Chapter Seven: Convention Obligations Beyond Rights: An Introduction to Undirected Duties

As has been shown in the foregoing chapters, both legal services and the media are complex phenomena under the Convention because they engage a number of different private and public interests.[1735] Generally speaking, the Court has been far more convincing in its protection of private interests than in its protection of public ones. In what follows, it will be argued that this is because the Court focuses only on rights, rather than taking the perspective of duties, since rights – unlike duties – are usually seen as necessarily conceptually linked to private interests.[1736]

This shift of perspective to emphasise the State's *duties* may be somewhat surprising for research on a human *rights* treaty. It is premised on the idea that the duties imposed on States by the Convention go beyond the duties that correspond to the rights of individual rights holders. The following chapters argue that the Court, by taking only the perspective of rights, at present deals only with a part of the obligations the Convention imposes on States. It currently concentrates only on the *directed* duties that correspond to individual Convention rights, and ignores the fact that the Convention can also impose *undirected* duties on the State. Because human rights are traditionally understood as grounded in individualistic concerns (as will be discussed in Chapter Eight), this leaves the Court struggling to address public interests – for these, undirected duties on the State would be a more suitable tool.

This chapter lays the foundations for the following chapters by introducing the two categories of directed and undirected duties or obligations (the terms 'duty' and 'obligation' will be used synonymously).[1737] It is well-established that obligations can be either directed, that is *owed to an identifiable individual*, or not owed in this way; however, the study of human rights treaties, to date, focuses exclusively on the former category and largely

1735 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1736 See Chapter Eight, 399ff.

1737 As Daniel Munoz, 'Obligations to Oneself' in Edward Zalta and others (eds), *Stanford Encyclopedia of Philosophy* (2022) 6 notes, '"duties" are just "obligations" with fewer syllables'.

ignores obligations which do not create corresponding claim-rights for individuals.

The chapter begins with a brief explanation of the concepts of directed and undirected duties (I.), drawing primarily on English-language literature as there appears to be little contemporary debate on these points in the other languages surveyed for this study.[1738] It then (II.) highlights that both types of duties exist both in domestic constitutional law and in public international law. The main part of the chapter shows that the Convention can also be read as creating a number of undirected duties (III.). After establishing the possibility of undirected duties under the Convention, this part gives examples from the Court's case law and attempts to explain why these undirected duties have not yet received greater attention.

I. A typology of duties: Rights-based, non-rights-based, directed and undirected

Duties, understood here in the classic sense of reasons that are both categorical and pre-emptive in force,[1739] can be classified according to various

1738 As is discussed at n 1756ff, this may well be because the point is considered so uncontroversial as to not be worth stating, given that these systems were historically more premised on systems of 'objective law' rather than subjective rights, as discussed in Xavier Bioy, *Droits fondamentaux et libertés publiques* (6th edn, LGDJ 2020) 30ff. The only substantial discussion of the idea of undirected duties in German in recent times appears to be Hubert Schnüriger, *Eine Statustheorie moralischer Rechte* (Brill 2014) 60ff, who discusses the English-language debate portrayed below. Mentioning a similar idea as a mere aside see eg, from the French-language discourse, Samantha Besson, 'Structure et nature des droits de l'homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux droits de l'homme* (2014) 31; for a historical contextualisation from the German-language literature see eg Marietta Auer, 'Subjektive Rechte bei Pufendorf und Kant: Eine Analyse im Lichte der Rechtskritik Hohfelds' (2008) 208 Archiv für die civilistische Praxis 584, 609, as well as – critically discussing the later English-language literature – Jan-Christoph Marschelke, *Jeremy Bentham - Philosophie und Recht* (Logos 2009) 173, and recently Moritz Blöchlinger, *Normative Legitimität von Recht, Moral und Menschenrechten im Lichte der positivistischen Trennungsthese* (Duncker & Humblot 2022) 222ff.

1739 cf the discussion in Massimo Renzo and Leslie Green, 'Legal Obligation and Authority' in Edward Zalta and others (eds), *Stanford Encyclopedia of Philosophy* (2022) 7.

criteria.[1740] For present purposes, the most important are 'two distinctions: (i) the distinction between rights-based duties and other duties, and (ii) the distinction between directed duties, which are owed to others, and non-directed duties'.[1741]

I. Duties based on rights and duties based on other concerns

The first of these distinctions highlights that there are different grounds for duties, only one of which are rights. Rights are one possible ground of duties, but '[r]ights are not the only source of duties'.[1742] Instead, 'duties can be based on considerations other than someone's rights'.[1743] This is not trivial, since, as Waldron notes, 'basing duties on rights is quite a different matter from basing them on general utility'.[1744] Unlike rights, which are traditionally seen as protecting *individual* interests,[1745] duties can thus be grounded on, in principle, any consideration classed as relevant. Like rights, duties can protect interests,[1746] but unlike rights, these do not

1740 See eg the list contained in Hugh Breakey, 'Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities' (2014) 63 Political Studies 1198, 1201.

1741 Japa Pallikkathayil, 'Revisiting the Interest Theory of Rights: Discussion of The Morality of Freedom' (2016) 14 Jerusalem Review of Legal Studies 147, 154.

1742 Amir Paz-Fuchs, 'Rights, Duties and Conditioning Welfare' (2008) 21 Canadian Journal of Law & Jurisprudence 175, 175; Aleardo Zanghellini, 'Raz on Rights: Human Rights, Fundamental Rights, and Balancing' (2017) 30 Ratio Juris 25, 26. Indeed, one classic position is even that 'the notion of duty is conceptually prior to that of a right', John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (de Gruyter 2011) 29, who also highlights that 'duties without corresponding rights' are possible. See, for a historical overview of this debate in German, eg Auer (n 1738) 588ff.

1743 Joseph Raz, 'On the Nature of Rights' (1984) 93 Mind 194, 213; Joseph Raz, 'The Nature of Rights' in Joseph Raz (ed), *The Morality of Freedom* (Clarendon 1988) 186. Perhaps particularly clearly Raz, 'Right-Based Moralities' (ibid) 202: 'the government has a duty to achieve all these goals or at least to try to do so. But its duty is not grounded in my interest alone. It is based on my interest and on the interests of everyone else, together with the fact that governments are special institutions whose proper functions and (normative) powers are limited'.

1744 Jeremy Waldron, 'Rights in Conflict', *Theories of Rights* (OUP 1989) 128.

1745 This point is expanded on in Chapter Eight, 399ff.

1746 Joseph Raz, 'Free Expression and Personal Identification' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 153: 'Duties protect interests inasmuch as their observance promotes the

necessarily have to be *private* interests. Duties based on human rights will be elaborated on in greater detail in Chapter Eight, which discusses various theories of human rights and highlights their generally individualistic focus.

2. Directed and undirected duties

The second distinction highlights that duties may be directed, that is *owed to an identifiable individual*, or they may not, existing, for example, in the interests of the public.[1747]

> Directed duties are duties that an agent owes to some party – a party who would be wronged if the duty were violated. They therefore comprise a three-place relation between the agent (or *subject*), the required action (or *content*) and the party (or *object*) who stands to be wronged. … [Non-directed duties] comprise only a two-place relation between subject and content.[1748]

'[I]f one is owed a duty then one is *wronged* by its violation. By contrast, violation of an undirected duty is wrong but does not wrong anyone in particular'.[1749]

The key point here is that directed duties are not the only possible form of duty (although they are the only one included in WN Hohfeld's seminal

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interests or their violation damages them. Rights protect interests inasmuch as they are the justifying reasons for duties which protect the interests'.

1747 The separation between directed and undirected duties is well-established. See eg Gopal Sreenivasan, 'Duties and Their Direction' (2010) 120 Ethics 465, 467; Rowan Cruft, 'Introduction' (2013) 123 Ethics 195, 195; Ariel Zylberman, 'The Very Thought of (Wronging) You' (2014) 42 Philosophical Topics 153, 154; David Frydrych, 'The Theories of Rights Debate' (2018) 9 Jurisprudence 566, 578; Joseph Bowen, 'Addressing the Addressive Theory of Rights' (2021) 39 Journal of Applied Philosophy 183, 183. Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 11 notes a 'standard usage in calling duties owed to a party "directed duties"'. See similarly, although not using this terminology, Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427, 434.

1748 Simon Căbulea May, 'Directed Duties' (2015) 10 Philosophy Compass 523, 523 (emphasis in original). See also Simon Căbulea May, 'Address, Interests, and Directed Duties' (2022) 39 Journal of Applied Philosophy 194, 194.

1749 Cruft, 'Introduction' (n 1747) 195; Rowan Cruft, 'Why is it Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201, 201. See similarly Zylberman (n 1747) 154.

account of 'fundamental legal conceptions',[1750] which has generated much subsequent confusion).[1751] As d'Almeida highlights,

> There are indeed duties – eg the duty that emerges from a promise made to someone – that seem, intuitively, to be relational; the action that is the content of the duty is owed to a specific individual, who holds the correlative claim-right. More recently, such duties have come to be called 'directed' duties … But it seems that we also properly use the term 'duty' to refer to what we are required to do regardless of whether we owe it to anyone; and it is plausible to think that the term 'duty', understood in this sense, is also aptly used to pick out legal positions. … Unlike directed duties, then, undirected duties do not correlate with claim-rights (or any other sort of entitlement) on anyone else. They are not relational positions. They are therefore not covered by Hohfeld's scheme; if we can have undirected as well as directed legal duties, Hohfeld's claim to comprehensiveness is unwarranted.[1752]

The correlation between right and duty thus only works one way: While every claim-right corresponds to a (directed) duty,[1753] '[not] every duty necessarily correlates with a claim-right'.[1754] Duties can arise without claim-rights. As a result, because the 'claim that every obligation defines some

1750 Developed in Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16 and Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

1751 As Sreenivasan (n 1747) 467 notes, '[o]n the whole, scholars have been content to follow Hohfeld in ignoring [undirected duties] altogether'.

1752 Luís Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 Philosophy Compass 554, 560 (citations omitted). He also notes later 'the fact that Hohfeld and his followers failed to differentiate between having a duty and having a *directed* duty to φ', ibid 562 (emphasis in original). See similarly, criticising 'Hohfeld [for] ignoring it altogether', Sreenivasan (n 1747) 467. Indeed, this may explain the greater awareness of undirected duties in Continental legal systems (Kenneth Campbell, 'Legal Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 16), which have their own theorists and are less strongly influence by Hohfeld.

1753 Joseph Bowen, 'Addressing the Addressive Theory of Rights' (2022) 39 Journal of Applied Philosophy 183, 183. Cruft coins the term 'Hohfeldian claim-rights and their flip-side, directed duties', Cruft, *Human Rights, Ownership, and the Individual* (n 1747) 11. In this sense, 'directed duties are at the heart of rights', Cruft, 'Why is it Disrespectful to Violate Rights?' (n 1749) 201. The same author also discusses the relationship between directed duties and rights in greater detail in Cruft, *Human Rights, Ownership, and the Individual* (n 1747) 80ff.

1754 d'Almeida (n 1752) 560, as well as Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 244. From the German literature see eg the passing remark in Auer (n 1738) 609.

right … is unsustainable … it surely matters whether reasoning about ethical requirements starts with rights or with obligations'.[1755]

II. Undirected duties in the law

In fact, the idea that duties can exist without corresponding rights is so well-established in many legal systems that it is typically not even discussed,[1756] since many legal systems took this – rather than the idea of subjective rights – as their historical point of departure.[1757] For example, the French, Russian and German legal systems, as well as systems inspired by these, separate fundamentally between the categories of *droit subjectif/sub"ektivnoe pravo/subjektives Recht* (rights for individuals corresponding to duties on someone else) and *droit objectif/ob"ektivnoe pravo/objektives Recht*, which denotes undirected duties (duties not corresponding to rights for individuals).[1758]

1755 Onora O'Neill, *Towards Justice and Virtue* (CUP 1996) 129.

1756 To the extent ascertainable, there does not appear to be any contemporary controversy on undirected duties in the literature in French, German or Russian. Highlighting the tendency to focus exclusively on the 'rights' side of human rights and ignore the perspective of the duties generated see, from the French-language literature, Besson (n 1738) 24.

1757 The controversy in these systems concerned the question of *directed* duties and was largely conducted in the 19th century, cf Paul Tiedemann, *Philosophische Grundlagen der Menschenrechte* (Springer 2023) 7 as well as the sources in n 1758.

1758 For French law see eg Jean-Louis Bergel, *Théorie générale du droit* (Dalloz 2003) 2ff, 30ff; Jean-Luc Aubert, *Introduction au droit* (7th edn, Armand Colin 1998) 2; Rémy Cabrillac, *Introduction générale au droit* (10th edn, Dalloz 2013) 2ff; Pascale Deumier, *Introduction générale au droit* (6th edn, LGDJ 2021) 59; for Russian law see the classic depiction in Fëdor Fëdorovič Kokoškin, *Russkoe gosudarstvennoe pravo v svjazi s osnovnymi načalami obščego gosudarstvennogo prava* (1909) 22ff, as well as more recently eg Andrej Andreevič Myznikov, 'Pravovye kategorii «Sub"ektivnoe pravo» i «Zakonnye interesy» v sovremennoj teorii gosudarstva i prava' (2006) 3 Teorija i istorija gosudarstva i prava 30 with further references; for German law see eg Reinhold Zippelius, *Juristische Methodenlehre* (11th edn, CH Beck 2012) 5, and, in much greater detail, Klaus Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' in Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1988) 477ff. Note that where the Court uses the term 'objective' in relation to the Convention obligations this does not mean non-relational, but only non-reciprocal, cf *Ireland v UK [Plenary]* App no 5310/71 (ECtHR, 18 January 1978), para 239; *Mamatkulov and Askarov v Turkey [GC]* App no 46827/99; 46951/99 (ECtHR, 04 February 2005), para 100.

I. Undirected duties in constitutional law

Moreover, modern constitutions typically impose a broad range of public-interest-based undirected duties[1759] on the *pouvoir constitué*. Perhaps the most obvious example are provisions regarding the organisation of the State. These are *duties* on the State; however, they do not appear to be *directed* towards any one individual. *Directed* duties, conversely, are typically dealt with in sections that focus on the fundamental rights of individuals.

To illustrate the difference between undirected and directed duties, German constitutional law's treatment of the judiciary may be a useful example. In German constitutional law, the idea that the constitution gives rise to both undirected and directed duties is firmly established.[1760] The German Basic Law deals with the judiciary primarily in two places: a chapter regulating the State's undirected duties, and a provision regulating the State's directed duties. Chapter IX of the Basic Law, entitled 'The Judiciary', imposes obligations on the State as regards, for example, court organisation. These are duties on the State that are (largely)[1761] not directed towards any individual. Chapter I ('Basic Rights'), conversely, guarantees an individual right to 'have recourse to the courts' against administrative action;[1762] this corresponds to a duty on the State that is *owed to every rights holder* and is thus directed.

Of course, in reality matters are far more complex. Arguably, some of the duties imposed on the State under Chapter IX are actually *directed*, while the obligations derived from the Basic Rights chapter probably also comport some *undirected* duties. Nonetheless, there is a distinction between two separate types of legal obligations: obligations *owed to identifiable individuals*, and obligations that exist in the public interest. Rights for individuals always require that there be an obligation owed to the individual; however, this is not the only obligation the State is under.

1759 From the literature on constitutional theory see eg Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 131ff.

1760 eg Stern (n 1758) 473ff discussing this distinction in relation to fundamental rights.

1761 The separation is not quite clean; a number of the provisions in the section are now seen as (primarily or also) imposing duties directed towards individuals on the State.

1762 Art. 19 § 4 (1) Basic Law.

2. Undirected duties in public international law

Moreover, public international law is eminently familiar with duties that are not owed to individuals. Indeed, up until relatively recently, public international law was understood as consisting *only* of such obligations. This was because individuals were understood as not satisfying public international law's conditions for rights-holdership, making them incapable of having rights under public international law.[1763] Instead, individuals, on these classic understandings, were 'mediated' through their States. For example, in the law of diplomatic protection, until relatively recently the understanding was that individuals were merely the objects of a violation of the rights of States, rather than being subjects of law themselves.[1764]

III. Undirected duties in Convention law

It is submitted that, in a similar vein, the Convention is not limited to directed duties corresponding to rights, but can also easily accommodate undirected duties on States. This section highlights that this is entirely compatible with the Convention's wording (1.), provides a (non-exhaustive) overview of examples (2.) and then discusses possible reasons why the idea of undirected duties under the Convention has not attracted attention so far (3.).

1. The Convention imposes undirected duties on States

The Convention's wording is entirely compatible with the idea that it imposes duties on States even where there are no corresponding rights for individuals. In fact, while nowadays debate mainly focuses on *rights* – to the point that the official title of 'Convention for the Protection of Human Rights and Fundamental Freedoms' has been replaced, in common

1763 For an introduction, see eg Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), para 66ff; Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (15th edn, Dalloz 2020), para 194ff; Vladislav Leonidovič Tolstyx, *Kurs Meždunarodnogo Prava* (Prospekt 2019) 49. In-depth analysis in Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016).

1764 cf ICJ, *LaGrand (Germany v USA)* (27 June 2001, ICJ Rep. 2001, 466).

parlance, by the name 'European Convention on Human Rights'[1765] – the Convention text itself, in several key places, takes the different perspective of States' *duties*.[1766]

This begins with the first article of the Convention: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The provision clearly imposes a duty on States; however, whether that duty is *directed* to individuals is arguably not resolved by the wording. A beneficiary of a duty is not necessarily a rights holder, as the widespread debate on third-party beneficiaries shows.[1767] Ironically, this focus on the State's *duty*, rather than any individual's *right*, was even underlined by the title added in Protocol 11 at a time when subjective enforcement moved from an option to a mandatory feature of the Convention system: The title to the provision now reads 'obligation to respect human rights' – no mention is made of this being an obligation *to* anyone. Indeed, this is arguably one of the main functions of Art. 13: Were it only for Art. 1, a State could hypothetically comply with its obligations without granting anything at all to the individual, for example by means of a purely objective system in which State bodies charge themselves with tackling all violations of the Convention rights. In line with this, the only enforcement mechanism that has always been mandatory under the Convention, the inter-State application under Art. 33 ECHR, does not require a violation of a right, but only an 'alleged breach of the provisions of the Convention', ie a violation of a duty.[1768]

The focus on duties as opposed to rights is also reflected in the Court's mission in Art. 19 ECHR, 'Establishment of the Court'. Here, the Court's purpose is given as '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties'.[1769] This focuses on the *duties* under-

1765 cf eg the Court's own website, https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=, accessed 08 August 2024.

1766 This is entirely consistent with the state of general public international law at the time of the Convention's drafting as discussed above, text to n 1763. Indeed, the Convention and the inception of human rights law are among the main international law developments that triggered the shift towards a view of public international law that recognises individuals at least to some extent.

1767 See eg Frances Myrna Kamm, *Intricate Ethics* (OUP 2007) 239; May, 'Directed Duties' (n 1748) 524; May, 'Address, Interests, and Directed Duties' (n 1748) 196ff; Zylberman (n 1747) 154.

1768 Discussing the differences between Art. 33 and Art. 34 see also 381ff.

1769 See, by contrast, Art. 30 of the African Charter on Human and Peoples' Rights, which notes that '[a]n African Commission on Human and Peoples' Rights …

taken by the States; once again, it does not mention any corresponding claim-rights. In line with Art. 33 and the initially optional nature of the individual application mechanism, in principle Art. 19 ECHR on its own is also compatible with exclusively undirected duties: The Court could also 'ensure the observance of the engagements undertaken by the High Contracting Parties' without there being any claim-rights for individuals. Continuing this focus on States' obligations, rather than individuals' rights, the Convention also declares the individual's position irrelevant in certain circumstances when the enforcement of Convention duties so requires.[1770]

Moreover, even though Arts 2 – 14 are universally interpreted as granting rights to individuals, they do not necessarily show this from their wording. Some of these provisions are worded as *rights* ('everyone has the right'; 'everyone is entitled'). However, others are phrased in terms of a *duty* ('no one shall be').

On an open reading, then, the Convention seems quite clearly to be able to accommodate the possibility that directed duties grounded on rights are not the only obligations imposed on States. This is equally reflected in the Court's case law. The Court has highlighted that it does not see itself as tasked only with giving effect to the rights of the individual applicant in a given case. Instead, many of its statements can be read as understanding the Convention as imposing broader duties on States. The Convention, in the Court's case law, is 'a constitutional instrument of European public order'[1771] 'designed to maintain and promote the ideals and values of a democratic society governed by the rule of law'.[1772] In a notable focus on

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shall be established … to promote human and peoples' rights and ensure their protection in Africa', or Art. 41 § 1 of the American Convention on Human Rights, which reads that '[t]he main function of the Commission shall be to promote respect for and defense of human rights'.

1770 For example in Arts 37 § 1, 39 § 1, regarding striking out and friendly settlements, where the Court can totally disregard the subjective wishes of the individual to focus on its mission of ensuring 'respect for human rights'.

1771 *Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 75, recently cited eg in *Ecodefence and others v Russia* App no 9988/13 and others (ECtHR, 14 June 2022), para 139, the belated judgment on the Russian Federation's Foreign Agents Act. One example of this 'constitutional' function, *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), has already been discussed in Chapter Five, 248ff. For an extensive discussion of the term 'European public order' see, now, Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021).

1772 *Merabishvili v Georgia [GC]* App no 72508/13 (ECtHR, 28 November 2017), para 307.

the States' duties, the Court highlighted as early as *Ireland v UK [Plenary]* (1978) that

> [t]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[1773]

As a result,

> [a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.[1774]

This seems to indicate that the Court understands the Convention as imposing duties on the Convention States that go beyond the directed duties that correspond to individual Convention rights.

2. Examples of undirected duties from the Court's case law

In fact, one possible reading of Art. 1 of the Convention is that it imposes an undirected duty on the State to ensure that it can satisfy the directed duties corresponding to Convention rights in each individual case. Perhaps this is what the Court means when it highlights that 'by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention"' and refers to this as a 'general duty' over and beyond the 'positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention'.[1775] Indeed, that would sit rather well with the fact that this 'general duty' jurisprudence has been developed in the Court's case law on systemic problems:[1776] Those cases concern less a violation of a duty *to*

1773 *Ireland v UK [Plenary]* (n 1758), para 154; *Ecodefence and others v Russia* (n 1771), para 68. Note, once again, the more general reference to 'rules' and 'engagements' rather than necessarily 'rights'.

1774 *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003), para 26; *Paposhvili v Belgium [GC]* App no 41738/10 (ECtHR, 13 December 2016), para 130.

1775 *Strezovski and others v North Macedonia* App no 14460/16 and others (ECtHR, 27 February 2020), para 61.

1776 *Broniowski v Poland [GC]* App no 31443/96 (ECtHR, 22 June 2004), para 143. Highlighting the public-interest nature of the systemic problems cases see eg

the individual applicant, but rather a violation of the duty requiring the State to maintain its ability to satisfy the directed duties corresponding to individual claims.[1777]

(a) *The State's duty to maintain a Convention-compliant judiciary*

Perhaps the most obvious example of an undirected duty from the main text of the Convention concerns the obligation to maintain a judiciary compliant with the Convention standards.

The Convention contains a number of rights for individuals which, in certain situations, require a judiciary conforming to certain characteristics. These rights put the State under correlative directed duties for the situations they apply to. However, these correlative directed duties do not exhaust the State's obligations as regards the judiciary. Instead, the State, is under an undirected duty to maintain its ability to fulfil the Convention rights which comprises maintaining a judiciary that *can* discharge the directed duties corresponding to individual claim-rights.

These two obligations – the directed duties that correspond to the Convention rights of each individual rights holder and the State's undirected duty to maintain its ability to fulfil these claims – are conceptually distinct. This is clear from the fact that it is possible to violate one of these obligations without violating the other.[1778] For example, it is entirely possible for the State to have satisfied its undirected duty to maintain a judiciary *capable* of satisfying the Convention rights without necessarily having satisfied the directed duty to satisfy them in the individual case at issue. This is in fact the typical situation where there are no systemic problems: In those cases, the State has discharged its undirected duties to generally maintain a Convention-compliant judiciary, but it is still possible that it has not complied with its directed duties. The directed duty covers only a part of

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Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 126.

1777 Note that in *Broniowski v Poland [GC]* (n 1776), the relevant section from para 134 onwards is entitled 'Compliance with Article 1 of Protocol No. 1', thus clearly taking the perspective of a duty.

1778 See, from the different context of Art. 8, *Nepomnyaschchiy and others v Russia* App no 39954/09; 3465/17 (ECtHR, 30 May 2023), para 78, where the Court explicitly 'consider[ed] that the existing legal framework is capable – at least in theory – of protecting the applicants from homophobic hate speech.'

the content of the undirected duty on the State; the *right* is narrower than the State's *duty*.

This is particularly clear from the fact that the Convention *rights* which impose duties on the State regarding a judicial system do so only in specific situations. Only where 'the determination of … civil rights and obligations or of a criminal charge' is at stake does Art. 6 § 1 impose a directed duty on the State to provide 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[1779] '[T]he State's positive obligation under Article 2 of the Convention requires that, where a life-threatening injury or a death occurs, an effective independent judicial system is set up to provide appropriate redress'.[1780] '[I]t is part of the States' duties under Article 1 of Protocol No. 1 at least to set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced,'[1781] which means 'that the States are under an obligation to provide judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any cases concerning property

1779 Indeed, the wording of 'independent and impartial tribunals established by law' is arguably more reminiscent of the kinds of norms which in domestic constitutions have their place in the chapter relating to the judiciary as one of the three branches of government. cf eg Chapter IX German Basic Law, Title 8 French Constitution of 1958.

1780 *Igor Shevchenko v Ukraine* App no 22737/04 (ECtHR, 12 January 2012), para 56. The wording here already shows the difficulties of an approach focused only on rights – presumably, the Court does not actually mean that, once a life-threatening injury or death occurs, the State must then set up an 'effective independent judicial system'. Instead, it seems more likely that the State is *generally* under an undirected duty to maintain such a system. For similar judgments, see eg *Calvelli and Ciglio v Italy [GC]* App no 32967/96 (ECtHR, 17 January 2002), para 49, noting further that 'Article 2 … enjoins the State … to take appropriate steps to safeguard the lives of those within its jurisdiction', ibid, para 48. For much the same reasoning on the basis of Art. 8 see *Botoyan v Armenia* App no 5766/17 (ECtHR, 08 February 2022), para 94.

1781 *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 117; *Theo National Construct SRL. v Moldova* App no 72783/11 (ECtHR, 11 October 2022), para 69. For the parallel case law in German constitutional law holding that 'effective legal protection securing property [is] an important element of the constitutional right itself' see eg Alexy (n 1759) 318.

matters'.[1782] Moreover, under certain circumstances Art. 13 ECHR may also require a remedy before a judicial authority.[1783]

These provisions, then, impose – in certain situations – a directed duty on the State that correlates to a Convention right. However, in order to be able to fulfil these various rights, the State has to – constantly – maintain a judiciary conforming to the requisite minimum standards. This is a separate obligation on the State. The State cannot satisfy the rights claims unless it complies with this obligation; however, that does not automatically mean that the obligation to maintain a judiciary is itself directed to any individual. Instead, the Convention imposes a *duty* on the State, but gives individuals a *right* only if other, further criteria are satisfied, for example the situational criteria discussed above.

In the Court's practice, this second, undirected duty, is not typically clearly separated from claims of violation of individual rights.[1784] Nonetheless, an undirected duty to maintain a Convention-compliant judiciary seems to be supported by the Convention text. Art. 6 § 1 requires the State to 'establi[sh] by law' 'independent and impartial tribunals'. This requires the State to maintain such a system regardless of whether or not there actually are disputes concerning 'the determination of civil rights and obligations or of a criminal charge' because such a tribunal must already have been established by law *prior* to such a dispute arising. Moreover, that this obligation cannot be limited to a directed duty corresponding to a right seems clear from the fact that the Convention also highlights that complying with this duty can require the State to *restrict* human rights. Art. 10 § 2 ECHR highlights that 'maintaining the authority and impartiality of the judiciary' is a legitimate aim for Convention purposes. The Convention therefore clearly envisions that, in the course of fulfilling its obligation to maintain a Convention-compliant judiciary, the State may have to restrict human rights. That indicates that this obligation on the State is not identical to the subjective rights of individuals.

1782 *Strezovski and others v North Macedonia* (n 1775), para 61.

1783 eg *Ramirez Sanchez v France [GC]* App no 59450/00 (ECtHR, 04 July 2006), para 165.

1784 See similarly Heike Krieger, 'Funktionen von Grund- und Menschenrechten' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 135, noting that the ECtHR has not to date recognised cases of obligations without a corresponding individual right.

Moreover, in recent case law it is the second, undirected duty that has come to the fore. This is particularly the case as regards the Polish rule-of-law crisis. Here, the Court focuses *mainly* on the violation of the undirected duty to maintain a Convention-compliant judiciary; the violation of a directed duty to the applicant is just a symptom of that violation. At the time of writing, certain formations of the Polish judiciary are in breach of the Convention, particularly Art. 6 § 1, because they have not been 'established by law',[1785] which compromises their independence and impartiality.[1786] This is *also* a violation of the rights of individual Convention-rights holders, but the main problem is that Poland is violating its undirected duty under the Convention to maintain a judiciary conforming to the Convention standard. The Convention violation is not only a violation of the rights of the individuals bringing cases before these 'courts', but a violation of the Polish State's undirected duty to maintain its ability to secure the Convention rights.

Tellingly, even the older case law on judicial organisation typically switched away from 'rights' to concentrate on the State's 'duties'.[1787] More recently, the Grand Chamber has even devised a label for this undirected duty: It now speaks of 'institutional requirements' under Art. 6 § 1,[1788] picking up a term that first appeared in a Chamber judgment in 2016[1789] and

1785 eg *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021), para 281, and *Juszczyszyn v Poland* App no 35599/20 06 October 2022), para 210, for the Disciplinary Chamber of the Supreme Court; *Advance Pharma sp z oo v Poland* App no 1469/20 (ECtHR, 03 February 2022), para 350, for the Civil Chamber of the Supreme Court; *Dolińska-Ficek and Ozimek v Poland* App no 49868/19; 57511/19 (ECtHR, 08 November 2021), para 354, for the Chamber of Extraordinary Review and Public Affairs of the Supreme Court; *Xero Flor w Polsce sp z oo v Poland* App no 4907/18 (ECtHR, 07 May 2021), para 290, for certain formations of the Constitutional Court.

1786 *Reczkowicz v Poland* (n 1785), para 284; *Juszczyszyn v Poland* (n 1785), para 215; *Advance Pharma sp z oo v Poland* (n 1785), para 353; *Dolińska-Ficek and Ozimek v Poland* (n 1785), para 357.

1787 As the Court put it in *Dobbertin v France* App no 13089/87 (ECtHR, 25 February 1993), para 44; *Keaney v Ireland* App no 72060/17 (ECtHR, 30 April 2020), para 109, '[t]he States have the duty to organise their judicial systems in such a way that their courts can meet each of the requirements of Article 6 § 1 of the Convention, including the obligation to hear cases within a reasonable time'.

1788 *Guðmundur Andri Ástráðsson v Iceland [GC]* App no 26374/18 01 December 2020), para 218, 233ff. German lawyers may notice a certain similarity to the idea of 'institutional guarantees' (author's translation, *Einrichtungsgarantien*), see eg Ute Mager, *Einrichtungsgarantien* (Mohr Siebeck 2003).

1789 *Letinčić v Croatia* App no 7183/11 (ECtHR, 03 May 2016), para 55.

is fast becoming a standard category.[1790] While there is also a violation of the rights of the applicant in these cases, the main issue is a violation of the undirected duty on States to maintain their ability to secure the Convention rights. Alluding to this second obligation, the Grand Chamber has now – without making any reference to individuals – 'emphasise[d] that the Convention system cannot function properly without independent judges. The Contracting Parties' task of ensuring judicial independence is thus of crucial importance'.[1791] It is submitted that this is not just a 'task' in the sense of a policy goal, but also a legal obligation on the States. The Convention imposes a duty on the States to ensure judicial independence; under what circumstances this duty can also give rise to rights for individuals is a different, subsequent question.

In recent literature, moreover, there is some awareness of this shift in the Court's approach. As one comment highlights, the Court

> move[s] away from the right of the individual to an independent and impartial judge and look[s] at judicial independence in a more structural way, permeating the domestic judiciary in its entirety. While it is certainly too soon to say that *Grzęda* has created an enforceable general duty on states under the Convention to guarantee the independence of the judiciary on an abstract, structural level, and a subjective right for judges to their independence, it may be an indication that the Court is willing to move more in that direction.[1792]

Indeed, the same authors argue at a later point that '[t]aken together [Arts 1, 13 and 35] can be understood as containing an obligation for all Contracting Parties to guarantee a structurally independent judiciary',[1793] and that the 'Grand Chamber's understanding [in *Grzęda*] of the principle of judicial independence moved away from its traditional individual right for the parties to a judicial dispute and more towards a general duty for the state

1790 All subsequent uses date from 2021 and 2022: *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 09 February 2021), para 290; *Xero Flor w Polsce sp z oo v Poland* (n 1785), para 247; *Reczkowicz v Poland* (n 1785), para 220; *Dolińska-Ficek and Ozimek v Poland* (n 1785), para 276; *Advance Pharma sp z oo v Poland* (n 1785), para 298; *Grzęda v Poland [GC]* App no 43572/18 (ECtHR, 15 March 2022), para 308; *Besnik Cani v Albania* App no 37474/20 (ECtHR, 04 October 2022), para 87; *Juszczyszyn v Poland* (n 1785), para 277, 334.

1791 *Grzęda v Poland [GC]* (n 1790), para 323.

1792 Mathieu Leloup and David Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law' (2022) 18 European Constitutional Law Review 753, 768. Note that the authors mix several different points here, since enforceability and rights-holdership are not the same question as whether there is such a general duty on states.

1793 Ibid 769.

to safeguard the independence of the judiciary as a whole'.[1794] Moreover, other commentators have highlighted that '[t]he objective aspect of judicial independence requires that all Council of Europe … member States be constitutionally and legal organised in accordance with the separation of powers doctrine, and thus that the judiciary represents a power separate from the other branches of government'.[1795]

Finally, this idea that in addition to directed duties to satisfy individual rights there are also undirected duties on the Polish State becomes particularly clear if one looks not at ECHR law, but at the European Court of Justice's approach to the Polish cases. In EU law, the changes to the Polish judicial system are treated as a problem relating not only to the Charter of Fundamental Rights, but also to Art. 19 § 1 (2) Treaty on European Union.[1796] This provision requires the Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' without itself clarifying whether there is a *right* on the part of individual human beings to demand this.[1797] Instead, this obligation is classed as an undirected duty on the State: Art. 19 TEU is contained not in a section granting individual rights, but in 'Provisions on the Institutions'.[1798]

As the foregoing shows, then, directed duties corresponding to rights for individuals are only a part of the obligations which the Convention

1794 Ibid 779.

1795 Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 European Constitutional Law Review 591, 606.

1796 cf eg Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*; Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*; Case C-791/19 *European Commission v Republic of Poland*; Case C-487/19 *W.Ż.*; Case C-204/21 *Commission v Poland*.

1797 There is some debate on this point, particularly on the relationship between Art. 47 § 2 CFR and Art. 19 TEU, as noted eg by Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395, 404. Interestingly, the (equally authentic) different language versions of the Charter differ in how they call the right under Art. 47 § 2 CFR: The English version uses 'right … to a fair trial', the French uses 'droit … à accéder à un tribunal impartial', while the German version uses 'Recht auf … ein unparteiisches Gericht'. Arguably, the latter version is linguistically far more focused on the State's duty: A more literal translation would be that this is a 'right to an independent court'.

1798 For the development of EU law see eg Bustos Gisbert (n 1795) 596ff, highlighting that in EU law the 'subjective aspect of judicial independence (as a citizen's right)' came considerably later due to the initially incomplete protection of human rights in EU law.

imposes on States regarding the judiciary. In addition to those directed duties allowing individuals, in certain situations, to require that the State act a certain way, States are also under an undirected duty to maintain their ability to fulfil these directed duties, which requires them to maintain a Convention-compliant judiciary.

(b) *The State's duty to maintain a democratic form of government*

Another example of an undirected duty under the Convention is the duty on States to maintain a democratic form of government, which the Court equally sees as an obligation on States to maintain their ability to fulfil the Convention rights. This undirected duty then underlies a number of more specific directed duties, that is, rights, but can also, in other situations, justify restrictions of rights.

In fact, in this area the undirected duty on the State is far more obvious than directed duties in the sense of rights. This is because Art. 3 Protocol 1, one of the provisions most clearly related to the undirected duty to maintain a democratic form of government, is comparatively unusual in the Convention text in that it explicitly states the undirected duty, rather than stating any subsequent rights. In this sense its wording more closely resembles provisions of State organisational law.[1799] Art. 3 Protocol 1 reads: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. No mention is made of any individuals that this duty is owed *to*, and indeed even the title 'Right to free elections' was added only in 1998.[1800] Here, the undirected duty is clear because the wording of the provision takes the per-

1799 cf also Jens Meyer-Ladewig and Martin Nettesheim, 'Zusatzprotokoll zur EMRK Artikel 3 Recht auf freie Wahlen' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention* (4th edn, Nomos 2017), para 2, who note that Art. 3 Protocol 1 deals with 'fundamental questions of state organisational law' (author's translation, '*staatsorganisationsrechtliche Grundfragen*'). In a similar vein Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 23, para 122, highlight that Art. 3 Protocol 1 is not limited to a 'subjective right'. There does not appear to be similar awareness outside of the German-speaking legal sphere.

1800 Art. 2 § 4 (a) Protocol 11. Prior to this, the Convention did not have article headings.

spective of the obligation on the State rather than any individual right. In fact, there was even serious disagreement over whether the provision also creates a *directed* duty in the form of a subjective right.[1801] While the Court later established that Art. 3 Protocol 1 also gave rise to rights, to this day the Court still makes statements that focus on the undirected duty to maintain a democratic form of government, as when it highlights that '[d]emocracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it'.[1802] While this language can be interpreted as reflecting a legal obligation, it makes no mention of a corresponding right.

Moreover, the Convention also explicitly assigns certain competencies to the legislative, as is clear from the way the Court has interpreted the idea of 'law' in various contexts. For example, the requirement of tribunals 'established by law' in Art. 6 § 1, as interpreted by the Court, is designed 'to ensure that the judicial organisation in a democratic society … is regulated by law emanating from Parliament'.[1803] There is thus a legal obligation on the State to maintain an elected assembly with a certain minimum amount of competencies; however, it is not clear that there is a corresponding subjective right on the part of any individual. Instead, it seems more promising to think of this duty to maintain a democratic form of government as an undirected duty. Not complying with such a duty is a violation of the Convention, but not by itself a violation of a Convention *right*, though of course it is unlikely that a State that violates its undirected duties will manage to avoid violating Convention rights further down the line. The undirected duty and the rights of individuals are nonetheless best kept separate. Similarly to the undirected duty to maintain a Convention-compliant judiciary, the undirected duty on States to maintain a democratic form of government can also interact with the rights of individuals both to enhance

1801 *Mathieu-Mohin and Clerfayt v Belgium [Plenary]* App no 9267/81 (ECtHR, 02 March 1987), para 47ff. Notably, the Commission initially spoke of an 'institutional' right, cf the discussion of this evolving term in ibid, para 51. For an overview of Art. 3 Protocol 1's drafting history see eg Agustín Ruiz Robledo, 'The Construction of the Right to Free Elections by the European Court of Human Rights' (2018) 7 Cambridge International Law Journal 225, who notes that 'the drafters of the Protocol were thinking of obligations of states rather than the rights of citizens; there was also no intention to formally enact the right to vote' (ibid 229).

1802 *Gorzelik and others v Poland [GC]* App no 44158/98 (ECtHR, 17 February 2004), para 89, as well as the discussion in Dzehtsiarou (n 1771) 58ff.

1803 *Coëme and others v Belgium* App no 32492/96 and others (ECtHR, 22 June 2000), para 98; *Guðmundur Andri Ástráðsson v Iceland [GC]* (n 1788), para 214.

them (where the Court sees them as furthering democracy)[1804] and to limit them (where they are in conflict with democracy).[1805] Taking exclusively the perspective of individual rights thus misses important features of the State's obligations.

(c) *The State's duty to maintain a functioning executive*

Similarly, the Convention also imposes an undirected duty on States to maintain a functioning executive. The positions guaranteed by a number of Convention rights can only be fulfilled if the State is able to enforce the law; this, in turn, implies a duty on the State to ensure that it maintains its ability to do so. To take an example from the Court's case law, 'execution of a judgment given by any court must … be regarded as an integral part of the "trial" for the purposes of Article 6'[1806] and '[t]he State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice'.[1807]

This second obligation is arguably best understood as an undirected duty. On its own, not maintaining such a system is a violation of a Convention obligation, but not (yet) of any identifiable individual's right. A right in the sense of a directed duty is violated only once someone attempts to enforce a judgment and cannot.

1804 cf eg the case law protecting political participation, Dzehtsiarou (n 1771) 53 with further references.

1805 Setting out case law on 'actions of the applicants [which] could potentially undermine democracy' ibid 53. See eg *Ždanoka v Latvia [GC]* App no 58278/00 (ECtHR, 16 March 2006), para 122, where the Court highlighted as legitimate the aim 'to protect the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime'.

1806 *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997), para 40; *Stoyanov and Tabakov v Bulgaria (No 2)* App no 64387/14 (ECtHR, 07 December 2021), para 47.

1807 *Fuklev v Ukraine* App no 71186/01 (ECtHR, 07 June 2005), para 84; *Ciocodeică v Romania* App no 27413/09 (ECtHR, 16 January 2018), para 84.

(d) *The State's 'obligation to protect the rule of law and prevent arbitrariness'*

In another example of an undirected duty under the Convention, the Grand Chamber in its 2012 judgment *Kotov v Russia* explicitly held that the State is subject to an 'obligation to protect the rule of law and prevent arbitrariness'.[1808] In fact, 'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention'.[1809] 'One of the fundamental components of European public order is the principle of the rule of law.'[1810] This requires the State 'at least to set up a minimum legislative framework including a proper forum allowing persons … to assert their rights effectively and have them enforced'.[1811]

Once again, this duty is best understood as an undirected duty on the State that requires it to maintain its ability to fulfil the directed duties contained in the Convention rights. Conversely, it does not appear that Convention rights cover the full scope of the State's obligation; a right on the part of individuals to require the State 'to protect the rule of law and prevent arbitrariness' seems difficult to justify because there does not seem to be an interest on the part of each and every individual that is sufficiently strong to justify such a right. Instead, such rights exist only as regards situations where the individual's interests are more closely concerned; nonetheless, the State remains under an undirected obligation to secure the preconditions to fulfil these Convention rights.

(e) *The State's duty as 'the ultimate guarantor of pluralism'*

Moreover, another example of an undirected duty under the Convention is the Court's holding that the State is 'ultimate guarantor of pluralism'.[1812]

1808 *Kotov v Russia [GC]* (n 1781), para 117; *Theo National Construct SRL. v Moldova* (n 1781), para 69.

1809 *Iatridis v Greece* App no 31107/96 (ECtHR, 25 March 1999), para 58; *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023), para 54.

1810 *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016), para 145; *Aliyev v Azerbaijan* (n 1771), para 225.

1811 *Kotov v Russia [GC]* (n 1781), para 117; *Theo National Construct SRL. v Moldova* (n 1781), para 69.

1812 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38; *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 184, discussed in Chapter Six, 313ff. See also, on this 'objective dimension' in both ECHR and German constitutional law, Rainer

The Court has not said that this obligation is owed to anyone; instead, it has used language that seems consistent with the idea that this is an undirected duty not immediately owed to anyone, as when the Court emphasises the 'interest of democratic society in securing a free press'[1813] and highlights the 'public's'[1814] right to receive information, as well as 'the key importance of freedom of expression as one of the preconditions for a functioning democracy'.[1815] In its further case law, it has gone into greater detail on this undirected duty, emphasising 'a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism',[1816] that 'the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'[1817] and that '[t]he [national] courts must … take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general'.[1818]

Once again, these are undirected duties imposed on the State to ensure that it can satisfy the directed duties contained in Convention rights. The undirected duty then interacts with these directed duties in different ways, sometimes reinforcing Convention rights and sometimes limiting them. As regards reinforcement of subjective rights, for example, 'the positive obligations under Article 10 of the Convention require States to … establi[sh] an effective system of protection of journalists'.[1819] Conversely, the State's

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Grote and Nicola Wenzel, 'Die Meinungsfreiheit' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 17ff.

1813 Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62.

1814 Constant jurisprudence since *Informationsverein Lentia and others v Austria* (n 1812), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 184.

1815 eg *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* App no 26826/16 (ECtHR, 23 September 2021), para 26.

1816 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* App no 38433/09 (ECtHR, 07 June 2012), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 186, 192.

1817 *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 January 2015), para 68, as well as the further cases cited above on 317.

1818 *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 51.

1819 *Khadija Ismayilova v Azerbaijan* App no 65286/13; 57270/14 (ECtHR, 10 January 2019), para 158.

public-interest obligations can also allow it to restrict individual rights: The Court has 'accepted that the ability of a country's licensing system to contribute to the quality and balance of programmes constitutes a sufficient legitimate aim for an interference', and 'also accepted that interferences seeking to preserve the impartiality of broadcasting on matters of public interest' and 'measures intended to ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programmes' all pursue legitimate aims.[1820] Similarly, where the Court has interacted with the position of the individual, it has even gone as far as highlighting that they have certain 'tasks', for example as a 'purveyor of information and public watchdog'[1821] or as imparting information and ideas on areas of public interest.[1822]

(f) *The State's duty to maintain separation of powers*

Finally, there also appears to be an undirected duty under the Convention requiring the State to maintain some level of separation of powers. While the Court has ostensibly denied that the Convention 'requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction',[1823] it has highlighted elsewhere 'the fundamental principles of the rule of law and the separation of powers'.[1824] Despite the Court's attempts to deny that it is regulating the allocation of powers, this is effectively the case when it 'emphasises that the notion of the separation between the political organs of government and the judiciary, as well as [the] importance of safeguarding the independence of judiciary, have assumed growing importance in its case law'.[1825] If '[o]nly an institution … [with] independence of the executive … merits the designation

1820 *NIT SRL v Moldova [GC]* (n 1812), para 174.
1821 *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 129.
1822 *Lingens v Austria [Plenary]* App no 9815/82 (ECtHR, 08 July 1986), para 41.
1823 *Kleyn and others v the Netherlands [GC]* App no 39343/98 and others (ECtHR, 06 May 2003), para 193; *Ramos Nunes de Carvalho e Sá v Portugal [GC]* App no 55391/13 and others (ECtHR, 06 November 2018), para 144.
1824 *Guðmundur Andri Ástráðsson v Iceland [GC]* (n 1788), para 233; *Juszczyszyn v Poland* (n 1785), para 277.
1825 *Svilengaćanin and others v Serbia* App no 50104/10 and others (ECtHR, 12 January 2021), para 64.

"tribunal" within the meaning of Article 6, para 1',[1826] this imposes a duty on the State to maintain some level of separation of powers.

Once again, these obligations are easier to explain as undirected duties. Granting a subjective right to each individual to allow them to require that the State be organised in this way seems difficult because the interest of each individual is probably not strong enough to justify such wide-reaching consequences. Conversely, classing this as part of the States' obligations to ensure that they can continue to fulfil the Convention rights seems relatively straightforward, since without separation of powers presumably a State would quickly lose its ability to eg provide independent and impartial tribunals or effective remedies.

(g) *The State's duty to take climate action*

Moreover, the April 2024 Grand Chamber judgment in *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, seen by many as a major step in the development of the Convention, can be read as a particularly clear case of the Court using undirected duties. In the admissibility section, the Court found that neither the individual applicants[1827] nor the association they had founded could claim that their rights were violated,[1828] but that the case was nonetheless admissible because

> the standing of an association to act on behalf of the members or other affected individuals within the jurisdiction concerned will not be subject to a separate requirement of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context.[1829]

It held that the complaints 'fall within the scope of Article 8'[1830] without having identified any rights.

The Court then proceeded to the merits, 'assess[ed] the respondent State's compliance with its duty to put in place, and effectively apply in

1826 *Beaumartin v France* App no 15287/89 (ECtHR, 24 November 1994), para 38; *Eminağaoğlu v Turkey* App no 76521/12 (ECtHR, 09 March 2021), para 90.
1827 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 535.
1828 Ibid, para 523, 525.
1829 Ibid, para 502.
1830 Ibid, para 525.

practice, the relevant mitigation measures'[1831] and found a violation of the Convention. 'Rights' are conspicuous by absence in its analysis of the merits: Instead, the Court assessed the State's compliance with its 'obligations' and 'duties', and found a violation. It did not, however, find that anyone's rights had been violated. This fits well with the idea that the Convention can generate undirected duties: The Convention can also impose obligations on States without a corresponding right.

(h) *Undirected duties as reflecting public interests*

While the foregoing overview is not intended to be exhaustive – presumably, there are other duties which the Convention imposes on States without necessarily granting a corresponding subjective right –, even this brief list of undirected duties under the Convention reveals a key point: the duties' grounding. Undirected duties are justified not by reference to any one individual, but by reference to a *public* interest.[1832] *KlimaSeniorinnen* itself shows this particularly well. The Court, at various points in the 260-page judgment, stressed that the climate crisis affects individual interests held in common by all members of the community.[1833] The Court noted 'lack of State action, or insufficient action, to combat climate change [entails] a situation with general effect':[1834] 'Everyone is concerned by the actual and future risks, in varying ways and to varying degrees, and may claim to have a legitimate personal interest in seeing those risks disappear';[1835] 'everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change.'[1836] Procedurally, the Court even highlighted that 'the grant of standing to the applicant association before the Court is in the interests

1831 Ibid, para 555.
1832 On this term see Chapter One at 66. Highlighting that the Court justifies pluralism as being in the public interest see also Decaux (n 1776) 124.
1833 On this term see Chapter One at 66.
1834 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 1827), para 485.
1835 Ibid, para 485.
1836 Ibid, para 483.

of the proper administration of justice'.[1837] The undirected duties imposed on States were therefore grounded by reference to public interests.[1838]

This is significant because it is a key difference to *rights*. Rights as traditionally understood – particularly human rights – are seen as grounded in *individual* interests.[1839] Conversely, *undirected duties* are not conceptually limited in this way. They can easily be justified by reference to those interests which all members of the community have in common. This is, moreover, apparent in the structure of the Convention, as discussed in Chapter Eight.[1840] Some elements of these undirected duties appear explicitly in the 'legitimate aims' section, such as 'maintaining the authority and impartiality of the judiciary' in Art. 10 § 2 as a reflection of the undirected duty, based on the public interest, to maintain a Convention-compliant judiciary; that these undirected duties are not based on private interests can thus also explain why they are strong enough to justify restrictions on Convention rights, since the private interest taken in isolation of every individual in eg democracy is probably not strong enough to justify severe restrictions on rights.

3. Possible reasons for the lack of attention to undirected duties

As the foregoing has shown, the Convention imposes undirected duties on States to maintain their ability to fulfil the directed duties that correspond to Convention rights. Why, then, have these undirected duties, to date, not been addressed more explicitly?

This section discusses a number of possible explanations. The main reason is presumably linked to the individual application mechanism's focus on directed duties, which have thus also formed the main focus of Convention scholarship. The section then highlights that the Convention drafters may have simply assumed that these duties would not be violated, that domestic human rights law may not have provided a sufficient template for the Court's jurisprudence and, finally, that States are traditionally hesit-

1837 Ibid, para 523 (emphasis added).

1838 See the description by George Letsas, 'Did the Court in KlimaSeniorinnen create an actio popularis?' (2024) <https://www.ejiltalk.org/did-the-court-in-klimaseniorinnen-create-an-actio-popularis/> accessed 08 August 2024, who goes on to make a different proposal based on the rights of future generations.

1839 On this see Chapter Eight, 399ff.

1840 Chapter Eight, 406ff.

ant to see public international law as partially determining their internal constitutional structure.

(a) *The individual application mechanism's focus on directed duties*

The most significant factor explaining why the Court has not, to date, paid significant attention to undirected duties may well be linked to the dominance, in practice, of only one of the two enforcement mechanisms laid down in the Convention.

Art. 33, entitled 'Inter-State cases', provides that '[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'. This provision can capture undirected duties comparatively easily, since these equally focus on a *breach* of the Convention rather than necessarily a violation of any rights of individuals. Art. 33 focuses on the State's *duty*, rather than on anyone's *right*, as reflected in the idea of an 'objective' mechanism enunciated by the Court in eg *Ireland v UK*.[1841] However, in practice Art. 33 cases are extremely rare, with only around 30 inter-State applications lodged to date in the entire history of the Convention. In the Court's contemporary practice,[1842] these cases are thus few and far between.

Conversely, Art. 34, which is entitled 'Individual applications', is now mandatory[1843] and makes up the bulk of the Court's work, is worded in a far narrower way. Individuals cannot complain of 'any alleged breach' like States can. Instead, they need to 'clai[m] to be the victim of a violation by

1841 cf *Ireland v UK [Plenary]* (n 1758), para 239; *Mamatkulov and Askarov v Turkey [GC]* (n 1758), para 100. Note that the Court understands 'objective' as meaning 'non-reciprocal', unlike the usage of that term in domestic law discussed at n 1758.

1842 For a contribution highlighting the key role of the inter-State application in the original Convention see eg Dean Spielmann and John Darcy, 'The European Court of Human Rights as a Guarantor of a Peaceful Public Order in Europe' (2014) 3 Cyprus Human Rights Law Review 106, 107. Discussing the role of the inter-State application as the 'default' means of enforcement and comparing it to the individual application mechanism see in detail Isabella Risini, *The Inter-State Application under the European Convention on Human Rights* (Brill 2018).

1843 Prior to Art. 1 Protocol 11 the right for individuals to apply to the Court was still an optional part of the Convention machinery. cf Art. 25 § 1 (1) of the original Convention text, which allowed petitions only 'provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petition'.

one of the High Contracting Parties of *the rights* set forth in the Convention or the Protocols thereto'.[1844] This mechanism is far more clearly geared at *directed* duties such as rights – although, notably, it does not seem to prohibit the Court from assessing undirected duties, at least if one takes Art. 19's description of the Court's function as 'to ensure the observance of the engagements undertaken by the High Contracting Parties' seriously. Nonetheless, the fact that individual applications, which have a close conceptual link to directed duties, make up essentially all of the Court's work may go a long way towards explaining why the Court has not to date discussed undirected duties extensively. In essence, the Court may be letting its vision of substantive Convention law be influenced by the procedural mechanism through which cases come before it.

The fact that the Court has, by and large, not interacted explicitly with undirected duties may thus flow from procedural peculiarities of Convention law and the dominance of Art. 34 over Art. 33.[1845] Once again, the Polish cases provide a useful comparison: If the question is framed not as 'has Poland violated the applicant's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (the question under Art. 34) but as 'has Poland breached its obligation to maintain independent and impartial tribunals established by law' (the question under hypothetical Art. 33 proceedings), the fact that what is at issue is an *undirected* duty becomes far clearer. If the Art. 33 mechanism enjoyed greater popularity, similarly to EU law where the European Commission can require compliance with the provisions of the Treaties without having to show that any individual's rights have been violated, this would presumably have prompted greater attention to the undirected duties the Convention generates. But, as Onora O'Neill has put it in the philosophical context: '[O]nce rights rather than obligations are treated as the basic deontic category, … those [obligations] which lack corresponding rights altogether are quite simply hidden from view'.[1846]

As a result, one possible explanation for the lack of awareness regarding undirected duties may be that in practice Art. 34, which requires the applic-

1844 Emphasis added. Even the pilot judgment procedure, which can be framed as dealing with individual applications arising out of situations where the State has violated its undirected duties, requires violation of an individual's rights.

1845 Highlighting the different approach to the public interest under Art. 33 see, from the French-language literature, Decaux (n 1776) 127.

1846 O'Neill, *Towards Justice and Virtue* (n 1755) 140.

ant to be the victim of a violation of a right,[1847] almost totally dominates the case law. However, the fact that the individual application mechanism makes directed duties more visible than undirected ones does not mean that the Convention cannot create undirected duties.[1848] First, it is worth emphasising that the substantive scope of obligations and their procedural enforcement are separate questions; in fact, mechanisms of procedural enforcement that are less developed than substantive obligations are a typical hallmark of international law. Second, the Convention contains an enforcement mechanism that easily accommodates undirected duties: the inter-State application under Art. 33. That this provision is not used particularly frequently is a practical consideration, but does not affect the Convention's ability to generate undirected duties. Moreover, while the individual application mechanism under Art. 34 requires that the applicant show 'victim status', this is mainly intended to exclude *actio popularis* claims and require the applicant to show that they are '"directly affected" by the measure complained of'.[1849] As the Court's case law particularly on public-service broadcasters shows,[1850] this requirement of being 'directly affected' can also be satisfied by a particularly close link to the undirected duty in question. It does not necessarily confine the Court to assessing only directed duties, as the many cases in which the Court takes the broader context into account show.[1851] Both the Court's case law and the Convention text contemplate a role for the Court that is not exclusively limited to assessing the situation of the applicant, particularly given Art. 19's broad definition of the Court's function and the fact that the Convention, even within the individual application mechanism, contains situations where it will depart from the individual applicant's position.[1852] Violation of an undirected duty can thus be argued both as part of an individual application and under the inter-State mechanism, as well as, of course, in political debate, as is typical of public international law. The focus on the individual application mechanism may thus explain why undirected duties have not

1847 For the Court's varying approaches to the concept of 'human rights' see Chapter Eight, 406ff, 415ff.

1848 See also 362ff.

1849 *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 04 December 2015), para 164. See now, however, *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 1827), para 460ff.

1850 Chapter Ten, 491ff.

1851 See particularly the cases listed at 364, as well as Chapter Ten, 491ff.

1852 See n 1770 with reference to Arts 37 § 1, 39 § 1.

received more attention, but does not exclude them as a category of Convention law.

(b) *Convention scholarship's focus on rights and directed duties*

In a repetition of the tendency in the Court's case law, Convention scholarship also typically focuses on rights and directed duties to the exclusion of undirected duties.[1853] Textbooks regularly highlight the Convention's purpose as essentially securing a number of particularly important private interests against the more powerful State.[1854] Discussion of the possibility of obligations on States which do not necessarily create identical corresponding individual rights is effectively non-existent,[1855] and even the literature on positive obligations focuses on positive obligations *owed to individuals*.[1856]

This focus on rights and directed duties may stem from the fact that the Convention's capacity to create rights under international law for individuals against States is more novel and therefore attention-grabbing.

1853 O'Neill, *Towards Justice and Virtue* (n 1755) 128 highlights that rights are also the predominant concept in contemporary ethics.

1854 See similarly Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Sweet & Maxwell 2019) 3–017; Lichun Tian, *Objektive Grundrechtsfunktionen im Vergleich* (Duncker & Humblot 2012) 41, 61, 221; Volker Röben, 'Grundrechtsberechtigte und -verpflichtete, Grundrechtsgeltung' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 9. For human rights law more generally see Maya Hertig Randall, 'Typologie des Droits de l'Homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux Droits de l'Homme* (Schulthess 2014) 41; Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 30ff; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 29.

1855 Krieger (n 1784), para 10, notes a similar absence of debate, as does Tian (n 1854) 36. A further potential reason for Convention scholarship's lack of discussion of undirected duties may be that the separation into rules of law (undirected duties) and rights is not typically explicitly discussed in English-speaking legal systems, cf Campbell (n 1752) 16ff.

1856 eg Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016) 11. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 17 explicitly highlights in her recent work on positive obligations that 'human rights law works from rights as a point of departure towards obligations'.

In the general literature on public international law,[1857] the Convention, along with other human rights treaties, has been most highlighted for its subjectively assigned positions since these have the potential to make the individual a subject of international law, in a significant contrast to classicist views of public international law. As one textbook puts it,

> [f]rom the perspective of individuals, the most important outcome of the internationalization of human rights is the fact that human persons now enjoy individual rights under international law and have therefore become partial subjects of this branch of law. Thus the traditional theory according to which international law by definition is limited to the legal status of states and international organizations has finally been overcome.[1858]

By comparison to this paradigm shift, the idea that the Convention *also* commits States to certain obligations regardless of the position of individuals is not new: This effect of international treaties is far less original and thus less noticeable than the idea that a treaty can directly grant rights to individuals. From the point of view of classic public international law, there would have been nothing ground-breakingly new (and thus likely to attract attention) in a treaty by which the States guaranteed to each other that they would organise certain questions of domestic organisational law in a specific way. Presumably, a formulation such as '[t]he High Contracting Parties shall establish by law independent and impartial tribunals', while overlapping in content, would have attracted less scholarly attention than the radical idea of according rights *directly to individuals* by means of a treaty between States, and creating an international court to adjudicate them to boot.

(c) *The Convention's assumption that undirected duties will not be violated*

Moreover, while there is support for the idea of undirected duties in the Convention text,[1859] there would have been ways of phrasing the Convention that would have made them even clearer. For example, the alternative hypothetical phrasing proposed above, that '[t]he High Contracting Parties shall establish by law independent and impartial tribunals', would arguably have made more explicit the same legal obligation that Art. 6 § 1 ('everyone

1857 eg von Arnauld (n 1763), para 66ff; Dupuy and Kerbrat (n 1763), para 194ff; Tolstyx (n 1763) 49.
1858 Kälin and Künzli (n 1854) 13.
1859 Above 363ff.

is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law') implies: the undirected duty to maintain a Convention-compliant judiciary.

One possible explanation for why such obligations that the States maintain their ability to satisfy the Convention rights were not more explicitly included in the Convention may have been that it was assumed that these undirected duties would not be violated anyway, and that the brunt of the Court and Commission's case-load would thus be failure to comply with obligations towards individuals under the Convention. The twelve original High Contracting Parties were largely countries with, by the standards of their time, relatively well-established and well-functioning democratic, rule-of-law based systems. Moreover, Art. 4 of the Council of Europe Statute made being 'able and willing to fulfil the provisions of Article 3', which highlights that

> [e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I,

a condition for membership in the Council of Europe. The underlying assumption may thus have been that all States would comply with their undirected duties to maintain their ability to satisfy the Convention rights, particularly since Art. 1 explicitly repeated their duty to 'secure to everyone within their jurisdiction' these rights and freedoms. It may thus have been taken for granted that all High Contracting Parties would maintain their ability to comply with the Convention rights.[1860]

Moreover, this explanation sits well with the Convention's initial focus on negative obligations.[1861] For negative obligations, it is not clear whether there are any separate undirected duties on the States requiring them to maintain their ability to fulfil *negative* obligations, since these only require that the State do nothing, an avenue always available. The preponderance of such negative obligations in the original Convention text supports the idea

1860 Conversely, that also explains why the case law applying a systemic conception of human rights appears mainly from the 1990s onwards: The States that had joined more recently had greater difficulty complying with their undirected duty to maintain their ability to fulfil the Convention rights, but the Court, instead of focusing on this root-cause violation, focused on the symptoms, the subsequent violations of individual rights.

1861 For a very brief introduction to the development of the Court's case law see eg Lavrysen (n 1856) 2.

that perhaps it was assumed that it was not necessary to regulate undirected duties aimed at ensuring that the State could satisfy the Convention rights.

(d) *Insufficient inspiration from domestic human rights law*

The fourth possible reason why undirected duties have not figured prominently in the Court's case law is because in domestic law – which is usually a key source of inspiration for the Court's doctrines – undirected duties are typically (with some exceptions) not discussed in the context of human rights norms. This is because most modern constitutions dedicate separate provisions to undirected duties. For example, instead of a human right in the style of Art. 6 § 1 guaranteeing certain organisational arrangements for the courts, both the French and German constitutions contain chapters on the organisation of the judiciary as one of the three branches of government.[1862] Debate on undirected duties thus focuses on those norms, rather than on the extent to which such undirected duties are contained in domestic human rights law. As a result, in eg German law,[1863] the idea that undirected duties can also derive from provisions that take the perspective of *rights* was long overshadowed by the more obvious idea that provisions worded as rights create directed duties and provisions worded as eg organisational law create undirected ones.[1864] Following various debates under the Weimar constitution that can now be seen as precursors to this

1862 cf eg Title 8 French Constitution of 1958; Chapter IX German Basic Law, although note that for the latter for example Stern (n 1758) 184ff highlights the close connection between empowering organisational norms and human rights and eg Michael Dolderer, *Objektive Grundrechtsgehalte* (Duncker & Humblot 2000) 240 maintains that it is possible to discern a tendency in the Basic Law to underpin even organisational norms with fundamental rights, leading to a kind of 'fundamental-rights-based procedural and organisational law' (author's translation, 'grundrechtliche[s] Verfahrens- und Organisationsrecht').

1863 To the extent ascertainable there does not appear to be a similar discussion in other legal systems. Noting the idea of undirected duties deriving from human rights as originating in Germany see eg Louis Favoreu, *Droit des libertés fondamentales* (8th edn, Dalloz 2021) 54 and Bioy (n 1738) 43.

1864 Klaus Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' in Klaus Stern and Florian Becker (eds), *Grundrechte-Kommentar* (3rd edn, Wolters Kluwer 2019), para 55, who refers to undirected duties derived from fundamental rights as a 'legal discovery' (author's translation, *juristische Entdeckung*). For a historical contextualisation see Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' (n 1758) 508ff.

realisation,[1865] it took until the 1950s for this idea of undirected duties derived from human-rights provisions – known in German as the 'objective function' of fundamental rights – to gain prominence,[1866] with several more decades of debate as to the full impact of this discovery.[1867]

It is thus no coincidence that in German law, the area where undirected duties flowing from human rights norms have been developed most extensively is in relation to a prerequisite of democracy for which there are *no* explicit organisational provisions at the constitutional level: freedom of broadcasting. The media are so important as to frequently be called the 'fourth estate';[1868] but unlike the other three 'estates', the German Basic Law does not (ostensibly) impose any duties on the State as regards media regulation. As a result, debate on the extent of the State's obligations focused on the extent to which the human rights norm regulating freedom of broadcasting imposes undirected duties on the State. However, while there is a rich literature specifically in relation to freedom of broadcasting, in other areas the debate is far less developed because – where there are explicit undirected duties committing the State to democracy[1869] or the rule of law[1870] – the extent to which such duties also derive from provisions focusing on human rights has less practical significance.

While the Court happily adopted similar doctrines as regards broadcasting,[1871] outside of this area it had comparatively little from the domestic level to draw on. This is not without a certain irony; given that undirected duties, at the Convention level, do *not* have separate norms regulating them, since the Convention does not contain explicit provisions regulating

1865 Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 1864), para 57; for an in-depth study of eg 'institutional guarantees' (author's translation, *Einrichtungsgarantien*) see Mager (n 1788).

1866 See seminally Bundesverfassungsgericht BVerfGE 6, 55 (71ff) – *Ehegattenbesteuerung*; BVerfGE 7, 198 (205ff) – *Lüth*. For an older historical contextualisation see Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' (n 1758) 491ff.

1867 See eg Bundesverfassungsgericht BVerfGE 39, 1 (42ff) – *Schwangerschaftsabbruch I*; BVerfGE 49, 89 (116ff) – *Kalkar I*, as well as, discussing the development of the case law, Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 1864), para 68ff. For an overview of the current state of the law see eg Matthias Herdegen, 'GG Art. 1 Abs. 3' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (2022), para 17 ff.

1868 Or, in the United States of America, the 'fourth branch'.

1869 Art. 20 § 1 Basic Law.

1870 Art. 20 § 3 Basic Law.

1871 For a comparison of German and ECHR law see Grote and Wenzel (n 1812), para 16ff.

the organisation of public power, the extent to which such undirected duties can be derived from provisions regulating Convention rights is even more important than at the domestic level. Public international law does not have a category of State organisational law in the way domestic constitutions do; as a result, the question of which organisational requirements can be derived from human rights treaties is even more pressing and leads to these taking on functions that domestic constitutional rights, complemented by explicit provisions regulating the organisation of the State, do not necessarily have to fulfil to the same extent.

(e) *Public international law is not traditionally understood as regulating domestic organisational law*

A final reason why the Court has not been more explicit about the undirected duties the Convention imposes is because many of these are particularly sensitive politically and might trigger allegations of the Court overstepping its mandate: A number of the undirected duties contained in the Court's case law (eg concerning the judiciary, democracy, the executive or the rule of law) are the kind of question that, domestically, is typically regulated at the constitutional level. In this sense, the undirected duties contained in the Convention contain a hard core of constitutional organisational norms, giving the Convention a 'constitutional' significance that goes far beyond regulating protection of individual rights, the area traditionally debated under the label of 'constitutionalising'[1872] the Convention. Once again, the recent case law on judicial organisation in Poland provides a clear example: The Polish Constitutional Court assessed largely the same issues as the ECtHR, but in relation to the Polish Constitution's provisions on the organisation of the judiciary and the rule of law.[1873]

One of the reasons why undirected duties have not been referred to more explicitly may therefore be the controversial nature of the idea that the European Convention on Human Rights contains rudiments of its own constitutional organisational law and thus has an impact on questions of domestic constitutional law.[1874] This is exacerbated by the fact that the

1872 cf n 1877.

1873 See the summary in *Xero Flor w Polsce sp z oo v Poland* (n 1785), para 30ff.

1874 See generally regarding the more assertive stance of EU law on 'harmonising' domestic legal orders Janneke Gerards, 'Uniformity and the European Court of

Convention, from a domestic perspective, stands at a sub-constitutional level in all States except Austria and the Netherlands.[1875] In keeping with the comparative lack of analysis of the extent to which human-rights norms can generate undirected duties, even where there has been debate on the Convention as a 'constitutional'[1876] document, that has focused almost entirely on the Convention rights as norms regulating the relationship between defined individuals and the State,[1877] rather than on their ability to impose undirected duties based on the public interest on the State.

Nonetheless, while the fact that European human rights law has not usually been understood as regulating domestic organisational law may explain the lack of attention paid to undirected duties, it does not mean that a clearer assessment of such duties would overstep the Court's mandate, given that these duties flow from the same legal provisions that give rise to the subjective Convention rights. These undirected duties, just like directed ones, derive from commitments the States have undertaken under the Convention and form preconditions for States to satisfy individuals' rights. Moreover, as discussed above, the Convention text, with the comprehensive obligation under Art. 1, the broad role envisioned for the Court in Art. 19 and the explicit permission to depart from the applicant's individual situation in Arts 37 § 1, 39 § 1 clearly contemplates a role for the Court that goes beyond the rights of individual applicants.[1878] While it is true that the most detailed normative content in the Convention is in relation to human rights and directed duties, diagnosing the Convention as a 'partial constitution in the field of human rights'[1879] in the sense of *only* subjectively assigned positions to the exclusion of constitutional elements dealing with

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Human Rights' in Koen Lemmens, Stephan Parmentier and Louise Reyntjens (eds), *Human Rights with a Human Touch: Liber amicorum Paul Lemmens* (Intersentia 2019).

1875 For an overview of the status of the Convention in various jurisdictions see eg Grabenwarter and Pabel (n 1799) § 3.

1876 For recent criticism of the term see eg Dzehtsiarou (n 1771) 96ff.

1877 From the copious literature see eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2012) 12 Human Rights Law Review 655, 666ff, as well as the summary in Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125, 138ff.

1878 See, in greater detail, 362ff.

1879 Christoph Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights' in Armin von Bogdandy and Pàl Sonnevend (eds), *Constitutional Crisis in the*

the organisation of the State seems incorrect. In fact, the Convention (and with it the Court's mandate) is not limited in this way; it also contains norms, albeit at a relatively high level of abstraction, regarding those organisational arrangements which have a significant impact on human rights. In this sense, the Convention has far more elements of a constitution than is typically assumed, and as the cases on the Polish rule-of-law crisis show, these elements may become increasingly prominent in the future.

IV. Conclusion: Undirected duties under the Convention

As has been shown, the Convention creates a number of duties on States. Only some of these, the more limited class of directed duties, correspond to *rights*. However, since the Court and Convention scholarship near-exclusively take a 'rights' perspective, they assess only a part of the duties that the Convention imposes on States. This is problematic because duties are a broader category than rights. The perspective chosen is therefore not irrelevant. As Onora O'Neill explains,

> [i]f the preference for theories of rights over theories of obligations were only a matter of choice among idioms, there would be little reason to prefer theories of obligation. … [T]heories of rights and of obligations are not extensionally equivalent. While it is true that there cannot be rights without correlative obligations, there can well be obligations without correlative rights.[1880]

None of this is to say that emphasising the Convention's role as creating *rights* for individuals is problematic. Rights have an important advantage over duties: They can easily justify the imposition of previously unknown duties as situations change.[1881] However, *only* focusing on rights (and directed duties) is a limitation. Such a perspective leaves all other undirected duties out of the picture because there are no corresponding rights.

The following two chapters show the difference between an approach that uses only rights and one that combines rights and undirected duties. Chapter Eight highlights that taking only the perspective of *rights* is problematic because human rights, as traditionally understood, reflect the

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European Constitutional Area: Theory, Law and Politics in Hungary and Romania (Hart 2015) 259. See similarly Röben (n 1854), para 11.

1880 Onora O'Neill, 'Rights to Compensation' (1987) 5 Social Philosophy & Policy 72, 83.

1881 Noting the 'dynamic aspect of rights, their ability to create new duties' Raz, 'On the Nature of Rights' (n 1743) 200.

interests of the individual rights holder and are thus ill-suited to capture wider public interests. Chapter Nine explains how *duties* can be grounded both on private and on public interests and shows how a view of the State's duties that also includes *undirected* duties can more convincingly resolve these cases without affecting outcomes. In essence, the claim that will be made is that the Court resolves cases involving the public interest by means of the wrong tool: It modifies its understanding of human rights, which it usually understands as focused on the position of the individual rights holder, to include public interests, which leads to tension with its case law in other areas. Instead, it should be protecting *public* interests via undirected duties on the State.