
STATES' POSITIVE OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW DURING THE CORONAVIRUS OUTBREAK

EVIDENCE REQUIREMENTS TO HOLD STATES ACCOUNTABLE THROUGH LITIGATION AND ADVOCACY

Certain areas of States' positive obligations depend on whether the State **knew or ought to have known** about risks, actions or inactions resulting in human rights violations. It is therefore important to collect sufficient evidence as the violations are taking place to strengthen advocacy activities and for potential future litigation; and to ensure that government bodies are being informed about potential risks and incidents. Documentation is thus a key element of legal accountability.

Content of the paper

- Scope of States' positive obligation under International and Regional Human Rights Law to protect LGBTI persons during COVID-19
- Guidelines on collection of evidence of States' action/ inactions. Such evidence is crucial both for litigation purposes, when bringing cases forward nationally and internationally; and advocacy purposes, to raise international awareness through documenting and reporting violations that happened/ are still happening.
- Guidelines on strategic litigation before different Human Rights institutions.
- Please note that this document is a selected reflection on positive obligation, mainly focusing on the European Convention on Human Rights. It does not cover all competent tribunals, however, some of which, like the UNHCR, remain relevant avenues to address the issues at stake¹.

I. EUROPEAN CONVENTION ON HUMAN RIGHTS²

ARTICLE 2: The right to life

ARTICLE 3: Prohibition of torture

- **THE POSITIVE OBLIGATION COMPONENT OF ARTICLE 2 CONTAINS THREE CATEGORIES.** All categories are relevant considering the protection of the LGBTI community during the pandemic, however evidence requirements differ.
 - i. **Obligation to put in place effective provisions and machinery to protect life.**
 - ii. **Operational obligation to take preventive steps** where the life of an identified individual is at risk.
 - iii. **Procedural obligation to investigate.**

¹ Please note that additional briefing documents addressing related issues will be published by ILGA-Europe in the coming weeks.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950, entry into force 03/09/1953, ETS N°005. https://www.echr.coe.int/Documents/Convention_ENG.pdf

↳ STRATEGIC LITIGATION CONSIDERATIONS: The European Court of Human Rights³ will be more receptive to the **procedural aspect of Article 2 and the investigations**, than it is to the substantive component.

The ECtHR has addressed the notion of positive obligations in cases related to protection of persons from lethal use of force by non-State actors, State' supervision of the functioning of health services and protection from industrial disasters.

- THE SCOPE OF THE POSITIVE OBLIGATION: APPLICABILITY TO LOCKDOWN MEASURES

- In *Osman v the UK*⁴ the Court established the State's obligation in relation to Article 2 to take reasonable measures to **protect individuals against real and immediate risks to their lives**.
 - ✓ The case concerned the killing of Ali Osman by Paul Paget-Lewis, a former teacher of his son, Ahmet Osman. The mother and her son complained that the authorities failed to appreciate and act on a series of **clear warning signs** that Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family. The **police had been given information** which should have made it clear that the individual posed a danger.
 - ✓ The Court held that Article 2 implies a positive obligation on the authorities to **take preventive operational measures** to protect an individual whose life is at risk from the criminal acts of another individual⁵. The applicant must 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. Such claim is analysed in the light of **all the circumstances of the case** at hand⁶.
- Since then, the Court has accepted that this obligation arises in a variety of situations where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, irrespective of whether those allegedly responsible are **State agents or private persons** or are **unknown or self-inflicted**⁷.
- As clarified in *Oneryildiz v Turkey*⁸ – which concerned deaths resulting from an accidental explosion at a rubbish tip – “this obligation must be construed as **applying in the context of any activity, whether public or not, in which the right to life may be at stake**”⁹.
 - ✓ Thus, the obligation to protect can arise in a variety of different circumstances where the right to life may be at stake - imposing a lockdown fits the bill.
 - ✓ The obligation also arises in a similar way for the prohibition on torture inhuman and degrading treatment: Article 3.

³ Hereinafter, the Court or ECtHR.

⁴ *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

⁵ *Ibid.*, §115.

⁶ *Ibid.*, §116.

⁷ For more case-law, see ECHR Guide on Article 2 of the Convention, updated April 2020, p.29.

https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf

⁸ *Öneryıldız v. Turkey [GC]*, no. 48939/99, ECHR 2004-XII.

⁹ *Ibid.*, §71.

- SYSTEMIC DYSFUNCTION AFFECTING THE LGBTI COMMUNITY

- The case *Lopes De Sousa Fernandez v Portugal*¹⁰ concerned the death of the applicant's husband following a series of medical problems that arose after a routine operation. The applicant alleged that her husband's death had been caused by negligence and carelessness on the part of the medical staff, and that the authorities had not elucidated the precise cause of the deterioration in her husband's health.
- The Court held that Article 2 can be applied in situations of **systemic dysfunction** in hospitals services resulting in a patient being deprived of access to life-saving treatments and the authorities **knew or ought to have known about such risk** and failed to undertake the necessary measures to prevent the risk from being materialised.¹¹

↳ STRATEGIC LITIGATION CONSIDERATIONS:

- *De Sousa Fernandez v Portugal* findings could be extended to other areas than health services: what matters is to identify **systematic failings and dangerous situations**.
- Use a combination of rights: Articles 2 + 8 (private life) alone or together with Article 14 (prohibition of discrimination)
- Key question: whether the government knew or ought to have known the dangers arising from exposure to threat to life from the virus. It is important to monitor and make States **aware to trigger their responsibility** (which can later be challenged when cases arise).

- OBLIGATION TO PROTECT A GROUP AT LARGE

- In certain cases, the obligation can apply in a more general sense to a wider category of persons, without the necessity to identify a risk to a **specific** person.
- The obligation to protect has been applied where the risk is actually posed to the public at large. In *Mastromatteo v Italy*¹², concerning the murder of the applicant's son by two convicts on prison leave and one placed under a semi-custodial regime, the Court found that the State had the **obligation to afford general protection to society against the potential acts of one or of several persons** serving a prison sentence for a violent crime, thus in this case establishing the obligation to protect the society from a specific group of persons¹³.

↳ STRATEGIC LITIGATION CONSIDERATIONS:

- The Court would **rather not have to rule on a broad class** and so **individual applicants, with individual stories, would be more successful**
- That said, **within the submission of evidence**, painting a **wider picture** would be helpful.

¹⁰ *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017.

¹¹ *Ibid.*, §§191-196.

¹² *Mastromatteo v. Italy* [GC], no. 37703/97, ECHR 2002-VIII.

¹³ *Ibid.*, §§69-71.

- EVIDENCE REQUIREMENTS FOR CASES BEFORE THE COURT

The Court has been flexible in accepting types of evidence for consideration of the cases before it. In the context of COVID-19 and threats to the lives of LGBTI persons, the following can serve as evidence before the ECHR:

- Police reports from individuals are most commonly used (especially when they are not acted upon). So ideally complaints from individuals, which have not been addressed would be preferable.
- Other sources including academic articles in some instances (LCB v UK) or official reports.

In *LCB v UK*¹⁴, the applicant suffered from leukaemia and imputed it to his father's exposure to radiation during his presence at Christmas Island where the UK conducted atmospheric tests of nuclear weapons in the 1950's. The Court analysed the voluminous evidence submitted, including "a report prepared by the British Nuclear Tests Veterans' Association ("BNTVA") indicating a high incidence of cancers including leukaemia in the children of Christmas Island veterans"¹⁵; as well as a report prepared by a "chartered engineer who had studied, *inter alia*, a number of photographs of the detonation on Christmas Island..."¹⁶. The specialisation and expertise of the authors of these reports was referenced by the Court.

- Reports from NGOs are quite often used in the practice of the Court, especially in cases where the Court is trying to establish situations in third countries or establishing broader systemic problems.
- Reports must preferably be supplemented with statistical data e.g. crime reports.

- THE SPECIFIC ISSUE OF DOMESTIC VIOLENCE

- The Court undertakes a **contextual analysis** in these kinds of cases.
- The Court has already linked individual instances of domestic violence against women to structural failures to take these abuses seriously See: *Opuz v. Turkey* and *Volodina v. Russia*¹⁷.

In *Opuz v Turkey*¹⁸, the Court used **statistical information and NGO Reports** to establish the general context of violence against women in the region and noted the UN Committee's call on the Government to react. It concluded that "discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence"¹⁹.

- Bringing cases before the ECtHR: How to minimise the Court's reference to the "wide margin of appreciation" of States in consideration of Convention rights?

→ It is important to focus and supply information on **structural, systemic issues**, trying to be as neutral as possible in the accusation towards government policies/ of politicians' behaviour .

→ It may be difficult to establish a positive obligation to protect right to life, rather, arguments on the **investigative obligation** would be more successful as the ECtHR is far

¹⁴ *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III.

¹⁵ *Ibid.*, §15.

¹⁶ *Ibid.*, §27.

¹⁷ *Volodina v. Russia*, 9 July 2019, no. 41261/17, ECHR 2019.

¹⁸ *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

¹⁹ *Ibid.*, §198.

more willing to find States in breach of **procedural obligation** to investigate rather than substantive component of right to life.

II. EUROPEAN SOCIAL CHARTER²⁰

Relevant rights

- **Article 7: Right of children and young persons to special protection against health hazards**
=>Include risks of **domestic violence**
- **Article 11: Right to health**
- **Article 12: Right to social security**
- **Article 13: Right to social or medical assistance**
=>Anyone without adequate resources has the right to social and medical assistance
- **Article 16: Right to social, legal and economic protection of families**
=>including adequate housing and domestic violence

- [European Committee on Social Rights Collective Complaint mechanism²¹](#)

While the Complaint mechanism does not provide for individual compensation, the Committee can look at **structural, systemic issues** in consideration of **socio-economic rights**.

Eg. Homeless people: after lock-down if they are being put back in the streets, this raises interference with existing enjoyment of right to adequate housing.

- [Shadow reporting to State periodic reports to the Committee on Social Rights²²](#)

States Parties regularly submit a report on the implementation of the Charter in law and in practice. National reports are examined by the European Committee on Social Rights, which decides whether the national situations they describe comply with the Charter. Where there are systemic issues at stake it would be relevant to inform the Committee.

III. THE RIGHT TO HEALTH UNDER THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)²³

[Article 12: Right to highest attainable standards of physical and mental health.](#)

Elements: **availability; accessibility** (of health facilities, goods and services - to everyone, without discrimination, special concern of vulnerable groups); **quantity and quality:** States have a positive obligation to protect from interferences by 3rd parties: ensuring **equal access to health care and health related services provided by 3rd parties.**

Obligation of non-discrimination and special protection includes the obligation to protect the most vulnerable. Even in times of resources constraints, the vulnerable groups must be protected.

²⁰ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <https://www.refworld.org/docid/3ae6b3678.html>.

²¹ Council of Europe, *Additional Protocol to the European Social Charter providing for a System of Collective Complaints*, 9 November 1995, ETS 158, available at: <https://www.refworld.org/docid/3ae6b37e0.html>. For more information on the procedure, please visit <https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure>.

²² The reporting system is set out in Part IV of the [1961 Charter](#) as amended by the 1991 [Turin Protocol](#) (ETS No. 142). For more information on the procedure, please visit <https://www.coe.int/en/web/european-social-charter/reporting-system>.

²³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI).

In prison, immigration detention, care homes, centre for homeless persons the duty to protect life is even more important because the **State has assumed responsibility to health and safety** and is exercising control, especially in relation to vulnerable persons.

↳ STRATEGIC LITIGATION CONSIDERATIONS: Litigation before UN Treaty Bodies: NGO and civil society can play a role by bringing cases through the UN Optional Protocols²⁴.

²⁴ UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117, available at: <https://www.refworld.org/docid/49c226dd0.html>. For more information on the procedure, please visit https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=63.