among CoE Member States even when it is considered that at its most basic level the State can discharge itself from the positive obligations giving rise from under Article 3 or 8 by having some sort of regulation, either legislative or administrative to deter private individuals from

violating each other rights,[343] as seen in this thesis prevention does not necessarily means criminal law provision. This is especially true if one were to consider the vulnerability of the perpetrators of bullying, which like the victim, are also children, also vulnerable, and entitles o protections under articles 3a and 8 even when it concerns possible sanctions.

The ECtHR has considered the vulnerability of children in a great number of cases considering different context such as domestic violence, school punishment and sexual abuse. The vulnerability analysis of the victim seems to affect the measures the State ought to take in order to provide effective protection. In cases of bullying the vulnerability of children and especially LGBT children could require from the State comprehensive positive measures to deal with their specific needs, this would of course depend on the specific circumstances of the case, but is likely that a victim of bullying would need more protection that a general policy expressing opposition to bullying. Similar to the case of *Đorđević*, concerning the rights of a person with disability in a vulnerable situation like children, policy and comprehensive measures which include the provision of social services might be needed in order to afford effective protection. The vulnerability of children seems also to have been considered by the Court in regards to cases of violence where the perpetrators where children.[344] In a case of bullying this could be reflected when considering effective respect in regards to the bully's rights.

Another element to consider regarding the protection owed to children by the State is the importance of education as a primary State interest. This was aspect was explicitly mentioned in both *O'Keeffe* and *Jubran*. Considering the context of education seems to lead to a more stringent approach in regards to the protections necessary to secure children's well-being whether the education institution is public or private. This is an area that needs further research,

[343] Xenos (n 49). 107.
[344] *Đorđević v. Croatia* (n 100); *Đurđević v. Croatia* (n 178).

at least in the case of the ECHR, which hopefully could be better answer when further elaboration is given by the Court through its case law.

The last chapter tried to address the vulnerability of LGBT people through the lens of stigma, and how positive obligations emerging from the anti-discrimination could serve bullying litigation. Chapter 5 findings state that in cases where discrimination plays a role, especially in regards to children's right to education, the ECtHR has interpreted a new emerging set of positive obligations to undo past discrimination and factual inequality. Peroni argues that these new approach is a new path towards substantive equality. While these obligations to undo discrimination past have only been applied in respect to racial and ethnic discrimination in the field of education, in other contexts it has covered other grounds including sexual orientation.

As demonstrated in this thesis there is still a lot of room for interpretation in regards to international human rights protections that Courts could apply to bullying. In some domestic jurisdictions – at least in the case of British Columbia, Canada - legal approaches to bullying might be more advanced, comparing bullying to harassment seems to have worked with great results to the applicant in the case of *Jubran*. Perhaps further research could focus on domestic court's approaches to bullying in order to draw lessons from there.

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