ARTICLES

Asserting the Right to Life (Article 2, ECHR) in the Context of Industry

By Dimitris Xenos[*]

A. Introduction

In the liberal tradition, there has always been scepticism about the state's involvement in the activities of industry. Instead, internal measures by way of self-regulation and collective action have been preferred. In recognition of the reality that exclusive reliance on such solutions has not prevented violations of human rights, to which a high constitutional importance is attached, other arrangements have to be provided. In the system of the European Convention of Human Rights (hereinafter the Convention),[1] positive obligations are imposed engaging the state in the active protection of human rights.[2] The need to protect human rights against the hazards of industry has been the main issue in the case of *Öneryildiz v. Turkey*, in which, for the first time in the jurisprudence of the European Court of Human Rights (hereinafter the Court), a claim under the right to life (Article 2 of the Convention) has successfully been asserted in the context of industry.[3]

The underlying logic in such developments rests upon the proposition that to the extent that it is the state that has the power and ability to regulate all activities within its jurisdiction, its indirect responsibility can potentially be sought in all

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November, 1950, E.T.S. 5, 213 U.N.T.S. 221 (as amended by Protocol No. 11, adopted on 11 May 1994, entered into force on 1 November 1998).

[2] The first clear statement of the European Court of Human Rights on the state's positive obligations was made under the right to respect for private and family life (Article 8), as follows: "Nevertheless it [Article 8-1] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life." Eur. Court H.R., *Marckx v. Belgium*, Judgement of 13 June 1979, Series A, No. 31, at 31. *See also* DRÖGE CORDULA, POSITIVE VERPFLICHTUNGEN DER STAATEN IN DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION (2003).

[3] Eur. Court H.R., *Öneryildiz v. Turkey*, Judgment of 30 November 2004, App. No. 48939/99, 2004-XII, (hereinafter *Öneryildiz* [GC], (2004)).

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

human rights violations. In an action before the Court, the legal questions are necessarily constitutional in nature, as a complaint targets directly or indirectly the state's legal mechanism. In that regard, when a human right is violated by industrial activity, it is open to the victims to accuse the state of not doing anything (or enough) in circumstances in which the latter is clearly capable of intervening and protecting them. Thus, inaction or, more colloquially, a hands-off approach on the part of the state sends the message that human rights violations can be tolerated. A negative consequence is clearly the distortion of public confidence in the rule of law and the relevance of constitutional values.

The possibility of challenging the industry by imputing the responsibility of the state for violations of human rights caused by the former has virtually brought industrial activities within the state's constitutional obligations.[4] However, such a constitutionalisation of industry, as far as human rights protection is concerned, has often experienced difficulties in its actual realisation. In particular, it is not always clear under which circumstances the state is obliged to actively protect the rights enshrined in the Convention, let alone to know how far these obligations extend. Admittedly, such issues become more pertinent in circumstances where human life is at stake. Although the state's positive obligations were repeatedly declared and expressly referred to by the European judges in cases arising out of the activities of industry, no action had ever succeeded under the heading of Article 2. Thus, positive obligations exist in doctrinal terms, but their effectuation is often hindered by a piecemeal application and inadequate sophistication in the numerous combinations of various principles and parameters (and sub-parameters) involved in judicial examination.

However, in the case of *Öneryildiz v. Turkey*, the Court has brought its jurisprudence to a turning point by providing clear principles to be assessed within a more reasoned structure of case adjudication. The Court found in favour of the

[4] On the topic of constitutionalisation of the legal relationships of individuals *see* Ulrich Scheuner, *Fundamental Rights and the Protection of the Individual against Social Groups and Powers in the Constitutional System of the Federal Republic of Germany, in* AMICORUM DISCIPULORUMQUE LIBER 253 (René Cassin ed., 1971); Frances Raday, *The Constitutionalization of Labour Law, in* THE CHANGING FACE OF LABOUR LAW AND INDUSTRIAL RELATIONS, LIBER AMICORUM FOR CLYDE W. SUMMERS 83 (Roger Blanpain & Manfred Weiss eds., 1993); Spiros Simitis, *The Rediscovery of the Individual in Labour Law, in* REFLEXIVE LABOUR LAW 183 (Ralf Rogowski & Ton Wilthagen eds., 1994); DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE (1999); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN LAW JOURNAL (GLJ) 341 (2006).

applicant in both the Chamber[5] and Grand Chamber[6] judgments by reproaching the respondent state for the loss of human life in an industrial accident.

In particular, the facts concerned the death of thirty-nine people following an explosion at a waste-treatment factory. The applicant lost nine of his close relatives who were living in the nearby area. According to the report, the factory in question had operated with technical problems since its early years. The state's authorities had failed to check the safety of the factory and enforce compliance with appropriate technical standards. They also allowed inhabitants to settle on the adjoining land. In addition, it was proved that although public officials had been made aware of the existence of a recent experts' report pointing to serious dangers for the local population, no measures were taken within the scope of their powers to prevent fatal harm being inflicted upon innocent individuals. In finding a violation of the right to life, the Court did not confine itself to the particular factual situation before it, but grasped the opportunity to articulate specific obligations for the state with regard to safety controls of every industrial activity.

In the following, we analyse the principles and reasoning of the Article 2 claim of that case, and their application in subsequent judgments, with the aim to evaluate the extent of the state's positive obligations to guarantee the right to life in the context of industry.

B. The Scope of Article 2: Moving from Intentional Inflictions to Negligent Failures

The preliminary question examined in *Öneryildiz* was whether Article 2 could be relied upon in claims seeking to engage the responsibility of the state for violations of the right to life caused by activities of industry**.** The argument is that the state can be made indirectly responsible for failing to protect the individuals who are most likely to be affected by such activities. In this respect, a failure is interpreted as an omission or inadequate action on the part of the state to safeguard the right to life. Such an interpretation accounts for the characterisation of the state's agents as being negligent, as opposed to intentionally inflicting harm.

The issue of intention was expressly raised by the Government before the Chamber, albeit unsuccessfully.[7] It was used once more before the Grand Chamber to argue

[5] Eur. Court H.R., *Öneryildiz v. Turkey*, Judgment of 18 June 2002, App. No. 48939/99 (hereinafter *Öneryildiz*, (2002)).

[6] *Öneryildiz* [GC], (2004).

[7] *Öneryildiz*, (2002), at para. 59.

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

that ""all situations of unintentional death" [that] came within the scope of Article 2 had given rise to an unprecedented extension of the positive obligations inherent in that provision."[8] Relying on previous case-law, the state sought to justify its "unprecedented extension" argument by criticising the Chamber for departing from the cases of *Mastromatteo v. Italy*,[9] *Osman v. the United Kingdom*,[10] and *Calvelli and Ciglio v. Italy*,[11] in which no violation of Article 2 had been found.

Although it is true that there were no violations of Article 2 in the cases cited in support of the Government's argument, it is equally true that these cases arose in different contexts, such as criminal acts between individuals (*Osman v. the United Kingdom* and *Mastromatteo v. Italy*) and negligent medical treatment (*Calvelli and Ciglio v. Italy*). From the cases pertaining to an industrial context, one would expect to see a reference to the case of *L.C.B. v. the United Kingdom* in which an Article 2 claim arising from the effects of nuclear activities was also unsuccessful.[12] As will be seen from the analysis that follows, selectively invoking the Court's case-law may not always be appropriate.

An argumentation that is based on unsuccessful claims may be misleading, in that whether or not a case succeeds depends on the specific facts of every case, its special circumstances and the parameters involved in the context concerned. In these terms, the general question of the state's obligations to safeguard the right to life in the context of industry should also be taken into account. It should be noted that all cases cited above by the Government were successfully admitted for hearing before the Court and had Article 2 engaged and examined. Equally misleading is the argument about intention (meaning inflicting harm deliberately), since the main claim under examination is exclusively concerned with the active protection of human life from industrial activities.

The Court clarified its position in both judgments of *Öneryildiz v. Turkey* by relying, not surprisingly, on the case of *L.C.B.* in which it had stated that "the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and

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[8] *Öneryildiz* [GC], (2004), at para. 66.

[9] Eur. Court H.R, *Mastromatteo v. Italy*, Judgment of 24 October 2002, App. No. 37703/97, 2002-VIII.

[10] Eur. Court H.R, *Osman v. the United Kingdom*, Judgment of 28 October 1998, App. No. 87/1997/871/1083, Reports of Judgments and Decisions, 1998-VIII.

[11] Eur. Court H.R, *Calvelli and Ciglio v. Italy* [GC], Judgment of 17 January 2002, App. No. 32967/96, ECHR 2002-I.

[12] Eur. Court H.R, *L.C.B. v. the United Kingdom*, Judgment of 9 June 1998, App. No. 14/1997/798/1001, Reports of Judgments and Decisions, 1998-III.

unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction."[13] The Grand Chamber reiterated in a slightly different, albeit similar, fashion that "Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *L.C.B.*, cited above, p. 1403, § 36…)."[14]

The Court's position in *Öneryildiz* is virtually the same as that in *L.C.B.*. However, the slightly different wording shows the shift in emphasis in the first two sentences toward elaborating upon the substantive scope of Article 2. Unlike the passage in *L.C.B.*, the Grand Chamber did not find it necessary to refer to "intentional" and "unlawful" taking of life and it went on in the remaining sentences to articulate the state's obligations as positive, something that is inferred in *L.C.B.,* but not expressly spelled out. As much in the *L.C.B.* case as in *Öneryildiz*, the exclusive issue under examination is that of "protection" of human life against the dangers of industrial activities. In the Court's doctrinal terminology, the Convention is concerned with the imposition of a positive obligation on the state for an active protection of the right to life, as deriving from the first paragraph of Article 2.[15] The Grand Chamber read this Convention provision as "the right to the protection of life", a statement that constitutes a bold and unequivocal clarification of the scope of protection afforded by Article 2.[16] It follows, therefore, that the corresponding scope of the state's liability encompasses, at least in certain contexts, negligent failures to protect human life.

With Article 2 provisions being interpreted in such terms, the early writings of some commentators regarding Article 2 of the Convention need to be revisited. In particular, the often-cited conclusion of James Fawcett who has written that "it is not life, but the right to life, which is protected by law"[17] should be seen within the subsequent development and operation of positive obligations in the system of the Convention which clearly afford the individual the "right to the protection of life" in some contexts. As the main claim before the Court concerns the active protection of the individual's Article 2 interests, any subsequent examination and evaluation

[13] *Id*. at para. 36.

[14] *Öneryildiz* [GC], (2004), at para. 71.

[15] The relevant part of the first paragraph of Article 2 is its first sentence, which reads: "Everyone's right to life shall be protected by law."

[16] *Öneryildiz* [GC], (2004), at para. 72.

[17] JAMES FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 37 (2nd ed. 1987).

of specific facts are necessarily made within the first paragraph of Article 2, which exclusively accounts for the imposition of positive obligations on the state. In complaints regarding the fatal effects of an industry, as seen in *L.C.B.* and *Öneryildiz,* as well as in all cases relied upon by the Government above, the relevant part of Article 2 that is exclusively quoted and examined by the Court is that of the first paragraph. Accordingly, issues about "intention", "infliction" and the corresponding principle of proportionality, which follows their examination, are not considered because they are not included in the first paragraph and hence, are not a concern.

The most pertinent questions to claims of active protection are whether such protection is required in the contextual circumstances concerned (i.e. industrial activities) and, if so, what the state's authorities are required to do. Both questions are examined below in sections C and D respectively.

C. Justifying Positive Obligations in the Context of Industry

The "right to the protection of life" as unanimously stated in the Grand Chamber is not of general applicability, given that the circumstances in which protection of life can be invoked are virtually infinite and hence, a positive obligation cannot realistically be expected to arise everywhere. Guidance as to when such a positive obligation is imposed on the state is given by the Grand Chamber in its statement that

> this [positive] obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites ("dangerous activities" – for the relevant European standards, see paragraphs 59 and 60 above).[18]

Under this clarification of positive obligations under the right to life, the protection of human life is an obligation of the state due to the "dangerous nature" of a given activity within its jurisdiction. Consequently, industrial activities are among the first to be considered, as they are dangerous "by their very nature". This is also the case where industrial accidents involve environmental issues, whereby they further

[18] *Öneryildiz* [GC], (2004), at para. 71.

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

justify and reinforce the application of Article 2.[19] Therefore, as far as industry is concerned, it can reasonably be maintained that the state is obliged to actively protect human life.

In addition, the Court confirmed its position that the assertion of human rights cannot be restricted by the source of the activity complained of.[20] To the extent that it is the state that has the ability and power to regulate operational and safety standards for the given industry (be it public or private), and supervise and enforce their implementation, a failure to do so can engage its European liability even for violations of Convention provisions for which direct factual causality lies with a non-state actor.

However, what is important in every case is the answer to the question of whether the industrial activity is "dangerous". This is another point on which the Government sought to distinguish the operation of the waste-treatment factories as being of a "very slight risk" as compared to nuclear installations.[21] However, what qualifies an activity as dangerous cannot be downgraded by simply comparing different activities, but rather by establishing whether they are dangerous in their own right. With respect to waste-collection sites, the Court (the Chamber) established the "dangerousness" of their operation by reference to various texts adopted by the Council of Europe in the environmental and industrial field and the disposal of urban and industrial waste that set the "relevant European standards" and hence, "confirm an awareness" of the risks involved.[22]

It should be noted that European standards often take the form of recommendations and texts detailing technical standards that are informed by the current state of scientific knowledge and formalised through a political consensus. However, in *Öneryildiz* the invocation of such standards at the stage of examining the ambit of the first paragraph of Article 2 was made in order to further establish the "dangerousness" of the activity concerned. Relevant European standards "confirm awareness" but they do not act as conditions for the applicability of

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[19] *Öneryildiz*, (2002), at para. 64.

[20] In *L.C.B.*, the fact that the industrial activities (nuclear tests) were state-sponsored had no bearing on the Court's reasoning. The same applies to the case of *Guerra and Others v. Italy*, in which the factory whose activities gave rise to an Article 8 complaint belonged to private interests, Eur. Court H.R., *Guerra and Others v. Italy*, Judgment of 19 February 1998, App. No. 116/1996/735/932, Reports of Judgments and Decisions, 1998-I.

[21] *Öneryildiz*, (2002), at para. 60.

[22] Such European standards are cited in the "Relevant Law" section of both judgments. *See Öneryildiz*, (2002), at para. 53-56 and 64 *and Öneryildiz* [GC], (2004), at para. 59-61.

Article 2 when such standards have not been provided for at a European level.[23] This is because the applicability of paragraph 1 of the right to life and the positive obligations flowing from it is justified by the general element of "dangerousness" which concerns the industrial sector in its totality.[24] One can hardly cite an industrial activity, which does not require some sort of precautionary positive measures, however limited and restrictive they may be, for safety purposes. In addition, independent scientific knowledge and/or previous accidents and complaints at a local and national level can suffice to "confirm awareness" of the dangers involved. In the present case, the Grand Chamber concluded in the affirmative on the applicability of Article 2 and the ensuing positive obligation on the state in the context of industry in general and the operation of waste-collection sites in particular.[25]

Although it is important for a positive obligation to arise as such, its realisation can only be effectuated by specific measures on the ground. At this stage, one should be careful to distinguish the issue of "if" positive obligations can be imposed on the state with that of the "extent" of those obligations, which is examined in turn.

D. Determining the Extent of the State's Positive Obligations

Having established the applicability of the first sentence of Article 2, the next task for the Court was to rule on the existence and adequacy of positive measures that should be taken in such circumstances, while not imposing an impossible or disproportionate burden on the state's authorities.[26] At this stage the first question to ask is what the protection of human life means in the context of industry.

Given the nature of Article 2 and the irreversible consequences in the event of its violation, protection of life can only entail two meanings: to either prevent innocent life from being put at risk or, when harm has occurred, but is not yet fatal, to prevent further deterioration of the victims' conditions. The latter can be translated as a positive obligation to hospitalise the victims of industrial accidents in order to save their life and limb. This obligation will not be discussed here, as it is undisputed and does not solely concern industrial activities, but the wider context of medical care for the injured. In the words of the Court, the main question is

[23] The Chamber explained that "European standards…merely confirm an increased awareness." *Öneryildiz*, (2002), at para. 64.

[24] *Öneryildiz* [GC], (2004), at para. 71. *See also supra* note 18, for the relevant passage.

[25] *Id.* at para. 71.

[26] *Öneryildiz* [GC], (2004), at para. 107.

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whether the state has complied with "its duty to take all necessary measures to prevent lives from being unnecessarily exposed to danger and, ultimately, from being lost."[27] With protection of life being stated in terms of prevention, "all necessary measures" examined and analysed in section I have an *ex ante* emphasis. Measures applied *ex post* will be seen in section II under the more general framework of procedural obligations that are also required in such circumstances to ensure due implementation and compliance of the measures discussed in I.

I. The Ex Ante Framework

An argument run by some commentators and also by the Government in the *Öneryildiz* case is that there should be an "immediacy" of a "serious risk" before positive measures are required. However, the primary goal in the use of this argument goes far beyond the determination of the measures required under the circumstances, as it can re-open the question of whether positive obligations have arisen in the first place. In recognition of such a potential inherent in this kind of argumentation, the question of whether there should be an "immediate" risk also needs to be discussed. In examining the parties' submissions, the Chamber considered *inter alia* that

> Although not every presumed threat to life obliges the authorities, under the Convention, to take concrete measures to avoid that risk, the position is different, *inter alia*, if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk (see, *mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 116).[28]

However, as seen earlier, the Chamber based the applicability of Article 2 (and by extension, the imposition of positive obligations) on the growing awareness of "environmental issues" and the applicable "European standards" regarding the industrial sector, and in particular, the storage of household waste which involves "inherent" risks.[29] Upon referral of the case to the Grand Chamber, the Government

[27] *Öneryildiz*, (2002), at para. 67. *See also Öneryildiz* [GC], (2004), at para. 70 and before para. 89.

[28] *Öneryildiz*, (2002), at para. 63.

[29] *Id*. at para. 64.

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criticized the Chamber for its failure to apply the "immediacy" and "reality" criteria when it examined the dangers posed by the operation of the waste-treatment factory in question.[30]

Despite such an express submission by the Government, the Grand Chamber omitted completely any reference to the *Osman* test (the passage above) on the question of applicability and hence, the imposition of positive obligations on the state. The same applied to the "General Principles" that the Court laid down to judge the state's compliance with the Convention.[31] "Immediacy" was given only incidental reference as a residual or additional finding in the final assessment of the particular facts.

It should also be noted that in the case of *Osman v. the United Kingdom*, "immediacy" was introduced in a case concerning a call for help to the local police to protect the applicant's family members from the alleged threats of another individual. Paragraph 116 of that judgment (as quoted in the passage above) provides a test as to when the state should act upon its positive obligations to take coercive action in such circumstances.

However, invoking tests deriving from other contexts can lead to complicated situations at the expense of legal certainty, especially when these tests are elevated to a level of general applicability. That *Osman* and *Öneryildiz* concerned an Article 2 claim does not mean that they should necessarily be decided on the same principles in all respects. In *Osman*, immediacy was aiming, admittedly, at a positive step in the form of an immediate manned action of the police force. But the initial claim that there should be a positive obligation (as opposed to just a positive measure) to protect the applicant's family had already been held applicable, and positive steps in the form of operational measures were found to have been complied with, whereby satisfying the positive obligations of the state required up to that stage. Immediacy was considered in relation to additional positive measures (e.g. arrest) that might have been required in those circumstances if the results of the operational measures of investigation had been incriminating.

Further, contextually, police operations are always given very careful and cautious examination due to interference with competing human rights.[32] Consequently,

[30] *Öneryildiz* [GC], (2004), at para. 77.

[31] "General Principles" refer to the structure of the Court's judgments.

[32] Restraints can legitimately be placed on police powers due to the competing human rights interests guaranteed by other Convention provisions, such as Articles 5 and 8. *See Osman v. the United Kingdom*, (cited *supra* note 10) at para. 116.

they are heavily regulated and always considered a last resort in emergency circumstances.

In contrast, the protection of human life in the context of industry proceeds upon different considerations within a non-emergency framework where positive measures are required well before the "immediacy" of the *Osman* test. The residual approach to that test by the Grand Chamber means that if some industrial activities have come, at some point, to present an immediate risk, then immediate emergency steps must be taken in addition to those required earlier.

The Grand Chamber clarified the non-emergency framework within which the industry is presupposed to operate when it stated that domestic regulations must be in place governing

> [T]he licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions…In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels. [33]

From this passage, one can discern measures of an institutional and practical nature that must be provided for and duly implemented in order to guarantee effective protection of human life in the industrial context. Accordingly, two corresponding categories can be formed for further examination.

1. Institutional Measures

In the first sentence of the quoted passage above, the licensing, setting up, operation, security and supervision of industrial activities constitute, in essence,

[33] *Öneryildiz* [GC], (2004), at para. 90.

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compulsory stages that must be provided for and administered by qualified public officials. To the extent that these stages are required by reference to the industrial context as a whole, rather than to the particular factual situation of a given case, they are institutional in nature and as such, their implementation is always required to condition the operation of the factory concerned.

These institutionalised stages are concerned with specific measures in the form of studies and research capable of determining safety standards. Thus, any subsequent examination of a factory's safety is made in accordance with those technical standards, as previously established. In *Öneryildiz*, an experts' report was found to have been undertaken some months before the industrial accident that caused the death of thirty-nine people. More importantly, the risk of an accident had come about much earlier, which could have been detected if the state's authorities had performed their safety control and supervision functions of the factory at an early stage.

Also, such a control is not exhausted at the initial stage of the factory's operation, but it should reasonably persist throughout the activities of the factory to safeguard against any material change on safety issues. In addition, given the different competences of the public officials involved in the actual supervision, it should be expected that appropriate administrative arrangements should be in place capable of identifying any shortcomings and errors committed by those responsible at the different levels of the state's control system.[34] On the facts, the Grand Chamber found that there was no such coherent supervisory system.[35]

Such measures should be seen as minimum obligations imposed on the state to guarantee an effective system of protection of innocent lives from the hazards of industry. This is also justified by the fact that the dangers involved are seen as inherent and, therefore, an obligation to act within an institutional framework is always expected to arise. Thus, unlike police action that depends on a prior notification, public officials in charge with industry's control are required to act on their own motion.

2. Practical Measures

An effective system of protection of human life should also reflect a practical result. For this reason, specific measures are required on the ground, which are usually determined during the institutional stages. Thus, the implementation of technical

[34] *Id.*

[35] *Id.* at para. 109.

standards and the rectification of any deficiencies encountered during the institutional stages are realized in turn by specific actions. Accordingly, practical measures can be seen as endemic to the safe operation of industry, as well as reactive to the factual situation concerned. In other words, they concern both contextual and ad hoc steps to form the basic protection expected from the state's authorities. In the following, we proceed to identify and analyse those measures examined by the Court in order to establish that protection of life does not operate in *abstracto*, but upon specific measures that should be known to the public officials in charge of industry's safety control.

a) Informing the Local Population

In the last quoted passage above, informing the local population is specifically mentioned as one of the "practical measures" to take in appropriate circumstances.[36] Citing the case of *Guerra and Others v. Italy* where warning information was first introduced as a positive measure against certain dangerous industrial activities,[37] the Court, in *Öneryildiz*, elevated it to a "right to information" and examined it as such.[38] Thus, counter-arguments to the effect that individuals could have requested information on the activities and dangers posed by the factory had no bearing on the Court's reasoning.[39] Not only can lay people not be blamed for failing to ask for information, given that they are not always in position to appreciate the seriousness of their circumstances, but it is a question of what the state has done to protect life, as opposed to what the individuals could have done for themselves.

However, the right to information requires more elaboration and specification because to have a right in the air does not secure protection of the individuals' lives *per se*. For this reason, the exact circumstances under which information should be

[36] *Öneryildiz* [GC], (2004), at para. 90.

[37] Eur. Court H.R., *Guerra and Others v. Italy,* Judgment of 19 February 1998, App. No. 116/1996/735/932, Reports of Judgments and Decisions, 1998-I. In that case, the Court found "the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory." *Guerra and Others*, at para. 60. This passage was quoted by the Chamber, *Öneryildiz*, (2002), at para. 84 and was also referred to by the Grand Chamber, *Öneryildiz* [GC], (2004), at para. 90.

[38] The Chamber devoted a separate heading in its judgment to examine the "Respect for the public's right to information." *Öneryildiz*, (2002), before para. 82. Equally, the Grand Chamber also examined the public's right to information, *Öneryildiz* [GC], (2004), at para. 90,108.

[39] *Öneryildiz*, (2002), at para. 85.

provided (when to inform), as well as its content (what to inform) should be established.

At first, it should be noted that the Court relied principally on the case of *Guerra* in finding a "right to inform", and not on *L.C.B.*, as discussed earlier for the applicability of the Article 2 claim. This point is of crucial importance and needs careful evaluation, as the positive measure of warning information in *Guerra* was decided in a claim under a different Convention Article, namely Article 8 that provides for the respect of private and family life. Although Articles 2 and 8 have close areas of concern with regard to physical integrity claims, their threshold of liability differs in that Article 8 entails, admittedly, a lower one.[40] However, by not relying on the principles and reasoning of the Article 2 decision of *L.C.B.*, which was equally concerned with a claim for warning information, the Court has made a step forward. In a case-law system, as is the Convention's, the authority of previously decided cases is estimated by the application of their reasoning in subsequent judgments. Accordingly, issues of causality deriving from tortious liability principles calculated on a balance of probabilities in *ex post facto* circumstances, as employed in *L.C.B.*, can be seen now as restrictive considerations compared to the reasoning of *Öneryildiz* where positive measures of protection are required upon the existence of a general risk to life. Thus, since industrial activities entail inherent dangers by their "very nature" (as seen earlier above), some precautionary measures could easily be required as a minimum protection.

Importantly, although the communication of information to the local population can be imposed as a precautionary measure, it is essential to know what its content should be. Warning information may be a vacant obligation where there is no prior obligation to collect it. In that connection, the provision of information is dependent on the institutional stages discussed above that should precede and be exhausted accordingly.

With the state's positive obligations being required and examined as early as the licensing stage, it is expected that early studies and reports must be prepared by the

[40] For the threshold of liability under Article 8 *see* Eur. Court H.R., *López Ostra v. Spain*, Judgment of 9 December 1994, App. No. 16798/90, Series A, No. 303-C, at para. 51. In his concurring opinion in *Guerra and Others v. Italy*, Judge Walsh concluded that "While bearing in mind that a breach of the Convention can frequently have implications for Articles other than the Article claimed to have been violated…The Convention and its Articles must be construed harmoniously. While the Court in its judgment has briefly mentioned Article 2, but has not ruled on it, I am of the opinion that this provision has also been violated. In my view Article 2 also guarantees the protection of the bodily integrity of the applicants…there was a violation of Article 2 in the present case and in the circumstances it is not necessary to go beyond this provision in finding a violation.", *Guerra and Others v. Italy*, (cited *supra* note 37).

state's agents that control the industrial activities from the very beginning. Therefore, it is the findings of such investigations that establish the information-knowledge, which the state is under an obligation to communicate. It should reasonably follow that if these findings point to a general risk having Article 2 implications, then general warnings should be provided. Conversely, if a specific or otherwise serious risk is found, then warning information should be given in detail. This alone confirms the inextricable link that exists between informing about a perceivable danger (the practical measure) and controlling and supervising industrial activities (the institutional measure).

b) Technical and Other Precautionary Measures

Informing the local population about the dangers to their lives does not suffice *per se* to discharge the state's obligations under the Convention. The Court has admitted that "in the absence of more practical measures to avoid the risks to the lives of the inhabitants…, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities."[41]

Indeed, more elaboration on the system of control and supervision is necessary, given the degree to which factual situations differ even if examined within the same context. The main point seems to be that each measure is not required in isolation, but as part and parcel of a system of protection that allows effective interaction and mutual functioning of its constituent parts in various situations. Thus, when report findings or supervision point toward risks to individuals' physical integrity, the state's positive obligations should reasonably require, in addition to warning information, specific practical measures that restore any technical deficiencies discovered before allowing the operation of the factory to continue (or start). This was the reasoning of the Grand Chamber which demanded more "practical measures" to have been provided under the circumstances.

Relying on the practice of the European states regarding the management and operation of waste-treatment factories, the Grand Chamber found that the main priorities of the authorities and operators include:

[41] *Öneryildiz* [GC], (2004), at para. 108.

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

- Isolating waste-disposal sites by ensuring that they are not located within a minimum distance of any housing;
- Preventing the risk of landslides by creating stable embankments and dykes and using compaction techniques; and
- Eliminating the risk of fire or biogas explosions. [42]

Such "practical measures", characterised as "main priorities", form the minimum pan-European standards of safety that must be implemented by all member states of the Convention to precondition the operation of such industries within their jurisdictions.

c) Emergency Measures

There are, however, circumstances where the danger posed by the industry has become an "immediate" one for the people living in the nearby area either by reason of some special circumstances or by the failure of public officials to act expeditiously in the earlier stages of control and supervision. Since what is at stake is human life, such a situation is always an emergency and, therefore, an immediate risk to life necessitates an immediate reaction on the part of the state's authorities. In that regard, a parallel can legitimately be drawn with the duty of the police to save human life upon knowledge of the existence of an immediate risk. In the context of industry, the most effective action in emergency circumstances seems to be to immediately close down the factory whose operation threatens the life and physical integrity of individuals. Such a drastic measure has already been seen in the case of *López Ostra v. Spain*, which concerned the activities of a private waste-treatment factory.[43] It should be remembered that that case was decided under an Article 8 claim which, as pointed out earlier, involved a lower liability threshold[44] and under circumstances where "immediacy" was hardly an issue. It should reasonably follow that the first step to take in emergency circumstances of an immediate danger to life is to order and enforce the closure of the factory in question for as long as technical and other practical measures are implemented.

An important point that merits due attention is that immediate action is required upon knowledge of an immediate risk to life. Admittedly, such knowledge is almost impossible to establish if the state's authorities have not previously

[42] *Id.* at para. 58.

[43] Eur. Court H.R., *López Ostra v. Spain*, (cited *supra* note 40).

[44] *Id.* at para. 51. *See also supra* note 40.

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

performed their duties during the institutionalised stages of control and supervision. In practice, this means that knowledge of an immediate threat is actively researched at the early stages of a factory's operation. Therefore, it can reasonably be maintained that the state's obligations to protect human life against industrial activities can only be guaranteed by a coherent system of control and supervision in which public officials act expeditiously in various levels.

II. The Ex Post Framework

In addition to the measures discussed above, the Court reads into the first paragraph of Article 2 "procedural obligations" that are "inherent" in that provision.[45] Such obligations have developed through the years in the form of a series of measures that must be taken when human life is lost. The word "procedural" is essentially a technical term used by the Court to define the state's obligations in *ex post facto* circumstances. However, although these measures are required *ex post*, their application is institutionalised to guarantee the implementation of the *ex ante* system of protection (as discussed above) and the accountability of all those responsible. In that regard, the regulation of procedural measures is expected in advance. In their examination, the Court seeks to establish first, whether appropriate procedural measures have been provided for in the state's legal system and secondly, whether the competent state's authorities have implemented and enforced them.

Because these measures are triggered upon knowledge of the loss of human life, their application is principally made by reference to all circumstances falling within the scope of Article 2. Context, however, can make a difference as much to the nature of these measures as to their intensity.

Procedural obligations have mainly been seen in cases of lethal force exercised by the state's agents or paramilitary groups. One of the most essential measures is the launch of an official investigation as soon as the state's authorities have become aware of the loss of life. In the case of *Ergi v. Turkey,* the Court stated that "the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."[46] In every case, the aim of an investigation is set as "the identification and punishment of those responsible."[47]

[45] *Öneryildiz* [GC], (2004), before para. 91; *Öneryildiz*, (2002), before para. 89.

[46] Eur. Court H.R., *Ergi v. Turkey*, Judgment of 28 July 1998, App. No. 66/1997/850/1057, Reports of Judgments and Decisions, 1998-IV, at para. 82.

[47] *Öneryildiz*, (2002), at para. 91.

Being well established in the jurisprudence, the procedural obligation to investigate is mainly examined as to its "effectiveness". The Court has had the opportunity in many cases to develop minimum standards against which the effectiveness of an investigation can be assessed.[48]

As discussed earlier, the state's obligations under Article 2 are not confined to cases in which the state's agents are employing lethal force, since "the right to the protection of life" can also be asserted in other circumstances, such as accidents at industrial sites. Therefore, the principles developed for procedural obligations are applicable "in other categories of cases."[49] In *Öneryildiz*, the key issue to be examined was not the launch of an investigation as such, but rather its scope. Thus, an investigation may prima facie be regarded as effective, but if its scope is restricted to specific offences (of lower liability), then its findings will be affected. Consequently, the question of effectiveness also relates to the adequacy of the investigation, as required under the circumstances. The Court had already held in its Chamber's judgment that the investigation undertaken by the competent authorities was weakened by not accounting for the link between negligent omissions and "the loss of human lives". [50]

Given the narrow scope of the investigation undertaken, it was not surprising that its findings fell short of the standards expected under the circumstances. These deficiencies were not rectified at the trial stage, where only some monetary fines were imposed (an amount equivalent at the time to approximately EUR 9.70), which were later suspended. The Court found again that the principles applied by the domestic courts were insufficient, since the "life-endangering aspect of the offence" was not examined at the domestic level.[51]

Indeed, the fines imposed were merely symbolic. Although they are labelled as "criminal" in the domestic legal order, the fact that the "life-endangering aspect of the offence" was not examined meant that the domestic judges would consider only low sanctions. As a result, the question became whether the procedural obligations under Article 2 could go so far as to determine the type and intensity of fines in cases of unintentional homicide arising in the industrial context. In addressing this question, the Grand Chamber reiterated that

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[48] *See, e.g.,* Eur. Court H.R., *McKerr v. the United Kingdom*, Judgment of 4 May 2001, App. No. 28883/95, 2001-III, at para. 157-161.

[49] *Öneryildiz* [GC], (2004), at para. 93.

[50] *Öneryildiz*, (2002), at para. 104.

[51] *Öneryildiz* [GC], (2004), at para. 115, 116; *Öneryildiz*, (2002), at para. 109.

> In this connection, the Court has held that if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims (see, for example, *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VII; *Calvelli and Ciglio*, cited above, § 51; and *Mastromatteo*, cited above, §§ 90, 94 and 95).[52]

A careful reading of this passage reveals that the Court generally interprets the positive obligations of the state under the right to life as not automatically imposing a criminal action "in every case" of unintentional death. However, this general position of the Court does not prevent it from taking into account the specific context concerned. In the Chamber's examination, the Court had also explained that

> The Court reiterates that the procedural obligation imposed on Contracting States under Article 2 of the Convention presupposes above all the setting-up of an efficient judicial system which, under certain circumstances, must include recourse to the criminal law (see, among other authorities, the above-mentioned cases of *Calvelli and Ciglio v. Italy*, §51, and *Demiray v. Turkey*, § 48).[53]

It follows, from both passages that the main question is not of whether Article 2 imposes a criminal remedy in all circumstances, but rather to justify and define its imposition in "certain circumstances".

Most of the Government's argument concentrated on the case of *Calvelli and Ciglio v. Italy* arising in the medical context.[54] Both the Chamber and the Grand Chamber effectively distinguished this case from *Öneryildiz* on their contextual differences. In

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[52] *Öneryildiz* [GC], (2004), at para. 92.

[53] *Öneryildiz*, (2002), at para. 90.

[54] Eur. Court H.R., *Calvelli and Ciglio v. Italy*, (cited *supra* note 11). *See also* the dissenting opinion of Judge Rozakis joined by Judge Bonello.

particular, the points of distinction for the Chamber were the number and status of the authorities found in breach of their duties and the fact that the repercussions of the risk in question were likely to affect more than one individual.[55] The Grand Chamber also found that the negligence attributable to public officials or bodies went beyond an error of judgment or carelessness.[56]

As seen in the foregoing analysis, the state's obligations to protect the right to life of those living around industrial sites arise as early as the examination of the license of the industry in question and persist throughout its operation. Therefore, industrial accidents are not seen as the result of an isolated "error of judgment" of a single person, as in the context of health care, which, by its nature, involves various degrees of unpredictability. In contrast, industrial activities operate in a more certain and predictable context in which accidents are often caused by systematic failures of those charged with averting them. In addition, the fact that more than one individual was exposed to the risk to life has also played a role in the Court's reasoning to define the procedural obligations of the state in the form of criminal sanctions. Further, such criminal sanctions must be adequate to reflect the gravity of the consequences involved and have the requisite "deterring" effect against negligence on the part of public officials in charge of industrial safety controls.[57] It should reasonably be asserted, therefore, that it is the form and intensity of the sanctions imposed that premise and sustain the system of protection of all positive measures required under the substantive aspect of Article 2.

E. The Consolidation of Legal principles and their Use as Criteria of Admissibility

In the case of *Öneryildiz v. Turkey*, the Court has laid down what the minimum administrative mechanism should be at a pan-European level to deal with the dangers of industrial activity. Given the development of a comprehensive legal reasoning, and the binding force of the rulings in both the Chamber and the Grand Chamber, it is expected that all subsequent claims arising in an industrial context should be approached in the light of these precedents. Accordingly, the all-encompassing legal framework of *Öneryildiz* that is made up of various stages, can also serve to examine questions of admissibility, with each stage being required to

[55] *Öneryildiz*, (2002), at para. 93.

[56] *Öneryildiz* [GC], (2004), at para. 93.

[57] *Id.* at para. 118.

https://doi.org/10.1017/S2071832200005551 Published online by Cambridge University Press

be exhausted in its respective order. Such a consolidation of principles has subsequently been seen in the admissibility case of *Bone v. France*.[58]

In that case, the applicants complained about the state's negligence in guaranteeing a security system for the operation of trains, and in particular for failing to impose a blocking system on the trains' doors, which had it been provided their son would not have died. It should be noted that the present case concerns the services or products of an industry and therefore the individuals to whom a positive duty of protection is owed are clearly identifiable.

Relying expressly on *Öneryildiz*, the Court examined whether the state has regulated the activities in question by imposing a security system. In particular, it found the existence of regulations aimed at guaranteeing the safety of passengers. Additionally, these security norms were known and applied by the rail company.[59]

The Court had also to examine how safety measures were implemented in practice and whether they were adequate in the circumstances. It was shown from the facts that the adolescent put himself in danger by opening the door when he was clearly aware that he would not be getting off in the accessible part of the platform. He also ignored a warning message on the door alerting of the serious dangers involved. The finding of such warning information sufficed to satisfy the Court that the minimum standards for effective safety measures have been regulated and duly implemented in a precautionary manner, as could reasonably be required in such circumstances.

With regard to post-fatal positive obligations of the state, it was also found that an investigation of a criminal law nature was carried out based on a technical expert evaluation of the company's safety obligations, and a detailed and impartial examination of facts, whereby satisfying the procedural obligations of the state flowing from Article 2.[60] The importance of these obligations for the actual implementation of safety standards has been stressed in the more recent case of *Pereira Henriques v. Luxembourg* in which it was held that the investigation of a fatal labour accident did not meet the Convention standards; that is the minimum content of steps that ensures effectiveness of the procedures in *ex post* circumstances. Thus, "[a]ny deficiency in the investigation which undermines its

[58] Eur. Court H.R., *Bone v. France*, Decision of 1 March 2005, App. No. 69869/01 (Available in French only).

[59] *Id.* p. 8, para. 3.

[60] *Id.* p. 10, para. 5 & 6.

ability to establish the cause of death or the person responsible will risk falling foul of this standard [of effectiveness]." [61]

F. Conclusion

The right to life, as guaranteed by Article 2 of the Convention, is the first and foremost human right. Unlike other Convention provisions in which the pursuit of the economic well-being of the country may legitimately limit their scope in certain circumstances, the right to life affords no such compromise. In the course of various industrial activities, a great number of dangers are likely to be encountered putting human life at risk. The responsibilities of the respective industries are reasonably called to be managed by the regulatory power and administrative ability of the state, which is under a positive obligation to guarantee enjoyment of the right to life within its jurisdiction. European human rights law has defined positive obligations in the form of a coherent system of various arrangements of both an institutional and practical nature that set the relevant standards by which the effective control of industries can be effectuated. Putting prevention of loss of human life at the heart of its structure, the implementation of an effective system of control involves in practice an interconnected hierarchy of stages, which requires that each one be provided for and, accordingly, exhausted by those public officials to whom these tasks have been assigned. Within this framework, individuals are able to constitutionalise their claims and acquire a direct course of action to force human rights standards on industries whose minimum content is determined by guaranteeing the right to life in absolute priority.

Such a constitutionalisation of human rights claims is relevant when fatal harm has been suffered, thereby giving rise to a complaint against the state for not having imposed adequate fines to deter negligence on the part of public officials and/or private entrepreneurs (e.g. corporate manslaughter charges). More importantly, it also targets the domestic system that fixes the very standards of operation, control and supervision of industries against which any negligence will come to be assessed. To the extent that a strict administrative structure has been laid down as a pan-European minimum (used also as admissibility criteria) vis-à-vis the activities of industries, a human rights complaint should be expected to arise in relation to every stage of that structure by means of judicial review in the corresponding levels involved. Thus, for a minimum administrative mechanism of human rights protection to exist not only in theory, but in practice, all indispensable stages of industrial safety controls should be reasonably open to the Court's supervision.

[61] Eur. Court H.R., *Pereira Henriques v. Luxembourg*, Judgment of 9 May 2006, App. No. 60255/00 (Available in French only).

Such a course of action may be seen as advanced, given that, only recently, the state's obligations have been clarified in the context concerned, and also because *locus standi* is conditioned upon qualification of a victim status under the provisions of Article 34 (former Article 25 (1)). Pragmatism, however, has led to an early relaxation of the victim criterion even in cases regarding less severe consequences than those provided for under the right to life.[62]

Accordingly, it can reasonably be contemplated that it will not be long before interested individuals, without waiting for harm to occur, will seek to challenge the effectiveness of industrial safety controls before the Court, whose recent judgments in the case of *Öneryildiz v. Turkey* have made crystal clear that the positive obligations of the state aim primarily at the prevention of loss of human life when Article 2 is asserted against activities of industry.

[62] *See*, *e.g.*, Eur. Court H.R., *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A, No. 28, at 34. In the case of *Guerra and Others v. Italy* (cited *supra* note 37) the applicants had not suffered any actual harm. Their complaints concerned precautionary measures in the event of an industrial accident and the failure of the state's administrative authorities to reduce the risk of pollution. The preliminary objection of the Government was not on the applicants' victim status, but rather on the alleged failure to exhaust domestic remedies, a fact, which suggests that there is an element of obviousness in pursuing an action before harm occurs.