Risk Regulation and the European Convention on Human Rights

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European law of risk regulation is commonly intended to be limited to the European regulation in the internal market. However, risk is also regulated in Europe by human rights law, which is often left aside in this area. In fact, disregard for the risk entailed by certain man-made activities as well as by natural events, may imply restrictions to, inter alia, the right to life and the right to respect for private and family life enshrined in the European Convention on Human Rights. This article aims at studying the manner in which this Convention regulates risk through human rights norms. It provides an overview of the standards set by the European Court of Human Rights in this field.

I. Introduction

Practical wisdom, sometimes designated also as prudence, was defined by Aristotle in his *Nicomachean Ethics* as "a true and reasoned state of capacity to act with regard to the things that are good or bad for man".[1] One could see this idea of prudence as a concept that has influenced the definition that is currently given to "risk regulation", as the body of law intended to protect health, safety, security and the environment that "seeks to reduce the risks of harm to individuals and society, stemming from all threats whether industrial or natural, voluntary or involuntary".[2] In Aristotle's terms, this regulation would conduct a man of practical wisdom to act with regard to human goods, but as he asserts, "while there is such a thing as excellence in art, there is no such thing as excellence in practical wisdom".[3]

The European Court of Human Rights' (hereinafter "the Court" or the ECtHR) case-law on risk regulation under the European Convention on Human Rights (hereinafter "ECHR" or "the Convention") is based on this latter assumption that excellence cannot exist in practical wisdom or prudence. In other words, risk cannot be completely avoided in modern life. Yet, it may sometimes threaten the full enjoyment of human rights. As many of the rights enshrined in the Convention may be involved, risk regulation has been treated as a cross-dimensional matter under ECHR. Cases involving risk of harm to individuals have been dealt with, mainly under Articles 2 and 8 of ECHR, which enshrine, respectively, the right to life[4] and the right to respect for private and family life[5]. Other rights,

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1 Aristotle, *Nicomachean Ethics*, translated by W. D. Ross (Kitchener: Batoche Books), 1999, at p. 95.

2 See Alberto Alemanno, "The Birth of the European Journal of Risk Regulation", *1 European Journal of Risk Regulation* (2010), pp. 1-4, at p. 1.

3 Aristotle, *Nicomachean Ethics*, *supra*, at p. 95.

4 See mainly *Öneryildiz v. Turkey*, 30 November 2004, Reports of Judgments and Decisions 2004-XII: explosion in a slum quarter surrounding a rubbish tip. Other good examples are, *Paşa and Erkan Erol v. Turkey*, 12 December 2006, Application 51358/99: explosion of an anti-personnel mine; *Budayeva and Others v. Russia*, 20 March 2008, Reports of Judgments and Decisions 2008: mudslide; *G.N. and Others v. Italy*, 1 December 2009, Application 43134/05: contaminated-blood transfusions; *Kalender v. Turkey*, 15 December 2009, Application 4314/02: railway accident; *Ciechońska v. Poland*, 14 June 2011, Application 19776/04: fall down of a tree in a health resort; *Kolyadenko and Others v. Russia*, 28 February 2012, Applications 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05: evacuation of water from a reservoir; *Ilya Petrov v. Bulgaria*, 24 April 2012, Application 19202/03: child's accident caused by an electric transformer situated in a children's park building.

5 See *López Ostra v. Spain*, 9 December 1994, A303-C: treatment of waste in tanneries. Also, among others, *Guerra and Others v. Italy*, 19 February 1998, Reports 1998-I: operations of a chemical factory; *McGinley and Egan v. the United Kingdom*, 9 June 1998, Reports 1998-III: exposure to radiation during nuclear weapons tests; *Hatton v. the United Kingdom*, 8 July 2003, Reports of Judgments and Decisions 2003-VIII: noise disturbance caused by the activities of an airport; *Taşkin and Others v. Turkey*, 10 November 2004, Reports of Judgments and Decisions 2004-X: permits issued for the exploitation of a goldmine; *Fadeyeva v. Russia*, 9 June 2005, Reports of Judgments and Decisions 2005-IV: operations of a steel plant; *Roche v. the United Kingdom*, 19 October 2005, Reports Judgments and Decisions 2005-X: exposure to toxic chemicals during tests; *Giacomelli v. Italy*, 2 November 2006, Reports of Judgments and Decisions 2006-XII: opera-

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such as the right to fair trial[6] (Article 6) as well as the right to property[7] (Article 1 of Protocol 1) and the prohibition of torture and inhuman and degrading treatments[8] (Article 3) have been applied in these cases.

The Court is hence due to contend with these 'right-threatening risks' in its mission to protect the rights enshrined in the Convention, which puts on the Contracting States the duty to act or to refrain from certain conducts. In fact, while dealing with a case in which the exercise of a right has been at risk, the ECtHR may examine whether the involved State has respected or not certain standards. It may go as far as to suggest what should have been or should be in the future the State's performance in that situation. Nevertheless, since the Court is normally owed to rule on human rights "violations" instead of "risks" of violations, not every risk is regarded as covered by the scope of the Convention. According to the Court's case-law and, generally, only real and immediate risks that the authorities know or ought to have known are covered.

The Court's case-law has thus aimed at governing risk through the setting of standards of behaviour (obligations) which arise from ECHR and that States must respect in order to be prudent States, that is, to guarantee the rights enshrined in this Convention. The Court's appraisal on States' behaviour in dealing with risk is therefore intended to assess whether the national authorities have done, in the case at hand, what could have been expected to be done from the standpoint of these obligations. This is such a difficult task for the Court, as the danger to fall under a paternalistic approach is latent. On the other side, if its approach is too libertarian, human rights may be infringed.

Depending on the right concerned, States are due to take into account different factors in order to establish whether (or not) a right-threatening risk is to be considered, i.e. whether the risk is known or ought to be known by the authorities and whether the risk is real and immediately linked with the exercise of the right involved. If these criteria are met, the risk is normally regarded as being covered by the scope of the Convention. This is also, on the side of States' authorities, such a difficult task, because they face as well the danger of a too paternalistic or a too libertarian approach vis-à-vis the individuals they govern.

Once risk is covered by the scope of the Convention, States are obliged to respect certain standards of conduct set by the Court in its jurisprudence, in order to guarantee the rights implicated. These may imply measures aiming to minimise that risk, as well as providing information on the latter and making it accessible to individuals, plus giving adequate judicial response to those facing the risk and its eventual damages. The following Parts of this study intend to review these two aspects. Part II will evaluate which are the risks covered by the scope of the Convention, while Part III will describe the States' obligations set by ECHR to regulate risk.

II. Risks Covered by the Scope of the Convention

In the landmark case of *Soering v. the United Kingdom*, the European Court of Human Rights admitted that a potential violation may give rise to an issue under the European Convention on Human Rights. More precisely, it acknowledged on that occasion that a matter may be considered under Article 3, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.[9] However, further case-law

tions of a plant for the storage and treatment of "special waste" (hazardous and non-hazardous); *Tătar v. Romania*, 27 January 2009, Application 67021/01: operations, including an accident, of a gold and silver mine; *Brânduşe v. Romania*, 7 April 2009, Application 6586/03: rubbish tip near a prison; *Deés v. Hungary*, 9 November 2010, Application 2345/06: noise, pollution and smell caused by traffic in a street; *Dubetska and Others v. Ukraine*, 10 February 2011, Application 30499/03: operations of State-owned industrial facilities; *Grimkovskaya v. Ukraine*, 21 July 2011, Application 38182/03: operation of a motorway; *Di Sarno and Others v. Italy*, 10 January 2012, Application 30765/08: emergency situation concerning the storage and treatment of waste.

6 See *Zander v. Sweden*, 25 November 1993, A279-B: operations of a plant for the treatment of household and industrial waste. Also, inter alia, *McGinley and Egan v. the United Kingdom*, 9 June 1998, Reports 1998-III; *Taşkin and Others v. Turkey*, 10 November 2004, Reports of Judgments and Decisions 2004-X; *Okyay and Others v. Turkey*, 12 July 2005, Reports of Judgments and Decisions 2005-VII: national authorities' failure to implement the domestic courts' order to shut down three thermal power plants which pollute the environment; *Stoine Hristov v. Bulgaria (II)*, 16 October 2008, Application 36244/02: passive smoking in prison.

7 See *Öneryildiz v. Turkey*, *supra*. More recently, *Kolyadenko and Others v. Russia*, *supra*.

8 See *Florea v. Romania*, 14 September 2010, Application 37186/03: passive smoking in a prison cell.

9 See ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Application 14038/88, §§ 90-91.

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made it clear that not every potential violation (risk of violation) is covered by the scope of the Convention and referred to the degree of probability that damage will occur. In the case of *Tauira and 18 Others v. France* relating to a series of nuclear tests carried out in the South Pacific, the applicants invoked the consequences which were likely to occur as a result of the decision to resume the nuclear tests. The European Commission of Human Rights considered nonetheless that merely invoking those risks was insufficient to enabling the applicants to claim to be victims of a violation of the Convention. In fact, as it was specified, "many human activities generate risks". The condition was, for the Commission, which recalled *Soering*, that the consequences of the act complained of were not too remote.[10]

The Court later refused to apply the Convention in *Balmer-Schafroth and Others v. Switzerland*, in a case relating to the decision to extend the operating licence of a power station and the proceedings filled against, in which it considered that the dangers were not established with a degree of probability that made the outcome of the proceedings directly within the meaning of the Court's case-law for the rights relied on by the applicants and that the connection invoked was too tenuous and remote.[11] The remote consequences of the act concerned were further evoked in *Asselbourg and 78 Others and Greenpeace Association-Luxembourg v. Luxembourg*, where the Court underlined that "in the system for the protection of human rights as envisaged by the framers of the Convention, exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention" and that "it is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of 'victim' on an individual applicant", referring again to the probability of the occurrence of a violation concerning him or her personally.[12] The applicants had mentioned in that case the pollution risks inherent in the production of steel from scrap iron, but the Court asserted that mere suspicious or conjectures were not enough in that respect.[13]

Therefore, the matter is to what extent States are due to take preventive measures in order to avoid potential violations and, at the same time, keep away from what the Court has called "paternalistic interpretations" of the Convention.[14] This approach was corroborated in the recent case of *Prilutskiy v. Ukraine*, which concerned the death of the applicant's son in a driving game. The Court highlighted in this case, that in the field of dangerous activities, "the positive obligations under Article 2 should not be unduly impaired by paternalistic interpretations, bearing in mind that the notion of personal autonomy is an important principle underlying the Convention guarantees, primarily those pertinent to private life" and recalled that "the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned, and improper State interference with this freedom of personal choice may give rise to an issue under the Convention". It took account of three factors to consider that an unrealistic or disproportionate burden must not be imposed on the authorities: the difficulties in policing modern societies; the unpredictability of human conduct; and the operational choices which must be made in terms of priorities and resources.[15] The Court has accordingly established in its jurisprudence that only real and immediate risks of which authorities have or ought to have knowledge entail for them a Convention requirement to take operational measures to prevent risks from materialis-

10 See European Commission of Human Rights, *Tauira and 18 Others v. France* (decision), 4 December 1995, Application 28204/95, D.R. 83-B, at p. 131-132, where Articles 2, 3 and 8 of the Convention and Article 1 of Protocol 1 had been alleged.

11 See ECtHR, *Balmer-Schafroth and Others v. Switzerland* [GC], 26 August 1997, Application 67\1996\686\876, § 40, where Article 6 § 1 was alleged. See, however, the dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek, who believed that it may suffice for finding a violation that there is proof of a link and the potential danger and evoked the precautionary principle: "Together with my colleagues in the minority, I would have preferred it to be the judgment of the European Court that caused international law for the protection of the individual to progress in this field by reinforcing the 'precautionary principle' and full judicial remedies to protect the rights of individuals against the imprudence of authorities".

12 See ECtHR, *Asselbourg and 78 Others and Greenpeace Association-Luxembourg v. Luxembourg* (decision), 29 June 1999, Application 29121/95. As regards the preventive aim of the Convention, see, however, the current concept of prevention in human rights law, Emmanuel Decaux and Sebastien Touzé (eds.), *La prévention des violations des droits de l'homme*, (Paris: Pedone), 2015.

13 See ECtHR, *Asselbourg and Others and Greenpeace Association-Luxembourg v. Luxembourg* (decision), *supra*.

14 Compare to the view of Christopher Hilson, "Risk and the European Convention on Human Rights: Towards a New Approach", *11 The Cambridge Yearbook of European Legal Studies* (2008-2009), p. 353-375, for whom the ECtHR's approach to risk is to be seen as a liberal approach.

15 See ECtHR, *Prilutskiy v. Ukraine*, 26 February 2015, Application 40429/08, §§ 32-33.

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ing,[16] which is a question that can only be answered in the light of the circumstances of the particular case.[17] This is the extent of States' intervention in this field, in which what is reasonable to expect acquires a crucial significance.

1. Real and Immediate Risks

The existence of a causal link between the event or situation invoked and the risk of harm alleged must be demonstrated in order to establish that the risk is real. In the landmark case *L.C.B. v. the United Kingdom*, the applicant had been diagnosed as having leukaemia. She invoked Article 2 as she considered that her childhood illness had been probably caused by her father's unmonitored exposure to radiation in his participation in nuclear tests. The Court considered that the State could only have been required to take measures of its own motion if "it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health" and further analysed the abovementioned causal link: "[h]aving examined the expert evidence submitted to it, the Court is not satisfied that it has been established that there is a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived". The Court found in that occasion that the alleged link was "unsubstantiated", giving particular importance to the information available to the State at that time, in the late 1960s, and excluded that there had been a violation of Article 2.[18]

In *Tătar v. Romania* the applicants alleged that they developed asthma as a consequence of water pollution from sodium cyanide and invoked Article 2 of the Convention, but the Court considered that they had not succeed in proving the existence of a sufficiently established causal link between the exposure to certain doses of sodium cyanide and the aggravation of asthma. The Court applied instead Article 8, as it was of the view that the existence of a serious and substantial risk to the health and wellbeing of the applicants could be however analysed from the standpoint of respect to their homes and private life, and more generally, to the enjoyment of a healthy and protected environment.[19] A similar attitude was followed by the Court in *Di Sarno and Others v. Italy* concerning the exposure of the applicants to waste. The fact that the applicants had not alleged that they were affected by the pathologies linked to this exposure and that the scientific studies submitted by the parties reach the opposite conclusion as to the existence of a causal link between exposure to the waste and an increased risk of developing pathologies such as cancer and congenital malformations, was in this case the element that lead the Court to exclude that the applicants' lives or health were threatened with regard to Article 2 of the Convention. Likewise in the *Tătar* case, the Court's thinking in this case was that Article 8 of the Convention was instead applicable, as it considered that the collection, treatment and disposal of waste were however dangerous activities for their homes and their private life.[20]

The causal link must be established with regard to each of the risks invoked. Indeed, in *Budayeva and Others v. Russia* which concerned the death of one of the applicants and the injuries sustained by other applicants and the members of their families exposed to a mortal risk in a mudslide, the Court observed that there had been authorities' omissions in the implementation of the land planning and emergency relief policies in the hazardous area and found that "there was a causal link" between the serious administrative flaws that impeded their implementation and the death of a person and the injuries sustained by the concerned applicants and the members of their family.[21] However, it further observed that it

16 See ECtHR, *Öneryildiz v. Turkey* [GC], 30 November 2004, Application 48939/99, particularly § 101.

17 A good example of a case showing that this answer can only be given by the specific circumstances of the case, is ECtHR, *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, 10 April 2012, Application 19986/06. In the mentioned case, the applicant's seven year old son had been frozen to death in 2004 as he was trying to return home alone after the early dismissal of the classes at school due to bad weather conditions. The Court carefully examines the particular circumstances and notes that "not every risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising", but further asserts that "nevertheless, in the circumstances of the present case, where a primary school is exceptionally closed early due to bad weather conditions, in the Court's opinion, it cannot be considered as unreasonable to expect the school authorities to take basic precautions to minimise any potential risk and to protect the pupils" (§ 41).

18 See ECtHR, *L.C.B. v. the United Kingdom*, 9 June 1998, Reports 1998-III, §§ 38-41.

19 See ECtHR, *Tătar v. Romania*, 27 January 2009, Application 67021/01, §§ 106-107.

20 See ECtHR, *Di Sarno and Others v. Italy*, 10 January 2012, Application 30765/08, §§ 108-109.

21 See ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, Reports of judgments and decisions 2008, § 158.

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could not be said that this link between the State's failure to take these measures and the extent of the material damage alleged by the applicants with respect to their properties, and thus, to the right to the peaceful enjoyment of possessions, had been "similarly well-established".[22]

The link required is therefore a close link sufficient to affect the scope of protection of the right alleged. Indeed, in the case of *Dzemyuk v. Ukraine* the applicant had invoked Article 8 of the Convention and submitted "that the construction of a cemetery near his house had led to the contamination of his supply of drinking water and water used for gardening purposes, preventing him from making normal use of his home and its amenities, including the soil of his own plot of land, and negatively affecting his and his family's physical and mental health".[23] The Court examined in this case whether the potential risks to the environment caused by the cemetery's location established a close link with the applicant's private life and home sufficient to affect his "quality of life" and to trigger the application of the requirements of Article 8 of the Convention.[24]

The proximity of the causal link depends, inter alia, on the degree of probability of the occurrence of the alleged danger. In the abovementioned *Balmer-Schafroth and Others v. Switzerland*, the Grand Chamber of the Court examined whether this link was "sufficiently close" to bring the provision alleged (i.e. Article 6 § 1 of the Convention) into play, "and was not too tenuous or remote". It was decisive for the Grand Chamber to exclude the applicability of the Convention, the fact that, as it was asserted, the applicants "did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühlerberg power station exposed them personally to a danger that was not only serious but also specific, and, above all, imminent".[25]

A certain degree of probability is hence required. The Court has used different terms to refer to this condition. On the one hand, it has referred to a "real and concrete risk",[26] a "serious risk";[27] a "high degree of risk";[28] a "serious and substantial risk";[29] or to dangers established "with a degree of probability"[30]. On the other hand, the Court has required that risk also be an "imminent risk".[31] This Court's approach on the degree of probability to which the risk must be established to be taken into account, has been rightly subject to criticism, especially in view of the fact that it excludes the application of the precautionary principle, which is instead applied to situations of scientific uncertainty.[32] In certain cases, the Court has observed that the risk must also be specific or individual, what means that it must be referred to specific and identified persons,[33] but it has also referred to, as it did in *Georgel and Georgeta Stoicescu v. Romania* -a case where the applicant had been attacked by a pack of stray dogs- the principle that establishes that the Convention is intended to safeguard rights

22 *Ibidem*, § 176.

23 See ECtHR, *Dzemyuk v. Ukraine*, 4 September 2014, Application 42488/02, § 73.

24 *Ibidem*, § 81 *et sqq*.

25 See ECtHR, *Balmer-Schafroth and Others v. Switzerland* [GC], *supra*, §§ 39-40. See, however, the dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek, whose opinion is that a "likelihood of risk and damage" is sufficient for Article 6 to be applicable, and that proof of a link and of the potential danger may suffice for finding a violation.

26 See ECtHR, *Hanzelkovi v. the Czech Republic*, 11 December 2014, Application 43643/10, § 75.

27 See ECtHR, *Binişan v. Romania*, 20 May 2014, Application 39438/05, § 52; *mutatis mutandis*, "a very serious risk", in *Pisari v. the Republic of Moldova and Russia*, 21 April 2015, Application 42139/12, § 54.

28 See ECtHR, *Pisari*, *supra*, § 55.

29 See ECtHR, *Tătar v. Romania*, *supra*: "risque sérieux et substantiel", § 107.

30 See ECtHR, *Balmer-Schafroth and Others v. Switzerland*, *supra*, § 40.

31 See ECtHR, *Kolyadenko and Others v. Russia*, 28 February 2012, Applications 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, § 155; *Balmer-Schafroth and Others v. Switzerland* [GC], *supra*, § 40; and *Athanassoglou and Others v. Switzerland* [GC], 6 April 2000, Application 27644/95, § 51.

32 See Elisabeth Lambert-Abdelgawad, "Le principe de précaution dans le système de la Convention européenne des droits de l'homme", in Hélène Ruiz Fabri and Lorenzo Gradoni (eds.), *La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation*, (SLC: Paris, 2009), p. 493-522, at p. 510: "Or, l'interprétation opérée par la CourEDH est très stricte; la CourEDH est mal à l'aise face à l'insuffisance de données scientifiques et face à la division de la communauté scientifique, éléments qui constituent selon elle, non le critère d'activation du principe de précaution, mais un obstacle à sa mise en œuvre bien souvent". On the Court's requirement of a "serious", "precise" and "especially imminent" danger, the Author is severe, at p. 511: "On ne peut qu'être critique par rapport à ces critères, spécialement par rapport à celui qui prime selon la jurisprudence européenne, à savoir le critère d'imminence, étranger au principe de précaution".

33 See again ECtHR, *Balmer-Schafroth and Others v. Switzerland*, *supra*, § 40 and *Athanassoglou and Others v. Switzerland*, *supra*, § 51.

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that are "practical and effective", which underlies its doctrine on the applicability of the Convention even in cases of potential violations, asserting that what this principle establishes "is also true in cases where a general problem for the society reaches a level of gravity such that it becomes a serious and concrete physical threat to the population". This meant, in that case, that the general risk represented by a large number of stray dogs in Bucharest implied an obligation for the Romanian authorities to take concrete measures.[34]

The fact that the applicants have sustained no injuries does not exclude the applicability of the Convention. While in certain cases the occurrence of harmful consequences makes the risk apparent,[35] in other cases, the absence of injuries makes it more difficult to establish that there was a real risk. In *Kolyadenko and Others v. Russia*, three of the applicants had survived with no injuries to a flooding caused by a large-scale evacuation of water from a reservoir. It was the Court's opinion that this had no bearing in the conclusion on the applicability of Article 2 of the Convention, as the circumstances left no doubt as to the existence of an imminent risk to their lives.[36] It seems that, according to the Court's case-law, a certain degree of risk must however be established, when there is no harm proved. In *Tudor v. Romania*, concerning the effects of an antenna installed in a prison for the protection of telephone communications, the fact that "there is no agreement amongst the scientific community as to the possible harmful effects of electromagnetic radiation on human health", was an element that the Court took into account to declare the application manifestly ill-founded.[37] The breach of domestic regulations is a main element of which the Court have regard. In the aforementioned case, the next element that the Court considered to exclude the application of the Convention was the fact that the domestic Court had found that the level of electromagnetic radiation respected the limits prescribed by the relevant domestic legislation in all the areas to which the applicant had access in the prison.[38] In *Dzemyuk v. Ukraine* the breach of the domestic regulations was also decisive for finding a violation of the Convention, but the Court has nonetheless observed that this was not sufficient in the case of *Koceniak v. Poland*. In this case, the applicant alleged that the activities of the slaughterhouse and meat-processing plant illegally constructed by his neighbour, which produced smell, noise and pollution, had created a risk to his health and that of his family, and invoked Article 8 of the Convention, but the Court was of the view that the mere fact that the buildings did not comply with the applicable provisions of the construction law was not sufficient grounds for asserting that the applicants rights under Article 8 were interfered with, and further examined whether the alleged environmental nuisances were "sufficiently serious". It took account of the fact that the applicant had provided no evidence to substantiate his allegation and, particularly, of a decision of the administrative authority that had declared that the activity was compatible with the requirements of the environmental legislation, to find that there had been no interference with Article 8.[39] Moreover, the evidence of the harmful effect alleged must be evaluated in relation to the information available at that time. This was the key element that influenced the Court's decision in the aforementioned *L.C.B. v. the United Kingdom*, in which it had particular regard of the "information available to the State at the relevant time" to assess whether the risk should have been taken into consideration and whether the obligation to take operational measures had come out.[40] The latter is a decision that can't but be seen as a sad decision from the ECtHR. One could say that it "added insult to injury", as it is unnecessary to explain here what the authorities were trying to find out with the concerned nuclear tests. Potential harmful effects! It is thus not disproportionate to have expected from the Court that States were responsible for not taking measures in tests of which it did not (obviously) know or couldn't have known the potential effects produced

34 See ECtHR, *Georgel and Georgeta Stoicescu v. Romania*, 26 July 2011, Application 9718/03, § 59, but also the *Partly dissenting opinion of Judge López Guerra*, for whom the Court cannot demand that authorities adopt all necessary measures to protect all people from all forms of danger in general.

35 For an example, see ECtHR, *Karsakova v. Russia*, 27 November 2014, Application 1157/10, where the Court found that, by denying the applicant's brother access to medical care and leaving him in solitary confinement in the absence of sufficient and appropriate monitoring or supervision while he was in detention, the authorities put his life in danger, causing his death.

36 See ECtHR, *Kolyadenko and Others v. Russia*, *supra*, § 155.

37 See ECtHR, *Tudor v. Romania* (decision), 3 June 2014, Application 42820/09, §§ 30-31.

38 *Ibidem*.

39 See ECtHR, *Koceniak v. Poland* (decision), 17 June 2014, Application 1733/06, §§ 60-65.

40 See ECtHR, *L.C.B. v. the United Kingdom*, *supra*, § 41.

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on human beings "at the relevant time", because –while undertaking such tests- they accepted however that harmful effects could materialize, even if the information available at that time had not reach to that conclusion.[41]

As regards the assessment of risks, the Court puts on States the burden of its estimation. In fact, it is its view that it is not for the ECtHR to substitute its own opinion for that of the domestic authorities in assessing the risk,[42] and, more generally, that it is not for an international court to determine in place of the competent national authorities the acceptable level of risk.[43] This is especially true where contracting States deal differently with that kind of risk,[44] or there is no agreement amongst the scientific community as to the harmful effects of a certain activity.[45]

2. Authorities Know or Ought to Have Known the Risk

The Convention law further calls for another requirement in assessing whether a State's authority is to take operational measures to avoid a risk. This second condition is related to the degree to which the risk could be foreseen. According to the ECtHR's case-law States are obliged to take into consideration risks that authorities know or have to know for the purpose of taking operational measures aiming to avoid them. In *Yildiz and Others v. Turkey*, for instance, the applicants complained of the death of their son, who had committed suicide while fulfilling the mandatory military service. The Court examined in this case the State's obligation to protect the applicant's son from him-self. One of the factors analysed was, in fact, whether the military authorities knew or ought to have known that there was a real risk that the applicant's relative gives up his own life, including the question whether the authorities were conscious of that risk.[46] In the earlier case of *Akteke and Kahriman v. Turkey* relating also to suicide committed during compulsory military service, the ECtHR had found that the military authorities "knew" that the young man's involvement in the concerned activities represented a real risk for his physical and psychological integrity and had not taken the appropriate measures, to decide that there had been a violation of Article 2.[47] Conversely, the Court found in another suicide case in a penitentiary institute, that the authorities couldn't reasonably know that the applicant's relative presented a real and immediate risk to commit suicide, and declared the application manifestly ill-founded.[48]

Things are however different if the authorities did not know, but ought to have known about the risk. What the ECtHR asks when the authorities did not know that there was a danger is whether, instead, they could have foreseen the risk in order to take preventive measures. This is the reasoning of the Court in *Makayeva v. Russia*, in which the applicant alleged that her son had been unlawfully detained and had then disappeared. What was examined first in this case was whether the authorities "could have foreseen" that the applicant's son was at real and immediate risk.[49] The question implied in this reasoning is one that is explicitly made in other cases: should the authorities have known of the risk? As the Court asserted in *Reilly v. Ireland*, the degree to which the authorities knew or ought to have known of the risk "is of critical importance".[50] This was the approach followed in the landmark case of *Öneryildiz v. Turkey* concerning the death of the applicant's close relatives in an accident at a municipal rubbish tip which was operated under the authorities' control, in which the Grand Chamber agreed with the Chamber "that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks".[51] In certain cases, what is foreseen is the probability of the

41 A similar idea is accepted in criminal law as concerns the *dolus eventualis*.

42 See ECtHR, *Hanzelkovi v. the Czech Republic*, *supra*, § 70.

43 See ECtHR, *Hristozov and Others v. Bulgaria*, 13 November 2012, Applications 47039/11 and 358/12, § 125, in a case concerning the authorities' refusal to give the applicants authorisation to use an experimental medicinal product that they wished to have administered by way of "compassionate use"; *mutatis mutandis*, *Durisotto v. Italy* (decision), 6 May 2014, Application 62804/13, § 40.

44 See ECtHR, *Hristozov and Others v. Bulgaria*, *supra*, § 108.

45 See ECtHR, *Tudor v. Romania*, *supra*, § 30.

46 See ECtHR, *Yildiz and Others v. Turkey* (decision), 7 April 2015, Application 34442/12, §§ 52-55.

47 See ECtHR, *Aktepe and Kahriman v. Turkey*, 3 June 2014, Application 18524/07, § 69-72.

48 See ECtHR, *Taner v. Turkey* (decision), 9 December 2014, Application 61020/11, § 50.

49 See ECtHR, *Makayeva v. Russia*, 18 September 2014, Application 37287/09, § 97.

50 See ECtHR, *Reilly v. Ireland* (decision), 23 September 2014, Application 51083/09, § 59.

51 See ECtHR, *Öneryildiz v. Turkey* [GC], *supra*, § 101.

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dangerous event to happen, but not equally to such degree the effects caused by the latter. This was the case in *Budayeva and Others v. Russia*, in which the parties agreed that a mudslide was likely to occur, but disagree on the authorities' prior knowledge that the mudslide was likely to cause devastation on a large scale than usual. The Court thus examined whether the authorities were also aware or had to be aware of the devastating consequences of the mudslide.[52]

States are due to take account of different factors in assessing the risk concerned. The Court has established in *Brincat and Others v. Malta* that the "most evident amongst them" is "objective scientific research", even if access to necessary information and acknowledgement by domestic courts were also other factors examined.[53] Specific regulations were another factor taken into consideration by the Court in *Öneryildiz*, in order to determine whether the authorities knew or ought to have known of the risk.[54]

This way of reasoning results from the frequently recalled claim of the Court according to which "an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources".[55] States' obligations must be hence interpreted in a manner not to impose to them an unbearable or excessive burden.[56] Particularly related to this assertion is the fact that the Court has established that the analysis of the aforementioned factors is an issue to approach from the point of view of the standards of the time in question rather than to judge the matter with hindsight.[57] This was also the logic of the Court in the aforementioned *L.C.B. v. the United Kingdom*.[58]

While assessing whether a risk could have been foreseen, the Court draws also a distinction between human conducts and natural events. According to its view, one should not disregard the unpredictability of human conduct[59] in assessing whether the authorities knew or should have known of the risk. The unforeseeable character of human behaviour was a factor that the Court took into account in *Taner v. Turkey* to hold that the authorities couldn't reasonably know of the risk. This does not mean that human conduct must be ignored. In *Identoba and Others v. Georgia*, a case concerning the attacks from counter-demonstrators to individuals during an LGBT's march, the Court took into consideration the attitudes in parts of Georgian society towards the sexual minorities, to conclude that the authorities knew or should have known of the risks of tensions associated with the applicant organisation's street march to mark the International Day Against Homophobia.[60]

III. States' Obligations and Individuals' Rights Stemming from the Convention in the Context of Right-threatening Risks

If a real and immediate risk of violation of a right enshrined by the Convention exists and the authorities know or should know about it, an obligation arise for the State concerned to take operational measures to avoid that risk. This obligation comes up even if the risk in question emanates from the activities of pri-

52 See ECtHR, *Budayeva and Others v. Russia*, *supra*, §§ 147-151.

53 See ECtHR, *Brincat and Others v. Malta*, 24 July 2014, Applications 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, § 106. The applicants alleged that the State had failed to protect them from the risks related to exposure to asbestos at a workplace which was run by a public corporation owned and controlled by the Government.

54 See ECtHR, *Öneryildiz v. Turkey*, *supra*, § 101: there were, in fact, particular regulations on the matter.

55 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 135.

56 See ECtHR, *Yildiz and Others v. Turkey* (decision), *supra*, § 55. According to the Court's view, an excessive burden would have been in the circumstances of *Taner supra* –- condemning the authorities for not doing more than what they did to prevent the prisoner from committing suicide. See *Taner v. Turkey* (decision), *supra*, § 51.

57 See ECtHR, *Reilly v. Ireland*, *supra*, § 60, where the Court examined the factor of "public awareness" of sexual abuse in institutions.

58 On the Court's reasoning in this case, see *supra* II.1. While this kind of reasoning is acceptable in most cases, in our view, it is not adequate in the case of tests, such as the nuclear tests concerned in *L.C.B.*, where the testers –States or individuals- are in fact "trying to know" about the eventual noxious effects of the product or procedure tested, by carrying out these tests. We are of the view that, in this hypothesis, States are to be considered responsible for the omitted measures that are subsequently acknowledged as necessary. This is not to be considered an impossible or disproportionate burden in these cases, because States, by undertaking those tests, accept that harmful effects may be caused. Authorities are, thus, to a certain degree, conscious of the eventual emergence of harmful consequences.

59 See ECtHR, *Yildiz and Others v. Turkey*, *supra*, § 55. See previously, *mutatis mutandis*, *Taner v. Turkey* (decision), *supra*, § 51, which refers to the "imprévisibilité du comportement humain".

60 See ECtHR, *Identoba and Others v. Georgia*, 12 May 2015, Application 73235/12, § 99, in relation to Articles 10 and 11 of the Convention.

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vate individuals[61] or from natural events,[62] and not only when it derives from States' conducts. In all of these cases, the risk in question gives rise to positive obligations of the State, that may vary depending on the right concerned.[63]

Positive obligations arise as soon as the authorities are or should be aware of the dangers concerned. The main duty implied by the Convention in this field is the authorities' obligation to take preventive measures in order to avoid a right-threatening risk, which may imply the adoption of practical as well as legislative and administrative measures (1). This may include also a duty to provide alternatives to risky situations. A further obligation is related to the access to information about dangerous activities or natural events (2). Under this obligation, States are due to provide individuals with information about the risk concerned, what may allow them to behaviour in a prudent manner as well, but also to effectively participate in the decision-making procedures that engage the management of risky activities or situations. Finally, when a risk couldn't be avoided and noxious consequences derived from this, an obligation to give adequate judicial response arises for the State concerned (3).

1. Avoiding Risk: the Obligation to Take Preventive Measures

Whenever the authorities know or should know that a real and immediate risk is threatening a right or a freedom enshrined in the Convention, even if this comes from a private individual's behaviour or a natural event, inaction is not admitted. Failure to take any preventive measure engages States' responsibility by omission under the Convention law. The case of *Bljakaj and Others v. Croatia* is an example of authorities' inaction on a right-threatening situation that engaged the State's responsibility. In fact, the applicants' relative had been killed in a shooting spree carried out by an individual apparently mentally disturbed at that time, who had known her from the divorce proceedings in which she, as a lawyer, had been representing his wife. The Court assessed the failures of the police and the absence of necessary relevant action, that were considered as a violation of Article 2 of the Convention. As it was the view of Judges Lazarova Trajkovska and Pinto de Albuquerque, if a State knows or ought to know that a segment of its population is subject to repeated violence and it fails to prevent harm to the members of that group of people when they face a real and present risk, the State can be found responsible by omission for the resulting human rights violations. This was also applicable in the present case where the risk resulted from the conduct of a non-State actor.[64] Preventive measures were also absent in the case of *Georgel and Georgeta Stoicescu v. Romania*, where the Court found that the "lack of sufficient measures taken by the authorities in addressing the issue of stray dogs in the particular circumstances of the case combined with their failure to provide appropriate redress to the applicant as a result of the injuries sustained, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life".[65]

The obligation to adopt preventive measures takes place as soon as the authorities become aware of dangers and may imply the adoption of both practical and legislative or administrative measures. As State's inaction, delayed action is also inadmissible.[66] Hence, an obligation to take measures arises from the kind of risky situations referred to above, but what is then the extent of State involvement in fulfilling its obligation? The ECtHR provided a wide-ranging answer to this question in the case of *Makayeva* cited above, where it examined whether the authorities "took measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[67] The extent of State involvement has to be established consequently in view of a number of elements. The Court has referred to the analysis of these elements as an exam of whether the risk

61 See ECtHR, *Zammit Maempel v. Malta*, 22 November 2011, Application 24202/10, § 63: "[i]t is clear that in the present case the disturbances complained of were not caused by the State or by State organs, but that they emanated from the activities of private individuals. While the case may therefore be seen as giving rise principally to the positive obligations of the State, rather than as an interference by the State, the Court is not required finally to decide this question, the test being essentially the same [...]".

62 See ECtHR, *Budayeva and Others v. Russia*, *supra*.

63 *Ibidem*, §§ 174-175.

64 See ECtHR, *Bljakaj and Others v. Croatia*, 18 September 2014, Application 74448/12, in particular, the Joint partly concurring and partly dissenting opinion of Judges Lazarova Trajkovska and Pinto de Albuquerque, § 5.

65 See ECtHR, *Georgel and Georgeta Stoicescu v. Romania*, *supra*, § 62.

66 See ECtHR, *Brincat and Others v. Malta*, *supra*, §§ 110-112.

67 See ECtHR, *Makayeva v. Russia*, *supra*, § 97.

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was, in the case at hand, minimised to the greatest extent possible,[68] minimised[69] or reduced to a safe level,[70] or whether all measures needed were taken to keep far from any risk of danger or harm[71].

The first factor that determines the extent to which States are due to react is to be find in the right threaten by the danger concerned. Not only measures must be taken in risky situations, but they also have to be able to protect the right or freedom threatened. In *Tătar v. Romania* mentioned above, the applicants complained about the authorities' inaction on the danger represented by the water pollution caused by the use of technologies by a private corporation. The Court considered that the existence of a serious and substantial risk for the health and wellbeing of applicants engaged a State's positive obligation to take reasonable and adequate measures that were able to protect their rights to respect of their private lives and home and, "more generally" to the enjoyment of a healthy and protected environment. It found that the State had failed to fulfil its obligation to guarantee those rights under Article 8 of the Convention, due to the lack of those measures.[72] In particular, the ECtHR asserted in *Budayeva* that a distinction must be drawn between the positive obligations under different rights. In the specific circumstances of the case, it distinguished between the positive obligations under Article 2 of the Convention and those under Article 1 of Protocol 1: "[w]hile the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives".[73] In the case of *Makayeva*, which concerned the right to life of a person who had been unlawfully detained and disappeared, the Court established that upon receipt of plausible information pointing to a real and immediate danger to a person's life, this obligation requires an "urgent and appropriate reaction" and further asserted that an "effective and rapid response" by the authorities was "absolutely vital" in the circumstances of the case. It finally referred to what "one could reasonably expect" in the context of the case.[74] However, in the circumstances of the more recent *Kolyadenko and Others v. Russia*, the Court found no differences between the positive obligations under Article 2 and those under Article 8 and Article 1 of Protocol 1 as the latter "required the national authorities to take the same practical measures as those expected of them in the context of their positive obligations" under the first provision.[75]

Once the measures required to protect the right concerned from a risk have been established, one must ask which of the measures required are within the scope of the authorities' power in a particular situation. In *Identoba and Others v. Georgia* the Court referred to an "obligation to use any means possible" to avoid the risk concerned and gave examples of the conducts expected from them.[76] What is possible or

68 See ECtHR, *Makaratzis v. Greece*, 20 December 2004, Application 50385/99, § 60, in a case concerning the use of potential lethal force by police officers. See, *mutatis mutandis*, *Ciorcan and Others v. Romania*, 27 January 2015, Applications 29414/09 and 44841/09, § 108.

69 See ECtHR, *Karaahmed v. Bulgaria*, 24 February 2015, Application 30587/13, § 105, in a case concerning the clash of leaders, members and supporters of a political party with Muslim worshippers who had gathered around a mosque for the regular Friday prayer. The Court required to the domestic authorities that they "should had been prepared –so far as was possible- to take steps first, to minimise the risk of that tension spilling over into violence and second, to secure both the rights of the demonstrators peacefully to assemble and the rights of the worshippers peacefully to pray" (§ 100).

70 See *James, Wells and Lee v. the United Kingdom*, 18 September 2012, Application 25119/09, 57715/09 and 57877/09, § 217, where the applicants had received sentences that intended to keep them in detention on the basis that their release could represent a risk to the public at large.

71 See ECtHR, *Paşa and Erkan Erol v. Turkey*, 12 December 2006, Application 51358/99, § 31, where the Court uses the terms "mesures nécessaires et suffisantes pour pallier ce risque" and § 38, the Court referring to "mesures de sécurité nécessaires pour éloigner tout risque", in a case concerning the explosion of an anti-personnel landmine that put the life of a child in risk and caused the amputation of his leg.

72 See ECtHR, *Tătar v. Romania*, *supra*, § 107 *et sqq*. For another case of State inaction see ECtHR, *Aktepe and Kahriman v. Turkey*, *supra*, where the Court found that a violation resulted from the authorities' failure to take measures to prevent a young man from committing suicide while fulfilling compulsory military service.

73 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 175.

74 See ECtHR, *Makayeva v. Russia*, *supra*, § 100-103. The Court found that there had been a "failure to act rapidly and decisively" (§ 105).

75 See ECtHR, *Kolyadenko and Others v. Russia*, *supra*, § 216.

76 See ECtHR, *Identoba and Others v. Georgia*, *supra*, § 99. See, however, the Partly dissenting opinion of Judge Wojtyczek, who is of the opinion that "it would have been more correct to state that the authorities were under an obligation to use *any means which might have been reasonably expected in the circumstances of the case*".

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within the authorities' power depends, according to the Court's case-law, on the nature of the danger concerned, among other factors. Natural events and human behaviour must be distinguished from that point of view, as the Court has established in *Budayeva* that "natural disasters, which are as such beyond human control, do not call for the same extent of State involvement". The Court drew a distinction between the obligations resulted from weather hazards and those engaged by dangerous activities of a man-made nature in that case. The former, as the Court asserted, do not necessarily extend as far as in the sphere of the latter as regards the protection of property.[77]

Individuals' imprudence may be also taken into account, as the Court did in *Kalender v. Turkey*, where it recalled that one must not put on the State's burden a positive obligation of protection without limits, but it cannot go as far as to legitimately justify the authorities inaction.[78] Similarly, in *Iliya Petrov v. Bulgaria*, the Court did not disregard the imprudence of the applicant, but found nonetheless a violation of the Convention resulting from the failure of the State to put in place a control system to ensure adequate application of security norms.[79] A further factor related to this is established according to what it is "reasonable to expect" from the authorities to avoid that risk. This was the reasoning of the Court in *Dönmez and Others v. Turkey*, where the applicants' relative death had resulted from an accident caused by an explosive device. Taking account of the fact that the anti-personnel landmine that had caused the accident was placed in an area which was transited both by the inhabitants and servicemen and that it was not a military area or an area mined by the authorities, the Court considered that it was "not reasonable" to expect from the authorities that they warn the inhabitants about the existence of a risk resulting from the presence of unknown-origin explosive devices on the public land.[80] Consequently, what is within the limits of the authorities' official powers is a factor to consider in order to know what could reasonably expect of them.[81] Still the Court took account of the efforts undertaken by the authorities to assess their behaviour in *Luginbühl v. Switzerland*.[82]

What measures are needed, and, in particular, what one could reasonably expect of the authorities to avoid a risk, is a question that, according to the Court, "can only be answered in the light of all the circumstances of any particular case".[83] In *Ciorcan and Others v. Romania*, for instance, the Court referred to the lack of time "which might have justified the absence of preparation" of a police operation.[84] However, it is possible to assert in a generic manner that under the Convention's obligations, States are due both to assess the risks entailed by natural events and human conducts and take legislative, administrative as well as practical measures to avoid the dangers identified. In the aforementioned *Kolyadenko*, the Court found, for example, that the authorities had positive obligations under Article 2 of the Convention both to assess all the potential risks inherent in the operation of the reservoir concerned, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risks.

Assessing potential risks is thus a measure involved in the obligation of States to avoid those risks.[85] This may include the carrying out of prior appropriate investigations and studies in order to avoid and assess *a priori* the effects of the activities concerned,[86] relying on pertinent expert opinions and referring to statutorily fixed thresholds[87] or putting

77 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 174.

78 See ECtHR, *Kalender v. Turkey*, 15 December 2009, Application 4314/02, § 49.

79 See ECtHR, *Iliya Petrov v. Bulgaria*, 24 April 2012, Application 19202/03, § 59 *et sqq*.

80 See ECtHR, *Dönmez and Others v. Turkey* (decision), 17 June 2014, Application 20349/08, § 29. See also the principles enounced in *Prilutskiy v. Ukraine*, *supra*, § 33, where the Court established that for an applicant complaining about a risk to life, it is sufficient "to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge"; and those in *M.C. v. Poland*, 3 March 2015, Application 23692/09, § 89, referring to the "steps which could have been reasonably expected" of the authorities, in a case concerning risks to physical integrity (Article 3).

81 See ECtHR, *M.C. v. Poland*, *supra*, § 89.

82 See ECtHR, *Luginbühl v. Switzerland* (decision), 17 January 2006, Application 42756/02.

83 See ECtHR, *Prilutskiy v. Ukraine*, *supra*, § 33. Also, *M.C. v. Poland*, *supra*, § 89, on Article 3 of the Convention.

84 See ECtHR, *Ciorcan and Others v. Romania*, *supra*, § 114.

85 See ECtHR, *Kolyadenko and Others v. Russia*, *supra*, §§ 168-170, where the Court found that the authorities had disregarded potential risks by failing to reflect them in legal acts and regulations and allowing urban development in the area downstream of the reservoir.

86 See ECtHR, *Lemke v. Turkey*, 5 June 2007, Application 17381/02, § 44. See also, *Brânduşe v. Romania*, 7 April 2009, Application 6586/03, § 73.

87 See ECtHR, *Traube v. Germany* (decision), 9 September 2014, Application 28711/10, § 30-31.

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in place a control system to ensure adequate application of security norms.[88]

As regards the preventive measures, authorities have actually a margin of appreciation in adopting and applying the policy required to avoid a certain risk.[89] This margin of appreciation is wider if there is no European consensus in the matter. The ECtHR has established in *Aparicio Benito v. Spain* –a landmark case on the protection against passive smoking in prisons- that it is not its task to impose to States a certain behaviour in each component of society and linked this to the fact that there was not a uniform reaction to passive smoking among the Contracting Parties of the Convention.[90]

The fact that activities are carried out in conformity with national and international norms constitutes an element for considering that sufficient preventive measures were set up,[91] but it is not decisive, as not only operational measures, but also the legislative and administrative framework adopted by States, are to be assessed. The circumstances examined in *Dubská and Krejzová v. the Czech Republic* are illustrative in that respect. The case concerned the prohibition for health professionals to attend home births, under Czech law, what increased the risk to the life and health of mothers and newborns. Three main factors were examined by the Court in order to evaluate the measures adopted by the national authorities to deal with those risks: whether they gave due weight to the competing interests and whether they carefully considered the possible alternatives and assessed the proportionality of their policy in respect of home births. It was the legislative and administrative framework what was in fact appraised in the case at hand.[92] The competing interests at stake were a factor considered also in *Wöckel v. Germany* where the Court had to decide on whether the German State was obliged to enact legislation prohibiting smoking in public with a view to protecting non-smokers.[93] Analysis of the competing interests may imply that authorities carry out investigations and studies in order to allow them to strike a fair balance between the various conflicting interests.[94] Whether the persons concerned had or not an opportunity to make their views heard in the decision-making process, is a factor that, according to the Court's case-law, must be taken into account to assess whether a State is acting or has acted as a prudent State.[95] In *Giacomelli v. Italy*, for instance, the Court took account of the fact that the possibility for any citizens concerned to participate in the licensing procedure of a plant for the treatment of toxic industrial waste and to submit their own observations to the judicial authorities and, where appropriate, obtain an order for the suspension of a dangerous activity, "were deprived of useful effect in the instant case for a very long period", to found that the State had not succeed in striking a fair balance between the interest of the community in having that plant and the applicant's effective enjoyment of her right to respect for her home and her private and family life, what constituted a violation of Article 8 of the Convention.[96] As regards the possible alternatives to risky activities or situations, the Court has frequently assessed whether the authorities have properly considered an alternative solution to face the risk concerned.[97] It has referred either to

88 See ECtHR, *Iliya Petrov v. Bulgaria*, *supra*, § 63.

89 See ECtHR, *Dubská and Krejzová v. the Czech Republic*, 11 December 2014, Applications 28859/11 and 28473/12, §§ 99-101, where the Court found that the State had not exceed the wide margin of appreciation afforded to them.

90 See ECtHR, *Aparicio Benito v. Spain* (decision), 13 November 2006, Application 36150/03, where the Court declared the application inadmissible, even if it accepted that the fact that a non-smoker prisoner was forced to share common spaces with smoker prisoners could constitute an interference with the right to private life as regards Article 8 of the Convention. However, see also ECtHR, *Florea v. Romania*, 14 September 2010, Application 37186/03 and *Onaca v. Romania*, 13 March 2012, Application 22661/06, where the applicants –non smoker prisoners forced to share a cell with smoker prisoners- invoked, differently, Article 3 of the Convention, the Court finding a violation of this provision this time.

91 See European Commission of Human Rights, *L., M. and R. v. Switzerland* (decision), 1 July 1996, Application 30003/96. Also, ECtHR, *Okyay and Others v. Turkey*, 12 July 2005, Application 36220/97, §§ 73-75, where the Court found a violation of Article 6 because the national authorities had failed to comply in practice and within a reasonable time with the judgments rendered by the administrative domestic court.

92 See ECtHR, *Dubská and Krejzová v. the Czech Republic*, *supra*, § 99.

93 See ECtHR, *Wöckel v. Germany* (decision), 16 April 1998, Application 32165/96.

94 See ECtHR, *Zammit Maempel v. Malta*, *supra*, § 70.

95 *Ibidem*, § 71. See, also ECtHR, *Traube v. Germany* (decision), *supra*, § 32.

96 ECtHR, *Giacomelli v. Italy*, 2 November 2006, Application 59909/00, §§ 94-98.

97 For a good example, see ECtHR, *Dubetska and Others v. Ukraine*, 10 February 2011, Application 30499/03, where the Court found that the Government had failed to adduce sufficient explanation for their failure to either resettle the applicants –who lived near industrial facilities and were mostly affected by pollution- or "find some other kind of effective solution" for more than twelve years.

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"alternative preventive measures",[98] "available alternative means",[99] "alternative possibilities"[100] or to "any other solutions".[101]

Besides the obligation to take practical measures, States have thus a positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the rights enshrined by the Convention[102] which must be adapted to the level of risk concerned.[103] The pertinent provisions must be duly applied as well, this being a factor that the ECtHR may consider in its assessment.[104] While the obligation to put in place a legislative and administrative framework has been defined by the Court as a "primary duty" of States, it also established in *Brincat and Others v. Malta* that "it cannot rule out the possibility, *a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice". In fact, the Court examined in this case whether the authorities had, in the absence of the required legal and administrative framework, taken "practical measures" to avoid the risk to health concerned.[105]

2. Providing Information and Making it Accessible: the Obligation to Provide Information about Risks and to Allow the Public's Access to it

In the landmark case of *Guerra and Others v. Italy*, the Court found a violation of Article 8 resulting from the fact that the applicants had not been given essential information that would have enabled them to assess the risks that they and their families might run if they continued to live in a town particularly exposed to danger in the event of an accident of a factory that had been classified as "high risk".[106] Not only an obligation to provide information about the risks entailed by the factory was put on the burden of the State, but also an individuals' right to be informed about those risks was recognized by the Court under this provision. Public's right to information was further recognized also under Article 2, which guarantees the right to life of individuals, in the aforementioned *Öneryildiz v. Turkey*. In this case, the Court was of the view that "particular emphasis should be placed" on this right among the preventive measures required and that it "may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards".[107]

The obligation of the authorities to provide individuals with information "enabling them to assess the risks they might run"[108] has been further defined by the Court in *Budayeva*, where the Court considered that "informing the public about inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned" and established that it requires that authorities show all possible diligence in informing the public about the risks in question.[109] It is at the same time, as asserted by judges De Meyer, Valticos and Morenilla in a joint dissenting opinion to *McGinley*, an individuals' right to know what might happen to them, without having to ask[110] and includes a specific obligation of dissemination of information.[111] The duty to inform may involve also an obligation to inform the population on the preventive measures foreseen to avoid further potential similar accidents as well as the measures to be taken by the population to avoid risks to health if an accident takes place again.[112]

The obligation to inform the public on the inherent risks is also to be fulfilled in the form of an oblig-

98 See ECtHR, *Mikhalchuk v. Russia*, 23 April 2015, Application 33803/04, § 58.

99 See ECtHR, *Pisari v. the Republic of Moldova and Russia*, *supra*, § 58.

100 See ECtHR, *Hanzelkovi v. the Czech Republic*, supra, § 75.

101 See ECtHR, *Kolyadenko and Others v. Russia*, *supra*, § 184.

102 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 159, where the State failed to discharge this positive obligation.

103 See ECtHR, *Yildiz and Others v. Turkey* (decision), *supra*, § 50.

104 See ECtHR, *Luginbül c. Switzerland* (decision), *supra*.

105 See ECtHR, *Brincat and Others v. Malta*, *supra*, § 112.

106 See ECtHR, *Guerra and Others v. Italy*, 19 February 1998, Reports 1998-I, § 60.

107 ECtHR, *Öneryildiz v. Turkey* [GC], *supra*, § 90.

108 See the terms used in *Öneryildiz v. Turkey* [GC], *supra*, § 108.

109 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 152. See, *mutatis mutandis*, the words in *Kolyadenko and Others v. Russia*, *supra*, § 181: "informing the public of the inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned".

110 See *Joint dissenting opinion of Judges De Meyer, Valticos and Morenilla*, in ECtHR, *McGinley and Egan v. the United Kingdom*, 9 June 1998, Reports 1998-III.

111 See ECtHR, *Di Sarno and Others v. Italy*, *supra*, § 113, where the applicants alleged that information had not been duly disseminated in order to allow them to assess the risk to which they were exposed. The Court found no violation of the Article 8 invoked, as the authorities had actually made public the assessment studies concerned in the present case.

112 See ECtHR, *Tătar v. Romania*, *supra*, § 101.

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ation to allow access to information.[113] In this hypothesis, it is an individual who seeks information about a risk and the authorities are due to provide them with all relevant and appropriate information on the inherent risk. In the case of *McGinley and Egan v. the United Kingdom*, the applicants had been exposed to alleged harmful levels of radiation following nuclear tests and alleged that the nondisclosure of the documents in question (military medical records and records on radiation levels) amounted to a violation of their rights to respect for their private and family lives under Article 8 of the Convention. The Court acknowledged in this case that "the issue of access to information which could either have allayed the applicants' fears in this respect, or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family life within the meaning of Article 8 as to raise an issue under that provision".[114] According to the Court, a positive obligation arose under Article 8 from the applicants' interest in obtaining access to the material in question and, in general, it can be said that "[w]here a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information".[115]

States must consequently take measures to allow to the interested individuals effective access to the information concerned under this obligation. In *Brânduşe v. Romania*, for instance, where the applicants had solicited to the administrative authorities information on a rubbish tip situated in the proximity of the area in which they remained detained in prison, the Court found that a violation of Article 8 had resulted from the fact that the State had not given evidence on the measures taken for the effective access to the assessment studies in question, nor to information allowing them to assess the risk to health to which they were exposed.[116]

The two abovementioned obligations were clearly identified in the recent case *Brincat and Others v. Malta* in which the Court recognized both the "duty to provide access to essential information enabling individuals to assess risks to their health and lives" and the "duty to provide such information", what was lacking in the case at hand as in practice "no adequate information was in fact provided or made accessible to the applicants".[117]

3. Giving Adequate Judicial Response: the Obligation to Conduct an Effective Investigation

If States have not taken the required measures to avoid a right-threatening risk, and even when they have taken preventive measures to prevent a certain risk from happening, it may occur that States fail to prevent the harm feared or unforeseen. A procedural obligation thus arise to investigate the circumstances in which the right concerned has been impaired[118] giving an adequate response to the failure in question.[119] This results not only from the need to ensure sufficient and appropriate redress in order to satisfy the positive obligation under the Convention[120] but also from the preventive and deterrent effect that prosecution and punishment of those responsible has in relation to future violations.[121]

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113 According to Christopher Hilson, "Risk and the European Convention on Human Rights: Towards a New Approach", *supra*, at p. 358-365, the access to information responds not only to the need, for individuals that have been exposed to a risk in the past, to prove a causal link between their illnesses and the exposure ("past risk-exposure causation cases") but also to allow individuals to make a choice in cases of present or future exposure; for instance, moving away from a polluted area or accepting the risk ("choice").

114 See ECtHR, *McGinley and Egan v. the United Kingdom*, *supra*, § 97. The Court found, by 5 votes to 4, no violation of Article 8, as it considered that the authorities had provided the applicants with such a procedure. See, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], 19 October 2005, *Reports of Judgments and Decisions 2005-X*, § 155, where the applicants had been exposed to small doses of toxic chemicals (mustard and nerve gas) for research purposes. In the latter, the Court recalls the principle enounced in *McGinley* but found, instead, a violation of this provision.

115 ECtHR, *McGinley and Egan v. the United Kingdom*, *supra*, § 101.

116 See ECtHR, *Brânduşe v. Romania*, *supra*, § 74. See, also ECtHR, *Tătar v. Romania*, *supra*, where the Court assesses whether the studies in question were accessible to the public, § 113 *et sqq*.

117 See ECtHR, *Brincat and Others v. Malta*, *supra*, §§ 113-114.

118 See ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, 14 March 2002, Application 46477/99, § 74, in which the Court found that "a procedural obligation arose to investigate the circumstances of the death" of the applicants' son.

119 See ECtHR, *Binişan v. Romania*, *supra*, § 83-91, where the Court found that the State had failed to provide an adequate response consonant with its obligations under the Convention.

120 See ECtHR, *Oyal v. Turkey*, 23 March 2010, Application 4864/05, § 68.

121 See ECtHR, *Begheluri and Others v. Georgia*, 7 October 2014, Application 28490/02, § 145.

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As the Court has clearly recalled in *Ciechońska v. Poland* concerning the right to life, "an issue of State responsibility under Article 2 of the Convention may arise in the event of the inability of the domestic legal system to secure accountability for any negligent acts endangering or resulting in the loss of human life". The Court established in this case that what is required to States in these cases is that they provide legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.[122] In the aforementioned *Öneryildiz v. Turkey*, full accountability of State officials or authorities for their role in the tragedy had not been secured and the Court consequently found that a violation of the procedural aspect of Article 2 resulted from this.[123]

The obligation to give adequate judicial response is a requirement that the Court examines under the procedural aspect of the right concerned,[124] even though it has also analysed this aspect under Article 6 of the Convention.[125] It may involve, under certain circumstances, an obligation to conduct an investigation *ex officio*. The Court has established in *Brincat and Others v. Malta*, that "although in most cases requiring an investigation a complaint is generally lodged with the authorities in order to obtain such an investigation, it is not mandatory in cases where the authorities are better placed to know about the original cause of the claim".[126]

The duty to give adequate judicial response is considered by the ECtHR as an obligation of means that does not compel the concerned State to any determined result.[127] The domestic authorities are accordingly due to make full use of the powers they possess to fulfil this obligation.[128] This must usually take the form of an effective investigation allowing to establish full accountability of those involved[129] and providing sufficient and appropriate redress to the victims.[130] The investigation must be effective, but it does not necessarily have to result in the identification and punishment of those responsible, as sometimes this is not possible despite the authorities' efforts and full exercise of their powers. This was the Court's reasoning in *Dönmez and Others v. Turkey*, where the ECtHR found manifestly unfounded an application because the authorities had taken all necessary measures to elucidate the case, although those responsible couldn't been identified. In particular, it concluded: "[e]n bref, la Cour constate que l'enquête, bien que n'ayant pas abouti à l'identification de l'auteur ou des auteurs de l'homicide, n'a pas été dénuée d'effectivité, et que les autorités compétentes ne sont pas restées inactives face aux circonstances dans lesquelles le proche des requérants a perdu la vie".[131] Subsequently, in *Pisari v. the Republic of Moldova and Russia*, the Court took account of the absence of an effective investigation to find a violation of Article 2 in a case concerning the circumstances surrounding the killing of the applicants' 18-year-old son by a soldier at a peacekeeping security checkpoint located in the territory of Moldova, following the Transdniestrian armed conflict.[132] Similarly, in *Kalender v. Turkey*, the Court found a violation of Article 2 in its procedural aspect for, inter alia, the lack of an investigation which would have allowed to establish full accountability of the authorities for their role in the accident in question.[133] The ECtHR requires from the States that they, at least, seek to truly determine the

122 See ECtHR, *Ciechońska v. Poland*, 14 June 2011, Application 19776/04, § 71.

123 See ECtHR, *Öneryildiz v. Turkey*, *supra*, § 117-118.

124 See ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, *supra*; *Murillo Saldias and Others v. Spain* (decision), 28 November 2006, Application 76973/01; *Öneryildiz v. Turkey*, *supra*; *Budayeva and Others v. Russia*, *supra*; *G.N. and Others v. Italy*, *supra*; *Kalender v. Turkey*, *supra*; *Oyal v. Turkey*, *supra*; *Kolyadenko and Others v. Russia*, *supra*; *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, *supra*; *Aktepe and Kahriman v. Turkey*, *supra*; *Binişan v. Romania*, *supra*; *Karaahmed v. Bulgaria*, *supra*; *Smaltini v. Italy* (decision), 24 March 2015, Application 43961/09; *Pisari v. the Republic of Moldova and Russia*, *supra*.

125 See, among others, ECtHR, *McGinley and Egan v. the United Kingdom*, *supra*; *Georgel and Georgeta Stoicescu v. Romania*, *supra*; *Howald Moor and Others v. Switzerland*, 11 March 2014, Application 52067/10; *Inci and Others v. Turkey*, 10 March 2015, Application 60666/10.

126 See ECtHR, *Brincat and Others v. Malta*, *supra*, § 123.

127 See, on this subject, Rüdiger Wolfrum, "Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations", in Mahnoush Arsanjani *et al*. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Nijhoff, 2010), pp. 363 *et sqq*.

128 See ECtHR, *Budayeva and Others v. Russia*, *supra*, § 164, where the Court found a violation of Article 2 in its procedural aspect resulting from the fact that the domestic courts had not make full use of the powers they possessed in order to establish the circumstances of the accident, as they had dispensed with calling any witnesses or seeking an expert opinion, despite the plaintiffs' requests.

129 See ECtHR, *Öneryildiz v. Turkey*, *supra*, § 94.

130 See ECtHR, *Oyal v. Turkey*, *supra*, § 70.

131 See ECtHR, *Dönmez and Others v. Turkey*, *supra*, § 37-39.

132 See, ECtHR, *Pisari v. the Republic of Moldova and Russia*, *supra*.

133 See ECtHR, *Kalender v. Turkey*, *supra*, § 57-58.

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role of the authorities involved,[134] what lacked, for instance, in *Kolyadenko and Others v. Russia*, where the Court found that the investigation had made no apparent attempts to find out whether any responsibility should be attached to the authorities involved, let alone to establish the identity of the particular officials responsible.[135] Where an investigation has not been completed, States must provide plausible reasons for that and where they lack, the Court considers that this impairs the procedural aspect of the right concerned.[136]

Still, the only existence of an investigation following the State's failure to avoid a right-threatening risk, does not suffice. The investigation conducted must additionally respect certain conditions under the procedural aspects of the rights concerned, in order to be considered as effective. The generic rules established by the Court in the field of procedural obligations are applicable.[137] The Court has, for instance, considered that these conditions lacked in *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, where the Court found serious deficiencies, namely the unreasonable delay in the proceedings and the applicants' inability to initiate compensation proceedings before the administrative courts due to the refusal of their legal aid claim[138] or in *Paul and Audrey Edwards v. the United Kingdom*, where the Court observed that the lack of power to compel witnesses and the fact that the applicants had been excluded from the proceedings, failed to comply with these requirements.[139] The fact that the domestic courts had omitted to confirm the existence of a link between the release of contaminating substances by a factory and the illness that finally caused the death of the applicant, has not to been considered in *Smaltini v. Italy* as an element that lead to a violation of Article 2 in its procedural aspect, as the alleged link had not resulted from the studies carried out on this subject and the applicant had not showed evidence proving the contrary. In the case at hand, the ECtHR took also account of the fact that supplementary investigations had been conducted following her request to corroborate the link in question and failed to prove its existence, in the context of contradictory proceedings.[140] The Court has also examined in other cases, under this aspect, whether the amounts awarded for the victims' redress have been reasonable[141] and, in particular, it takes account of the amounts awarded by the Court in comparable cases.[142] Acknowledgment of the authorities' responsibility in the events concerned is a factor that the ECtHR takes also into account to assess whether the redress offered was adequate[143] The Court has established too that administrative proceedings leading to a compensation awarded to the relatives of the victims died in suspected circumstances, must be accepted as effective.[144]

II. Conclusion

The European Court of Human Rights' case-law gives us evidence on how deeply are human rights concerned with risk regulation. Not only the law applied

134 See ECtHR, *Aktepe and Kahriman v. Turkey*, *supra*, § 72, where the Court notes the authorities' willing to elucidate the case, but finds at the same time deficiencies in the investigation, as some of them did not seek to truly determine the role of each of the authorities and this resulted in a violation of Article 2 for the suicide committed by the young man during the military service.

135 See ECtHR, *Kolyadenko and Others v. Russia*, *supra*, § 200.

136 For an investigation uncompleted four years after the events in question, see ECtHR, *Karaahmed v. Bulgaria*, *supra*, § 110-111.

137 See, on this subject, Constantinos I. Panagoulias, *La procéduralisation des droits substantiels garantis par la Convention européenne des droits de l'homme* (Bruxelles: Nemesis/Bruylant), 2011; Eva Brems, "Procedural protection: an examination of procedural safeguards read into substantive Convention rights", in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR, The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2015), p. 137 *et sqq*. On the specific matter of procedural safeguards and risk, see Ole W. Pedersen, "The Ties that Bind: The Environment, the European Court of Human Rights and the Rule of Law", *16(4) European Public Law* (2010), p. 571-595.

138 See ECtHR, *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, *supra*, § 43 *et sqq*. For a case of excessive delay of the proceedings, see *G.N. and Others v. Italy*, *supra*, where the Court found that the judicial authorities had failed to provide to the persons who had been contaminated by hepatitis C and HIV virus following blood transfusions and whose lives had been put in risk, an adequate and prompt response according to the procedural aspects of the obligations resulting from Article 2 of the Convention. As regards the length of the proceedings, see also ECtHR, *Oyal v. Turkey*, *supra*, § 75.

139 See ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, *supra*, § 87.

140 See ECtHR, *Smaltini v. Italy*, *supra*, § 51 *et sqq*.

141 See ECtHR, *Murillo Saldias and Others v. Spain* (decision), *supra*: the amounts awarded by an administrative court haven't been considered as unreasonable and being susceptible, instead, of augmentation by the supreme court, what satisfied the Court.

142 See ECtHR, *M.C. v. Poland*, *supra*, § 93, for an amount "being considerably below the awards made by the Court in comparable cases", what resulted in a violation of the right concerned.

143 See ECtHR, *Murillo Saldias and Others v. Spain*, *supra*.

144 See ECtHR, *Akdemir and Evin v. Turkey*, 17 March 2015, Applications 58255/08 and 29725/09, § 65, where the Court found that the amounts awarded were not insufficient.

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(the European Convention on Human Rights' provisions and its Protocols), but also, and mainly, the facts established in the examined procedures, prove this link. Paradoxically, evidence is, in the field of risk regulation, one of the most intricate matters, as it is usually not unproblematic for individuals to demonstrate that a real and immediate right-threatening risk exists, then putting on the burden of States obligations which arise under the Convention law.

This seems to us the weakest part of the work of the ECtHR in its interpretation and application of the ECHR on risk regulation. In fact, as regards the manner in which States have to deal with risks, it correctly has required from national authorities what one could reasonably expect of them. But the same can't be said in respect of the applicants, the Court expecting of them sometimes a diabolical proof of the risks faced. On the one hand, the ECtHR has been often stingy with applicants in accepting their allegations of risks that reveal difficult to prove as 'real and immediate', as it is required according to the Court's case-law. The case of *L.C.B. v. the United Kingdom*, in which the ECtHR asked the applicant to prove that the potential harmful effects of the nuclear activities that the concerned State was testing, represented a real risk according to the information available at the time of the tests, is an obvious example of this disproportionate balance between what is expected of States and what is expected of individuals before the Court. Moreover, the resources available for the States are not usually the same as those accessible for individuals in the diverse stages of risk regulation: the means available to know about a risk, those to deal with it and the means to face its effects are completely unequal in favour of States. Still, the Court seems not be taking account of this asymmetrical situation in its procedures. What it is demanding from individuals is not always balanced with the treatment received by States, that is, ask the latter what could be reasonably done in a risky situation and, conversely, ask to applicants (individuals) evidence of an immediate and real risk that is established as known or ought to be known by the implicated State, in order to bring its responsibility into play.

On the other hand, the ECtHR has to rule under certain conditions which result not only from its own regulations but also from general principles of law, that rationalize its work at the same time. It has to respect the rules of procedure that represent guarantees for both parties. It is hence possible to ask whether this may excuse the Court for these shortcomings, even if the parity of burden put on the parties is one of the general principles that shall be taken into consideration in its procedure. But the way the ECtHR is treating the subject of risk regulation recalls undoubtedly a deficit in the definition and application of the precautionary principle by its jurisprudence. The dissident Judge Pettiti and some of his joining colleagues put it clear in *Balmer-Schafroth and Others v. Switzerland*, asking the Court for "progress" in this field since this early case of 1997. One could attribute this shortage to the fact that this is (still!) a principle that seems to be quite unfamiliar to the Court. Not only it remains mostly unapplied in its jurisprudence but also, when it is narrowly applied, it is not defined and the conditions of its application remain indefinite. It is difficult to find a reason (let alone the reason of State) to excuse the Court for its reluctant, if not conformist approach in the (in)application of this principle, while building the case-law that will lead to regulate risk in the future under the European law of human rights.

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