FACULTY OF LAW AND CRIMINOLOGY

Locked up, logged off

A closer look at protection and provision of Internet access for prisoners within the ECHR framework

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We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

- Franklin D. Roosevelt, 1944 State of the Union address

I implore the reader to ask for themselves: how much has Internet access become a prerequisite for the effective enjoyment of these self-evident rights for you?

SAMENVATTING

Naarmate de effectieve uitoefening van internationaal en regionaal erkende mensenrechten zoals vrijheid van meningsuiting, het recht op het ontvangen van informatie en het recht op onderwijs verplaatsen naar een online omgeving, worden we meer en meer afhankelijk van internettoegang. In landen waar grote ondernemingen infrastructuur bouwen en overheden zich inzetten om ook voor de minderbedeelden internettoegangspunten te voorzien, lijkt de vraag of er mensenrechtenclaims zijn op internettoegang abstract en overbodig. Voor een specifieke groep in diezelfde samenleving is dit echter niet het geval: gevangen. Ook zij beschikken over dezelfde mensenrechten, maar worden systematisch uitgesloten van het internet.

Daarom onderzoekt deze masterproef of en op welke manier het Europees Hof voor de Rechten van de Mens lidstaten verplichtingen oplegt inzake internettoegang voor gevangenen. Uit rechtspraakanalyse blijkt dat het Hof uitsluitend een rechtmatigheidstest toepast in gevallen dat lidstaten internettoegang toekennen aan gevangen, ongeacht de reikwijdte van de verleende internettoegang. Het feit dat het Hof de toepassing van deze wetmatigheidstest laat afhangen van nationale wetgeving is hoogst problematisch omdat het daardoor lidstaten indirect aanspoort om internettoegang expliciet uit te sluiten voor gevangenen. Tevens toont de analyse aan dat deze rechtspraak in principe ingaat tegen eerdere rechtspraak inzake internettoegang.

Verder duidt dit onderzoek aan dat het Hof nalaat om aan staten positieve verplichtingen tot het voorzien van internettoegang voor gevangen op te leggen. Aan de hand van onderzoek naar de ontwikkeling van positieve mensenrechtenverplichtingen door het Hof reikt dit onderzoek enkele redelijke elementen aan dat het Hof zou kunnen hanteren in de ontwikkeling van zulke positieve verplichting.

Om de bovenstaande bevindingen te staven, past dit onderzoek ten slotte deze conclusies toe op een hypothetische zaak voor het Hof. Deze hypothetische zaak kent grote gelijkenissen met bepaalde hangende zaken voor Belgische rechtbanken en laat toe om te voorspellen hoe het Hof op basis van haar rechtspraak Belgische gevangenisrecht zou beoordelen en de gevangenen al dan niet een recht op internet zou toekennen.

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Uiteraard kunnen mijn mama, papa en zusje niet ontbreken. Jullie hebben me altijd zo veel en zo intensief gesteund dat ik niets anders wou doen dan jullie trots maken en een goed voorbeeld zijn. De liefde en steun die jullie me gegeven hebben tijdens, maar ook voor deze opleiding vormde een bron voor onuitputtelijk doorzettingsvermogen.

Dit academiejaar stond helemaal in het teken van de Jessup Moot Court. Team 316, bestaande uit drie knotsgekke geniale dames en ik, trotseerde verschillende universiteiten van over de hele wereld. Die 49^{e} plaats van de 574 was bitter-sweet niet omdat ik per sé wou winnen, maar vooral omdat het hard werk van Liselotte, Matilde, Mira, Joyce, Laurence en Prof. Maes echt meer erkenning verdiende.

Een vriend als Simon wens ik iedereen toe. Samen kunnen we zeveren, lachen en Jesus doen dabben, maar evenzeer zware discussies voeren of over moeilijke gevoelens spreken. Die Spaanse lessen waren niet echt leerrijk, maar de goede vriend die ik eraan over hield is onbetaalbaar.

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I. INTRODUCTION

A. INTRODUCTION TO THE RESEARCH QUESTIONS

Internet access is important. To an increasing number of persons, it is, for daily tasks like work, education, and communication with others, vital.[1] Accordingly, the influence of Internet on our daily lives and the protection of human rights on the Internet are widely discussed topics. However, the occurrence of Internet-shutdowns[2], disproportionate content bans[3] and even the adoption of a law allowing State authorities to cut off individuals' Internet access merely as punishment for copyright infringement[4], demonstrate the fragile relation between this important technological invention and our claims of access thereto.

The dependency on Internet access to engage with and belong to society is painstakingly visible among prisoners. Education, news, information held by public authorities and contact with loved ones are aloof for those finding themselves in prison. The weak public concern for prisoners' rights does not account for this increasing dependency on Internet access and risks to marginalize an important part of our community. To prevent our prisons from becoming *oubliettes*, a legal research is warranted.

B. RESEARCH QUESTIONS

The following research attempts to answer exhaustively four research questions.

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[1] Max R, Ritchie H and Ortiz-Ospinoza E, 'Internet' (*Our World in Data*, 2015) <https://ourworldindata.org/internet#citation> (last accessed 14 May 2021).

[2] Access Now, 'Shattered Dreams and Lost Opportunities: A Year in the Fight to #KeepItOn' (*Access* Now, 2021) <https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf> (last accessed 14 May 2021).

[3] Niaki AA and others, 'ICLab: A Global, Longitudinal Internet Censorship Measurement Platform', *2020 IEEE Symposium on Security and Privacy (SP)* (IEEE 2020) <https://ieeexplore.ieee.org/document/9152784/> (last accessed 14 May 2021); Ovida S, 'What Internet Censorship Looks Like' *New York Times* (New York City, 21 January 2021) <https://www.nytimes.com/2021/01/21/technology/internet-censorship-uganda.html> (last accessed 14 May 2021).

[4] French Law 2009-669 protecting the diffusion of content on the Internet of 12 June 2009, published 13 June 2009 (Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet) as explained by Lucchi N, *The Impact of Science and Technology on the Rights of the Individual*, vol 26 (Springer International Publishing 2016) 58 <http://link.springer.com/10.1007/978-3-319-30439-7> (last accessed 14 May 2021); Pollicino O, 'The Right to Internet Access: Quid Iuris?' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 267-268.

1. Which negative and positive obligations does the European Court of Human Rights ("ECtHR" or "the Court") impose upon States concerning Internet access for prisoners?

The main attempt of this research question is to summarize the jurisprudence of the ECtHR on the interpretation of the European Convention on Human Rights ("ECHR")[5] regarding negative and positive obligations of States concerning Internet access for prisoners. The reason why these two types of obligations are handled jointly, is simply because the Court by virtue of one recurring paragraph consistently excludes the existence of positive obligations of States to provide prisoners with Internet access.

2. What are the general consequences of the Court's jurisprudence concerning Internet access for prisoners?

This research question does not attempt to answer what the specific consequences are per Council of Europe ("CoE") Member State, but generally reflects upon the potential effects of caveats within the jurisprudence as summarized under research question one. This research question is extremely important as most commentaries of this jurisprudence assume that because the Court extended prisoners' already existing Internet access, that this will be the case generally.

3. Does the Court's general jurisprudence concerning positive obligations provide for meaningful arguments in the development of State's positive obligation to provide prisoners with Internet access?

The aforementioned will demonstrate that States do not have by virtue of the Court's jurisprudence any positive obligation to provide their prisoners with Internet access *in abstracto*. However, the aforementioned will also show that the Court has shied away from interpreting one specific case lodged before it as concerning positive obligations, whereas the question did concern exactly that. Therefore, a presumption is made that the Court to some degree purposefully shies away from the formulation of positive obligations in this regard. This research question accordingly takes a general look into the Court's case-law concerning positive obligations under civil and political human rights law, as well as the Court's interpretation of the ECHR to protect social, economic, and cultural human rights in order to develop some reasonable criteria the Court could use in the formulation of positive obligations of States concerning Internet access for prisoners.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953).

4. How would the Court's jurisprudence concerning Internet access for prisoners apply in a case similar to one currently pending before Belgian courts?

In the summer of 2020, several prisoners in Leuven-Centraal, a Belgian prison, lodged an application before Belgian courts because they were denied Internet access for the purposes of higher education.[6] Given that the aforementioned will have demonstrated that the Court attributes great weight to the particular domestic laws and practice in the analysis of the lawfulness of restrictions of prisoners' Internet access, this last research question applies the Court's reasoning to Belgian law, specifically within the context of the Leuven-Centraal prison.

C. THE METHODOLOGY

The first three research questions have been answered by way of literature research. The author started from the relevant case-law by the ECtHR. For the contextualization of this case-law, the author relied on official guides on ECtHR case-law as developed by the Court[7] and three general handbooks concerning the Court.[8] Additionally, the author read several articles concerning the specific topic of Internet access for prisoners, which by application of the snowball method resulted in many directly or indirectly relevant literary sources.

The fourth question however pertains to the situation in a specific Belgian prison and called for more groundwork. The author thus firstly informally had several conversations with the lawyer representing the prisoners involved in the specific case, who explained their grievances and the specific situation in the Leuven-Centraal prison. Additionally, the coordinator of Vocvo (the institution tasked by the

[6] Scheerlinck H, 'Gevangenen dagvaarden Belgische Staat omdat ze geen online les mogen volgen aan KU Leuven' *VRT NWS* (Leuven, 19 June 2020) <https://www.vrt.be/vrtnws/nl/2020/06/19/gevangenen-ku-leuven-online-lessen/> (last accessed 16 May 2021).

[7] European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights, prisoners' guide' (31 December 2020) <https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf> (last accessed 8 April 2021); European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights, Freedom of Expression' (31 August 2020) < https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf> (last accessed 2 May 2021); European Court of Human Rights, 'Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, Right to Education' (31 December 2020) < https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf > (last accessed 8 April 2021).

[8] Van Dijk P and others, *Theory and Practice of the European Convention on Human Rights* (5th edition, Intersentia 2018); Schabas WA, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015); Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020).

Flemish Government with coordinating education to prisoners in Flemish prisons) answered some general questions concerning Internet access for prisoners during a phone-call.

D. STRUCTURE AND FOCUSSES

1. Why a human rights approach?

Human rights generally, and more specifically the ECHR, mainly regulate the relation between States and individuals within their jurisdiction. Letsas, even more tellingly states

> [t]he purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will of their state, rather than give effect to that will.[9]

The human dignity and essential living conditions of prisoners are in the hands of States and specialized institutions. Prisoners in that regard do not always enjoy sympathy from the general public. They thus form a minority, separated from the free not only by walls, but also by exclusion from the public debate and even then, by stigma. Hence, human rights are an important means for prisoners to seek treatment in line with traditional and evolutive principles of human dignity, not or ill-supported by democratically elected individuals.

2. Why the ECHR?

This research focusses on the ECHR and the interpretation thereof by the ECtHR for several reasons.

a) Territorial application

Firstly, with 47 member States, the territorial jurisdiction of the EC(t)HR extends from Iceland to Vladivostok[10] and far beyond[11]. Additionally, the jurisprudence by the Court is also relevant for purposes outside of this jurisdiction, as showcased for example by the weight attributed thereto by the International Court of Justice.[12] The advantage of a human rights convention extending in application beyond the traditional European western States is showcased by the Courts jurisprudence relating to Internet access which mainly concerns applications lodged against Turkey and Russia.

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[9] Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 74.

[10] Greer S, *The European Convention on Human Rights* (Cambridge University Press 2006) 1.

[11] *AlSaadoon and Mufdhi v. the United Kingdom* App no 61498/08 (ECtHR 30 June 2009) [86]-[89]. See more recently, yet less decisive on this regard *Georgia v. Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) [136], [175] and [269].

[12] *Ahmadou Sadio Diallo* (*Guinea v Congo*) (Merits) [2010] ICJ Rep 639 [68].

b) Binding case law

The binding judgements by the supranational ECtHR have rendered the ECHR a "*human rights protection system of unparalleled effectiveness*".[13] These judgements constitute an important source of law within the framework of the ECHR as they are considered *res interpretata* for other member States; the Court in 2002 adjudged that

> […] in the interests of legal certainty, foreseeability, and equality before the law […] should not depart, without good reason, from precedents laid down in previous cases.[14]

c) Concrete negative and positive obligations

These two elements imply a final and most important reason for the focus on the ECHR: the Court's jurisprudence allows for a discussion of concrete negative and positive duties. The Court translates generally defined human rights to concrete positive and negative duties of States in its case-law. This is specifically helpful for the purposes of researching the connection between human rights and Internet access. Take for example the New York Times opinion "*Internet Access Is Not A Human Right*" by Vinton G. Cerf, one of the co-developers of the World Wide Web, in which he stated the following:

> The best way to characterize human rights is to identify the outcomes that we are trying to ensure. These include critical freedoms like freedom of speech and freedom of access to information - and those are not necessarily bound to any particular technology at any particular time.
>
> […]
>
> Improving the Internet is just one means, albeit an important one, by which to improve the human condition. It must be done with an appreciation for the civil and human rights that deserve protection — without pretending that access itself is such a right.[15]

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[13] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 32 referring to Ryssdal R, 'The Coming of Age of the European Convention of Human Rights', European Human Rights Law Review (1996) 18, 18. The author does note that recently, Russia refused to follow an interim judgement by the ECtHR requiring the release of Aleksey Navalny. This raises the question regarding the future effectiveness of the ECtHR in cases concerning disputes of a highly sensitive nature. See BBC News, 'Navalny must be freed, European rights court tells Russia' *BBC News* (London, 17 February 2021) < https://www.bbc.com/news/world-europe-56102257> (last accessed 16 May 2021).

[14] *Christine Goodwin v. United Kingdom* App. no 28957/95 (ECtHR, 11 July 2002) [74]. See also See also Arnardóttir OM, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 European Journal of International Law 819 <https://doi.org/10.1093/ejil/chx045> (last accessed 2 May 2021).

[15] Cerf VG, 'Internet Access Is Not a Human Right' *New York Times* (New York City, 4 January 2012) <www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1&ref=opinion> (last accessed 23 April 2021).

The problem of such discourse is that it omits questions of concrete duties of States, remains vague and makes a discussion of human rights appear theoretical. The Court's case law allows us to move beyond such abstract framing by analyzing *ratio decidendi* of the Court's binding jurisprudence which has real effects in a broad territorial scope.

II. WAIT, PRISONERS HAVE HUMAN RIGHTS?

A. OBJECT AND PURPOSE

The aim of this first chapter is to illustrate that prisoners, especially within the framework of the ECHR, retain all human rights apart from liberty and thus may not be subjected to arbitrary or disproportional restrictions of their human rights. This chapter showcases how within a European context, treatment of prisoners is based on two basic principles: the principle that it is morally unjustified to treat prisoners as second-class citizens and the principle that imprisonment serves primarily the purposes of rehabilitation and reintegration.

B. NORMATIVE CONCEPTS CONCERNING THE TREATMENT OF PRISONERS 101

The treatment of prisoners is an issue widely discussed and reflected upon throughout human history. Jeremy Bentham puts it plainly.

> To please everybody, is acknowledged to be in no instance a very easy task. There are perhaps few instances in which it is less so than this of penitentiary discipline. There are few subjects on which opinion is more under the sway of powers that are out of the reach of reason. Different tempers prescribe different measures of severity and indulgence. Some forget that a convict in prison is a sensitive being; others, that he is put there for punishment. Some grudge him every gleam of comfort or alleviation of misery of which his situation is susceptible: to others, every little privation, every little unpleasant feeling, every unaccustomed circumstance, every necessary point of coercive discipline, presents matter for a charge of inhumanity.[16]

1. Less-eligibility principle

The concept of less-eligibility for prisoners encompasses the idea that prisoners' standard of living should not be superior to that of individuals of the lowest significant social class in that society.[17] Melossi defines this principle even more determinatively on the basis of the highly authoritative work on this topic by Rusche and Kirchheimer as follows:

> […] the standard of living within prisons (as well as for those dependent on the welfare apparatus) must be lower than that of the lowest stratum of the working class, so that, given the alternative, people will opt to work under these conditions, and so that punishment will serve as a deterrent.[18]

This principle finds its origin in the 18th and 19th utilitarian school of thought as a consequence of prevailing poverty in the English States. As a guiding principle, philosophers and politicians assessed

[16] Jeremy B, *The Works of Jeremy Bentham* (John Bowring ed William Tait 1843).

[17] Sieh EW, 'Less Eligibility: The Upper Limits Of Penal Policy' (1989) 3 Criminal Justice Policy Review 159, 159.

[18] Sieh EW, 'Less Eligibility: The Upper Limits Of Penal Policy' (1989) 3 Criminal Justice Policy Review 159, 159.

that aid to non-working individuals should not render that class more eligible than those working, as this would incentivize the latter category to join the non-working, pauper class. This theory presupposes that maintaining horrendous living conditions for the lowest classes of society will stimulate labor amongst individuals. Applied to prisons, the aim is to disincentivize individuals from committing crimes by substantially and perceptively maintaining living conditions in prison equal or lower than those of the lowest and poorest classes of society.[19]

One of the basic premises of the less-eligibility principle is the relative function thereof. Namely, a comparison between prisoners and the lowest classes of society. Given that the principle emanates from a purely domestic application[20] and the fact that living conditions of the lowest classes of society undergo extreme variations depending on States, it is reasonable to interpret and apply this principle in a purely domestic situation. Put simply by Friday:

> A society without slums cannot let their prisoners live under slum conditions; a society which has accepted collective responsibility for the physical and economic welfare of its citizens cannot abut the rights of even those who transgress against its rules.[21]

Friday with this proposition defends that living conditions in Swedish prison are therefore not comparable to those in poorer States, exactly because of the general high standard of living in the Swedish society as a whole.[22]

2. Principle of normalization

In contrast to the principle of less-eligibility, current European prison policy and legislation is mainly based on the principle of normalization.[23] This principle is based on respect for human dignity and presupposes that a prison sentence entails harm on the prisoners. The aim is to reduce this harm as much as possible by introducing the positive effects of free life in prison for the purposes of rehabilitation and reintegration. A basic aspect of this principle is that prisoners retain all other human rights apart from the right to liberty; limitations on other human rights can only be justified insofar they are a necessary

[19] Sieh EW, 'Less Eligibility: The Upper Limits Of Penal Policy' (1989) 3 Criminal Justice Policy Review 159,159-163.

[20] Given the development and initial exclusive application in the English State: [20] Sieh EW, 'Less Eligibility: The Upper Limits Of Penal Policy' (1989) 3 Criminal Justice Policy Review 159, 159-163.

[21] Friday PC, 'Sanctioning in Sweden: An Overview' (1976) 40 Federal Probation 48.

[22] Friday PC, 'Sanctioning in Sweden: An Overview' (1976) 40 Federal Probation 48.

[23] See Rule 5 Council of Europe, 'Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules' (Strasbourg, 11 January 2006).

implication of the deprivation of liberty. Accordingly, prison conditions should resemble to the greatest extent reasonable those of free life.[24]

By application of this principle, prisoners have been allowed to maintain contact with their family by means of visits, written correspondence, and telephone. Additionally, means of entertainment such as books, magazines and television are allowed and increasingly perceived as a right of prisoners.[25]

3. Application to Internet access

Arguably, in States where even the poorest individuals have access to Internet (think for example through means of computers at public libraries), the less-eligibility principle would not necessarily constitute an obstacle to extending such access to prisoners. Given that even the poorest citizens in states such as Denmark, Sweden, or Iceland[26] are able to access the Internet, as evidenced by near total Internet usage in these States, granting prisoners Internet access would namely not entail a treatment superior to the "*lowest classes of society*". Even more so, specific content restrictions for prisoners (for example a prohibition on social media) would meet the more severe standard of less-eligibility: a treatment worse than even the "*lowest classes of society*" and hence -arguably- disincentivize individuals to commit crimes, as Internet access would in any event be more limited in prison than in the free world.

Nevertheless, the principle of normalization is one of the general core foundations of the current European penal policy, which introduces the question: should the positive aspects of Internet access be introduced in prison?

This is an important question, but not the main subject of this research. Instead, this thesis addresses States' current human rights obligations regarding Internet access for prisoners within the context of the ECHR with the aim of giving an overview thereof. This on turn allows for scrutiny. In that sense, this research functions primarily as an answer to the question of legal remedies for prisoners in obtaining Internet access, not as guide thereto.

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[24] See generally: van Zyl Smit D and Snacken S, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2009) 99-105. On the issue of Internet access for prisoners in Belgium: Maes E and others, 'PrisonCloud Voor Gedetineerden. Grenzen Aan Digitale Normalisering?' (2019) 40 Panopticon 29.

[25] Maes E and others, 'PrisonCloud Voor Gedetineerden. Grenzen Aan Digitale Normalisering?' (2019) 40 Panopticon 29, 34-35.

[26] World Bank, 'Individuals using the Internet (% of population)' (*Worldbank*, 2021) < https://data.worldbank.org/indicator/IT.NET.USER.ZS> (last accessed 4 May 2021).

C. THE EUROPEAN COURT OF HUMAN RIGHTS AND PRISONERS

The European Court of Human Rights plays an important role in the protection of all prisoners under the jurisdiction of contracting States to the ECHR. The scope of this protection primarily concerns prisons of CoE Member States on their respective territory, but also extends to individuals under physical power and control of Member States extra-territorially.[27]

In *Hirst*, the Court very clearly outlined its perception on the human rights of prisoners:

> In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. […]
>
> Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment […].[28]

Prisoners thus lose their right to liberty but retain their other human rights within this framework. This follows from the object and purpose of the Convention, namely the protection of human dignity of all individuals, including prisoners.[29] Therefore, States must organize their penitentiary system in such a way as to protect prisoners' dignity, regardless of financial or logistical difficulties.[30]

1. Derogable human rights of prisoners

Certain rights within the Convention are non-derogable: a prisoner never loses the right to life[31], or the right to a fair trial[32], nor can prisoners be subjected to torture[33], forced labor[34] or punishment without a legal basis[35] as understood within the framework of the ECHR.

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[27] *AlSaadoon and Mufdhi v. the United Kingdom* App no 61498/08 (ECtHR 30 June 2009) [86]-[89]. See more recently, yet less decisive on this regard *Georgia v. Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) [136], [175] and [269].

[28] *Hirst v. the United Kingdom (no. 2)* App no 74025/01 (ECtHR, 6 October 2005) [69].

[29] *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015) [89]-[90] and *Vinter and Others v. the United Kingdom* App nos. 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013) [113].

[30] *Muršić v. Croatia* App no 7334/13 (ECtHR, 20 October 2016) [99]; *Neshkov and Others v. Bulgaria* App nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 1 June 2015) [229].

[31] Art. 2 ECHR.

[32] Art. 6 ECHR.

[33] Art. 3 ECHR.

[34] Art. 4 ECHR.

[35] Art. 7 ECHR.

However, other provisions within the ECHR are derogable: States may interfere with these rights if these restrictions are justified. For Arts. 8-11 ECHR, interferences must fulfill the cumulative criteria of the three-step-test. Interferences with other human rights in the ECHR, such as the right to education[36] only require a general proportionality analysis. As noted by the Court in *Hirst*, deprivation of liberty necessarily entails restrictions on these rights, but justification in line with the aforementioned standards of the ECHR is still required.[37] This entails generally that *intra muros*, the enjoyment of human rights may be more limited than outside of prison. For example, the Court has adjudged that while prisoners retain a right of contact with their family under Art. 8 ECHR, supervision on communication with the outside world or during family visits might be necessary and hence justified.[38]

Ultimately while the Court has underlined that imprisonment has a punitive aim[39] and the aim to protect the general public[40], it has increasingly put an emphasis on the rehabilitative function of a prison sentence.[41]

D. CONCLUSION

Prisoners should not become the subject of arbitrary or indiscriminate restrictions of their dignity and more generally their human rights. This follows from the principle of normalization as upheld generally by the ECtHR. The question thus rises to what extent prisoners have a justiciable right to Internet access within the framework of the ECHR.

[36] Art. 2 Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1950, entered into force 18 May 1954) ("AP1").

[37] See also Brems E and Voorhoof D, 'Politieke vrijheden van gedetineerden: vrijheid van meningsuiting, recht op toegang tot informatie, vrijheden van vergadering en vereniging, recht op deelname aan verkiezingen.' in Eva Brems and others (eds), *Vrijheden en vrijheidsbeneming, mensenrechten van gedetineerden* (Intersentia 2005) 82.

[38] See for example *Aliev v. Ukraine* App no 41220/98 (ECtHR, 29 April 2003) [187].

[39] *Murray v. the Netherlands* App no 10511/10 (ECtHR, 26 April 2016) [101].

[40] *Mastromatteo v. Italy* App no 37703/97 (ECtHR, 24 October 2002) [72].

[41] *Murray v. the Netherlands* App no 10511/10 (ECtHR, 26 April 2016) [101]-[104].

III. INTERNET ACCESS FOR PRISONERS BY VIRTUE OF ART. 10 ECHR: A TALE OF DOUBLE STANDARDS AND A LACK OF POSITIVE OBLIGATIONS

A. OBJECT AND PURPOSE

This chapter addresses the first three research questions specifically in light of Art. 10 ECHR. Corresponding with these questions respectively, this chapter firstly summarizes the Court's jurisprudence regarding this issue. Secondly, an assessment shall be made of the consequences of this jurisprudence. Ultimately, by means of doctrine based on the Court's jurisprudence concerning State's positive obligations generally, this chapter shall address how the Court could potentially develop concrete and reasonable positive obligations for States to provide Internet access to prisoners by virtue of Art. 10 ECHR.

In order to contextualize the aforementioned however, this chapter firstly addresses States' general negative obligations under Art. 10 ECHR and the specific jurisprudence concerning Internet access *extra muros*.

B. GENERAL DUTIES TO NOT INTERFERE WITH FREEDOM OF EXPRESSION

1. Negative duties under freedom of expression: a general introduction

Art. 10 (1) ECHR protects the right to freedom of expression, encompassing "*the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*". The Court has held that this right constitutes "*one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man*".[42] Hence, the substantive scope of this right is rather broad; not only opinions and expressions of a political nature fall under the purview of the protection of Art. 10 ECHR, but also instances of artistic expression[43], information of commercial nature[44], publications of photographs[45] or even choices of clothing[46] are protected forms of expression within the framework of Art. 10 ECHR.[47]

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[42] *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49].

[43] *Müller and Others v. Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [27].

[44] *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* App no 10572/83 (ECtHR, 20 November 1989) [26]; *Casado Coca v. Spain* App no 15450/89 (ECtHR, 24 February 1994) [35]-[36]; *Mouvement raëlien suisse v. Switzerland* App no 16354/06 (ECtHR, 13 July 2012) [61].

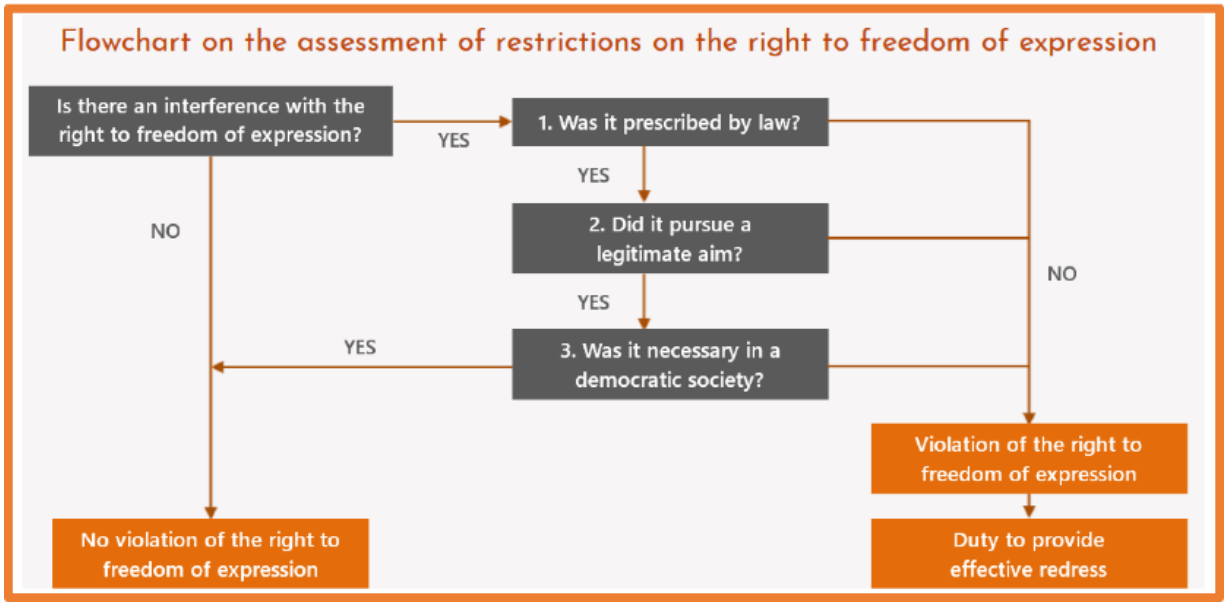
[45] *Axel Springer AG v. Germany* App no 39954/08 (ECtHR, 7 February 2012).

[46] *Stevens v. the United Kingdom* App no 11674/85 (Commission Decision 3 March 1986, DR 46) p. 245.

[47] However, the Court has been reluctant to define accurately the scope of Art. 10 ECHR; in certain cases of 'hate-speech'or Anti-semitism, the Court has categorically resided to Art. 17 ECHR and

The negative obligation entails that States may not interfere with the freedom of individuals to hold opinions, and to receive and impart information and ideas regardless of frontiers. In light of the effective protection of Art. 10 ECHR, States *inter alia* may not interfere with the means of dissemination of expression and information.[48] The right to receive information specifically prohibits States from restricting access to information that others wish or may be willing to impart to individuals.[49]

Interferences of this right can only be lawful if they meet the cumulative criteria of the three-step-test under Art. 10 (2) ECHR. Namely, 1) the interference must be prescribed by law 2) must pursue one of the legitimate aims as exhaustively listed under Art. 10 ECHR and 3) must be necessary in a democratic society. The aforementioned can be visualized in the following manner[50]:



adjudged that the applicants could not rely on the protection of Art. 10 ECHR given their abuse of rights. This method of handling such cases has been critiqued for obscuring the scope of Art. 10 ECHR, especially when the three-step-test is adequate to adjudge such cases. See generally: Cannie H and Voorhoof D, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' (2011) 29 Netherlands Quarterly of Human Rights 54. See more recently: Shattock E, 'Should the ECtHR Invoke Article 17 for Disinformation Cases?' (*EJIL:Talk!*, 2021) <https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/> (last accessed 1 May 2021).

[48] *Autronic AG v. Switzerland* App no 12726/87 (ECtHR, 22 May 1990) [47].

[49] *Magyar Helsinki Bizottsag v. Hungary* App no 18030/11 (ECtHR, 8 November 2016) [156], *Leander v. Sweden* App no 9248/81 (ECtHR, 26 March 1987) [74].

[50] Noorlander P, 'Freedom of Expression Module 1, Introduction' (Presentation) <https://rm.coe.int/20201210-noorlander-help-course-on-freedom-of-expression/1680a0ccc9> (last accessed 21 April 2021).

2. What are interferences by public authorities as understood within Art. 10 ECHR?

The effective protection of Art. 10 ECHR is firstly dependent on the scope of "*interference by a public authority*": the Court will namely dismiss a restriction not amounting to such an interference.[51]

Ratione personae, the Court interprets this criterion broadly. For example, the Barcelonian Bar was determined to be public authority for its domestic basis as an institution of public law; *a fortiori* proven by the general interest it served.[52]

Ratione materiae, the scope of interferences appears broad from the jurisprudence of the Court, stating that this may concern measures such as "*formality, condition, restriction or penalty*".[53] The adoption of legislation having the effect of broadly suppressing specific types of opinion, which thus imposes chilling-effects on individuals, can be considered as an interference with Art. 10 ECHR, even where such measures did not directly concern a specific individual.[54] Mere threats of prosecution or criminal proceedings before military courts can equally impose such chilling-effects and thus concern such interferences.[55] The assessment depends on a case-by-case assessment of the Court; characterizations by domestic courts are not determinative.[56] In that respect, prohibition of publications[57], a judicial decision preventing a person from receiving transmissions from telecommunication satellites[58] but also the removal of artworks with sexual imagery of unidentified minors[59] are examples of what the Court judged to be interferences with Art. 10 ECHR.[60]

This broad reading follows from an effective interpretation of Art. 10 ECHR: if certain restrictions would not qualify as interferences by public authorities, the protection of Art. 10 ECHR would only apply to restrictions that have met a gravity threshold, making the protection of Art. 10 ECHR for a

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[51] Schabas WA, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 453.

[52] *Casado Coca v. Spain* App no 15450/89 (ECtHR, 24 February 1994) [38]-[39].

[53] *Wille v. Liechtenstein* App no 23118/93 (ECtHR, 25 November 1999) [43].

[54] *Vajnai v. Hungary* App no. 33629/06 (ECtHR, 8 October 2008) [54].

[55] *Dilipak v. Turkey* App no 29680/05 (ECtHR, 15 September 2015) [50].

[56] *Yılmaz and Kılıç v. Turkey* App no 68514/01 (ECtHR, 17/07/2008) [58]; *Bahçeci and Turan v. Turkey* App no 33340/03 (ECtHR, 8 August 2011) [26]. This appears to be in line with the concept of "*autonomous concepts*" as defined by Letsas, see 206.

[57] *Cumhuriyet Vakfı and Others v. Turkey* App no 28255/07 (ECtHR, 8 October 2013).

[58] *Khurshid Mustafa and Tarzibachi v. Sweden* App no 23883/06 (ECtHR, 16 December 2008) [32].

[59] *Ulla Annikki Karttunen v Finland* App no 1685/10 (ECtHR, 10 May 2011).

[60] See also: Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 491.

large part of potential applicants merely "*theoretical and illusory*"[61]. Therefore, in line with its jurisprudence, the Court shall always interpret a real and concrete restriction on the rights protected under Art. 10 ECHR as an interference therewith.[62]

3. The three-step-test

The actual assessment of whether restrictions are lawful is situated at the level of the three-step-test.

For the fulfilment of the first criteria – "*prescribed by law*" – the ECtHR requires that the domestic legal basis for the interference a) must be accessible to the person concerned, b) render foreseeable its consequences and c) must be compatible with the rule of law.[63] A rule is foreseeable if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct.[64] Additionally, the domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. The Court has held that the law therefore must indicate with sufficient clarity the scope of discretion granted to public authorities and the manner of its exercise.[65]

The substantive scope of the second criteria – "*pursuing a legitimate aim*" – appears limited by the exhaustive listing of such legitimate aims in Art. 10 (2) ECHR. However, the fulfillment of this criterion has not posed an obstacle for Contracting States given the comprehensive range of the listed aims.[66] The Court does retain the power to interpret the scope of these legitimate aims: in the *Navalnyy* case, the Court for example adjudged that two arrests of Aleksey Navalny, (Алексей Анатольевич Навальный, commonly referred to as Alexei Navalny) did not pursue a legitimate aim as prescribed under Art. 11 ECHR.[67]

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[61] For explanation on the effective interpretation of the ECHR, see 'Principle of Effectiveness' *infra*.

[62] In contrast: *Schweizerische radio- und fernsehgesellschaft et autres v. la Suisse* App no 68995/13 (ECtHR, 12 November 2019) [72].

[63] *Dink v. Turkey* App nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR, 14 September 2010) [114].

[64] *RTBF v. Belgium* App no 50084/06 (ECtHR, 29 March 2011) [103]; *Altuğ Taner Akçam v. Turkey* App no 27520/07 (ECtHR 25 October 2011) [87].

[65] *The Sunday Times v. the United Kingdom (no. 1*) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Maestri v. Italy* App no 39748/98 (ECtHR, 17 February 2004) [30].

[66] Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 355.

[67] *Navalnyy v. Russia* App nos 29580/12, 36847/12, 11252/13,12317/13, 43746/14 (ECtHR, 15 November 2018) [123]-[127]. The analogy between Art. 10 and 11 ECHR can be drawn given the similar structure of the three-step test. Therefore, the three-step-test in general handbooks is discussed in a joint manner: Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 347-375.

The fulfillment generally of the last criterion – "*being necessary in a democratic society*" – requires that the interference serves a pressing social need and is proportional to the legitimate aim.[68] The interpretation of this criterion is the subject of much criticism as it is directly connected with the substantive margin of appreciation granted to States. This substantive margin of appreciation *inter alia* determines a minimum level of human rights protection but leaves States to interfere with other civil and political interest surpassing this minimum level.[69] Specifically, regarding Art. 10 ECHR, the Court applies different levels of scrutiny dependent on the types of restrictions and the types of speech. For example, prior restraints on publications as such "*call for the most careful scrutiny on the Court's part*" given their inherent dangers to Art. 10 ECHR.[70] When it concerns restrictions affecting the freedom of the press, State's margin of appreciation is more restricted than in cases of restrictions of other forms of expression.[71]

C. THE YILDIRIM-JURISPRUDENCE: APPLICATION OF THE GENERAL RULE TO INTERNET ACCESS *EXTRA MUROS*

1. Differentiating the Yıldırım-jurisprudence from other issues

The ECtHR has since the 2012 *Yıldırım* case[72] developed jurisprudence ("*Yıldırım*-jurisprudence") concerning the blocking of entire webpages. While these cases did not concern a wholesale ban on Internet access (Internet-shutdowns[73] or individual exclusion of Internet access[74] for example), the Court categorized the restrictions of entire websites as affecting the accessibility of Internet in general:

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[68] For a more detailed analysis, see *Silver v. United Kingdom* Apps nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [97].

[69] See generally Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Lemmens K, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 European Journal of Law Reform 78.

[70] *Observer and Guardian v. the United Kingdom* App no 13585/88, (ECtHR, 26 November 1991) [60].

[71] *Dammann v. Switzerland* App no 77551/01 (ECtHR, 25 April 2006) [51].

[72] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012).

[73] Ayalew YE, 'The Internet Shutdown Muzzle(s) Freedom of Expression in Ethiopia: Competing Narratives' (2019) 28 Information & Communications Technology Law 208 <https://doi.org/10.1080/13600834.2019.1619906> (last accessed 23 April 2021) Rydzak J, 'Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India' (2019) Global Digital Policy Incubator, Stanford University 1.

[74] De Filippi P and Bourcier D, '``Three-Strikes'' Response to Copyright Infringement: The Case of HADOPI' in Francesca Musiani and others (eds), *The Turn to Infrastructure in Internet Governance* (Palgrave Macmillan US 2016).

> […] measures blocking access to websites are bound to have an influence on the accessibility of the Internet and, accordingly, engage the responsibility of the respondent State under Article 10 [ECHR].[75]

These cases differ from those where a State-sanctioned action led to the deletion of certain content on a website or the suspension of an account on a website.[76] A distinction can be made by means a hypothetical example: if certain tweets are deleted or a Twitter user account gets suspended and this restriction is attributable to a State, this concerns content-specific restrictions. Were a State to block access to Twitter for certain tweets on that platform, then this would constitute a wholesale ban and invoke the Yıldırım-jurisprudence.

The following table gives an overview of the cases in which the Court developed its Yıldırım-jurisprudence and the nature of the challenged blocking measure per case.

[75] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [53].

[76] In *Kablis v. Russia* App nos. 48310/16 and 59663/17 (ECtHR, 30 April 2019), which dealt with content deletion and suspension of an account, the Court does refer to the *Yıldırım*-jurisprudence, but only because the Prosecutor deleted more posts than those envisaged by the law. This case, while systematically categorized under *Yıldırım*-jurisprudence is hence not comparable therewith. In contrast, see categorization by: Voorhoof D, 'Same Standards, Different Tools? The ECtHR and the Protection and Limitations of Freedom of Expression in the Digital Environment' in Michael O'Boyle (ed), *Human Rights Challenges in the Digital Age: Judicial Perspectives* (Council of Europe 2020) 22 and ECtHR Press Unit, 'Access to Internet and freedom to receive and impart information and ideas' (March 2021) < https://www.echr.coe.int/Documents/FS_Access_Internet_ENG.pdf> (last accessed 17 May 2021).

Ahmet Yıldırım v. Turkey 2012	A court decision blocking the entirety of Google Sites, because it hosted one site containing insults to Atatürk and whose owner was thus subject to criminal proceedings. The applicant, an academic whose personal site was also hosted on Google Sites, was blocked from sharing his work and other information because of the collateral blocking measure.
Akdeniz v. Turkey 2014	Blocking of two websites ("myspace.com" and "last.fm") on the grounds that they streamed music in violation of copyright.
Cengiz and Others v. Turkey 2015	Wholesale blocking of YouTube because of a handful videos in violation of Turkish defamation law. The applicants, all professors with active YouTube profiles, complained that this action violated Art. 10 ECHR considering the relevance of YouTube for their work.
Vladimir Kharitonov v. Russia 2020	Collateral blocking of a website hosted on the same IP address as a website containing information about the use and production of drugs.
OOO Flavus and Others v. Russia 2020	Blocking of three websites based on content allegedly calling for "*extremist activities*". Take-down request was unspecified and went beyond the limits of an already broad law.
Bulgakov v. Russia 2020	Blocking of a website because it hosted one piece of unlawful material, an e-book which was categorized as an extremist publication, even when the e-book was deleted as soon as the applicant found out about its illegality.
Engels v. Russia 2020	The blocking of a website because it hosted information about filter-bypassing tools on the internet.

2. <u>In-depth analysis of the Yıldırım-jurisprudence</u>

The reason why the author chooses to refer to this specific case-law as the *Yıldırım*-jurisprudence is not only for the sake of convenience and clarity, but also because the Court consistently refers to this specific case in other judgements concerning similar issues. While the later four Russian judgments have been called precedent-setting[77], the *ratio decidendi* of these cases ultimately are minor additions to the somewhat comprehensive *Yıldırım*-jurisprudence.

[77] Güngördü A, 'The Strasbourg Court Establishes Standards on Blocking Access to Websites' (*Strasbourg Observers*, 26 August 2020) <https://strasbourgobservers.com/2020/08/26/the-strasbourg-court-establishes-standards-on-blocking-access-to-websites/#more-4809> (last accessed 17 May 2021).

a) Restrictions on Internet access are *prima facie* incompatible with the right to freedom of expression: they constitute an interference with Art. 10 ECHR.

The Court consistently adjudges that State-imposed measures restricting access to certain websites constitute an interference with Art. 10 EHCR by means of the following reasoning.

Firstly, the Court underlines the broad substantive scope of Art. 10 ECHR:

> In that regard it points out that Article 10 guarantees freedom of expression to "everyone". It makes no distinction according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom […]
>
> It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information […]
>
> Likewise, the Court has consistently emphasized that Article 10 guarantees not only the right to impart information but also the right of the public to receive it […]. [78]

Secondly, the Court acknowledges, in line with previous judgements, the principal or central role the Internet plays in the fulfilment of the broad scope of Art. 10 ECHR.

> It is true that the measure did not, strictly speaking, constitute a wholesale ban but rather a restriction on Internet access which had the effect of also blocking access to the applicant's website. Nevertheless, the fact that the effects of the restriction in issue were limited does not diminish its significance, especially since the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. [79]

Therefore, the Court concludes that these restrictions on Internet access thus constitute an interference by public authorities, calling for the application of the three-step-test.

These observations are not necessarily revolutionary: while predating the *Yıldırım*-judgement by 7 years, Best's statement, captures the essence of the Court's *ratio decidendi* accurately:

> […] a symmetric information right to some extent requires the Internet, and thus access to the Internet itself has become a human right […] Thus to be excluded from this information technology is, effectively, to be excluded from information, full stop.[80]

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[78] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [50]; *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [36].

[79] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [54].

[80] Shandler R and Canetti D, 'A Reality of Vulnerability and Dependence: Internet Access as a Human Right' (2019) 52 Israel Law Review 77 90 referring to Best M, 'Can the Internet Be a Human Right?' (2004) 4 Human Rights & Human Welfare 23.

Indeed, exactly because within the framework of the ECHR the right to freedom of expression and the right to receive and impart information protects a large scope of expressions and information[81], and the scope of "*interferences by public authorit[ies]*" is extremely broad[82], it is uncontroversial that in the light of the developing role of the Internet as a primary means of exercising this human right[83], any State-imposed restrictions on access thereto constitute an interference with Art. 10 ECHR. These findings align with the focus of international human rights discourse on State's negative obligations to not interfere with individuals' Internet access.[84] In contrast, these findings do not reflect any positive obligations to provide individuals with Internet access; the applicants already had Internet access.

b) Legal standing for interferences

The applicants in the *Akdeniz and Cengiz* cases were users of the blocked websites.[85] Not necessarily all users of a blocked website have a legal standing before the Court to bring a claim based on Art. 10 ECHR. In *Akdeniz*, the Court found that a former user of two blocked websites sharing music illegally could not be considered as a victim and hence lacked legal standing to bring a claim on the basis of Art. 10 ECHR.[86] The Court adjudged this on the basis that 1) there were plenty of other means to listen to music without violating copyright[87] 2) this blocking did not bar the individual from accessing an important source of communication and therefore did not hinder him in participating in a debate of general interest[88] and 3) he could ultimately be considered as a normal or passive user of the sites.[89]

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[81] See I.A.1.

[82] See I.A.2.

[83] For a description of cyber-dependence see also: Shandler R and Canetti D, 'A Reality of Vulnerability and Dependence: Internet Access as a Human Right' (2019) 52 Israel Law Review 79-83.

[84] United Nations, Human Rights Committee, *General Comment 34*, CCPR/C/GC/34 (12 September 2011) [43]; United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/HRC/35/22 (30 March 2017) [76]; United Nations, General Assembly, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/32/13 (18 July 2016) [10]. See more generally: Çalı B, 'The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 278-279.

[85] Respectively *Akdeniz v. Turkey* App no 20877/10 (ECtHR, 11 March 2014) [5] and *Cengiz and others v. Turkey* App nos. 48226/10 and 14027/1 (ECtHR, 1 December 2015) [50]. In *Cengiz*, two of the three applicants not only used YouTube to receive information, but also to impart information by video, as they were professors active in the field of freedom of expression. *Ibid* [40].

[86] *Akdeniz v. Turkey* App no 20877/10 (ECtHR, 11 March 2014) [29].

[87] *Akdeniz v. Turkey* App no 20877/10 (ECtHR, 11 March 2014) [25].

[88] *Akdeniz v. Turkey* App no 20877/10 (ECtHR, 11 March 2014) [26].

[89] *Akdeniz v. Turkey* App no 20877/10 (ECtHR, 11 March 2014) [27].

This judgement is regrettable not for its outcome, but for its inadequate legal reasoning and the ambiguity it created. Art. 10 ECHR protects the right to receive information, which concerns information that others wish or may be willing to impart to individuals.[90] Accordingly, the restriction of these sites did concern an interference with Art. 10 ECHR, and given the gross violations with copyright, could have been addressed sufficiently by applying the three-step test. Instead, the Court opted to handle the case on the basis of formal elements.

Later, in the *Cengiz* case, the Court adjudged that some YouTube-users did have a legal standing to bring a claim before the Court in reaction to wholesale blocking of the site.[91] The Court attempted to make a distinction between these applicants and the applicant in *Akdeniz* on the basis of the purposes for which the applicants used YouTube, namely academia. However, the Court left open the question whether individuals using YouTube solely for recreational purposes for example could equally enjoy standing. Even more confusing is the fact that in *Cengiz*, the Court did not define nor make a distinction between active or passive users: in *Akdeniz*, the fact that the applicant only used the blocked sites passively proved to be an obstacle to his legal standing; in *Cengiz*, one of the applicants only used YouTube to receive information but nevertheless was accorded standing.[92]

A meaningful interpretation could be given to these cases by judging that regardless of the quality and activities of users, they have a legal standing to bring a claim before the Court in reaction to the restriction of a website. This legal standing would only be denied when that site is manifestly used contrary to other rights (such as piracy-sites, sites sharing sexual abuse of minors, sites exclusively used to support anti-democratic messages). However, such a vague scope of manifest misuses of the web evidently raises more questions and is simply unnecessary given the more structural and comprehensive approach provided by the three-step-test of Art. 10 (2) ECHR.

The applicants in *Yıldırım* and the Russian[93] cases were all owners of the sites. It is self-evident that this category of applicants has a legal standing to bring a claim before the Court in this regard.

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[90] *Magyar Helsinki Bizottsag v. Hungary* App no 18030/11 (ECtHR, 8 November 2016) [156], *Leander v. Sweden* App no 9248/81 (ECtHR, 26 March 1987) [74].

[91] *Cengiz and others v. Turkey* App nos. 48226/10 and 14027/1 (ECtHR, 1 December 2015) [50]-[51].

[92] *Cengiz and others v. Turkey* App nos. 48226/10 and 14027/1 (ECtHR, 1 December 2015) [40].

[93] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [12]; *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [4]; *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [4]; *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [4]; *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [4].

A fortiori, a restriction on the entire Internet confers a legal standing upon any individual given that this would bar said individual access to meaningful platforms of communication and hence exclude them from debates of general interest.

c) Legal filtering: a question of quality of law

Besides the deemed inadmissible *Akdeniz* case, the Court found all website bans brought before it a violation of Art. 10 ECHR. More precisely, every ban was deemed to be in violation of Art. 10 ECHR given that the interference did not mee the criterion of being prescribed by law.

In *Yıldırım*, the Court judged that the wholesale blocking of websites on the basis of a preliminary judicial order constituted a prior restraint, requiring a particularly strict legal framework ensuring both tight control over the scope of the ban and effective judicial review to prevent any abuses.[94] The Court here ruled that the blocking of all Google Sites was not sufficiently prescribed by law as there was a clear lack of foreseeability. This lack of foreseeability was due to several factors. Firstly, the law granted great latitude to the public authorities responsible for the blocking of telecommunication; as evidenced by the fact that the blocking order could be extended to Google Sites in general and thus also the website of the applicant without the need to involve these parties in the criminal proceedings.[95] Secondly, domestic law did not require the courts to make a balancing exercise of the interests at stake; the domestic courts accordingly did not take into account the overbroad nature of the restriction.[96] The absence of this balancing also entailed that the law did not provide for sufficient safeguards against abuse.[97]

In *Cengiz*, the Court even more decisively judged that the blocking of YouTube in its entirety was simply not provided by any provision in Turkish law. To the regret of judge Pinto de Albuquerque and judge Lemmens, these judgements did not introduce any further and specialized standards for such filtering-laws. The former in his concurring opinion to the Yıldırım case presented 11 criteria for domestic law to be compliant with Art. 10 ECHR.[98] Judge Lemmens in his concurring opinion to *Cengiz* argued the judgement to have been a missed opportunity as the Court did not address the new Turkish law - not applicable to the case at hand yet invoked by Turkey - as *obiter dictum* in the judgement.[99]

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[94] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [61].

[95] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [60]-[63].

[96] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [65]-[66].

[97] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [67]-[68].

[98] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) (Concurring Opinion judge Pinto de Albuquerque) p. 22.

[99] *Cengiz and others v. Turkey* App nos. 48226/10 and 14027/1 (ECtHR, 1 December 2015) (Concurring Opinion Judge Lemmens) p. 21, 22.

The four Russian cases, judged on the same day, constitute a first step to a more comprehensive approach requested by the two judges. For the sake of brevity, the author summarizes the important aspects of these cases.

The Court firstly makes a distinction between the types of blocking at hand: "collateral blocking" concerned the blocking of all sites shared on the same IP address[100], "excessive blocking"[101] concerned the blocking of an entire website for an e-book or information about filter-bypassing and "wholesale blocking"[102] concerned the total blocking of three sites for certain news coverage. Secondly, the Court develops a more comprehensive approach to the quality requirements of a filtering-law by means of (somewhat overlapping) criteria: the measure must have a domestic legal basis[103] and must generally fulfill the following criteria:

[100] *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020).

[101] *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) and *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020).

[102] *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020.

[103] See specifically in this regard: *Cengiz and others v. Turkey* App nos. 48226/10 and 14027/1 (1 December 2015) [63].

The measure must be foreseeable and must afford the applicant the opportunity to regulate his conduct	1. The Court requires the domestic law to be narrowly defined: the Court interprets the great latitude given to public authorities as allowing indiscriminate collateral restrictions.[104] a. The exercise of powers to interfere with the right to impart information must be clearly circumscribed to minimize the impact of such measures on the accessibility of the Internet.[105] b. A provision allowing for a blocking measure on the basis of a judicial decision which identified particular Internet content as constituting information the dissemination of which should be prohibited in State X does not meet this criterion, *a fortiori* when the measure is specifically targeting a website with information on filter-bypassing.[106] c. A provision allowing for the restriction of online "*calls for public events held in breach of the established procedure*" is equally overly broad.[107] 2. There must be safeguards against abuse. a. The law must require the authorities to verify the collateral effects of restrictions and communicate priorly to those potentially affected by the measure.[108] b. The request for the take-down must be specific to the content.[109] 3. The measure must be transparent.[110] a. A public-ran website concerning some information about the measure should prescribe text of the blocking decision, any indication of the reasons for the measure or information about avenues of appeal and should allow for third-party notification in addition to providing a legal basis for and the date and number of the blocking decision as well as an identification of the issuing body.[111] 4. The law must oblige the Courts to make a balancing exercise between the interest sought by the public authorities and those of the owners or users of a website.[112]
The legal framework must be compatible with the rule of law	1. The legislation must provide safeguards to protect individuals from the excessive and arbitrary effects of blocking measures.[113] a. Vague categories of illegal content almost automatically lead to arbitrariness. b. Prolonged restrictions of the website after the challenged content has been deleted by the owner are considered as excessive and therefore incompatible with Art. 10 ECHR.[114] c. Wholesale blocking of access to an entire website is an extreme measure which has been compared to banning a newspaper or a television station. Giving an executive agency such a broad discretion carries a risk of content being blocked arbitrarily and excessively.[115]

[104] *Contra*: *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) (Joint Concurring Opinion Judges Lemmens, Dedov and Poláčková) [4].

[105] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [63].

[106] *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [27]-[30].

[107] *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020 [33].

The Court was unanimous in these decisions, apart from the interpretation of the first criteria. In a shared concurring opinion to the *Kharitonov* case, judges Lemmens, Dedov and Poláčková argued that the Russian law did not allow for collateral blocking *ab initio*; the measure therefore lacked a domestic legal basis and hence an assessment of the quality of law was unnecessary. In their view the authorities acted outside of the domestic law. They argued that in absence of an explicit prohibition, it could be implied that the domestic law did not grant the authorities unbound powers, as holding otherwise in such technical matters would incur overregulation.[116]

Thirdly, the Court addressed whether a wholesale ban of media critical for the Government could pursue a legitimate aim and be necessary in a democratic society in the *OOO Flavus case*. The Court however only limited itself to the *Yıldırım*-jurisprudence and made a general statement that a wholesale ban on news coverage needs motivation additional to the motivation given for content-specific bans. The reason for this unsatisfying answer lies in the fact that Russia did not put forward any legitimate aims or pressing social needs to justify the interference and the fact that the Court found that both the Prosecutor General and public authorities responsible for telecommunication operated largely beyond what was prescribed by the Russian law.[117]

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[108] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [63]; *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [42]-[43]; *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [41]; *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [35]-[36]; *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [31]-[32].

[109] *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020 [32]; *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [33].

[110] *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [42].

[111] *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [44].

[112] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [66]; *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [45]; *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [43]; *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [37]; *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [33].

[113] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [68]; *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [46]; *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [40]; *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [34].

[114] *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [38].

[115] *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) [38]; *Bulgakov v. Russia* App no 20159/15 (ECtHR, 23 June 2020) [34].

[116] *Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020) (Joint Concurring Opinion Judges Lemmens, Dedov and Poláčková) [4]-[5].

[117] *OOO Flavus and Others v. Russia* App nos. 12468/15, 23489/15 and 19074/16 (ECtHR, 23 June 2020) [36]-[38].

The criteria set out by the Court in effect must enable individuals to be informed about a precise scope of illegal content, the breadth of actions the Government can take against websites providing such content, the domestic legal basis on which such actions have been taken and the appeals against such actions. These measures must not extend further than what is necessary to restrict access to the illegal content. In the same line, the domestic courts must balance all interests at stake. If not already following from these criteria, the domestic law must also provide for sufficient protection against arbitrary and excessive measures in accordance with the rule of law.

The Court ultimately addressed specific topics such as the unwarranted collateral effect of blocking access to websites hosted on the same IP-address as the illegal site and the content-neutral character of filter-bypassing techniques which entails a high level of scrutiny on restrictions of such content.[118]

d) Conclusion

The restriction of access to certain websites is categorized by the Court as a restriction to Internet access. In light of a broad interpretation of the scope of "*interferences*" *ratione materiae* and the principal role of the Internet in the exercise of freedom of expression, Internet access restrictions always constitute interference with Art. 10 ECHR *ratione materiae*. The Court then consistently addresses these interferences by means of the three-step-test; putting an emphasis on the quality of law that allows for such restrictions. The Court's rather comprehensive approach to restrictions of websites signifies that it attributes great weight to the role of Internet access for the purposes of Art. 10 ECHR, as it also underlines explicitly. *A fortiori* absolute restrictions on Internet access would not meet these criteria considering their excessive nature.[119]

D. THE *KALDA*-JURISPRUDENCE: APPLICATION OF THE GENERAL RULE TO INTERNET ACCESS *INTRA MUROS*

1. Freedom of expression and prisoners

The right to freedom of expression does not stop at the prison gates, but prison-specific threats such as stalking of victims or the continuing of criminal behavior through contact with the outside world, call for certain restrictions. Such restrictions might be necessary to serve the legitimate aims of prevention

[118] In *Engels*, the Court emphasizes the important role of filter-bypassing but falls short of prohibiting *in abstracto* as in this case, there was simply no need to, given the lack of a legal basis. However, the high level of scrutiny the Court imposes on the blocking of content in combination with the prohibition of arbitrary and vague domestic law, States will have very little room to ban such content: *Engels v. Russia* App no 61919/16 (ECtHR, 23 June 2020) [27]-[30].

[119] The two current pending cases will most likely not be the source of any new criteria developed by the Court, given the excessive nature of the restrictions. *Akdeniz and Altiparmak v. Turkey* App no 5568/20; *Akdeniz and Altiparmak v. Turkey* App no 35278/20.

of disorder and crime or the protection of the rights of others generally, provided under Art. 10 (2) ECHR. These legitimate aims however do not allow for restrictions unnecessary in a democratic society, entailing a test of proportionality. The Court in that regard adjudged that:

> the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.[120]

Hence, disproportionate punishment for moderately offensive statements against the judicial and penitentiary systems in a personal manuscript amounted to a violation of a prisoner's right to freedom of expression[121], but the confiscation of an autobiographical manuscript graphically describing a prisoner's crimes was considered to be a necessary interference with Art. 10 ECHR.[122]

As stated before, Art. 10 ECHR equally protects the right to receive information others have or may be willing to share.[123] In that sense, the Court applies a similar test of proportionality on restrictions to newspapers or books prisoners request access to.[124] For example, the Court found the banning of newspapers not containing content either obscene or likely to endanger security a violation of Art. 10 ECHR.[125] In the same sense, the Court found some control over the content of prisoners' communication outside the prison a part of the ordinary and reasonable requirements of imprisonment.[126]

The aforementioned case-law demonstrates that Court does apply scrutiny on the treatment of prisoners in regard to their rights enjoyed under Art. 10 ECHR by means of the three-step-test, but States do enjoy a seemingly wider margin of appreciation exactly because of the inherent restrictions on this right that come with a deprivation of liberty.[127]

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[120] *Yankov v. Bulgaria* App no 39084/97 (ECtHR, 11 December 2003) [129].

[121] *Yankov v. Bulgaria* App no 39084/97 (ECtHR, 11 December 2003) [130]-[145].

[122] *Nilsen v. the United Kingdom* App no 36882/05 (ECtHR, 9 March 2010) [51]-[58].

[123] *Magyar Helsinki Bizottsag v. Hungary* App no 18030/11 (ECtHR, 8 November 2016) [156], *Leander v. Sweden* App no 9248/81 (ECtHR, 26 March 1987) [74].

[124] See generaly: Brems E and Voorhoof D, 'Politieke vrijheden van gedetineerden: vrijheid van meningsuiting, recht op toegang tot informatie, vrijheden van vergadering en vereniging, recht op deelname aan verkiezingen.' in Eva Brems and others (eds), *Vrijheden en vrijheidsbeneming, mensenrechten van gedetineerden* (Intersentia 2005) 105-107.

[125] *Yurtsever and Others v. Turkey* App nos. 14946/08, 21030/08, 24309/08, 24505/08, 26964/08, 26966/08, 27088/08, 27090//08, 27092/08, 38752/08, 38778/08 and 38807/08 (ECtHR, 20 January 2015) [102].

[126] *Nilsen v. the United Kingdom* App no 36882/05 (ECtHR, 9 March 2010) [51].

[127] Vermeulen B and Van Roosmalen M, 'Right to Education (Article 2 of Protocol No. 1)' in Pieter Van Dijk, Fried Van Hoof and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2017) 805.

2. The *Kalda*-jurisprudence

a) Kalda v. Estonia

(1) Issue

The Court was firstly faced with a prisoner's request to Internet access in 2016.[128] Mr. Kalda, an Estonian prisoner serving a life-sentence, was denied access to the general official website of the Council of Europe in Talinn[129], the website of the Estonian Chancellor of Justice and the site of the Estonian Parliament.[130] The applicant complained that this restriction violated his right to receive information, as protected under Art. 10 ECHR. The Estonian Supreme Court adjudged that, while Estonian law allowed access to certain websites, the requested sites did not fall within the ambit of this domestic provision. The government therefore argued that this restriction was legally provided under the aforementioned Estonian law and that the efforts necessary to prevent unauthorized Internet use by the prisoners would be excessive in comparison with the benefits for prisoners with a wider access to the Internet.[131] In addition, the Estonian government argued that Mr. Kalda's right to receive information was guaranteed, as he could engage in correspondence and make telephone calls as an alternative means of obtaining public information.[132]

(2) Domestic law

Estonian law allowed for online access to certain official legislation and judicial databases.[133] However, the websites to which the applicant wished to obtain access to, did not fall within the ambit of this law. The law was not quoted by the Court, but rather summarized in the following manner:

> Section 31-1 of the Imprisonment Act (Vangistusseadus), which entered into force on 1 June 2008, provides that prisoners are prohibited from using the Internet, except on computers specially adapted for said purpose by a prison which has allowed such access (under the supervision of the prison authorities) to the official databases of legislation and the database of judicial decisions.[134]

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[128] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [52].

[129] Initially, the Applicant wished access merely to the HUDOC Database. However, the general site of the CoE contained unofficial translation of judgements into Estonian. The Court of Appeal broadened the request to contain access to the CoE site, since the burden of translation should not be put on the Applicant.

[130] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [6].

[131] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [38].

[132] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [39].

[133] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [21].

[134] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [21].

(3) Was there already Internet access for prisoners?

Arrangements necessary for the use of the Internet by prisoners had been made and the related costs were borne by the authorities.[135]

(4) The Court's assessment

The Court firstly narrowed the scope of the dispute given that the applicant merely requested access by means of Internet to information already freely available in the public domain. The dispute thus did not concern the question as to concrete obligations of States to share specific information proactively.[136] Secondly, the Court underlined the important role of Internet for the exercise of Art. 10 ECHR as adjudged in the *Yıldırım*-jurisprudence.[137]

Most importantly, the Court made two conclusions. On the one hand, the Court stated that Art. 10 ECHR does in no way constitute a right to Internet access for prisoners. However, the Court found that because domestic law allowed access to some websites, the restriction of access to websites containing similar information constituted an interference with the right to receive information.[138]

The Court accepted that the restriction – to sites other than those provided under the Estonian law- was prescribed by law[139] and pursued the legitimate aim of protecting the rights of others and the prevention of disorder and crime[140], but adjudged that this interference was not necessary in a democratic society. The non-compliance with that last criterion was based on three elements.

Firstly, the Court looked into the content to which the applicant requested access to. The Court noted that the content on the requested sites predominantly concerned legal information that would uphold human rights protection and be of interest to the applicant's rights in court proceedings. Additionally, at the time of the initial domestic request, translations of ECtHR case-law were only accessible through one of the requested sites.[141]

Secondly, the Court underlined the important role of Internet for obtaining public information, as was evidenced specifically by the fact that in Estonia, the official publication of legal acts and Estonian

[135] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [53].

[136] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [41]-[43].

[137] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [44].

[138] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [45].

[139] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [46].

[140] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [47].

[141] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [47].

summaries and translations of ECtHR judgements only took place via the online version of *Riigi Teataja* and no longer through its paper version.[142]

Thirdly, the Court addressed the fact that the domestic courts did not undertake any detailed analysis into the alleged security risks that the requested access would incur. Additionally, the Court noted the absence of convincing evidence that would prove noteworthy additional costs imposed by extending access to three websites.[143]

(5) Dissenting Opinion Judge Kjølbro

The decision by the Second Section of the Court was not unanimous: Judge Kjølbro did not agree with the decision for the following two reasons.

Firstly, Judge Kjølbro did not agree with the reasoning that the interference with Art. 10 ECHR only followed from the fact that Estonia had already provided limited access to websites. He argued instead that, in line with the *Yıldırım*-jurisprudence, all restrictions of Internet access constitute an interference with Art. 10 ECHR, equally for prisoners. He noted that in holding the contrary, the Court essentially holds against States their well-willingness in granting prisoners some access to Internet.[144]

Secondly, he argued that while he found the restriction of Internet access an interference with Art. 10 ECHR, this interference was necessary in a democratic society and thus not violated Art. 10 ECHR. He noted that, in absence of any comparative legal research which points to a European or international support for right to Internet access for prisoners[145] and the inherent risks of granting prisoners Internet access[146] in combination with potential excessive costs for Member States accorded with a judgement imposing a certain right to Internet access for prisoners, States should be accorded a wide margin of appreciation. In addition, because of these complex and novel elements, Judge Kjølbro noted that this case should have been decided by the Grand Chamber.[147]

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[142] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [52].

[143] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [53]: websites hosted by State authorities and one by an international organization.

[144] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [2], [7]-[8].

[145] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [9]-[10], [14].

[146] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [11], [14].

[147] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [15].

b) Jankovskis v. Lithuania

(1) The issue

The Court's second case in this regard concerns the denial of access to information about education. The applicant, Mr. Jankovskis, a prisoner in Lithuania, had requested the Lithuanian Ministry of Education and Science for information about certain study programmes. The Ministry replied that all information could be found on the official State website.[148]

(2) Domestic Law

Lithuanian law did not prescribe a right to Internet access for prisoners, in contrast to the *Kalda*-case. A general rule applicable to all individuals in Lithuania prescribed however that:

> 1. The purpose of providing information about education is to furnish a person with information to help him or her choose the right education and education provider, as well as the aspired education and profession in line with his interests, dispositions and abilities.
>
> 2. A school shall make public the information about programmes of formal and non-formal education implemented at schools, choices offered, terms of admission, paid services, teachers' qualifications, major school survey findings, and the traditions and achievements of the school community.
>
> 3. Vocational information and vocational guidance services shall include the provision of information about opportunities afforded by vocational training programmes, higher education study programmes (aukštojo mokslo studijų programas) ... employment prospects on the labour market in Lithuania, as well as consultations. This service shall be provided by schools, information centres, consultancy companies and labour exchanges (darbo biržos) in compliance with requirements laid down by the Minister of Education and Science and the Minister of Social Security and Labour.[149]

(3) Was there already Internet access for prisoners?

No. However, the Lithuanian courts did not even go so far as to argue that extended Internet access could incur additional costs for the State.[150]

(4) The Court's assessment

The Court firstly reiterated that there exists no general right to Internet access, nor to specific sites for prisoners under Art. 10 ECHR.[151] However, the Court interpreted the general domestic provision guaranteeing a right to information about education as a right to access this information via Internet. The Court only interpreted this domestic provision in such a broad manner as the Lithuanian Government had explicitly and exclusively referred to the website in their response to the applicant's request. Hence, the restriction to a website hosted by public authorities containing this guaranteed

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[148] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [6]-[7].

[149] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [34].

[150] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [61].

[151] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [55].

information concerning education amounted to an interference with the applicant's rights to receive information under Art. 10 ECHR.[152]

The Court subsequently found that the interference was prescribed by law. Even though there was no explicit provision in Lithuanian law prohibiting Internet access for prisoners, the Court held that this prohibition could be reasonably ascertained by the applicant on the basis of the prohibition on working with radio and electronic communication devices, and the requirement that all correspondence by prisoners be conducted in writing and sent by post via the prison authorities.[153] Then, the Court accepted the legitimate aim of protecting the rights of others and the prevention of disorder and crime. This decision was motivated additionally by the fact that telephone fraudsters from prisons had already cheated people of large sums of money.[154]

Finally, the Court took into account the following elements to judge that the restriction to the specific website was not necessary in a democratic society and hence violated Art. 10 ECHR.

Firstly, the Court took into account the content present on the site to which the applicant requested access to. The Court stated that the site to which the applicant requested access to was directly relevant to the applicant's interest in obtaining education, which was in turn of relevance for his rehabilitation and subsequent reintegration into society.[155] Moreover, access to the site was more efficient than making requests for specific information, as acknowledged by the Lithuanian Government. The Court framed this request within the increasing understanding of a "*right to internet access*" and went as far as stating that "*certain information is exclusively available on Internet*".[156]

Secondly the Court underlined that both the Lithuanian Government and the domestic courts refrained from arguing that access to this one website could incur additional costs for the State. Regarding the alleged security risks, the Court stated that the domestic courts did not weigh in the fact that the website to which access was requested, was a website hosted by public authorities.[157] Accordingly, the requested access would have "*hardly posed a security risk*" in the words of the Court.[158]

[152] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [55].

[153] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [57].

[154] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [58].

[155] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [59].

[156] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [62].

[157] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [61].

[158] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [62].

c) Ramazan Demir v. Turkey

In 2021, the Court adjudged along the same lines on the merits in a case similar to *Kalda* and *Jankovskis*.[159]

(1) The Issue

Here, Mr. Ramazan Demir, a Turkish national, was denied access to the sites of the European Court of Human Rights, the Turkish Supreme Court and the Official Turkish Legal Gazette while in pre-trial detention in a Turkish prison. The applicant wished access to these sites not only to prepare his own defense, but also in light of his activities as a lawyer. The Turkish Government argued that the restriction of access was based on a specific exemption for prisoners belonging to illegal organizations or presenting a certain danger.[160]

(2) Domestic Law

The Turkish law prescribed that supervised Internet access solely for the purposes of education and reintegration could be authorized. This access could be withheld when convicted prisoners imposed a certain danger or were members of an illegal organization.

The Turkish law read as follows:

> 3. Dans les établissements ouverts et fermés ainsi que dans les centres d'éducation pour mineurs, l'utilisation d'outils et d'équipements de formation audiovisuels ne **peut être autorisée** que dans le cadre de programmes de formation et de réinsertion et dans les locaux désignés à cet effet par l'administration pénitentiaire. L'Internet peut être utilisé sous contrôle et dans la mesure rendue nécessaire par les programmes de formation et de réinsertion. Le condamné ne peut garder un ordinateur dans sa cellule. Cependant, l'introduction dans les établissements pénitentiaires d'ordinateurs dans un but formatif et culturel peut être autorisée après avis favorable du ministère de la Justice.
>
> 4. Ces droits peuvent être restreints par la décision du comité d'administration et d'observation à l'égard des condamnés présentant une certaine dangerosité ou appartenant à une organisation illégale.[161]

(3) Was there already Internet access for prisoners?

Yes, as follows from the Court's observations:

> Elle note à cet égard que les dispositions nécessaires à l'utilisation d'Internet par les détenus sous le contrôle des autorités pénitentiaires avaient en tout état de cause été prises dans le cadre de programmes de formation et de réinsertion.[162]

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[159] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing).

[160] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [2]-[8].

[161] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[14]-[15].

[162] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [46].

(4) The Court's assessment

The Court reiterated that there exists no general right to Internet access, nor to specific sites under Art. 10 ECHR for prisoners.[163] Given however that Turkish law did allow, when authorized, for Internet access solely for the purposes of education and reintegration, and that access to the three sites would be of interest to Mr. Demir's profession and thus to his education and reintegration, the restriction of this access constituted an interference with Mr. Demir's rights under Art. 10 ECHR according to the Court.[164]

The Court accepted that this interference was prescribed by law and pursued the legitimate aim of protecting the rights of others and the prevention of disorder and crime.[165] However, the Court found that the interference was not necessary in a democratic society and hence violated Art. 10 ECHR. This conclusion was based on two elements.

Firstly, the Court underlined that the domestic courts did not provide sufficient explanations as to why his access would not meet the criteria of formation or integration, nor why Mr. Demir would fall within the category of persons to whom access could be denied to on the basis of a danger or membership to illegal organizations.[166]

Secondly, the Turkish Government nor domestic courts provided evidence as to why this restriction was necessary for the legitimate aims of maintaining order and security in the prison and the prevention of crime. The Court in this regard underlined the presence of necessary infrastructure and the absence of detailed analysis of any additional security risks imposed by extending access to the three sites, taking into account the fact that the sites were hosted either by public authorities or by an international organization, only containing legal information.[167]

3. Observations

a) The Court implores States to ban Internet access for prisoners

The *Yıldırım*-jurisprudence established a clear principle: restrictions on access to certain websites and *a fortiori* almost total restrictions on access to the Internet constitute an interference with "*everyone's*" right to freedom of expression. In principle, the Court's statement that access to certain information has become dependent on Internet access in the *Jankovskis* case only reinforces the *Yıldırım*-

[163] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [34].

[164] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[35]-[38].

[165] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [40]

[166] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[45].

[167] *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [46].

jurisprudence.[168] In order for such restrictions to be lawful under Art. 10 ECHR, they must meet the cumulative criteria under the three-step-test. Given that the Court in *Hirst*[169], in line with the principle of normalization, adjudged that prisoners should not deprived of their human rights merely for the sake of being prisoners, the conclusions of the *Yıldırım*-jurisprudence should equally apply to them: a restriction of Internet access constitutes for everyone an interference with Art. 10 ECHR, *intra* and *extra* muros. The Court however took a very different approach.

It namely only found the restriction of prisoners' Internet access an interference with Art. 10 ECHR if domestic law provided to a certain extent a right to Internet access for prisoners. This leaves a blind-spot: in absence of such domestic law, the Court would abstain from assessing the lawfulness of these restrictions, regardless of their arbitrary nature.[170] The *Jankovskis* case is particularly interesting in this regard, as domestic law did not provide for an explicit basis for a right to Internet access for prisoners, in contrast to domestic law in *Kalda* and *Ramazan Demir*. However, the Court determined that a general right to information about education could be interpreted as granting the prisoner a right to Internet access in a similar fashion to Kalda. However, this conclusion was based on the fact that the Lithuanian government itself acknowledged that the information to which the individual sought access to, was exclusively or at least most exhaustively, provided for on the requested website. The Court stated that only for that reason, it was "*ready to accept*" that this right to information about education entailed a right to access to that specific site. If this would not have been the case, and the Government would have provided the applicant for example with information through a letter, the Court might not have given such an extensive interpretation of domestic law, and hence, a restriction to Internet access would have not arisen to an interference with the applicants' rights under Art. 10 ECHR.

(1) The Court discourages States from granting prisoners Internet access

This is highly problematic firstly, as it does not take into account the scope of Internet access given by States in their well-willingness. As Judge Kjølbro in his dissenting opinion to *Kalda* argued:

> In my view, it should not be held against the Respondent Government that Estonia, in the interest of prisoners, has decided to provide prisoners with limited access to the Internet. Doing so may in practice discourage other States from taking a similar step, if providing access to

[168] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [62].

[169] See II.C.

[170] This issue was also underlined by Ciuffoletti S and others, 'Part II ECHR Law, Prisoners' access to court in the European Convention on Human Rights system. Achievements and prospects' in Eechaudt V and others, *Research Project EUPRETRIALRIGHTS: Analysis of European Law as Regard to Access of Detained Persons to the Law and to Court* (Research project EUPRETRIALRIGHTS, 2019) 60-61.

> certain webpages on the Internet may be used as an argument for granting access to other webpages too.[171]

Indeed, if the law of a State allowed for access to websites Y, Z and X, the Court's jurisprudence could potentially extend this intentionally very limited access to an unlimited number of sites. Now, this issue might in practice not be as severe, as the Court always took into account the content to which the prisoners requested access to, which in the aforementioned cases only concerned sites hosted by public authorities and international organizations or websites for educational purposes. Accordingly, it is possible that in a State where prisoners only have access to some online judicial databases, the Court might find that a restriction on Netflix is necessary in a democratic society.

Now, it could still arguably be held, in line with the same jurisprudence, that restrictions on access to a website like Netflix might not be necessary in a democratic society in that same case. Indeed, the Court primarily places an emphasis on the additional security risks and costs the extension of access to new websites might incur for the State for the determination of the last criterion of the three-step-test. Arguably, access to a platform like Netflix would not necessarily incur such additional costs or security risks, which for States raises the question how far the Court could go in interpreting their domestic provisions which ultimately were indented to allow prisoners a limited extent of Internet access. Whether this extension of access is reasonable is not the central part of this research, but it is clear that this jurisprudence creates ambiguity for States.

(2) Ambiguity could push States to total deprivation of Internet access

The Court however gives States an option to opt out of this ambiguity. Indeed, the Court only introduces the three-step-test insofar domestic law has not absolutely prohibited Internet access for prisoners. Accordingly, the Court incentivizes States to explicitly ban any form of Internet access for prisoners to avoid accountability before the Court. In practice only few States within the CoE have adopted laws explicitly allowing Internet access for prisoners.[172] This jurisprudence might constitute a realistic obstacle to States' willingness of a gradual introduction of Internet access for prisoners.

b) Do positive obligations give the Court the heebie-jeebies?

Aside from the outright formal discriminative nature of this jurisprudence, the Court also seems to conveniently avoid an underlying question of positive obligations.

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[171] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [7].

[172] Ciuffoletti S and others, 'Part II ECHR Law, Prisoners' access to court in the European Convention on Human Rights system. Achievements and prospects' in Eechaudt V and others, *Research Project EUPRETRIALRIGHTS: Analysis of European Law as Regard to Access of Detained Persons to the Law and to Court* (Research project EUPRETRIALRIGHTS, 2019) 59.

In the *Jankovskis* case (in contrast to the other cases), no evidence is put forward that Lithuania had actually provided any means of Internet access to the applicant in prison. Accordingly, authors in 2012 wondered if this judgement would prompt the Court to answer the question whether States have a positive obligation to provide prisoners with Internet access.[173] This question actually starts where the aforementioned ends: the Court allowing States to deprive prisoners of Internet access essentially equates with the lack of a positive obligation of States to provide prisoners with some Internet access.

The Court did consistently adjudge in all aforementioned cases, including in *Jankvoskis*, that

> [a]rticle 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners.[174]

The Court did however not motivate this paragraph, aside from stating that imprisonment

> inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information.[175]

In *Jankovskis*, the Court had every possibility to motivate why States do not have such positive obligations. Especially given the fact that Lithuania did not even argue that the provision of Internet access would incur any costs, the formulation of a positive obligation could have been effective and extremely limited.[176] Instead, the Court interpreted a domestic law having absolutely nothing to do with Internet access, as providing a limited access to Internet for prisoners. The Court thus went out of their way to interpret a domestic provision seemingly far beyond its object and purpose to be able to apply the reasoning of the *Kalda*-case, which only reinforces the aforementioned issue of ambiguity. Indeed, if the Court would be willing to interpret any domestic law as allowing Internet access for prisoners, States would want to take a safe route and explicitly ban Internet access for prisoners.

This raises two questions: is the Court scared of addressing positive obligations relating Internet access, and what could a well-motivated answer to positive obligations have looked like?

4. A more consistent approach

Summarized, the Court's jurisprudence can be visualized in the following manner.

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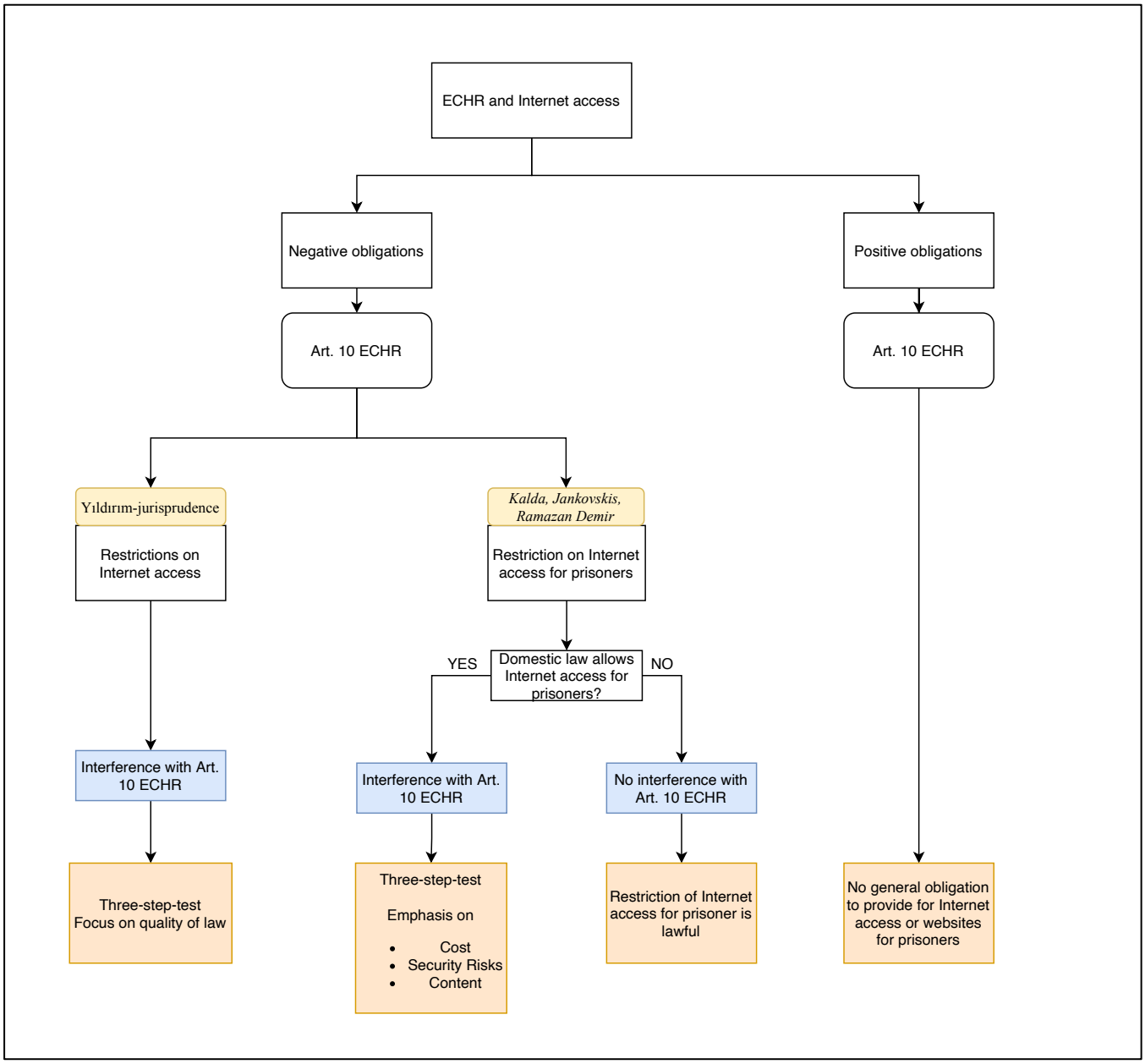
[173] De Hert, P., Kloza, D., 'Internet (access) as a new fundamental right. Inflating the current rights framework?', European Journal of Law and Technology, Vol. 3. No. 3, 2012.

[174] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [45]; *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [55]; *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [59]; *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing) [34].

[175] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [55].

[176] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [61].

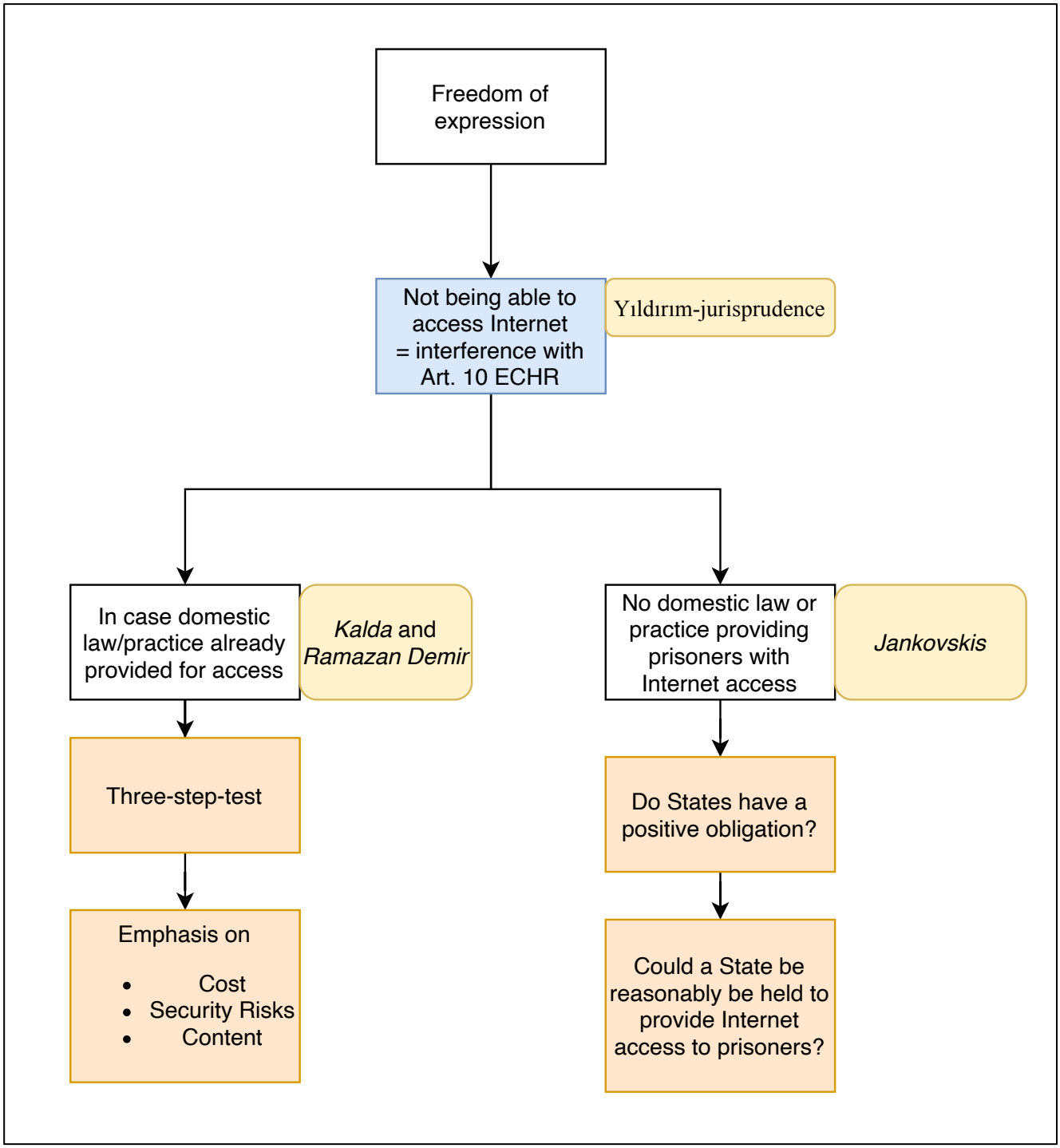


Given the aforementioned issues arising out of the fact that the Court finds domestic law determinative in the question whether it should apply the three-step-test, the author proposes the following approach.

1. Deprivation of Internet access as imposed by a States always constitutes an interference with Art. 10 ECHR, regardless of domestic law.
2. If domestic law allows prisoners restricted Internet access, the Court should apply the three-step-test and assess whether the restriction to other specific sites is necessary in a democratic society. In that regard, the Court could take into account and further develop States' substantive margin of appreciation to ban certain content but also test whether these restrictions are arbitrary.

3. In States where domestic law nor practice gives prisoners respectively a right or possibility to Internet access, an assessment should be made if this interference with Art. 10 ECHR is lawful.

This proposition can be visualized as follows:



Such jurisprudence firstly would align with the Court's Yıldırım-jurisprudence in contrast to the current jurisprudence. Secondly, it would entail that restrictions on Internet access, regardless of their extent,

would need to be assessed by the Court. This establishes a basic level of protection for prisoners firstly, but most importantly would do away with the ambiguity of the current jurisprudence, and thus allow States to progressively allow Internet access for prisoners instead of incentivizing them to do the opposite. The author acknowledges that States may not agree with this involvement of the Court. However, from the established jurisprudence it appears that the Court might be willing to take into account State's margin of appreciation to ban certain online content. Accordingly, this jurisprudence would not necessarily entail vast extensions of Internet access for prisoners, but merely prohibit arbitrary and indiscriminate restrictions of Internet access, in line with the basic premise of prisoners' treatment as upheld generally by the Court.[177]

E. A POSITIVE OBLIGATION TO INTERNET ACCESS FOR PRISONERS? ASSISTING THE COURT IN DEVELOPING A COMPREHENSIVE, JURISPRUDENCE-BASED, APPROACH

The author's proposition highlights the question the Court has avoided to address fairly so far: do States have a positive obligation to provide prisoners with Internet access? Given that the financial status of CoE Member States varies extremely, with some Member States even actively involved in armed conflicts, this question calls for nuance. The following subchapter will look into the Court's case-law concerning positive obligations in order to find elements which could provide a nuanced answer.

1. Why the aforementioned focus on negative duties?

On the international human rights level, the question of access to Internet is framed as a negative duty of States to not interfere with already established Internet access.[178] This question frames within the larger context of "*cyber-libertarianism*", putting an emphasis on States' obligations to refrain from interfering with freedoms in the online environment.[179] In the same sense, we have seen that the Court frames the question of access to Internet for prisoners as a negative duty, even when States have not adopted any measures that already provided Internet access to prisoners.

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[177] See II.C.

[178] United Nations, Human Rights Committee, *General Comment 34*, CCPR/C/GC/34 (12 September 2011) [43]; United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/HRC/35/22 (30 March 2017) [76]; United Nations, General Assembly, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/32/13 (18 July 2016) [10]; United Nations, Human Rights Council, *Resolution 39/6, The Safety of Journalists*, A/HRC/RES/39/6 [6]. See more generally: Çalı B, 'The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 278-279.

[179] Kundu A and Dalmia A, 'A Case For Recognition Of The Right To Internet Access In The Age Of Information' (2020) 11 (2) Journal of Indian Law and Society XIII, XVI.

a) Civil and political human rights: a focus on negative duties

This focus does not stem from a disinterest in positive obligations, but rather from the conceptual nature of civil and political rights generally, and the focus of the ECHR on such human rights.

The ECHR of 1950 was arguably the first enforceable comprehensive human rights treaty adopted after the Second World War.[180] The Convention in essence is a treaty developed within the framework of the CoE, one of the concerted efforts by allied forces after the Second World War to a) prevent future conflicts and b) form a block against the communist Eastern Bloc by means of co-operation or integration through regional organizations such as the CoE, but also NATO and later the European Union.[181]

Accordingly, the aim was to establish a human rights convention, allowing for a collective enforcement of certain human rights established in the 1948 Universal Declaration of Human Rights ("UDHR")[182]. Exactly because the Convention was drafted by "*like-minded*" European States with "*a common heritage of political traditions, ideals, freedom and the rule of law*"[183], the ECHR only initially encompassed human rights that were generally found amongst the drafting States: civil and political human rights. Civil and political human rights essentially are a product of the Age of Enlightenment and the late 18th century Age of Revolutions, specifically in France and modern-day United States[184], which is why these rights are most central in western constitutions. In their most basic form, these rights are an expression of liberalism, perceiving the State's role in everyday life as minimal. Accordingly, these obligations in their conceptual nature focus on the negative duties of States; the obligation to not do something that would interfere with individuals' lives.

Pierre-Henri Teitgen, the rapporteur of the legal committee during the drafting of the ECHR, summarizes the choice to only include civil and political human rights as follows:

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[180] Schabas WA, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 1.

[181] Greer S, *The European Convention on Human Rights* (Cambridge University Press 2006) 15-24; Sweeney JA, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2013) 9-13.

[182] Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III)) ("UDHR").

[183] Preamble ECHR.

[184] Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2012) 181-182 and 281 referring respectively to Cranston M, 'Are There Any Human Rights?' (1983) 112 Daedalus 1, 13 and United Nations, *Annotations on the Text of the Draft International Covenants on Human Rights*, UN Doc. A/2929 (1955) [9]. See also more generally Vande Lanotte J, Goedertier G and Haeck Y, *Belgisch publiekrecht* (1st edn, Die Keure 2015)262.

> [T]he committee agreed without difficulty that the collective enforcement should extend solely to rights and freedoms: (a) which imposed on the States only obligations 'not to do things,' which would thus be susceptible to immediate sanction by a court; and (b) which were so fundamental that human dignity and democracy were inconceivable if they were not respected; it followed that so-called economic and social rights should be excluded, at least to begin with.[185]

However, the following will demonstrate that the Court has now departed from this initial aim and interpreted the ECHR generally to impose positive obligations upon States.

On the one hand, the Court has developed positive obligations as a necessary extension of civil and political human rights. On the other hand, the Court has interpreted the ECHR as protecting some social, economic and cultural human rights. Leijten notes that in literature, these two types of positive obligations are seen as closely related, irrespective of the fact that these are fundamentally different obligations. She does admit that both types of obligations overlap.[186] Accordingly, the following two subchapters will discuss how the Court's jurisprudence regarding these two types of positive obligations might be useful in formulating a positive obligation upon States to provide prisoners Internet access.

2. Social, economic and cultural human rights: a huge detour

a) An introduction to social, economic and cultural human rights.

The UDHR in addition to civil and political human rights, established social, economic and cultural human rights. Conceptually, such rights emphasize State's positive duties to ensure adequate living conditions that allow for human dignity of individuals within their jurisdiction. Examples are the right to work, the right to social security or the right to an adequate standard of living. These rights originate from the Mexican and Russian Revolutions during the first half of the 20th Century and have further developed during the period of decolonization in the 1960's.[187] Because these rights postdate civil and political rights, this set of rights is also referred to as "*second-generation rights*". On the international level, these rights can be found for example in the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[188] In contrast to civil and political rights, these rights attribute a great role to the State in the fulfillment of individual and collective needs, an expression in its basic form or

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[185] Leijten I, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 28 referring to Teitgen P-H, 'Introduction to the European Convention on Human Rights' in R.S.J. Macdonald and others (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers Leiden 1993) 5.

[186] Leijten I, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 39-40.

[187] Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2012) 279.

[188] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

communism. On the international level ultimately, these rights were initially developed as "*programmes*" to be protected by means of political process, not through adjudication.[189]

As mentioned before, the ECHR initially did not contain social, economic and cultural rights.[190] The CoE namely adopted the European Social Charter ("ESR") in 1961 with the intention of protecting such rights.[191] However, the ECtHR does not have jurisdiction over this Charter, instead the European Committee of Social Rights is tasked with the handling of complaints in this regard.[192] This has however not excluded the Court from adjudging that some provisions within the ECHR equally require States to take positive measures converging with social, economic and cultural rights, as there exists no "*watertight*" distinction between those rights and civil or political human rights.[193]

b) Two manners in which the Court protects socio-economic rights: Leijten's theses

Leijten has summarized the manners in which the Court has applied an extensive interpretation of the ECHR to protect socio-economic rights by means of two theses.

(1) The Effectiveness Thesis

The first thesis concerns the Effectiveness Thesis. This thesis emphasizes how the effective interpretation of civil and political **norms** of the ECHR imply the protection of socio-economic **interests**. With **norms**, Leijten refers to the explicit provisions in the ECHR, the term **interests** is used for what deserves (or is claimed to deserve) protection through these provisions.[194]

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[189] Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2012) 181-182 and 281 referring respectively to Cranston M, 'Are There Any Human Rights?' (1983) 112 Daedalus 1, 13 and United Nations, *Annotations on the Text of the Draft International Covenants on Human Rights*, UN Doc. A/2929 (1955) [9]. See also more generally Vande Lanotte J, Goedertier G and Haeck Y, *Belgisch publiekrecht* (1st edn, Die Keure 2015) 262.

[190] Apart from a few exemptions such as the right to legal assistance in criminal cases (Art. 6 (3) ECHR). See Brems E, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 135.

[191] European Social Charter (3 May 1961, entered into force 26 February 1965).

[192] Brems E, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 135-136.

[193] Leijten I, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 39-57, referring to *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979) [26] and elaborating on the consistency of this jurisprudence.

[194] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 59.

> The term 'norms' (or 'provisions') is used to refer to the rights as they are written down, whereas the term 'interests' is used for what deserves (or is claimed to deserve) protection

The starting point of this thesis is the 1975 *Golder* judgement. The applicant was denied permission, for the purposes of instigating libel procedures against a prison officer, access to a solicitor. The applicant claimed this to be a violation of his rights to a fair trial under Art. 6 ECHR, while that provision did not prescribe a right to court nor to legal advice. In essence, the Court was thus asked whether Art. 6 ECHR could imply a State's duty of protection for certain interests not explicitly prescribed in the Convention, a question similar to the doctrine of "*unenumerated rights*" in the United States.[195] In *Golder*, the Court accepted the applicability of the traditional interpretation techniques vested within Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("VCLT")[196] by virtue of its customary nature[197], and in accordance with Art. 31 (1) VCLT emphasized the object and purpose of the ECHR; namely upholding the rule of law. Exactly because the Court assessed access to court as inherent to the upholding of the rule of law, it judged that Art. 6 ECHR could only be interpreted as guaranteeing a right of access to court.

This judgement was a first step moving away from judges and authors adhering to originalism; namely those stating the Convention should be interpreted solely in light of its text or intentions of the drafters. The extent of this first step must also be put into perspective; the majority of judges in the *Golder* case believed that they ultimately did not force new obligations upon States, but that this reading emanated from the text itself.[198] Regardless, this judgement invoked critique from judge Sir Gerald Fitzmaurice for imposing unforeseen obligations upon States by a judicial tribunal, a task up to the CoE Member States by manner of amendments to the Convention according to him.[199]

The *Golder* judgement was a first test of how far the ECtHR could go in interpreting the ECHR in manner exceeding the intentions of the drafters. Soon after, the Court developed its own methods of

> through these provisions. This terminology does not involve any value judgment. Norm, on the one hand, is not meant to refer to the moral or normative quality of a provision. Interests, on the other, does not as such refer to an inferior category of individual concerns; they may well – though need not always – overlap with fundamental rights.

[195] See generally: Dworkin R, 'Unenumerated Rights: Whether and How Roe Should Be Overruled' (1992) 59 The University of Chicago Law Review 381.

[196] Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[197] Similar to the International Court of Justice in *Arbitral Award of 31 July 1989* (*Guinea-Bissau v. Senegal*) [1991] ICJ Rep 69 [48].

[198] Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 63.

[199] Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 63.

interpretation exceeding the traditional approach of the VCLT[200], which ultimately served the purpose of an extended interpretation of the ECHR to encompass socio-economic interests.

(a) Principle of Effectiveness

Firstly, the Court has since *Airey* in 1976 developed and underlined that the ECHR must be interpreted in line with a principle of effectiveness:

> [t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[201]

In *Airey*, the applicant could not enjoy legal aid to initiate a divorce from her abusive husband because State-funded legal aid was limited to criminal proceedings. Exactly because of the necessity of an effective reading of the ECHR, the Court judged that she should have been granted legal aid in the given circumstances. The Court thus went further than the text of the ECHR and implied that States have a positive obligation to provide for legal aid, even for civil procedures in certain circumstances.

Thus, in combination with (meta-)teleological approach to the ECHR, the Court has lent more extensive interpretations to the ECHR, requiring States to take positive actions in the socio-economic sphere, such as requiring a level of health care for asylum-seekers.[202]

(b) Evolutive Interpretations

Secondly, the Court has also famously judged the ECHR to be a "*living instrument*", deserving of an evolutive interpretation.[203] In essence, the Court here introduces interpretations of the ECHR that depart from the initial wording, object and purpose thereof. The evolutive interpretation is often linked with the aforementioned principle of effectiveness: exactly because our present-day needs or values regarding human rights require a new interpretation of the ECHR, the Court will depart from what was initially intended or foreseen by the drafters of the ECHR.[204]

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[200] Leijten argues that the Court has added to the VCLT by developing its own methods of interpretation. It could however be argued that the evolutive interpretation, autonomous concepts and European consensus are merely applications of the VCLT, see for example Koch IE, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006) 10 The International Journal of Human Rights 405, 423 <http://www.tandfonline.com/doi/abs/10.1080/13642980601019730>. However, this discussion falls beyond the purpose of this thesis. What the author wants to underline is that these concepts are specific methods of interpretation developed and relied upon by the ECtHR. Hence, these techniques function as tools for understanding the reasoning and conclusions of the ECtHR in future judgements.

[201] *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979) [24].

[202] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 64.

[203] *Tyrer v. the United Kingdom* App no 5856/72 (ECtHR 25 April 1978) [31].

[204] From her wording, it appears that Leijten makes a distinction between these two methods of interpretation, yet connects them for the aforementioned reasons. In any event, for the purposes of this

Leijten demonstrates how such a dynamic interpretation has extended the protection of the ECHR to socio-economic interest by referring to the *Stec* case. Here, the Court judged that noncontributory social benefits fell within the scope of "*possessions*" protected by Art. 1 AP1 ECHR. The Court based this interpretation on the increasing supportive role of the welfare State systems, stating that:

> [i]n the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right.[205]

(c) Autonomous Concepts

In 1967, the Court introduced what Letsas calls "*autonomous concepts*".[206]

Different domestic jurisdictions use different terminology. To prevent States from shielding themselves from duties under the ECHR by relying on domestic concepts not foreseen in the Convention, the Court maintains that the meaning of certain concepts in the ECHR must not be equated with the meaning that these very same concepts possess in domestic law.[207]

Autonomous concepts also constitute a basis on which the Court has extended the interpretation of the ECHR to the protection of socio-economic interest. In the aforementioned *Stec* case, the United Kingdom argued that noncontributory social benefits did not fall within the scope of "*possessions*" protected by Art. 1 AP1 ECHR. The Court disagreed and adjudged that the term "*possessions*" concerned an autonomous concept, to be interpreted by the Court, not by the United Kingdom.

(d) Conclusion

Leijten concludes that these three methods of interpretation render some socio-economic interests unavoidable by-products of the civil and political provisions in the ECHR, and hence protected.[208] Letsas, in a similar fashion, states that by whatever means of interpretation, the Court essentially seeks to protect moral principles.[209]

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research it is important to understand that the Court does not perceive the *travaux* or other expressions of the authors as determinative for the present-day interpretation of the ECHR.

[205] *Stec and others v. the United Kingdom* App nos 65731/01 and 65900/01 (ECtHR, 6 July 2005) [51].

[206] Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 40-48.

[207] Letsas G, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', European Journal of International Law 15 (2004) 279, 282.

[208] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 68.

[209] Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 79.

(2) The Indivisibility Thesis

Leijten's second thesis is based on the view that all human rights are indivisible, interdependent, and interrelated. Leijten firstly acknowledges the philosophical nature of this indivisibility based on theories developed by Sen and Nussbaum and subsequently, like Koch[210], demonstrates the legal nature of this indivisibility by means of international soft law and agreements within the CoE specifically. Leijten argues based on scholarship by Koch and Mantouvalou that the ECHR is to be interpreted in an integrated or hermeneutic manner, thus also requiring socio-economic guarantees. Leijten also underlines that another method of interpretation as used by the Court plays an essential role in this thesis. Namely, the Court seems to contribute weight to the consensus of States regarding matters of socio-economic interests.[211] In contrast to the Thesis of Effectiveness, this thesis is however more based on theoretical assumptions than consistent jurisprudence by the Court.[212]

(3) Illustrating the Court's socio-economic interpretation by means of a syllogism.

Leijten's work provides us with a comprehensive framework to approach the question how the Court takes into account and protects socio-economic interests. The Court however often mixes these types of interpretation; for example, the *Stec* case demonstrates that the Court departs from previous interpretations (evolutive interpretation) in light of the developments and interpretations reflected by comparative research of Member States (principle of effectiveness based on comparative research) and effectuates this interpretation by judging that the term "*possessions*" embedded within Art. 1 AP1 ECHR is an autonomous concept. In the interest of our later question, the author therefore attempts to simplify Leijten's work by means of syllogistic reasoning.

Major Premise	Art. X ECHR protects a human right.

[210] For the contrast between political and legal indivisibility, see: Koch IE, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006) 10 The International Journal of Human Rights 405 <http://www.tandfonline.com/doi/abs/10.1080/13642980601019730>.

[211] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 76.

[212] Leijten does invoke specific case law where the Court seemed to implement an integrated approach to the ECHR, but this case-law is considerably less consistent than the well-documented methods of interpretation used by the Court.

Minor Premise	The effective exercise of the human right requires protection or provision of socio-economic interest Y. The necessity thereof follows from the inherent nature of the human right or comparative legal research.
Conclusion	By virtue of Art. X ECHR, States have an obligation to provide for socio-economic interest Y.

c) Legal limits to the protection of socio-economic rights within the framework of the ECtHR

The contextualization of socio-economic rights showcases that the Court may to a certain extent be willing to interpret the ECHR as imposing socio-economic obligations on States. However, for the following reasons, the extents of these obligations cannot be construed as unlimited.

(1) Structural margin of appreciation

The first limit to an extensive reading of socio-economic interest into the ECHR is the doctrine of margin of appreciation. Letsas makes a distinction between two types of margins of appreciation, namely the substantive and structural margin of appreciation. The former, as an extension of the "*accommodation clauses*" found in Arts. 8-11 ECHR, leaves the Member States a power or margin to interfere with the freedoms as set out by the Convention. The structural margin of appreciation however concerns the deference by the Court to domestic authorities, as the latter are better placed to judge on a specific matter. Letsas refers to Brems, who framed the (structural) margin of appreciation as a natural product of the distribution of powers between the Convention institutions and national authorities sharing the responsibility for enforcement.[213]

While Letsas focusses more on how this structural margin of appreciation functions as a means to deal with issues where no or little consensus amongst States exists, the same concept of deference also helps us to understand how the Court restrains itself from judging exhaustively in cases where the protection of socio-economic interests are being sought. Namely, the Court has explicitly and consistently referred to its structural)margin of appreciation in exactly such instances.[214] The Court's judgement in the 2020

[213] Brems E, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' 56 Zeitschrift Für ausländische öffentliches recht und Völkerrecht (1996) 240, 304.

[214] See generally: David V, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts* (Intersentia 2020) 227-235 and *Stec and others v. the United Kingdom* App nos 65731/01 and 65900/01 (ECtHR, 6 July 2005) [52]; *Stummer v. Austria* App no 37452/02 (ECtHR, 7 July 2011) [89];

Hudorovic case is a good example.[215] In this case, the applicants, Roma's living in informal settlements in Slovenia, claimed that the State had violated *inter alia* its obligations under Art. 8 ECHR by not providing them with sufficient infrastructure for water to their settlements. The Court in its judgement firstly stated clearly that Art. 8 ECHR does not guarantee a right to water. The Court did, in line with the Effectiveness Thesis[216], consider that:

> A persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8. Therefore, when these stringent conditions are fulfilled, the Court is unable to exclude that a convincing allegation may trigger the State's positive obligations under that provision.[217]

However, exactly because the allocation of resources such as water frame mostly within a "*complex and country specific assessment of various needs and priorities for which funds should be provided*", the Court applied the structural margin of appreciation, and stated that

> [i]n the Court's view, the States must be accorded wide discretion in their assessment of those priorities and the legislative choices they make, given their wide margin of appreciation in socio-economic matters.[218]

The Court then 1) took into account several measures undertaken by Slovenia to provide for some infrastructure and the fact that the applicants willfully chose to remain in their settlements when other options seemingly were available, 2) the fact that the applicants enjoyed social benefits from the State and 3) the fact that the applicants were not able to demonstrate that the State's alleged failure to provide them with access to safe drinking water resulted in adverse consequences for health and human dignity, to determine that Slovenia had acted within their margin of appreciation and accordingly found no violation of Art. 8 ECHR.[219]

This judgement illustrates most aforementioned characteristics of socio-economic rights within the framework of the ECHR. On the one hand, the Court applies aspects of both the Effectiveness Thesis and the Indivisibility Thesis to identify an increasing conceptualization of a right to water, which is by its nature a socio-economic right. On the other hand, the Court relies on the structural margin of

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Taskin and others v. Turkey App no 46117/99 (ECtHR 10 November 2004) [116–117]; *Fadeyeva v. Russia* App no 55723/00 (ECtHR, 9 June 2005) [104].

[215] *Hudorovic and others v. Slovenia* App nos. 24816/14 and 25140/14 (ECtHR, 10 March 2020).

[216] The fact that the Court also goes into extensive details about international and regional (soft) law concerning water access might also be interpreted as a partial nod to the integrative approach as set out in the *Indivisibility Thesis*.

[217] *Hudorovic and others v. Slovenia* App nos. 24816/14 and 25140/14 (ECtHR, 10 March 2020) [113].

[218] *Hudorovic and others v. Slovenia* App nos. 24816/14 and 25140/14 (ECtHR, 10 March 2020) [144].

[219] *Hudorovic and others v. Slovenia* App nos. 24816/14 and 25140/14 (ECtHR, 10 March 2020) [158].

appreciation to defer a judgement on the adequate fulfillment of allocation of resources to the State authorities, concluding that there has been no violation of Art. 8 ECHR.

While such invocation of a margin of appreciation has been referred to as an arbitrary "*deep-seated reluctance*"[220] of the Court to adjudge on socio-economic interests, the observations of Letsas allow us to frame this use of the margin of appreciation in a) the international concept of social, economic and cultural rights established within the international legal framework as programmes instead of justiciable rights and b) the legitimate aim of the Court to establish a balance between the competences of national authorities and the ECtHR in order to protect *inter alia* its legitimacy. Indeed, if the Court would start to impose extensive interpretations of resource-allocation duties upon States, it would undermine the implementation of its judgements.

In conclusion, the Court by recognizing the protection of socio-economic interests by virtue of the ECHR extends the Convention's protection *ratione materiae* considerably, but by a deferential proportionality analysis, these socio-economic rights are balanced away.[221]

(2) Insufficient generalization

US Supreme Court Justice Holmes in his dissention opinion to the Northern Securities Co. v. United States[222] stated:

> [G]reat cases, like hard cases, make bad law.

The ECtHR remains a court that judges only on the substance of specific issues brought before it, either by individuals or by States. The Court thus takes an incremental case-based approach to the development of socio-economic rights, not leaving much room for reasonable analogic interpretations. As an example, it could be argued that different circumstances in the *Hudrovic* case might have merited a different judgement by the ECtHR. For the sake of argument, if Slovenia failed to provide clean water to many households of which the inhabitants were not reasonably expected to relocate, and this lack of

[220] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 85 referring to Palmer E, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', *Erasmus Law Review*, 2 (2009) 397, 399-400.

[221] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 215 referring to Young KY, 'Proportionality, Reasonableness, and Socio-Economic Rights' (20 January 2017) in V.C. Jackson and M. Tushnet (eds.) *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017).

[222] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 82, referring to *Northern Securities Co. v. United States*, 193 U.S. 197, 400–401 (1904).

access was proven to result in adverse consequences for health and human dignity, the Court might have not accepted that such omissions were acceptable within Slovenia's margin of appreciation.

General statements on the protection of socio-economic interests by virtue of the ECHR are thus limited to the inherent case-based approach of the ECtHR.[223]

d) Striking a balance by means of core rights

To understand how the Court balances a broader reading of civil and political rights with the inherent limitations due to its supranational judiciary nature, Leijten puts forwards the "*core rights*" approach. She argues that the Court could, and does in some cases, base itself on 1) the intrinsic value of the human right or their *raison d'être* and 2) comparative research and expert opinions to determine the minimal socio-economic interests guaranteed by the ECHR.[224]

The aforementioned restrictions allow us to amend the syllogism in the following manner:

Major Premise	Art. X ECHR protects a human right.
Minor Premise	The effective exercise of the human right requires protection or provision of socio-economic interest Y. The necessity thereof follows from the inherent nature of the human right or comparative legal research.
Conclusion	By virtue of Art. X ECHR, States have an obligation to provide for socio-economic interest Y. However, this obligation to provide is limited insofar the provision frames within a "*complex and country specific assessment of various needs and priorities for which funds should be provided*". The scope of the structural margin of appreciation depends on numerous domestic factors. Examples can include financial situation of a State or the provision of social benefits to citizens which can reasonably be expected to serve the requested socio-economic benefit.

[223] Certain authors have criticized the Court in this regard for not upholding socio-economic rights in a coherent theory of adjudication: see generally Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 81.

[224] Leijten I, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 178-184.

e) Internet access as a social-economic interest protected by virtue of the ECHR?

The aim of this chapter is to develop relevant criteria which Court could take into account in assessing whether States have a positive obligation to provide prisoners with Internet access.

Internet access might have become a necessary or at least principal means for the enjoyment of other social, economic and cultural rights. Such statements are for example resonated on the international human rights level by Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression Frank La Rue and David Kaye. The former described Internet access, as a "*catalyst for individuals to exercise their right to freedom of opinion and expression*"[225] therefore concluding that Internet "*facilitates the realization of a range of other human rights*"[226] and concerns "*an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress*".[227] The subsequent mandate holder, David Kaye, stated in Thematic reports of respectively 2015 and 2020 that "*[a]s such, an open and secure Internet should be counted among the leading prerequisites for the enjoyment of the freedom of expression today*"[228] and that "*[i]n a moment of global pandemic, the right of access to the Internet should be restated and seen for what it is: a critical element of health-care policy and practice, public information and even the right to life*"[229]. In more contemporary doctrine, some have even argued that the right to enjoy the benefits of scientific progress and its applications (Art. 24 UDHR and Art. 17 ICESCR) might imply a right to Internet access.[230]

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[225] United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue*, A/HRC/17/27 (16 May 2011) [22]; United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/HRC/44/49 (24 April 2020) [44].

[226] United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue*, A/HRC/17/27 (16 May 2011) [22].

[227] United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue*, A/HRC/17/27 (16 May 2011) [85].

[228] United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/HRC/29/32 (22 May 2015) [11].

[229] United Nations, Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/HRC/44/49 (24 April 2020) [24]. See also, United Nations, General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye*, A/73/348 (29 August 2018) [28].

[230] Okediji RL, 'Does Intellectual Property Need Human Rights?' (2018) 51:1 International Law and Politics 1, 36; Szoszkiewicz Ł, '"Internet Access as a New Human Right? State of the Art on the

Indeed, Internet access for many has become a socio-economic interest. In that same sense, the Court has adjudged as *obiter dictum* that Internet access is increasingly perceived as a right on itself, in light of the socio-economic problem of the "*Digital divide*".[231] However, the Court does not adjudge that the ECHR gives way to a socio-economic right to Internet; the Court only adjudges that restrictions on Internet access (could) interfere with Art. 10 ECHR.

However, taking into account Leijten's theses, the following could be argued.

(1) Some relevant observations by the Court

In *Yıldırım*, the Court noted that the Internet has become

> one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.[232]

Later, the Court went further and stated that certain information, to which individuals have a right of access to under Art. 10 ECHR, is only available on the Internet.[233]

Additionally, in *Yıldırım*, the Court as *obiter dictum* noted the following:

> In view of the fact that legislation concerning the Internet, which has to be seen against a background of rapidly changing new technologies, is particularly dynamic and fragmented, it is difficult to identify common standards based on a comparison of the legal situation in Council of Europe member States. A survey carried out by the Court of the legislation of twenty member States (Austria, Azerbaijan, Belgium, the Czech Republic, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Russia, Slovenia, Spain, Switzerland and the United Kingdom) reveals that the right to Internet access is protected in theory by the constitutional guarantees applicable to freedom of expression and freedom to receive ideas and information. The right to Internet access is considered to be inherent in the right to access information and communication protected by national Constitutions, and encompasses the right for each individual to participate in the information society and the obligation for States to guarantee access to the Internet for their citizens. It can therefore be inferred from all the general guarantees protecting freedom of expression that a right to unhindered Internet access should also be recognized.[234]

The aforementioned provides us with some arguments that the Court increasingly perceives Internet access as necessary for the effective enjoyment of the rights under Art. 10 ECHR. Accordingly, it could

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Threshold of 2020"' (2018) 8 Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza 50, 58 <https://pressto.amu.edu.pl/index.php/ppuam/article/view/21599> (last accessed 16 May 2021).

[231] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) [52]; *Jankovskis v. Lithuania*, App no 21575/08 (ECtHR, 17 January 2017) [62]; *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[133].

[232] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [54].

[233] *Jankovskis v. Lithuania*, App no 21575/08 (ECtHR, 17 January 2017) [49].

[234] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [31].

be argued that on the basis of an effective and evolutive interpretation of the Convention, Art. 10 ECHR might call for some reasonable positive measures of States to provide individuals with Internet access. Given that Art. 10 ECHR in principle grants prisoners equal human rights, the same could *a priori* be held for prisoners.

(2) Internet access for prisoners as "complex and country specific assessment of various needs and priorities for which funds should be provided"?

Presuming for the sake of argument that indeed, Art. 10 ECHR does impose an obligation to provide Internet access to the general public. The provision of Internet access in the form of infrastructure development would arguably fall under the scope of "*complex and country specific assessment of various needs and priorities for which funds should be provided*"; any assessment of that obligation would thus hence fall within State's structural margin of appreciation.

In the same line, States would argue that the allocation of resources for the purposes of granting prisoners the luxury of Internet access would extend far beyond what is expected from them under the Convention given their structural margin of appreciation. Indeed, Judge Kjølbro in his dissenting opinion to *Kalda* argued that granting Internet access to prisoners might be excessive.[235] However, is this always really the case? Then why in *Jankovskis* did the responding State not even go as far as arguing that the access would incur any costs?[236] In an informal interview with a lawyer[237] currently defending several prisoners who were denied Internet access in a Belgian prison, two potential answers came up.

Firstly, allowing for Internet access is not necessarily a cost-heavy problem: just like prisoners have to pay for privileges like telephonic contact or television sets, they might reasonably be willing to pay for the small additional costs such Internet access would incur.

Secondly, a combination of two very low-cost options could generally exclude the issue of security risks. On the one hand, a firewall could be installed, blocking access to all websites, apart from the ones to which access is granted to under domestic law.[238] On the other hand, specific bolts could prevent access to internal components.

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[235] *Kalda v. Estonia* App no 17429/10 (ECtHR, 19 January 2016) (Dissenting Opinion Judge Kjølbro) [11].

[236] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [61].

[237] Identity shared with the promotor of this thesis.

[238] See Smith G, 'What Is A Proxy Server, How Does Proxy Work and More' (*Tech Excel*, 2020) <https://techexel.com/proxy/> (last accessed 10 May 2021).

In any event, the wording in the *Jankoviskis* case seem to indicate that States bear the burden of proof of demonstrating the additional costs arising from such hypothetical positive obligations.[239]

The following can be summarized as follows:

Major Premise	Art. 10 ECHR protects the right to freedom of expression, including the right to hold opinions freely and to receive and impart information and ideas. (Prisoners retain these human rights)

Minor Premise	• The effective exercise of the right to freedom of expression, including the right to hold opinions freely and to receive and impart information and ideas requires protection and provision of Internet access.
	• This is demonstrated by the Court adjudging that
	  o the Internet is the principal means of exercising this human right and
	  o *a fortiori* that certain information is only accessible online.
	• Comparative research of 20 CoE Member States demonstrates a general Constitutional guarantee to Internet access.

Conclusion	Internet access provision to prisoners might fall within the scope of "*complex and country specific assessments of various needs and priorities for which funds should be provided*" and therefore is an element of States' structural margin of appreciation. However, States still have a burden of proof to demonstrate the excessiveness of these additional difficulties and especially costs such positive actions would entail. If States fail to demonstrate this excessiveness, the Court might reasonably impose very limited positive obligations to provide prisoners for Internet access, while still taking into account the substantive margin of appreciation States have in restricting specific content for prisoners.

(3) Conclusion

The aforementioned demonstrates that Internet access as a socio-economic right might warrant positive measures by States specifically in relation to prisoners. However, exactly because on the International level the construction of Internet access as socio-economic right is limited to certain non-binding opinions of Special Rapporteurs and propositions in academia, this reasoning might be too far of a stretch under the ECHR.

[239] *Jankovskis v. Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [61].

3. Positive obligations within civil and political human rights

As stated by Leijten, the civil and political human rights provided by ECHR also directly require positive actions by States generally.[240] Indeed, there are several types of positive obligations within the ECHR not necessarily linked with socio-economic rights or interests.

The question at hand, namely the obligation of States to provide prisoners with Internet access, concerns a substantive vertical positive obligation as categorized by Lavrysen: an obligation directly regulating the relations between the individual and the State.[241]

a) A special duty of care towards persons under the State's control

The Court specifically holds that the control States exercise over prisoners requires an enhanced duty of care, exactly because of prisoners' vulnerability. While in relation to health care *extra muros* the Court refrains from imposing concrete duties upon States to provide for sufficient health care generally[242], the Court gives States a vastly narrower margin of appreciation in the health care of their prisoners for example.[243]

Art. 10 ECHR entails positive obligations for States. However, the Court's jurisprudence in this regard has been very limited. A relevant case concerns *Dink*, where the Court judged that this positive obligation requires States *inter alia* to create a favorable environment for the participation in public debate by establishing mechanisms for the protection of authors and journalists.[244] In contrast the Court has adjudged that States do not, under Art. 10 ECHR, have a positive obligation to collect and disseminate information of its own motion in a situation where a dangerous factory imposes a threat to the well-being of the local population.[245] The limited extent of these pre-established positive obligation under Art. 10 ECHR can thus not reasonably be interpreted as obliging States to allocate resources for

[240] Leijten I, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 40. See also: Lavrysen L, 'Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights' (PhD, Ghent University 2016).

[241] Lavrysen L, 'Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights' (PhD, Ghent University 2016) 92.

[242] *Pentiacova and Others v. Moldova* App no 14462/03 (ECtHR, 4 January 2005).

[243] Lavrysen L, 'Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights' (PhD, Ghent University 2016) 97.

[244] *Dink v. Turkey* App nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR, 14 September 2010) [137].

[245] *Guerra and others v. Italy* App no 14967/89 (ECtHR, 19 February 1998) [53].

provision of Internet access generally. However, in the specific context of prisoners, the balancing exercise is different.

Namely, a decision of a State to imprison an individual generally entails a deprivation of Internet access; for such access, the prisoner entirely depends on the provision thereof by the prison facilities. This accordingly establishes a position of vulnerability, which can be confirmed either by the Court's own case law where it adjudged that Internet access has become a principal means for the exercise of Art. 10 ECHR[246], and that even some information is only available on Internet access[247], but most importantly from research demonstrating the pains of imprisonment caused by a lack of Internet access for prisoners.[248]

This vulnerability imposes accordingly upon States an obligation of means to provide prisoners with Internet access. Simply put, in absence of State's positive measures, prisoners are left with a theoretical and illusory[249] protection of their rights under Art. 10 ECHR.

b) Limit of these duties

Here again, the structural margin of appreciation could come into play.[250] Exactly because such positive obligations require to a certain extent an allocation of resources, which conceptually falls beyond the purposes of justiciable civil and political human rights, it is normal courts show a certain deference to public authorities, as these are better placed in such assessments. *A fortiori*, a supranational court like the ECtHR would not want to impose unreasonable obligations upon States.

In this regard, it could however be argued that deprivation of Internet access for prisoners is so severe[251], that it might not necessarily fall within State's structural margin of appreciation, or that, just like in *Hudorovic*, States must introduce at least some positive measures[252] which could reasonably allow prisoners Internet access. It would go beyond the purposes of this research to propose concrete positive

[246] *Yıldırım v. Turkey* App no 3111/10 (ECtHR, 18 December 2012) [54].

[247] *Jankovskis v. Lithuania*, App no 21575/08 (ECtHR, 17 January 2017) [49].

[248] Bagaric M, Hunter D and Fischer N, 'The Hardship That Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners' (2017) 51 Akron Law Review 261, 312-316; Järveläinen E and Rantanen T, 'Incarcerated People's Challenges for Digital Inclusion in Finnish Prisons' [2020] Nordic Journal of Criminology 1 <https://doi.org/10.1080/2578983X.2020.1819092> (last accessed 16 may 2021); Reisdorf BC and Jewkes Y, '(B)Locked Sites: Cases of Internet Use in Three British Prisons' (2016) 19 Information, Communication & Society 771 <https://doi.org/10.1080/1369118X.2016.1153124> (last accessed 16 May 2021).

[249] *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979) [24].

[250] See generally Chapter III.E.2.c)(1).

[251] See note 248.

[252] *Hudorovic and others v. Slovenia* App nos. 24816/14 and 25140/14 (ECtHR, 10 March 2020) [158].

duties exhaustively, especially since the Court will only develop such obligations on a case-by-case basis. Most importantly, the Court could take into account the specific financial situation of a State, allowing for a necessary differentiated approach amongst CoE Members States.[253]

F. CONCLUSION

The Court adjudges consistently that restrictions of Internet access for prisoners only constitute an interference with Art. 10 ECHR if domestic law allows for certain Internet access. Conversely, if a State absolutely bans Internet access for prisoners, the Court shall refrain from assessing that ban by means of the three-step-test. This line of reasoning opposes the *Yıldırım*-jurisprudence by the Court which judged that any interference with Internet access constitutes an interference with Art. 10 ECHR for "*everyone*". More importantly, this jurisprudence bolsters States to absolutely ban any form of Internet access to prisoners, as it allows States to avoid accountability to the Court and ultimately to prisoners.

Ultimately, this jurisprudence indicates that States do not have a positive obligation to provide prisoners with Internet access, irrespective of costs or security risks. This jurisprudence seems to oppose the Court's established jurisprudence that prisoners should not be subjected to arbitrary, indiscriminate, and disproportionate restrictions of their rights under the Convention. The Court's jurisprudence regarding social, economic and cultural rights on one hand, and the jurisprudence concerning positive obligations as an extension of civil and political human rights on the other hand provide for some relevant criteria the Court could use in developing a positive obligation to provide prisoners with Internet access. The Court's cautious approach to imposing positive duties incurring the allocation of resources should not be read as exculpating States entirely from providing prisoners with Internet access, *a fortiori* when low-cost practical solutions would allow prisoners Internet access. The interpretation of the specific positive duty shall depend on a case-by-case approach. In such cases, States will bear the burden of proof regarding the alleged excessiveness of the costs resulting from Internet provision to prisoners.

[253] The GDP per capita in Ukraine for example is around 3.600 USD, while that in Monaco is 187.681 USD. Country-economy, 'COE – Council of Europe' (*Country-economy*, 2021) < https://countryeconomy.com/countries/groups/council-europe> (last accessed 16 May 2021) Accordingly prison conditions in both countries should be assessed by very different standards; it would be unreasonable to hold that a war-torn State should provide their prisoners with Internet access.

IV. INTERNET ACCESS FOR PRISONERS BY VIRTUE OF ART. 2 AP1 ECHR: MORE NUANCED?

A. OBJECT AND PURPOSE

This chapter addresses the only case the Court has adjudged concerning a right to Internet access for prisoners by virtue of Art. 2 AP1 ECHR. This allows for a comparison with the *Kalda*-jurisprudence and a more extensive understanding of the Court's view on the role Internet access plays in the enjoyment of education.

B. ART. 2 AP1 ECHR: A NEGATIVE APPROACH

1. Introduction into Art. 2 AP1 ECHR

The First Protocol to the Convention for the Protection of Human Rights and Fundamental introduced three new substantive articles into the ECHR framework, namely the right to property, the right to not be denied education and the obligation for States to hold free elections. The protocol entered into force in 1954 after 10 ratifications and has been ratified by 45 members of the Council of Europe. Only Switzerland and Albania have yet to ratify the protocol.[254]

The right to not be denied education, provided under Art. 2 AP1 ECHR is phrased as a negative obligation. While some ECtHR judgements impose reasonable positive measures on States to guarantee effective education[255] (specifically relating to the language of instruction)[256], Art. 2 AP1 ECHR does not impose a positive obligation upon States to create a public education system or to subsidize private schools.[257] In essence, Art. 2 AP1 ECHR merely protects individuals against arbitrary interferences with access to educational institutions existing at a given time.[258]

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[254] Council of Europe, 'Chart of signatures and ratifications of Treaty 009, Full list, Status as of 05/05/2021' (*Council of Europe*, 2021) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=m7sUsyEC> (accessed 5 May 2021)

[255] *Papageorgiu and Others v. Greece* App nos. 4762/18 and 6140/18 (ECtHR, 31 October 2019) [76].

[256] *Cyprus v. Turkey* App no 25781/94 (ECtHR, 12 May 2014).

[257] *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* App nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 23 July 1968) THE LAW [I.B.3].

[258] Belgian *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* App nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 23 July 1968) THE LAW [I.B.3].

Restrictions on education must be foreseeable for those concerned, proportionate and must pursue a legitimate aim.[259] In contrast to Articles 8 to 11 of the ECHR, Art. 2 AP1 ECHR does not exhaustively list such legitimate aims; States have a wider margin of appreciation in regulating and restricting education, exactly because "*it by its very nature calls for regulation by the State*".[260] The negative prohibition vested within Art. 2 AP1 ECHR also pertains to higher education[261], but the margin of appreciation regarding restrictions is broader in those circumstances given "*the inverse proportion to the importance of that education for those concerned and for society at large*".[262] In essence, the test for restrictions is not the usual three-step-test, but instead merely a proportionality test which varies in scrutiny depending on the type of education.

2. Art. 2 AP1 ECHR and prisoners

This scope of protection of Art. 2 AP1 ECHR is narrower for prisoners, given that the Court adjudged that prevention from continuing full-time education during the period corresponding to the lawful detention after conviction by a court cannot be construed as a deprivation of the right to education within the meaning of Article 2 AP1 ECHR[263], irrespective of the recommendations by the Committee of Ministers.[264] The Court confirmed in *Velyo Velev*:

> Although Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, **where such a possibility is available** it should not be subject to arbitrary and unreasonable restrictions.[265]

The Court further does not give much guidance on the right to education of prisoners. In the cases concerning education for prisoners, the Court does not answer the central question: "*what can be considered as an acceptable level of educational facilities in a contemporary European state?*" as noted

[259] *Leyla Şahin v. Turkey* App no 44774/98 (ECtHR, 10 November 2005) [154].

[260] Belgian *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* App nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 23 July 1968) THE LAW [I.B.5].

[261] *Leyla Şahin v. Turkey* App no 44774/98 (ECtHR, 10 November 2005) [141].

[262] *Uzun v. Turkey* App no 37866/18 (ECtHR, 10 November 2020) [35]; *Ponomaryovi v. Bulgaria* App no 5335/05 (ECtHR, 21 June 2011) [56] ECHR

[263] *Epistatu v. Romania* App no 29343/10 (ECtHR, 24 September 2013) [62], referring to several admissibility decisions. See also Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 608.

[264] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34]. The fact that the Court sets asides this authoritative soft law justifies why this research focuses on the ECHR and its interpretation by the Court to discover the justiciability of rights.

[265] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

by Lavrysen.[266] Furthermore, a central obstacle in defining this scope is the small amount of doctrine discussing and contextualizing this ECtHR jurisprudence developed since the 2010's.[267]

In regard to the negative obligations, the Court grants a wide substantive margin of appreciation to States in regard to restrictions of education for prisoners, as evidenced in the recent *Uzun* case. The Court found that banning a specific category[268] of prisoners from education was neither arbitrary nor unreasonable, and moreover accepted that this measure was necessary and proportionate, given the temporal aspect of the restriction in light of the increased number of prisoners in the wake of the 2016 attempted *coup d'état* in Turkey.[269]

3. The only case: Mehmet Reşit Arslan et Orhan Bingöl v. Turkey

a) Mehmet Reşit Arslan et Orhan Bingöl v. Turkey[270]

(1) The Issue

In this case, two Turkish prisoners, both serving life-sentences for membership of an illegal armed organization, appealed to the Court because they were denied access to computers and the Internet which they intended to use for higher education.[271]

[266] Lavrysen L, 'Education in prison: right to education only protects access in case of 'existing' educational facilities (Velyo Velev v. Bulgaria)' (Strassbourg Observers, 2014) < https://strasbourgobservers.com/2014/06/13/education-in-prison-right-to-education-only-protects-access-in-case-of-existing-educational-facilities-velyo-velev-v-bulgaria/> (last accessed 5 May 2021).

[267] Rainey B, MCcormick E and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 609 and Schabas WA, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 1009 only refer to a handful of articles which either discuss a human right to education extending beyond the specific framework of the ECHR, or in connection with the freedom of religion. Vermeulen B and Van Roosmalen M, 'Right to Education (Article 2 of Protocol No. 1)' in Pieter Van Dijk, Fried Van Hoof and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2017) 889-908 is a chapter that indulges upon the Court's case law in a consistent manner, but makes no reference to other more critical analysis of this jurisprudence.

[268] In contrast to indiscriminate interferences with human rights of prisoners, see *Hirst v. the United Kingdom (no. 2)* App no 74025/01 (ECtHR, 6 October 2005).

[269] *Uzun v. Turkey* App no 37866/18 (ECtHR, 10 November 2020).

[270] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019).

[271] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [1]-[50].

(2) Domestic Law

The Turkish law prescribed that supervised Internet access solely for the purposes of education and reintegration could be authorized. This right could be withheld when convicted prisoners imposed a certain danger or were members of an illegal organization.[272]

(3) Was there already Internet access for prisoners?

Yes, as follows from the Court's observations:

> Il n'est pas contesté en l'espèce que les établissements pénitentiaires dont il s'agit disposaient des moyens permettant de fournir aux condamnés la possibilité offerte par l'article 67 § 3 de la loi n° 5275.[273]

(4) The Court's assessment

Before adjudging on the merits of the case, the Court adjudged that the right to education was applicable in the present case and reiterated the principles it had set out regarding prisoner's right generally, and specifically the principles from the foregoing *Kalda* and *Jankovskis* cases. Most importantly, the Court underlined the difference between the scope of allowed restrictions under Art. 10 ECHR and those under Art. 2 AP1 ECHR. Exactly because of the wider margin of appreciation in the regulation of education, restrictions are lawful as long as there is a proportionality between the aim of the restriction and the means undertaken in that regard.[274]

The Court finally adjudged that the restriction of supervised access to the Internet used solely for higher education was disproportionate to the aim of public order and hence constituted a violation of Art. 2 AP1 ECHR on the basis of several elements. The fact that the restrictions with the aim of public order were based on a specific provision in Turkish law for persons affiliated with illegal terrorist organizations[275] and that one applicant had been the subject of several disciplinary sanctions did not weigh up against[276]

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[272] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [37]. See also: *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[14]-[15].

[273] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [65].

[274] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [56].

[275] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [64].

[276] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [68].

- the specific provision in Turkish law which allowed for supervised Internet access for prisoners for educational purposes[277],
- the importance of education for prisoners as underlined by the Committee of Ministers of the Council of Europe[278],
- the interest of the applicants to pursue higher education that directly followed from the legal provisions allowing such education and[279]
- the absence of an analysis by domestic courts of the alleged security risk that would follow from this access.[280]

4. Observations

In this case, domestic law and practice already foresaw Internet access for prisoners. This case thus concerned the negative obligation of States to not deprive prisoners of Internet access already available. Given that the Court consistently held that the scope of Art. 2 AP1 ECHR for prisoners only concerns education "*where such a possibility is available*", the Court assessed whether the education was available, and if so, whether the restrictions were not arbitrary or unreasonable.[281] With that specific intention, the Court assessed that because Turkish law did not absolutely prohibit Internet access for prisoners, access to the higher education requested indeed was possible, and hence introduced a test of proportionality. This test of proportionality, while structurally different from the three-step-test under Art. 10 ECHR, placed an emphasis on much of the same elements: costs, content and additional security risks. The precedent set out by this Court can be visualized as follows:

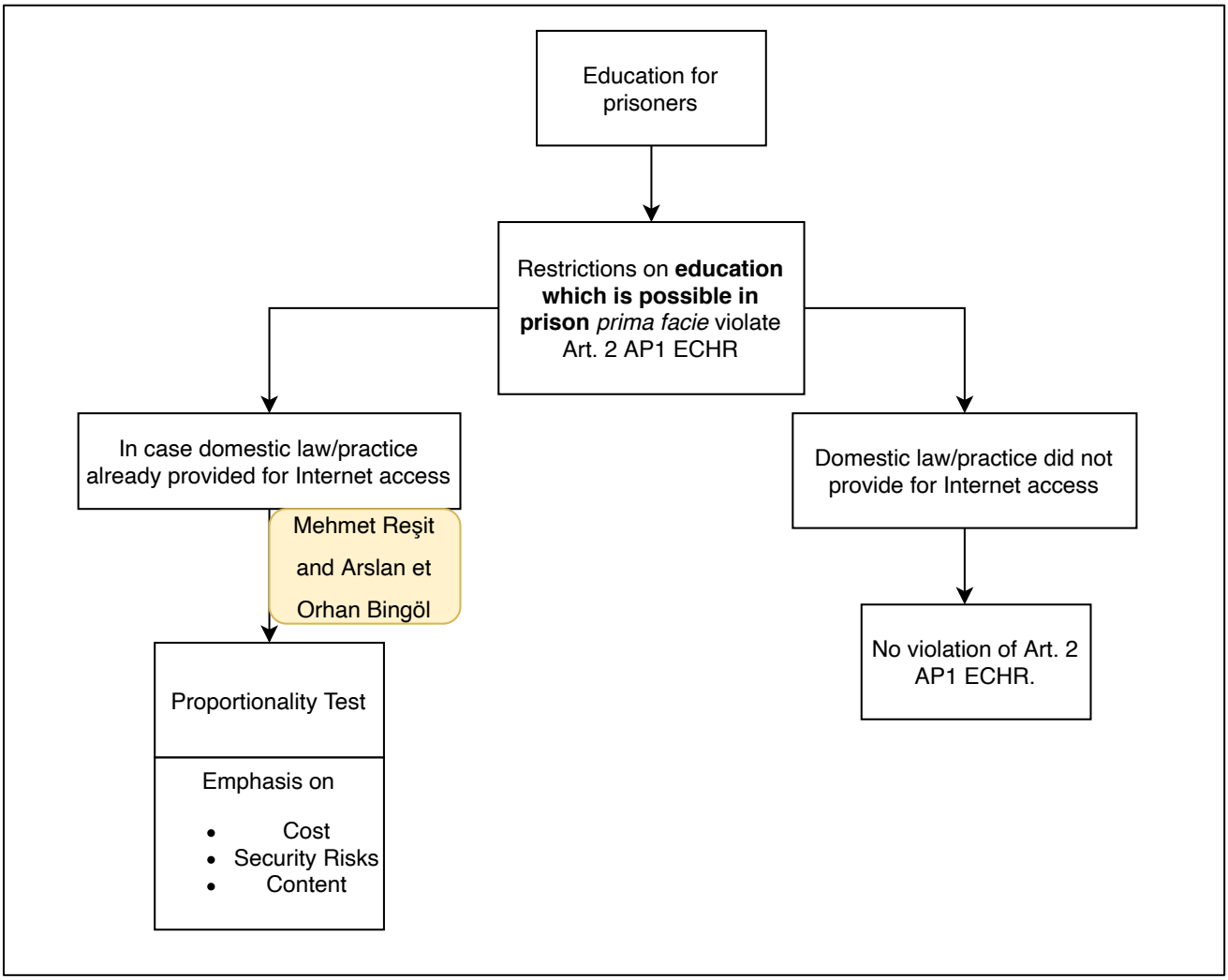
[277] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [60]-[65].

[278] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [69]

[279] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [66].

[280] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [69], [71].

[281] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].



a) Indirect positive effects on education for prisoners

Rights of education for prisoners within the framework of the ECHR depend essentially on the interpretation of "*where such a possibility [of education] is available*"[282]: only in cases of such availability will the Court apply its proportionality test. In *Mehmet Resit Arslan and Orhan Bingol*, the Court judged that when Internet access is not absolutely prohibited, there is a possibility of education, which accordingly merits a proportionality test.[283] In essence, the restriction of Internet access in such cases becomes a restriction of education at pre-existing institutions, invoking a proportionality test. Therefore, restrictions on the possibility of Internet-based education in absence of laws absolutely prohibiting Internet access for prisoners can henceforth be presumed to be scrutinized by the Court, allowing for a more effective and practical interpretation of the ECHR.[284] This can be visualized by means of a syllogism:

[282] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

[283] See Chapter III IV.B.3.a).

[284] See Chapter III.E.2.b)(1)(a).

Major Premise	Where a possibility of education at a pre-existing institution is available for prisoners, it should not be subject to arbitrary and unreasonable restrictions.[285]
Minor Premise	State X's domestic law does not prohibit Internet access for prisoners absolutely
Conclusion	State X may not arbitrarily and unreasonably restrict Internet access necessary for the purposes of education as Internet access equates access to that specific education.

By no means does this resolve the larger issue as pointed out by Lavrysen; education which cannot be enjoyed via Internet still falls outside this added scope of protection. However, this step by the Court allows for more scrutiny on arbitrary restrictions of Internet access by acknowledging the role Internet access plays in the provision of education.

b) Incentivizing prohibition of Internet access

In line with the *Kalda*-jurisprudence, this jurisprudence puts an emphasis on domestic law. States are thus still allowed and accordingly incentivized to ban Internet access for prisoners.[286]

C. POSITIVE OBLIGATIONS TO PROVIDE FOR INTERNET ACCESS?

1. A strict reading of Art. 2 AP1 ECHR

Art. 2 AP1 ECHR does not impose positive obligations upon States to provide prisoners with education.[287] In *Mehmet Reşit Arslan et Orhan Bingöl* the Court underlines that education is a complex service for which States have certain margin of appreciation regarding the allocation of resources, in line with the aforementioned structural margin of appreciation.[288] By extension, this article cannot be interpreted as requiring States to provide prisoners with Internet access for the purposes of education.

[285] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

[286] See Chapter III.D.3.a).

[287] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

[288] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [57].

2. An argument of reasonability?

As noted, the Court could and should take into account the specific vulnerable position of prisoners.[289] Indeed, the Court itself on multiple occasions noted the important role of education for the purposes of reintegration.[290] In that sense, prisoners are entirely dependent on prison facilities for their education. In times where education increasingly mitigates to an online environment, the argument to deprive prisoners of Internet access becomes increasingly unreasonable. Accordingly, a similar conclusion can be made as under Art. 10 ECHR: exactly for the sake of prisoners' vulnerable position, Art. 2 AP1 ECHR should be interpreted as imposing upon States some positive obligations to grant prisoners an effective enjoyment of education.

D. CONCLUSION

Mehmet Reşit Arslan et Orhan Bingöl v. Turkey aligns with the *Kalda*-jurisprudence: States are incentivized to deprive prisoners of Internet access entirely. Such a reasoning could arguably follow from a strict interpretation of Art. 2 AP1 ECHR but for the same reasons as mentioned in Chapter IV disavows the vulnerable position prisoners find themselves in. Accordingly, not only where States already provide for Internet access, but also where States absolutely ban Internet access for prisoners, the Court should assess the lawfulness of the State's (in)action by means of a proportionality analysis which could take into account costs, content and security risks.

[289] See Chapter III.E.3.a).

[290] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [69]; *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[35]-[38].

V. APPLYING THE CASE TO A BELGIAN CASE CURRENTLY PENDING

A. OBJECT AND PURPOSE

The analysis of the Court's jurisprudence has demonstrated that States are free to absolutely deprive prisoners of Internet access, and moreover are incentivized to do accordingly as this excludes any possibility of scrutiny by the Court. Additionally, the Court's jurisprudence has not yet developed any positive obligations concerning the provision of Internet access to prisoners.

In order to demonstrate the potential problematic aspects of the jurisprudence regarding negative obligations and the unreasonableness of absolutely excluding positive obligations concerning Internet access, this last question applies these principles to a case based on an application currently pending before Belgian Courts.[291]

B. THE ISSUE, A HYPOTHETICAL CASE

1. A summary of the factual aspects of the case

The issue of the hypothetical case can be summarized as follows:

- X is serving a sentence of 25 years in Leuven-Centraal[292], for murder. This prisoner has been convicted in accordance with the Belgian penal code. X's crime did not frame into organized crime. X does not challenge the sentence.
- X shows a perfect record in the prison: he has not yet been the subject of disciplinary sanctions, nor are there any indications of him imposing any danger to the guards and other prisoners. Nor are there any indications that X imposes danger to persons outside of prison.
- X wants to enroll in a Bachelor of Laws at the University of Ghent ("UGent") in the year 2020-2021.
- With those aims in mind, X requests
    - Internet access, more specifically to the online platform of the UGent and
    - an up-to-date laptop in order to study from within the cell.
- X is willing to pay for the necessary costs rising from the laptop provision and Internet connection in his cell.

[291] Scheerlinck H, 'Gevangenen dagvaarden Belgische Staat omdat ze geen online les mogen volgen aan KU Leuven' *VRT NWS* (Leuven, 19 June 2020) <https://www.vrt.be/vrtnws/nl/2020/06/19/gevangenen-ku-leuven-online-lessen/> (last accessed 16 May 2021).

[292] A prison located in Flanders, Belgium.

- His request is denied domestically. X exhausts all domestic remedies and lodges a complaint before the ECtHR. The Court deems his claim as admissible.

2. Motivation of choices made in the hypothetical case

The author opted to render X an individual already convicted. In jails, facilities where individuals await their judgement ("*Strafhuizen*") request for education could potentially be perceived less reasonable exactly because of the restricted time prisoners spend there. This in contrast to a 25-year sentence in prison ("*Strafinrichting*").

Secondly, X's access to Internet imposes no threat of continuance of organized crime given that the presence of such elements could affect a test of reasonability.

Thirdly, the author opted for the UGent not only because this thesis was submitted to this University, but also because this university in contrast to other Belgian universities does not proactively provides education for prisoners. Enrollment in these classes would therefore be dependent on access to the online environment.[293]

Fourthly, the author opted to look specifically into Leuven-Centraal because the case currently pending before domestic courts concerns Internet access in this very prison.[294] Accordingly, the author has additional information about the infrastructure and rules in this very prison, which allows for more concrete answers.

3. Internet access in Leuven-Centraal

In Leuven-Centraal, Internet access is possible to a certain extent.[295] There are several computers where prisoners can access certain websites. Namely a block of the entire World Wide Web applies, with only certain websites being allowed, such as the website of the public library of Leuven and some websites for online exams. All external links on these websites are blocked. Exactly because of these security measures, these activities are not directly supervised.

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[293] Vocvo, 'Database opleidingsaanbod gevangenissen, universiteiten' (*Vocvo*, 2021) <https://sites.google.com/vocvo.be/opleidingsaanbod-gevangenissen/homepage?authuser=0> (last accessed 17 May 2021).

[294] Scheerlinck H, 'Gevangenen dagvaarden Belgische Staat omdat ze geen online les mogen volgen aan KU Leuven' *VRT NWS* (Leuven, 19 June 2020) <https://www.vrt.be/vrtnws/nl/2020/06/19/gevangenen-ku-leuven-online-lessen/> (last accessed 16 May 2021).

[295] This information was shared to me by the lawyer currently defending several prisoners who were denied Internet access for educational purposes in the Leuven-Centraal prison. (Identity shared with promotor of this thesis). This information was subsequently confirmed by the Leuven-Centraal administration in a phone call.

Moreover, every cell in the prison comes equipped with telephonic facilities. The applicants in the real-life case argue that these facilities allow VoIP. In a phone call with the administration of Leuven-Centraal, this was however denied.

C. RULE: FOLLOWING THE COURT'S CASE-LAW

This hypothetical case bears great similarities with the 2019 *Mehmet Reşit Arslan et Orhan Bingöl* case: prisoners had requested Internet access for the purposes of higher education and were denied this access, which the Court ultimately found a violation of Art. 2 AP1 ECHR. In the same manner, the central question is whether the non-provision/restriction of Internet access by the Belgian prison facilities as upheld before domestic courts complies with Art. 2 AP1 ECHR. While the *Mehmet Reşit Arslan et Orhan Bingöl* case differs from *Kalda* and *Jankovskis* in that it does not concern Art. 10 ECHR, the case confirms the central reasoning of these cases: States are not obliged to provide prisoners with Internet access, but if domestic law does allow some Internet access, restrictions therewith need to be addressed by the tests under respectively Art. 10 ECHR or Art. 2 AP1 ECHR. Recently in *Ramazan Demir*, this reasoning has been confirmed, hence, this jurisprudence can be seen as a whole, constituting (quasi-) binding precedent for future cases. Hence, the *ratio decidendi* of *Mehmet Reşit Arslan et Orhan Bingöl* provides us with a perfect example of the line of reasoning of the Court.

a) The extent of domestic law

As we have seen, Art. 2 AP1 ECHR *ratione materiae* also applies to higher education for prisoners. In that sense, the restrictions of access to pre-existing higher education interferes with Art. 2 AP1 ECHR.[296] More specifically relating to prisoners, the Court adjudged that

> [a]lthough Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions.[297]

The restrictions thus must not meet a three-step-test as provided under inter alia Art. 10 ECHR, but must be proportional to the legitimate aim, effectively giving States a wider substantive margin of appreciation in restricting prisoner's rights to education.[298] The Court judged that if domestic law and practice don't establish an absolute prohibition on Internet access for prisoners it will extend its test of proportionality to the restrictions of Internet access.

> La Cour observe que la législation et la pratique turques ne prévoient pas une interdiction absolue relative à l'usage d'ordinateur et à l'accès à l'internet dans les établissements

[296] *Leyla Şahin v. Turkey* App no 44774/98 (ECtHR, 10 November 2005) [141].

[297] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

[298] The three-step-test as applicable in cases concerning Arts. 8-11 ECHR equally imposes a test of proportionality, but in a much narrower manner.

> pénitentiaires, y compris des prisons de haute sécurité. […] Pour la Cour, il ne fait pas de doute que la manière de réglementer les modalités d'accès à ces types de possibilité dans le milieu carcéral relève de la marge d'appréciation de l'État contractant.[299]

In essence, the restriction of Internet access in such cases becomes a restriction of education available at pre-existing institutions, requiring a proportionality test. Conversely, if domestic law prohibits Internet access, this falls within State's margin of appreciation.

The first question thus is if Belgian has prohibited Internet access for prisoners, inside its margin of appreciation. If in contrast, Belgian law and practice demonstrate that Internet access is possible to be authorized, the question rises whether the restriction was arbitrary or unreasonable.

b) The proportionality test

In regard to proportionality test, the following applies in cases of education; States have a wider margin of appreciation in their restrictions, especially concerning prisoners. However, the restrictions must not be unreasonable or arbitrary. The Court has further defined this criterion as follows in *Mehmet Reşit Arslan et Orhan Bingöl*: the domestic authorities are obliged to balance the interests at hand and prevent abuse of the internal rules by the internal administration:

> Il lui suffit de rechercher si les juridictions nationales ont rempli, d'une part, leur tâche consistant à mettre en balance les différents intérêts en jeu dans la présente affaire et, d'autre part, leur obligation d'empêcher tout abus de la part de l'administration dans l'application des règles internes.[300]

As demonstrated, by means of a syllogism, the Court reasons in the following manner

Major Premise	Where a possibility of education at a pre-existing institution is available for prisoners, it should not be subject to arbitrary and unreasonable restrictions.[301]
Minor Premise	State X's law and practice does not absolutely ban Internet access for prisoners.

[299] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [64].

[300] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [64].

[301] *Velyo Velev v. Bulgaria* App no 16032/07 (ECtHR, 27 May 2014) [34].

Conclusion	State X may not arbitrarily and unreasonably restrict Internet access necessary for the purposes of education.

D. APPLICATION

1. Does Belgian Law allow Internet access?

a) The standard: Turkish law applicable in Mehmet Reşit Arslan et Orhan Bingöl

The Court judged that because the Turkish law applicable in *Mehmet Reşit Arslan et Orhan Bingöl* did not absolutely prohibit Internet access for prisoners, any restrictions therewith should be reasonable and non-arbitrary. This law read as follows :

> 3. Dans les établissements ouverts et fermés ainsi que dans les centres d'éducation pour mineurs, l'utilisation d'outils et d'équipements de formation audiovisuels ne **peut être autorisée** que dans le cadre de programmes de formation et de réinsertion et dans les locaux désignés à cet effet par l'administration pénitentiaire. L'Internet peut être utilisé sous contrôle et dans la mesure rendue nécessaire par les programmes de formation et de réinsertion. Le condamné ne peut garder un ordinateur dans sa cellule. Cependant, l'introduction dans les établissements pénitentiaires d'ordinateurs dans un but formatif et culturel peut être autorisée après avis favorable du ministère de la Justice.
>
> 4. Ces droits peuvent être restreints par la décision du comité d'administration et d'observation à l'égard des condamnés présentant une certaine dangerosité ou appartenant à une organisation illégale.[302]

Irrespective of the *prima facie* exceptions applicable in the case at hand, the Court found that the law did not absolutely prohibit Internet access and accordingly applied a test of proportionality.[303]

b) Overview of Belgian Law

(1) General Belgian Prison Law and competences

Penitentiary matters are a federal competence in Belgium. The main Belgian legal act in this regard is the 2005 'Basiswet betreffende het gevangeniswezen en de rechtspositie van de gedetineerden'

[302] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [37]. See also: *Ramazan Demir v. Turkey* App no 68550/17 (ECtHR, 9 February 2021, not final as of writing)[14]-[15].

[303] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [64].

("Belgian Prison Law"or "BPL").[304] This law sets out the basic legal framework for the execution of prison sentences and other liberty-depriving measures.[305]

The BPL firstly explicitly sets out a number of basic principles applicable to all individuals having become the subject of deprivation of liberty. A prison sentence is executed with respect for the psychological, physical and material circumstances that respect the dignity of the human being. The prison sentence also accounts for the maintenance or growth of the prisoners' self-respect and points the prisoner to his or her individual and social responsibilities.[306] A prison sentence shall not entail the deprivation of political, civil, social, economic and cultural rights other than those determined in the sentence and those determined by law.[307] During the execution of the sentence, avoidable harm shall be prevented.[308]

Secondly, the BPL sets out basic principles for specific categories of aforementioned individuals. For convicted individuals, the law explicitly states that they only lose their right to liberty.[309] Furthermore, the sentence for convicted individuals has the aim to a) repair the harm caused to victims b) the rehabilitation of the convicted individual and c) his reintegration into free society.[310] Prisoners shall be given the opportunity to work constructively in the realization of their detention plan, an individual plan for the prisoners with the aim of harm-prevention, the safe execution of this sentence, rehabilitation and reintegration.[311]

Thirdly, the BPL prescribes that each prison has house rules which further determine the internal rules per prison. In the definition of the rules, the "*penitentiare administratie*", or the penitentiary administration, is the public authority tasked with the execution of liberty-depriving convictions and other liberty-depriving measures as required by the competent authorities. The Belgian Penitentiary Administration is in the hands of the director-general of Penitentiary Institutions.[312] Art. 9 BPL (originally Art. 8 BPL) has as its effect that prisoners shall only be deprived of their right to liberty, not their other human rights. During the drafting of the BPL in 2004, a member of Parliament stated that

[304] Belgian Prison Law of 12 January 2005, published on 1 February 2005 (Wet 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van gedetineerden) ("BPL").

[305] Art. 3 BPL.

[306] Art. 5 (1) BPL.

[307] Art. 6 (1) BPL.

[308] Art. 6 (2) BPL.

[309] Art. 9 (1) BPL.

[310] Art. 9 (2) BPL.

[311] Art. 9 BPL.

[312] Art. 1 (11) and (12) BPL.

this provision would entail *de facto* that prisoners would remain to the maximum a member of the free society, by means of the Internet for example.[313]

(2) Education

Apart from specific elements irrelevant for the purposes of this research[314] education generally is a competence of the respective "*Gemeenschappen*", namely the French, German and Flemish Communities.[315] Hence, education as an element of social assistance to prisoners for the purposes of reintegration, is a competence of these respective Communities.[316] Prisons remain however federal institutions. In order to facilitate such Community competences in federal institutions, federal and Community laws have established a legal basis for cooperation agreements between these two levels.[317] These do however not explicitly grant prisoners a right to education, nor a right to Internet access for the purposes of education.[318]

In regard to education, Art. 76 BPL states that the penitentiary administration must ensure that the prisoners have "*access as broad as possible*" to activities having the aim of a useful time allocation during the imprisonment or with the maintenance or amelioration of his chances of reintegration in the free society "*that have been made available to them*". The law determines that education, literacy, professional activities or the continuance thereof, social-cultural education, creative and cultural activities or physical education fall within the category of useful activities. Art. 78 BPL also determines that convicted individuals have a right, depending on their detention plan and the execution of their sentence, to finish education in which they were already enrolled in, to retrain themselves or to follow

[313] He contested this freedom; however, his statements were of no relevance in that regard. Belgian Parliamentary Preparatory Works DOC 51 K 0231/003 p. 12 (Laeremans J) < https://www.dekamer.be/FLWB/pdf/51/0231/51K0231003.pdf> (last accessed 17 May 2021).

[314] The determination of compulsory education, minimal requirements for the right to grant degrees and pensions in the field of education: Art. 127 (1) (2) Belgian Coordinated Constitution of 17 February 1994, published on 17 February 1994 (De gecoördineerde Grondwet) ("B Const").

[315] Arts. 127 (1) and. 3 B Const.

[316] Art 5 [1] II, 7° Special Law Concerning the Restructure of Institutions of 8 August 1980, published on 8 August 1980 (Bijzondere wet tot hervorming der instellingen) ("BWHI").

[317] Art 92 bis §1 BWHI; Flemish Decree concerning the organization and of assistance to prisoners of 8 March 2013, published 11 April 2013 (Decreet betreffende de organisatie van de hulp- en dienstverlening aan gedetineerden); Cooperation agreement between the Federal State, the Flemish Community and the Flemish Region concerning assistance to prisoners of 8 July 2014 (Samenwerkingsakkoord tussen de Federale Staat en de Vlaamse Gemeenschap en het Vlaams Gewest inzake de hulp- en dienstverlening aan gedetineerden).

[318] This separation of competences constitutes a bottleneck for the implementation of Internet access in prisons. From an informal interview with the coordinator of Vocvo (the institution tasked by the Flemish Government with coordinating education to prisoners in Flemish prisons), it followed that Vocvo is entirely dependent on the resource allocation decided by the federal level, requiring a degree of lobbying at that level.

a "professional education", inside or even outside of the prison. The preparatory works of the BPL do not clarify the indented scope of this provision. The phrasing of the text seems to indicate that this provision grants a right to either continue or reorientate education which the prisoner was already enrolled in, and not a right to start new studies necessarily. Art. 76 BPL and 78 BPL thus give right respectfully to non-interference with education foreseen/organized in prison and the right to continue or reorientate in studies that were initiated before the sentence.

(3) Art. 65 BPL

Chapter III of the law concerns contact with the outside. Part IV thereof concerns the use of a telephone and other means of telecommunication. Whereas the use of a telephone is legally provided for, the use of other means of telecommunication is not. Art. 65 BPL states that:

> "All means of telecommunication that have not been made available to the prisoner by the penitentiary administration or that are not allowed by, or by virtue of, this law are prohibited."[319]

This article is the result of a 2016 legislative change to the BPL as proposed by the Belgian Federal Government under the lead of the Minister of Justice Koen Geens, in light of the Pot-Pourri IV amendments. The preparatory works of this article are brief in contrast to the preparatory works of the similar provision in the original 2005 law. Given that these are content-wise related, the author demonstrates by means of the preparatory works firstly the intentions of the authors of the original article, and subsequently those of the authors of the new article.

(a) Original Art. 65 BPL

The current Art. 65 BPL constitutes a refinement of the previous provision Art. 65 BPL which stated that

> All means of telecommunication between the prisoners and the outside that have not been allowed by, or by virtue of, this law are prohibited. For educational purposes, the King can allow other means of telecommunication other than those provided by this law.

During the first stages of drafting, authors of the proposition noted they wanted a similar provision to account for "*the explosive growth of mobile telephone usage and other means of communication*".[320] In 2004, the Government already proposed explicitly to ban Internet access, given that it constituted a means of communication which could almost not be monitored or controlled.[321] Interestingly enough,

[319] The French and Dutch translations do not differ.

[320] Belgian Parliamentary Preparatory Works DOC 51 K0231/002 p.93 (Borginon A, Perpète A, Van Parys T) < https://www.dekamer.be/FLWB/PDF/51/0231/51K0231002.pdf> (last accessed 17 May 2021).

[321] Belgian Parliamentary Preparatory Works DOC 52 K0231/007 p.14 (2004 Belgian Government) < https://www.dekamer.be/FLWB/pdf/51/0231/51K0231007.pdf> (last accessed 17 May 2021).

the Government proposed this by means of an extra article nearly identical to the current Art. 65 BPL, with the motivation that this enshrined the principle of "*everything which is not allowed, is forbidden*" in order to account for the development of future technology.[322] In further clarifications however, the Government did acknowledge that the aim of such article would be to allow prisoners for "*pedagogical purposes*"[323] supervised access to "*certain websites*" such as the Flemish employment office[324]. In essence, the law allowed the Government to grant Internet access to prisoners mainly for the purposes of education. While such modalities are present in certain prisons, and were present even before the introduction of the BPL[325], the Government never acted on its promise: no official acts formally granted a right of Internet access to prisoners.

(b) Current Art. 65 BPL

> "All means of telecommunication that have not been made available to the prisoner by the penitentiary administration or that are not allowed by, or by virtue of, this law are prohibited."[326]

Firstly, this new Art. 65 BPL omits the wording "*for educational purposes*", given that the drafters found access for such purposes too restrictive in our current society, as illustrated by the access to the platform PrisonCloud: an online platform where prisoners can consult certain information relevant to their lives in prison, available in certain prisons in Belgium.[327]

Secondly, the Government was advised by the Council of State to change the wording in the text from "*[…] allowed by, or by virtue of,* ***this law*** *are prohibited*" to *"[…] allowed by, or by virtue of,* ***the law*** *are prohibited*" given that other laws can also provide for such legal bases.[328] However, the Government

[322] Belgian Parliamentary Preparatory Works DOC 52 K0231/007 p.14 (2004 Belgian Government) < https://www.dekamer.be/FLWB/pdf/51/0231/51K0231007.pdf> (last accessed 17 May 2021).

[323] Belgian Parliamentary Preparatory Works DOC 52 K 0231/015 p.95 (Rapport of the Commission of Justice led by Perpète A) <https://www.dekamer.be/FLWB/pdf/51/0231/51K0231015.pdf> (last accessed 17 May 2021).

[324] Belgian Parliamentary Preparatory Works DOC 52 K 0231/009 p.3 (2004 Belgian Government) < https://www.dekamer.be/FLWB/PDF/54/1986/54K1986001.pdf> (last accessed 17 May 2021).

[325] Belgian Parliamentary Preparatory Works DOC 52 K 0231/015 p.15 (Rapport of the Commission of Justice led by Perpète A) <https://www.dekamer.be/FLWB/pdf/51/0231/51K0231015.pdf> (last accessed 17 May 2021).

[326] Belgian Parliamentary Preparatory Works DOC 54 K 1986/001 p.84 (The Belgian Parliament) < https://www.dekamer.be/FLWB/PDF/54/1986/54K1986001.pdf> (last accessed 17 May 2021).

[327] Maes E and others, 'PrisonCloud Voor Gedetineerden. Grenzen Aan Digitale Normalisering?' (2019) 40 Panopticon 29.

[328] Belgian Council of State: department Legislation Nr. 59.226/1/2/3 (19 May 2016) p.102< http://www.raadvst-consetat.be/dbx/avis/59226> (last accessed 17 May 2021).

in their preparatory works objected to this non-binding advice, exactly because such phrasing would allow other means of telecommunication to prisoners which the Government did not intend to grant.[329]

Thirdly, the Government stated that it had the intention of only allowing means of telecommunication allowed by the penitentiary administration or by the BPL itself.[330] This reflects the principle of "*everything which is not allowed, is prohibited*", which formed the essence of the former and thus also current Art. 65 BPL.

Most interestingly, the final text of Art. 65 BPL refers to the penitentiary administration for making available and hence legal other means of telecommunication, instead of the King (The Federal Administration in its collegial capacity[331]).

c) First conclusion: Belgian law and practice does not absolutely ban Internet access.

On first sight basis, the Turkish and Belgian law seem vastly different: the Turkish law explicitly allowed the authorization of Internet access, the Belgian law prohibits all means of telecommunication not allowed by law or by the penitentiary administration. This would seem to indicate that the Belgian law restricts Internet access for prisoners absolutely, which falls within their margin of appreciation. This seems to follow *a fortiori* from the preparatory works indicating that everything which is not allowed is prohibited.

However, the Belgian law is similar if not identical to the Turkish law in its effect for the following reason.

Art. 65 BPL establishes generally that if the competent authorities have made Internet access possible, it is not prohibited. Given that Leuven-Centraal has acted on Art. 65 BPL by allowing some forms of Internet access[332], it thus appears that *in casu*, the Internet access by practice was not absolutely prohibited. *A fortiori*, the preparatory works of Art. 65 BPL establish that it was the explicit intention to make sure prisoners would enjoy Internet access for educational purposes if possible.

This combination of the Belgian law and practice resembles what the Court found determinative in *Mehmet Reşit Arslan et Orhan Bingöl* as a prerequisite for the application of its proportionality test: the

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[329] Belgian Parliamentary Preparatory Works DOC 54 K 1986/001 p.84 (The Belgian Parliament) < https://www.dekamer.be/FLWB/PDF/54/1986/54K1986001.pdf> (last accessed 17 May 2021).

[330] Note the wording is slightly different to Art. 65 BPL itself.

[331] And not solely the Minister of Justice, as was initially provided for, but as a reaction to non-binding advice of the Council of State amended as to respect the separation of powers. Belgian Council of State: department Legislation Nr. 59.226/1/2/3 (19 May 2016) p.102 < http://www.raadvst-consetat.be/dbx/avis/59226>.

[332] See Chapter V.B.3.

domestic law and practice do not absolutely ban Internet access for the prisoners.[333] While this Internet access is extremely limited in Leuven-Centraal, it unequivocally leads to the conclusion that the Court will apply a test of proportionality on the restriction to other sites such as those requested by X for his education, as follows by the Court's consistent case-law.

2. The proportionality test: the balance in favor of X?

As noted before, the Court under Art. 2 AP1 ECHR shall assess whether the State has balanced the interests at hand and prevented abuse of the internal rules by the internal administration.

In that regard two elements arise.

Firstly, sufficient software and hardware measures have been taken to prevent abuse of Internet access in Leuven-Centraal. A general firewall effectively blocks access to all sites not allowed by the authorities. Additionally, the available fixed computers can only be opened by means of a drill due to the special bolts.[334] The level of security is confirmed by the fact that the current Internet access is not directly supervised. Therefore, the addition of the online university platform onto the list of allowed sites to allow X education would not raise noteworthy security risks.

Moreover, given the availability of fixed computers and necessary firewall-software, no noteworthy additional costs would seem to follow from the addition of the university platform to the list of allowed websites.

Accordingly, the restriction of access to the online platform of the UGent is an unreasonable and arbitrary restriction of access to education at a pre-existing facility, in violation of Art. 2 AP1 ECHR.

a) The provision of a laptop: the introduction of positive obligations?

The aforementioned analysis frames exclusively within the Court's consistent jurisprudence regarding restrictions on Internet access already foreseen in prison, pertaining thus to the negative obligation of a State not to arbitrarily restrict Internet access for prisoner. In contrast, the request of a laptop extends beyond the already established case-law.

(1) Motivation

The essence of requesting a laptop would be to enhance the possibility of learning. The prisoner would not be hindered by the limited availability of the general fixed computers foreseen in Leuven-Centraal and could therefore more effectively save his documents on a central computer. It would moreover

[333] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [64].

[334] See Chapter V.B.3.

introduce more freedom, taking into account that certain specific tasks in higher education require longer periods of work.

(2) Belgian denial on the basis of limited positive obligations

The Belgian authorities could in this regard reasonably argue that Art. 2 AP1 ECHR imposes no positive duties upon States to provide prisoners education, let alone hardware for those purposes.[335] Additionally, the Court consistently reiterates that States do not have general positive obligations to provide prisoners with access to Internet or to some specific websites in absence of any domestic law in that respect.

(3) An argument of reasonability

The author however submits the following.

Exactly because X is a prisoner, whose access to Internet is entirely dependent on the prison facilities, a heightened duty of care should be imposed upon Belgium in line with the vertical substantive positive duties as put by Lavrysen.[336] The Court itself consistently acknowledged and underlined the necessity of Internet access for the enjoyment of Art. 10 ECHR[337]. In that same sense, the higher education to which X requests access to equally requires Internet access, as universities like the UGent have moved towards online platforms for these purposes. This platform is necessary for access to classes, textbooks and exercises.

Having access to this material by virtue of the aforementioned jurisprudence is one thing but being able to effectively make use thereof is another. Indeed, the scarceness of available computers and the limited time allocated for the use thereof additionally presents an obstacle to the prisoners' effective exercise of education. Whereas it is completely unreasonable to require from all CoE Member States provision of Internet access[338], it would in light of the heightened duty of care in combination with specific elements of this case not be unreasonable to require the Belgian State to undertake some specific positive measures.

When looking into the specific details of this case, necessary hardware is available for extremely restricted Internet access from the prison cell according to the applicant. The applicant is willing to pay rent for his laptop and the additional costs accorded therewith.[339] In regard to safety measures, current Internet access is not directly supervised exactly because of the sufficiency of the firewall. The use of

[335] See Chapter IV.C.1.

[336] See Chapter III.E.3.a).

[337] See Chapter I.A.3.a) and Chapter III.E.2.e)(1).

[338] See note 253.

[339] See Chapter V.B.3

a telephone on the cell is equally unsupervised. Accordingly, allowing X to pay for extremely limited and secured, yet necessary prison cell Internet access for educational purposes could hardly be interpreted as falling inside of Belgium's structural margin of appreciation, exactly because of the lack of additional complex resource-allocations this access would require. Hence, the Court could and should require Belgium to make available the requested laptop within this specific context.

3. Conclusion

In light of the precedent by the Court, Art. 65 BPL does not absolutely prohibit Internet access for prisoners, entailing that the Court will apply a test of proportionality under Art. 2 AP1 ECHR. Accordingly, the restriction of Internet access to the online university platform constitutes a violation of X's rights under Art. 2 AP1 ECHR as the possible concerns do not weigh up against the absence of additional noteworthy cost or the absence of security risks. In contrast, the ECHR as interpreted by the ECtHR, seemingly would not impose upon Belgium the obligation to provide X with a laptop in his cell. However, in light of the facts at hand, as assessed by the Court's case-law defined by Lavrysen, it appears that imposing such a small-scall, low-cost positive obligation upon Belgium would not be unreasonable and could be interpreted as an extension of positive obligations under Art. 10 ECHR, in absence of similar obligations under Art. 2 AP1 ECHR.

E. ISSUES AND OBSERVATIONS

1. Emphasis on domestic law

Some might take issue that the Belgian law, which on its own does not establish that Internet access is allowed, might be interpreted in such a way because of the fact that some Internet access was made available in Leuven-Centraal. This aligns perfectly with what was established in Chapter III.D.3.a): because the Court makes the application of the three-step-test (Art. 10 ECHR) or the proportionality test (Art. 2 AP1 ECHR) exclusively dependent on domestic law, States are bolstered to absolutely ban Internet access for prisoners. Exactly because Belgian law leaves open the possibility of Internet access for prisoners and some extremely limited Internet access was already made available in Leuven-Centraal, the Court here allows itself to assess the proportionality of the restriction.

The Court's case-law would be far more comprehensive if it established that any restriction of Internet interferes with Art. 10 ECHR or violates Art. 2 AP1 ECHR *prima facie*, but then allowed for a balancing between the State's wide substantive margin of appreciation in matters of prisoner's rights and the increasing central role Internet plays for the enjoyment of these rights. If Belgium would have had domestic law banning Internet absolutely, the prisoners would have been left in the cold.

2. Belgian right to education

As established, Art. 76 and 78 BPL seemingly only give right respectfully to non-interference with education foreseen/organized in prison and the right to continue or reorientate in studies that were initiated before the sentence.[340] A strict reading would thus prohibit prisoners from enrolling in a new education, such as X requested.

Making abstraction of the compliance of these articles with the constitutionally protected right to education[341], such a reading would be *prima facie* be in violation of Art. 2 AP1 ECHR. Art. 2 AP1 ECHR namely prohibits any unreasonable or arbitrary restrictions on access to pre-existing educational institutions education for prisoners. Absolutely prohibiting the enrollment in a university on the basis that the prisoner is starting new education appears extremely arbitrary. This does not entail that prisoners have an unbound right to education however; access to education can be limited in light of a State's limited resources or the real dangers that this education would entail.[342] For example, prisoner Y wants to enroll in classes with the aim of becoming a car-mechanic. Art. 2 AP1 ECHR firstly does not oblige States to provide such education in prison. However, in a nearby school, such education is available, and Y would be willing to bear the necessary costs. Given that Y however poses a real threat to people outside of prison or that there are limited financial resources to guarantee adequate supervision of Y during his classes, the State can reasonably argue that the restriction was reasonable and not arbitrary. In contrast, blocking access to that school merely on account that this would not be a continuation or reorientation in relation to his former education, would be unreasonable and arbitrary, as it purposefully prevents the rehabilitation and reintegration of Y.

This is where Internet access and its possibilities for education really shine. As Internet access decreases the costs and security risks accorded with education for prisoners, restrictions thereon should equally decrease. In effect, *Mehmet Reşit* and *Arslan et Orhan Bingöl* constituted a first important step in that regard: the prisoners merely wanted to enroll or continue their higher education in prison in a fashion that did not impose unreasonable obligations upon their State. Such jurisprudence seems on first sight basis optimistic for prisoners wanting to enroll in education available online, especially taking into account the increasing migration of education to the online environment during the Covid-19 pandemic.

However, the Court's case-law falls short of comprehensively balancing the decrease the costs and security risks accorded with education for prisoners, given that it only allowed itself to apply this test of proportionality on the basis that domestic law did not absolutely prohibit Internet access for prisoners.

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[340] See Chapter V.D.1.b)(2).

[341] Art. 24 B Const.

[342] *Mehmet Reşit Arslan et Orhan Bingöl v. Turkey* App no 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019) [69].

In effect, the Court makes the effective protection of prisoners' rights absolutely and entirely dependent on domestic law, which really puts placemarks next to its purpose as a regional human rights court.

VI. CONCLUSION

As Internet access increasingly becomes a central element in our lives, restrictions thereon increasingly affect the enjoyment of our human rights. The fact that an individual has been deprived of his or her liberty does not make such inaccessibility any less problematic. However, States acting on the normative concept of less-eligibility, often disguised as non-demonstratable arguments of security risks and limited resources, attempt to frame this lack of Internet access as an acceptable pain of imprisonment. Exactly because the European Human Rights Convention has as its central purpose the collective enforcement of human rights on the basis of shared values, as primarily enforced through the European Court of Human Rights, this thesis looks into the relevant jurisprudence of that Court to analyze if and how this regional body protects certain rights of prisoners to Internet access.

The Court's jurisprudence is problematic as it holds against States that they have allowed some Internet access to prisoners by means of domestic law and practice by making the application of either the three-step-test under Art. 10 ECHR or the proportionality test under Art. 2 AP1 ECHR exclusively dependent on that law. On the one hand, this entails unforeseen consequences for States who were well-willing to allow prisoners some Internet access. On the other hand, this jurisprudence allows States to deny prisoners Internet access entirely, without imposing these tests of lawfulness. States are thus incentivized to explicitly and absolutely deprive prisoners of Internet access. Allowing States to deny prisoners Internet access without any human rights accountability opposes the Court's general jurisprudence regarding the treatment of prisoners, contradicts specifically the necessity of Internet access as underlined by the Court in its Yıldırım-jurisprudence and seems to contradict the principle of regional human rights enforcement through a central court. In Belgium, where domestic law and practice allows for very limited Internet access, this jurisprudence would have the effect of introducing a proportionality analysis reasonably extending Internet access to online education for example, while the domestic lawmakers most likely had the intention of determining themselves when such access could be granted over time. Accordingly, the Belgian lawmaker under the guise of this jurisprudence could be motivated to restrict Internet access for prisoners in the future, as States would be entirely free to do accordingly. A future approach of the Court should and could be more comprehensive by finding that restricting prisoners' Internet access generally interferes with their human rights and unavoidably entails a test of lawfulness, either by means of the three-step-test or by means of a more general test of proportionality.

In addition, the Court in *Jankovskis* shied away from translating the importance of Internet access into positive obligations where the applicant requested to do accordingly. However, there are several arguments the Court could have taken into account to define properly the extent of limited positive obligations, given that in effect, prisoners do not dispose over access unless the authorities undertake positively described measures. The Court could have balanced the limits of positive obligations

regarding issues of complex issues of resource allocation with the vulnerable position of the prisoner, taking into account the fact that the request of the applicant in that case did not impose any additional costs. In that same sense, in a pending case before Belgian Courts, the request of a laptop in a prison where such access is technically possible without any notable security risks or additional costs should be interpreted as a reasonable positive obligation under Art. 2 AP1 ECHR.

These findings provide a look into the *status quo* of the (absence of) European human rights protection concerning Internet access for prisoners which on turn allows for further research into how, if, and why prisoners should enjoy Internet access.