

EUROPEAN COURT OF HUMAN RIGHTS

E.S. v. Sweden, Application no. 5786/08

Written submissions by the Human Rights Centre of Ghent University

EXECUTIVE SUMMARY

The case of *E.S. v. Sweden* has the potential to become a leading case for the Court's positive obligations doctrine. It is submitted that it is important for the Court to take the positive obligation to develop and effectively apply a regulatory framework to protect against human rights violations in the private sphere seriously. These written comments respectfully question the use of the "significant flaws" test in the Chamber judgment and argue that this test is hard to reconcile with the principles of priority-to-rights and effectiveness. The Grand Chamber is respectfully called upon to exercise leadership in the field of positive obligations, by endorsing the principles of priority-to-rights and effectiveness. Such leadership is all the more required in the light of the international consensus to effectively protect minors against sexual abuse.

1. INTRODUCTION

These written comments are prepared and submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to leave granted by the President of the European Court of Human Rights on 8 February 2013, in accordance with rule 44 § 3 of the Rules of the Court. The Human Rights Centre is an academic centre. One of the Centre's leading projects is "Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning." The project is led by Professor Eva Brems and funded by the European Research Council. It is in the context of this project that these written comments are submitted for your consideration.

Significance case in light of jurisprudence

In the leading case of *X and Y v. the Netherlands*, the Court has recognized that positive obligations under Article 8 ECHR "may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves."¹ This case was the first one in which the Court acknowledged the importance of providing individuals a degree of legal protection in their relations vis-à-vis other private actors. The positive obligation to provide a degree of legal protection has subsequently penetrated the Court's entire positive

¹ ECtHR 26 March 1985, *X and Y v. the Netherlands*, no. 8978/80, para. 23.

obligations jurisprudence. The Court has recognized such a positive obligation not only under Article 8 ECHR,² but also under *inter alia* Articles 2³, 3⁴, 4⁵, 5⁶ and 11.⁷ In the literature, this positive obligation has been described as representing “the minimum obligation of Contracting States under the Convention”⁸ and as “the first and most basic content of positive obligations.”⁹ This positive obligation is twofold: (1) states have to develop a regulatory framework containing adequate standards preventing violations of human rights by private actors¹⁰, if necessary through criminal law provisions¹¹ (i.e. ‘substantive protection’), and (2) states have to develop procedures that allow individuals to claim their human rights vis-à-vis other private actors¹² (i.e. ‘procedural protection’).¹³

The obligation to structurally provide legal protection in private relations is particularly important since it amounts to the ‘translation’ of international obligations that are otherwise not binding on private actors into binding domestic law (‘substantive protection’)¹⁴ that is enforceable in practice (‘procedural protection’).

Therefore it is necessary for the Court to take the positive obligation to develop and effectively apply a regulatory framework to protect against human rights violations in the private sphere seriously, by applying stringent legal standards. The Grand Chamber judgment in *E.S. v. Sweden* is likely to become a leading case in the field of positive obligations and therefore it provides the Court with a unique opportunity to exercise leadership in this respect. In particular, it allows the Grand Chamber to abandon the overly deferential “significant flaws” test applied in the Chamber judgment.

While the notion of “significant flaws” has been mentioned in the earlier cases of *M.C. v. Bulgaria*¹⁵, *Siliadin v. France*¹⁶ and *M. and C. v. Romania*¹⁷, in those cases it did not have any impact on the Court’s further reasoning. However in the Chamber judgment in *E.S. v. Sweden* it

² E.g. ECtHR 2 December 2008, *K.U. v. Finland*, no. 2872/02.

³ ECtHR (GC) 17 January 2002, *Calvelli and Ciglio v. Italy*, no. 32967/96.

⁴ E.g. ECtHR 4 December 2003, *M.C. v. Bulgaria*, no. 39272/98.

⁵ E.g. ECtHR 26 July 2005, *Siliadin v. France*, no. 73316/01.

⁶ E.g. ECtHR 16 June 2005, *Storck v. Germany*, no. 61603/00.

⁷ E.g. ECtHR 6 November 2012, *Redfearn v. the United Kingdom*, no. 47335/06.

⁸ K. Starmer, “Positive obligations under the Convention”, in J. Lowell and J. Cooper (eds.), *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2001), 139 at 147.

⁹ D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Abingdon: Routledge, 2012), 107.

¹⁰ E.g. ECtHR 4 December 2003, *M.C. v. Bulgaria*, no. 39272/98; ECtHR 26 July 2005, *Siliadin v. France*, no. 73316/01.

¹¹ ECtHR 26 March 1985, *X and Y v. the Netherlands*, no. 8978/80, para. 27.

¹² E.g. ECtHR 9 October 1979, *Airey v. Ireland*, no. 6289/73; ECtHR 26 March 1985, *X and Y v. the Netherlands*, no. 8978/80; ECtHR 7 February 2002, *Mikulić v. Croatia*, no. 53176/99.

¹³ See L. Lavrysen, “Protection by the law” in E. Brems and Y. Haeck (eds.), *Human Rights & Civil Rights in the 21st Century* (Heidelberg: Springer, forthcoming).

¹⁴ *Ibid.*

¹⁵ ECtHR 4 December 2003, *M.C. v. Bulgaria*, no. 39272/98, para. 167.

¹⁶ ECtHR 26 July 2005, *Siliadin v. France*, no. 73316/01, para. 130.

¹⁷ ECtHR 27 September 2011, *M. and C. v. Romania*, no. 29032/04, para. 112.

is suddenly elevated to a general principle¹⁸ and applied as a separate and decisive test to examine whether the shortcomings in domestic legislation and practice amounted to a failure to discharge the positive obligation under Article 8 ECHR¹⁹. It is respectfully submitted that the application of the “significant flaws” test in the Chamber judgment is overly deferential and fails to live up to the principles of priority-to-rights (2.) and effectiveness (3.). Regardless of how the Grand Chamber decides on the merits of the case, it would be preferable if its legal reasoning reflects a more stringent approach. Moreover, more stringency is particularly required in the field of protection of minors against sexual abuse (4.).²⁰

2. THE PRIORITY-TO-RIGHTS PRINCIPLE

The priority-to-rights principle requires that Convention rights are principally accorded greater weight than collective goods in the proportionality analysis.²¹ There are numerous examples of cases in which the Court has recognized a variant of the priority-to-rights principle, suggesting that it may rightly be considered as a general principle of Convention law. As early as the Belgian Linguistics case the Court recognized that “[t]he Convention [...] implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.”²² The priority-to-rights principle is further reflected in the requirement to interpret limitations of Convention rights restrictively²³. Protection of Convention rights can thus be considered as the rule, while justified limitations are the exception²⁴. The priority-to-rights principle thus principally favours human rights protection over competing interests and there is no principled reason why the same is not equally relevant in the context of positive obligations as in the context of negative obligations.

The priority-to-rights principle is also reflected in the burden of proof: the principle requires that, once the applicant has established an interference with a Convention right²⁵, the state bears the

¹⁸ ECtHR 21 June 2012, *E.S. v. Sweden*, no. 5786/08, para. 59.

¹⁹ *Ibid.*, paras. 64, 66, 68 and 72.

²⁰ These arguments have already been developed in L. Lavrysen, “No ‘Significant Flaws’ in the Regulatory Framework: *E.S. v. Sweden* and the Lowering of Standards in the European Court of Human Rights’ Positive Obligations Case-Law” (under consideration for publication, manuscript on file).

²¹ S. Greer, “Constitutionalizing Adjudication under the European Convention on Human Rights”, *Oxford Journal of Legal Studies* (2003), 405 at 413-414.

²² ECtHR 23 July 1968, Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para. 5 (Article 2 Protocol 1).

²³ E.g. ECtHR (Plenary) 6 September 1978, *Klass and Others v. Germany*, no. 5029/71, para. 42 (Article 8); ECtHR (Grand Chamber) 12 February 2004, *Perez v. France*, para. 73 (Article 6); ECtHR (Grand Chamber) 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97, para. 146. (Article 11); ECtHR (Grand Chamber) 10 December 2007, *Stoll v. Switzerland*, no. 69698/01, para. 61 (Article 10).

²⁴ S. Smet, “The Nature and Form of Conflicts between Human Rights in the Case Law of the European Court of Human Rights” (manuscript on file), 40.

²⁵ T. Thienel, “The Burden and Standard of Proof in the European Court of Human Rights”, *German Yearbook of International Law* (2007), 543 at 587.

burden of proving the proportionality of that interference.²⁶ In case of doubt, the axiom *in dubio pro libertate* applies: as the state bears the burden of proof, any remaining doubt as to the necessity of a limitation will play to the benefit of the Convention right concerned²⁷. As argued in the literature, this division of the burden of proof equally applies to positive obligations: once the applicant establishes that a situation comes within the scope of a Convention right, the priority-to-rights principle *mutatis mutandis* requires the state to bear the burden of proof that its inactions do not violate the Convention right concerned.²⁸

In the judgment in *E.S. v. Sweden*, the Chamber however applies a different approach by holding that “only significant flaws in legislation and practice, and their application, would amount to a breach of the State’s positive obligations under Article 8.”²⁹ Such a statement by its nature requires the applicant to provide the positive proof of the existence of a “significant flaw” rather than requiring the state to provide the negative proof of the absence of a “significant flaw”. The applicant is thus placed at a disadvantaged position vis-à-vis the state, since the applicant has to provide both proof of the interference and proof of the existence of a “significant flaw”. This creates a presumption that the state has discharged its positive obligations, which is contrary to the priority-to-rights principle, since it exempts the state from bearing the burden of proof in the proportionality analysis. The “significant flaws” test further violates the axiom *in dubio pro libertate*, since remaining doubt benefits the state rather than the applicant.

In the next section, an alternative approach will be proposed, in which the state is required to bear the burden of proof that it has provided “practical and effective protection” – taking into account possible countervailing interests³⁰ – whenever an applicant has established that a situation enters

²⁶ Greer, *supra* note 21, 428; similarly S. Van Drooghenbroeck, “Conflits entre droits fondamentaux, pondération des intérêts: fausses pistes (?) et vrais problèmes”, in J.-L. Renchon (ed.), *Les droits de la personnalité* (Brussels: Bruylant, 2009), 299 at 314-315. E.g. ECtHR (Grand Chamber) 13 July 2000, *Elsholz v. Germany*, no. 25735/94, para. 48, and ECtHR (Grand Chamber) 12 September 2012, *Nada v. Switzerland*, no. 10593/08, para. 181 (Article 8; the need for the state to adduce “relevant and sufficient” reasons for justifying an interference); ECtHR 24 April 2012, *Yordanova and Others v. Bulgaria*, no. 25446/06, para. 118 (Article 8, inferences drawn from lack of explanation or argumentation justifying interference).

²⁷ F. Ost and S. Van Drooghenbroeck, “La responsabilité face cachée des droits de l’homme”, in H. Dumont, F. Ost and S. Van Drooghenbroeck (eds.), *La Responsabilité face cachée des droits de l’homme* (Brussels: Bruylant, 2005), 2 at 33-34; Smet, *supra* note 24, 40.

²⁸ L. Lavrysen, “The Scope of Rights and the Scope of Obligations: Positive Obligations”, in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, forthcoming); and similarly G. van der Schyff, *Limitation of Rights – A Study of the European Convention and the South African Bill of Rights* (Nijmegen: Wolf Legal Publishers, 2005), 69; and J. Gerards and H. Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’, *International Journal of Constitutional Law* (2009), 619 at 644.

²⁹ ECtHR 21 June 2012, *E.S. v. Sweden*, no. 5786/08, para. 59.

³⁰ See for example the Court’s approach in ECtHR 2 December 2008, *K.U. v. Finland*, no. 2872/02, para. 48, in which the Court recognizes that a positive obligations must not be interpreted as to impose an “impossible or disproportionate burden” on the state authorities. It is of course on the state to convincingly establish the existence of such an “impossible or disproportionate burden”.

the scope of a Convention right and thus *prima facie* requires Convention protection³¹. Such an approach would be in line with the priority-to-rights principle.

3. THE PRINCIPLE OF EFFECTIVENESS

The Court has always stressed that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”³² The principle of effectiveness can be considered as a general interpretative principle applied by the Court to determine the extent of Convention protection.³³ In positive obligations cases, whenever the regulatory framework and/or its application was scrutinized, the Court always applied a standard of effectiveness,³⁴ even in the earlier cases where the Court mentioned the notion of “significant flaws”.³⁵ This indeed has been the very standard since the Court in *X and Y v. the Netherlands* held that Dutch criminal law did not provide the applicant “with practical and effective protection.”³⁶

In general terms, in this type of cases, the principle of effectiveness requires at the basic level the existence of a measure capable of providing individuals protection against human rights violations by private actors. While absolute protection is not required, as positive obligations are obligations of means rather than obligations of result, the principle of effectiveness does require that the state strives to provide as much protection as can reasonably be expected.³⁷ According to *Xenos*, “the choice of measures is reviewed against the standard of effectiveness, which aims, consciously or unconsciously, at an end/complete result”,³⁸ in particular the end result “not to

³¹ Lavrysen, *supra* note 28; *mutatis mutandis* in the context of positive obligations in German Constitutional Law, R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), 328 (“Wherever procedural norms can raise the protection of constitutional rights they are *prima facie* required by constitutional principles. If no competing principles apply, then there is a definitive right to their application”).

³² E.g. ECtHR 9 October 1979, *Airey v. Ireland*, no. 6289/73, para 24.

³³ D. Harris, M. O’Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2009), 15.

³⁴ E.g. ECtHR 2 December 2008, *K.U. v. Finland*, no. 2872/02, para. 49 (“*practical and effective protection* of the applicant required that *effective steps* be taken to identify and prosecute the perpetrator”); ECtHR 7 January 2010, *Rantsev v. Cyprus and Russia*, no. 25965/04, para. 184 (“the spectrum of safeguards set out in national legislation must be adequate to ensure the *practical and effective protection* of the rights of victims or potential victims of trafficking”); ECtHR 9 October 1979, *Airey v. Ireland*, no. 6298/73, para. 33 (“*effective respect* for private or family life obliges Ireland to make this means of protection *effectively* accessible”).

³⁵ ECtHR 26 July 2005, *Siliadin v. France*, no. 73316/01, para. 148 (“the criminal-law legislation in force at the material time did not afford the applicant, a minor, *practical and effective protection*”); ECtHR 4 December 2003, *M.C v. Bulgaria*, no. 39272/98, para. 185 (“the approach taken by the investigator and the prosecutors in this case fell short of the requirements inherent in the States’ positive obligations ... to establish and apply *effectively* a criminal-law system punishing all forms of rape and sexual abuse”) and similarly ECtHR 27 September 2011, *M. and C. v. Romania*, no. 29032/04, para. 121.

³⁶ ECtHR 26 March 1985, *X and Y v. the Netherlands*, no. 8978/80, para. 27.

³⁷ *Mutatis mutandis* ECtHR (Grand Chamber) 28 October 1998, *Osman v. United Kingdom*, no. 234582/94, para 116.

³⁸ *Xenos*, *supra* note 9, 118.

suffer a violation of human rights by a given activity.”³⁹ In other words, the principle of effectiveness requires an appropriate means-ends relationship. While the Court holds that the choice of means to discharge a positive obligation generally falls within the state’s margin of appreciation,⁴⁰ the protection offered by these means must nonetheless be effective. The principle of effectiveness in combination with the margin of appreciation doctrine thus delineates a range of means that are appropriate to protect human rights. If the state fails to use a means at its disposal or if it applies a means that for whatever reason is not capable of appropriately protecting the right concerned in practice, the state has failed to discharge its positive obligation.⁴¹

In the context of the investigative obligation under Article 2 ECHR, the Court has explicitly acknowledged this link between the principle of effectiveness and the capability to investigate successfully in the case of *Nachova and Others v. Bulgaria*: “[a]ny deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.”⁴² The same *mutatis mutandis* applies to the investigative positive obligation under Article 8 ECHR, which is at stake in the present case.

The Chamber judgment falls foul of the principle of effectiveness for several reasons. Firstly, it is disturbing that the Chamber stressed several times the fact that Swedish criminal law “in theory” – rather than in practice – provided sufficient protection⁴³. The Convention however requires “practical and effective” rather than “theoretical or illusory” protection. Secondly, a standard similar to “significant flaws” has been rejected in the context of the positive obligation under Article 2 ECHR to take preventive operational measures to protect an individual whose life is at risk. In *Osman v. the United Kingdom*, the Court did not accept the standards proposed by the Government – whether there has been “gross negligence” or “wilful disregard of the duty to protect life” – on the grounds that “[s]uch a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2.”⁴⁴ Thirdly, “effective” protection cannot simply be equated with the absence of “significant flaws”. On a spectrum, protection is not either effective or ‘significantly flawed’: between both points on the spectrum, there are other positions in which insufficient protection is provided. As the ‘significant flaws’ test would not result in the finding of a violation with respect to these other

³⁹ *Ibid.*, 102.

⁴⁰ E.g. ECtHR 9 June 2005, *Fadeyeva v. Russia*, no. 55723/00, para 96.

⁴¹ Unless it can justify the proportionality of its inaction, in line with the priority-to-rights principle.

⁴² ECtHR (Grand Chamber) 6 July 2005, *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, para. 113; *mutatis mutandis* ECtHR (Grand Chamber) 13 December 2012, *El-Masri v. “The Former Yugoslav Republic of Macedonia”*, no. 39630/09, para. 183 (Article 3).

⁴³ ECtHR 21 June 2012, *E.S. v. Sweden*, no. 5786/08, paras. 60, 65 and 72.

⁴⁴ ECtHR (Grand Chamber) 28 October 1998, *Osman v. United Kingdom*, no. 234582/94, para. 116.

positions, the introduction of this test in the Chamber judgment thus amounts to the lowering of standards in the Court's jurisprudence.

4. PROTECTING MINORS AGAINST SEXUAL ABUSE

It is particularly important for the Court to apply firm legal standards in the field of protection of minors against sexual abuse. In the context of the positive obligation to criminalise offences against the person, this was acknowledged by the Court in *K.U. v. Finland*: “[w]here the physical and moral welfare of a child is threatened such injunction assumes even greater importance. The Court recalls in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.”⁴⁵

The need for the Court to take a firm approach with respect to the criminal law protection of children against sexual abuse is in line with international legal standards, in particular the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography⁴⁶ and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse⁴⁷. The Optional Protocol requires states to criminalize *inter alia* the production and possession of child pornography (Article 3, para 1 (c)) as well as an attempt to commit such act (Article 3, para 2). It further requires states to adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the Protocol at all stages of the criminal justice process (Article 8, para 1). The Council of Europe Convention equally requires the criminalisation of the production and possession of child pornography (Article 20, para 1). The Convention *inter alia* requires states to take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child (Article 30, para 1). Both the Optional Protocol and the Council of Europe Convention would be futile in the absence of the effective investigation and prosecution of the offences concerned.⁴⁸

5. CONCLUSION

The case of *E.S. v. Sweden* provides the Grand Chamber with a unique opportunity to exercise leadership in the field of positive obligations. It falls outside the scope of this third party

⁴⁵ ECtHR 2 December 2008, *K.U. v. Finland*, no. 2872/02, para. 46.

⁴⁶ Adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, 2171 UNTS 227.

⁴⁷ Adopted at the 28th Conference of European Ministers of Justice in Lanzarote on 25 October 2007, 201 CETS.

⁴⁸ *Mutatis mutandis* Article 8 para. 2 Optional Protocol and Article 34 para 2 Council of Europe Convention, that both require that uncertainty about the age of the victim may not prevent the initiation of criminal investigations.

intervention to argue what the most appropriate outcome for this case would be, but it is important for the further development of the Court's positive obligations jurisprudence that the Grand Chamber develops and applies firm legal standards. It has been argued that the application of the "significant flaw" test in the Chamber judgment amounts to a lowering of standards in the Court's jurisprudence. The way forward for the Grand Chamber is to endorse the principles of priority-to-rights and effectiveness. The former requires that Convention rights are principally accorded greater weight than collective goods in the proportionality analysis and that the state bears the burden of proving the proportionality of its inactions. The latter requires the existence in practice of a means capable of protecting a Convention right. In the context of the investigative positive obligation, any deficiency in the investigation that undermines the capability of establishing the circumstances of the case or the perpetrator's liability falls foul of the standard of effectiveness. The application of firm legal standards is all the more required in the light of the international consensus to effectively protect minors against sexual abuse.



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20 February 2013