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Abstract

This study examines State obligations to prevent and redress corporate-related human rights violations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. It discusses the evolving jurisprudence of the European Court of Human Rights in two areas of international legal doctrine of particular relevance to the business and human rights debate: the application of international human rights obligations to non-state actors (the public-private divide); and the jurisdictional scope of international human rights treaties (the territoriality-extraterritoriality divide). The study revises and updates a 2010 contribution to the mandate of the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities John Ruggie. The INTRODUCTION offers an overview of the global regulatory framework on business and human rights. PART B systematises the case law of the European Court of Human Rights (ECtHR) on the public-private divide in terms of two categories of State obligations: negative obligations to respect human rights in relation to corporations acting as state agents; and positive obligations to protect human rights in relation to corporations acting as third parties. PART C discusses the ECtHR's approach to the extraterritorial dimension of State obligations to prevent and redress corporate-related human rights violations. The study discusses cases of direct extraterritorial jurisdiction (acts 'performed' outside the State's territory) and extraterritorial effects cases (acts 'producing effects' outside the State's territory), and their respective relevance to the business and human rights domain. Consideration is also given to the growing body of case law on the extraterritorial dimension of the human right to remedy, which remains a pressing concern in the business and human rights domain.

Keywords

Human Rights, Business, Corporations, Extraterritorial Human Rights Protection, European Court of Human Rights, UN Guiding Principles on Business and Human Rights

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Introduction

The global regulatory framework on business and human rights

The first edition of this study was prepared in support of the mandate of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Entities (SRSG).[1] It complemented the SRSG's own reports on State responsibilities to regulate and adjudicate corporate activities under the core UN human rights treaties,[2] and two studies conducted on the Inter-American and the African regional human rights systems.[3] The global regulatory framework on business and human rights has undergone significant changes since the original publication of the study.

In June 2011, the UN Human Rights Council endorsed the **UN Guiding Principles on Business and Human Rights (UNGPs)** that evolved out of the SRSG's 'Protect, Respect and Remedy' Framework.[4] The UNGPs build on three pillars: (i) the state duty to protect human rights against violations by third parties, including corporations; (ii) the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others; and (iii) greater access to effective remedies, both judicial and non-judicial, for victims of corporate human rights abuse. Following the end of the SRSG's mandate, a UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Entities was established to promote the 'effective and comprehensive dissemination and implementation' of the UNGPs.[5] The SRSG was not asked to develop a new international legal instrument on business and human rights but merely to 'elaborate the implications of existing standards and practices for states and businesses'.[6] Accordingly, the UNGPs' treatment of state duties to regulate and adjudicate corporate activities impairing human rights remains firmly rooted in the traditional state-centred conception of international law:

> At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse by business enterprises within their jurisdiction.[7]

The second significant development since the original publication of this study is the further elaboration of the extraterritorial dimension of the state duty to protect human rights against corporate abuse by the

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[1] D. Augenstein, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights', Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (April 2011).

[2] H. R. C., 'State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties', A/HRC/4/35/Add.1 (13 February 2007); H. R. C., 'State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions', A/HRC/11/13/Add.1 (15 May 2009).

[3] C. Anicama, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System (April 2008); South African Institute for Advanced Constitutional, Public, Human Rights and International Law, 'The State Duty to Protect, Corporate Obligations and the Extraterritorial Application in the African Regional Human Rights System' (February 2010).

[4] H. R. C., 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

[5] H. R. C., 'Human Rights and Transnational Corporations and Other Business Entities', A/HRC/RES/17/4 (06 July 2011).

[6] *Id.* para 14.

[7] *Id.* para 2.

UN Human Rights Treaty Bodies. In 2011, a consortium of academics and civil society organisations adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights that advocate a more progressive approach to international law in the area of business and human rights.[8] In the same year, the Committee on Economic, Social and Cultural Rights (CESCR) published a statement on human rights and the corporate sector in which it called upon States to 'take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant'.[9] In its 2016 draft General Comment, CESCR further specifies that 'extraterritorial obligations arise when a State Party may exercise control, power or authority over business entities or situations located outside its territory, in a way that could have an impact on the enjoyment of human rights'. These obligations extend 'to any business entity over which [a State Party] may exercise influence by regulatory means or by the use of incentives'.[10] The other international human rights treaty bodies have espoused similar views.

It is doubtful whether current state practice supports such an extensive interpretation of international legal obligations to protect against extraterritorial corporate human rights abuse.[11] In the wake of the UNGPs, some states have adopted so-called 'home-state' or 'parent-based' legislation to regulate corporate human rights impacts with extraterritorial effect.[12] However, there is little evidence that states adopt such legislation in recognition of a corresponding obligation in international human rights law.[13] The perceived weakness of international law in addressing extraterritorial corporate human rights abuse has rekindled debates about the need for an **international business and human rights treaty**.[14] In 2014, the UN Human Rights Council adopted a resolution establishing another intergovernmental working group tasked with developing an 'international legally binding instrument on transnational

[8] 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (Maastricht: 2011), published with extensive commentary in 34 *Human Rights Quarterly* (2012) 1084-1169.

[9] C. E. S. C. R., 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', E/C.12/2011/1 (12 July 2011) para 5.

[10] C. E. S. C. R., 'Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/60/R.1 (17 October 2016) paras 33, 36.

[11] In February 2017, CESCR organised a one-day consultation on its draft General Comment that was positively received by some States, while rejected by others; see

http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21210&LangID=E.

[12] In this regard, the SRSG has recommended that states consider the use of 'domestic measures with extraterritorial implications'. Different from 'jurisdiction exercised directly in relation to actors or activities overseas', such measures rely 'on territory as the jurisdictional basis, even though [they] may have extraterritorial implications'; see H. R. C., 'Business and Human Rights: Further Steps towards the Operationalisation of the "Protect, Respect and Remedy" Framework', A/HRC/14/27 (9 April 2010) para 48.

[13] The United Kingdom's National Action Plan (NAP) implementing the UNGPs is instructive in this regard. The 2016 update of the NAP lists two examples of home-state or parent-based legislation: the UK Bribery Act that provides for liability of companies in the UK for acts of bribery committed anywhere in the world; and the Modern Slavery Act whose disclosure and transparency requirements extend to the global supply chains of companies carrying out business in the UK. At the same time, the NAP makes clear that the UK adopts a narrow (territorial) view of human rights jurisdiction: 'Human rights obligations generally apply only within a State's territory and/or jurisdiction. Accordingly, there is no general requirement for States to regulate the extraterritorial activities of business enterprises domiciled within their jurisdiction, although there are limited exceptions to this, for instance under the treaty regimes'; see HM Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (May 2016) para 11.

[14] An earlier attempt to directly impose human rights obligations on corporations in international law had failed to garner the necessary support of states and business enterprises; see U. N. Economic and Social Council, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12 (26 August 2003).

corporations and other business enterprises with respect to human rights'.[15] A first draft is expected before the end of 2017.

Business and human rights in the Council of Europe and the European Convention System

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a regional international treaty drafted within the Council of Europe (CoE), an international organisation formed after the Second World War. The ECHR entered into force in 1953 and has been ratified by all 47 Member States of the Council of Europe.

In October 2010, the Parliamentary Assembly of the Council of Europe adopted a recommendation on human rights and business in which it called upon States parties 'to explore ways and means to enhance the role of businesses in respecting and promoting human rights'. This should include 'examining the feasibility of elaborating a complementary legal instrument, such as a convention or an additional protocol to the European Convention of Human Rights'.[16] In March 2016, the CoE's Committee of Ministers adopted another recommendation concerning the implementation of the UNGPs in Europe. As concerns the state duty to protect human rights (first pillar), it calls upon Member States to:

- Apply such measures as may be necessary to require business enterprises operating within their territorial jurisdiction to respect human rights;
- Apply such measures as may be necessary to require, as appropriate, business enterprises domiciled within their jurisdiction to respect human rights throughout their operations abroad;
- Encourage and support these business enterprises by other means so that they respect human rights throughout their operations.[17]

With regard to access to remedy (third pillar), Member States should ensure that their domestic courts are competent to adjudicate civil claims concerning business-related human rights abuses 'against business enterprises domiciled within their jurisdiction'.[18]

The ECHR and its protocols focus on the protection of civil and political rights.[19] However, the European Court of Human Rights (ECtHR) has clarified that there is **no watertight division separating civil and political rights from social, economic and cultural rights**.[20] Accordingly, the Court has interpreted a range of civil and political rights as also protecting social and economic interests. This includes the right to life (Article 2 ECHR), freedom from forced labour (Article 4 ECHR), the right to respect for home and private and family life (Article 8 ECHR), freedom of association (Article 11 ECHR), the protection of property (Article 1, Protocol No. 1), the right to education (Article 2, Protocol No. 1), and freedom from discrimination (Article 14 ECHR and Protocol No. 12).

Member States of the Council of Europe are not required to give direct effect to the ECHR in their domestic law. What is sufficient is that they provide an equivalent standard of human rights protection. The status and rank of the ECHR is determined by Member States' domestic legal systems. The ECtHR understands its role as a supervisory one and generally leaves States a certain measure of discretion (a

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[15] H. R. C., 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (14 July 2014).

[16] CoE Parliamentary Assembly, 'Human Rights and Business', Recommendation 1936 (2010).

[17] CoE Committee of Ministers, 'Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business' (2 March 2016) para 13.

[18] *Id*. para 34.

[19] Social and economic rights are protected through another Council of Europe treaty, the European Social Charter (ESC). Compliance with the ESC falls outside the compulsory jurisdiction of the European Court of Human Rights and is instead monitored by the European Committee of Social Rights.

[20] See E. Ct. H. R., Case of *Airey v Ireland* (Judgment of 9 October 1979).

'margin of appreciation') in complying with their obligations under the European Convention. What sets the ECHR apart from other international human rights treaties is its remarkably effective legal machinery.[21] The Court has compulsory jurisdiction. Pursuant to Article 34 ECHR, 'the Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'. The Court's judgments are legally binding in international law (Article 46(1) ECHR). Apart from declaratory relief, the Court can also award 'just satisfaction' to the injured party (Article 41 ECHR). The execution of judgments is monitored by the CoE's Committee of Ministers.

All Member States of the European Union (EU), but not the EU itself, are parties to the ECHR. Article 6(2) of the Treaty on European Union (TEU) as amended by the Treaty of Lisbon provides for accession of the EU to the ECHR. However, in *Opinion 2/13* the Court of Justice of the European Union (CJEU) raised concerns about a full-fledged ECtHR supervision of EU acts, which has quashed hopes of a speedy accession.[22] Article 6(3) TEU states that the European Union 'shall respect fundamental rights, as guaranteed by the European Convention … as general principles of law' and the CJEU has consistently treated the ECHR as one of the sources of EU human rights protection, alongside the EU's own Charter of Fundamental Rights. Until accession, the ECtHR will not admit complaints brought directly against the European Union. However, the Strasbourg Court has entertained indirect complaints against EU acts in cases brought against EU Member States. The ECtHR's case law in this area is characterised by a tension between facilitating the accession of CoE Member States to other international organisations and ensuring an effective protection of European Convention rights in relation to these international organisations.[23]

Focus and scope of the study

The study highlights existing state obligations under the European Convention to regulate and control corporate activities impairing human rights, and to ensure access to justice and effective remedies in cases of corporate-related human rights violations. Yet the study also identifies procedural and substantive standards developed in the case law of the ECtHR that can serve as guidance for States to enhance the protection of human rights against corporate abuse even where they are not legally required to do so.

The study discusses the evolving jurisprudence of the European Court of Human Rights in two areas of international legal doctrine particularly relevant to business and human rights: the application of international human rights obligations to violations committed by non-state actors (the public-private divide); and the jurisdictional scope of international human rights treaties (the territoriality-extraterritoriality divide). The interaction between these two areas of legal doctrine lies at the heart of many difficulties of international law in accounting for human rights violations committed in the course of global business operations. Put crudely, the ECHR has traditionally confined human rights obligations to the relationship between public authorities and private individuals located on the state's territory. This

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[21] See H. Keller & A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press: 2008). Until 1999, the Strasbourg legal machinery also comprised a European Commission of Human Rights that handled the admissibility of individual applications. Protocol No. 11 to the ECHR abolished the Commission. A three-judge Committee now rules on the admissibility of a case. Admissible cases are put before a seven-judge Chamber, which can refer cases to a Grand Chamber consisting of seventeen judges.

[22] Ct. J. E. U., *Opinion pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties*, Opinion 2/13 of the Court (18 December 2014).

[23] In the well-known *Bosphorus* case, the ECtHR established a rebuttable presumption that EU law would ensure standards of human rights protection equivalent to those of the ECHR; see E. Ct. H. R., *Bosphorus v Ireland* (Judgment of 30 June 2005), applied in E. Ct. H. R., *Avotins v Latvia* (Grand Chamber Judgment of 23 May 2016).

legal compartmentalisation of human rights within and between public and territorial states fails to address a core concern in the business and human rights domain, namely human rights obligations of the home state of the parent or controlling company of 'multi-national' corporations domiciled within its territorial jurisdiction to protect third-country victims against extraterritorial corporate human rights abuse.

PART B discusses **the application of the European Convention to human rights violations involving non-state actors, including corporations**. Cases in this area involve among others media corporations, privately run hospitals and schools, and trade unions. There is also a robust body of case law on human rights protection against corporate abuse in the environmental sphere.[24] Finally, there is a considerable number of cases concerning access to justice and effective remedies for corporate-related human rights violations.

PART C considers the ECtHR's approach to **the extraterritorial dimension of the state duty to prevent and redress corporate-related human rights violations**. It discusses both cases of direct extraterritorial jurisdiction (acts 'performed' outside the state's territory) and extraterritorial effects cases (acts 'producing effects' outside the state's territory) and their respective relevance to the business and human rights domain.[25] Consideration is given to the growing body of case law scrutinising state measures to control cross-border movements of people, and to the extraterritorial dimension of the right to remedy which remains a pressing concern in the business and human rights domain.[26]

The study focuses on cases decided by the European Court of Human Rights and the (now defunct) European Commission of Human Rights in the period from 2000 to 2017. While priority was given to cases in which the ECtHR directly addresses State obligations to regulate and adjudicate corporate activities, a systematic analysis of these obligations also required the inclusion of case law involving other non-State actors. The discussion of the extraterritorial dimension of the State duty to prevent and redress human rights violations draws on cases involving both State and non-State actors.

The State duty to prevent and redress corporate-related human rights violations

Introduction

According to the UN Guiding Principles on Business and Human Rights, 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.[27] Specifically with regard to the 'state-business nexus', the UNGPs note that 'where a business entity is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations'.[28]

The text of the ECHR does not suggest that the European Convention directly imposes human rights obligations on non-state actors, including corporations. Article 1 ECHR only requires States to 'secure' human rights to 'everyone within their jurisdiction'. Correspondingly, Article 34 ECHR only permits applications to the Court by individuals claiming to be a victim of a violation by a State. This

[24] See further C. o. E., 'Manual on Human Rights and the Environment (Strasbourg: 2012, 2nd edn.).

[25] For an overview see E. Ct. H. R., 'Factsheet: Extra-Territorial Jurisdiction of States Parties to the European Convention on Human Rights' (February 2016).

[26] See, for example, H. R. C., 'Business and Human Rights: Improving Accountability and Access to Remedy', A/HRC/L.19 (29 June 2016).

[27] See UNGPs (n 3) para 1.

[28] *Id.* para 4.

notwithstanding, the Court tends to refer to 'violations' (as opposed to 'abuse') of human rights by non-state actors.[29] In other cases, the ECtHR appears to directly ascribe human rights duties to non-state actors. In *Von Hannover*, the Court justified a private media corporation's freedom of expression with reference to its corresponding duty to impart information to the public. Although the press 'must not overstep certain bounds, in particular respect for the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest'.[30]

Nevertheless, according to the still prevailing view corporations and other non-state actors only incur duties to protect human rights through domestic legislation implementing States' international human rights obligations.[31] This means, on the one hand, that the European Convention treats corporations more akin to private individuals (as bearers of human rights entitlements) than to public authorities (as bearers of human rights obligations).[32] It entails, on the other hand, that the ECHR ensures corporate compliance with human rights only indirectly *via* (negative and positive) state obligations.[33]

The nature of State obligations to secure human rights in relation to corporate activities

The ECtHR has interpreted the requirement that States 'secure' the rights and freedoms of the European Convention to everyone within their jurisdiction (Article 1 ECHR) as imposing negative and positive obligations on public authorities. Negative obligations require States to abstain from unjustified interference with, and thereby to respect, human rights. Positive obligations require States to ensure the effective realisation of human rights even in the face of events for which they do not bear direct responsibility.[34] Negative and positive state obligations come to bear on corporate human rights abuse *via* the doctrines of direct attribution and third-party responsibility. **Negative obligations require states to respect human rights in relation to corporations acting as state agents; positive obligations require states to protect human rights in relation to corporations acting as third parties**. While, in the first case, acts of corporations are attributed to the state so that the latter is considered to directly interfere with human rights, in the second case the state violates its human rights obligations by failing to take all reasonable and appropriate measures to protect individuals against corporate abuse.

In practice, the distinction between negative and positive obligations can be difficult to draw because both the issues of direct attribution and third-party responsibility ultimately turn on a normative assessment of the relationship between the state and the non-state actor violating human rights, which

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[29] See, for example, E. Ct. H. R., *Cyprus v. Turkey* (Grand Chamber Judgment of 10 May 2001) para 81. The terminology of human rights 'abuse' is commonly used to indicate that non-state actors infringing human rights do not have corresponding international legal obligations to protect them.

[30] E. Ct. H. R., *Von Hannover v. Germany* (Judgment of 24 June 2004) para 58.

[31] According to the Human Rights Committee, obligations under the International Covenant on Civil and Political Rights 'are binding on States Parties and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law; H. R. Cm., 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', General Comment No 31, CCPR/c/21/Rev.1/Add.1326 (29 March 2004) para 8.

[32] Critically on this 'jurisdictional filter' A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press: 2006) 349-352.

[33] In a similar vein, the Human Rights Committee considers that the 'obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights'; see 'General Comment No. 31' (n 30) para 8.

[34] See, for example, E. Ct. H. R., *Marckx v. Belgium* (Judgment of 13 June 1976); *Goodwin (Christine) v. United Kingdom* (Judgment of 11 July 2002); *X and Y v. Netherlands* (Judgment of 26 March 1985); *Plattform 'Ärzte für das Leben' v. Austria* (Judgment of 21 June 1986). It should be noted that the distinction between negative and positive state obligations cannot be mapped one-to-one onto the distinction between the state duty to respect and the state duty to protect human rights, as the state duty to respect can entail negative as well as positive human rights obligations.

must be determined on a case-by-case basis. At the same time, the ECtHR has held that the relevant test for justifying an interference with human rights is broadly similar in both constellations:

> The boundaries between the State's positive and negative obligations … do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; in both contexts the State enjoys a certain margin of appreciation.[35]

In *Fadeyeva*, the ECtHR elaborates the distinction between negative and positive state obligations and the conditions under which States are required to secure human rights against corporate abuse.[36] The applicants lived in vicinity of the largest Russian steel plant owned and operated by a private corporation. Pollution levels from the plant had for many years exceeded permitted levels and were found to cause the applicant's severe health problems. The applicant had applied numerous times to be resettled outside the plant's 'sanitary security zone' that separates the industrial site from the town's residential areas:

> The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1) of the Convention. …
>
> The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors [including the exercise of public control over the plant's industrial activities] shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligations under Article 8 of the Convention.[37]

Fadeyeva is also instructive as concerns the different levels of scrutiny the ECtHR applies depending on whether what is at stake is the breach of a negative or a positive state obligation. Reiterating that in cases of 'direct interference by the State' (breach of a negative obligation) and in cases of 'the breach of a positive duty', the applicable principles are 'broadly similar',[38] the Court holds that

> Direct interference by the State with the exercise of Article 8 rights will not be compatible with paragraph 2 unless it is 'in accordance with the law'. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention.However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure 'respect for private life', and even if the State failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion 'in accordance with the law' of the justification test cannot be applied in the same way as in cases of direct interference by the State.[39]

Failing direct attribution of corporate conduct to the State, the recognition of positive obligations mitigates the fact that the European Convention does not directly bind non-state actors (so-called indirect horizontal effect). However, **whereas negative obligations constitute duties of result, positive**

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[35] E. Ct. H. R., *Keegan v Ireland* (Judgment of 26 May 1994) para 49.

[36] E. Ct. H. R., *Fadeyeva v. Russia* (Judgment of 9 June 2005), applied by *Ledyayeva and Others v. Russia* (Judgment of 26 October 2006).

[37] *Id.* paras 89, 92.

[38] *Id.* para 94.

[39] *Id.* paras 95, 96.

obligations merely impose duties of (diligent) conduct on the State - to do what is reasonable and appropriate in protecting human rights. Moreover, that private corporations are also entitled to human rights protection under the European Convention means that at the justification stage their rights need to be balanced against, and can outweigh, the human rights of individual applicants.[40]

Negative obligations to respect human rights in relation to corporations acting as State agents

For negative human rights obligations to arise, corporate conduct must be directly attributable to the State so that the act of the private business entity can be treated as an act of the State itself. Under the domestic law of many CoE Member States and under European Union law, corporate activities can be treated as an act of the State by virtue of state ownership and control, by virtue of the corporation exercising public functions, or by virtue of a combination of both.[41] The European Court of Human Rights uses **a combination of different criteria to determine on a case-by-case basis whether corporate activities are directly attributable to the State**:

- The corporation's legal status (under public law / as a separate legal entity under private law);
- The rights conferred upon the corporation by virtue of its legal status (for example, the conferral of rights normally reserved to public authorities);
- The corporation's institutional independence from the State (including state ownership);
- The corporation's operational independence from the State (including de lege or de facto state supervision);
- The nature of the corporate activity ('public function' or 'ordinary business', including the delegation of core state functions to private entities);
- The context in which the corporate activity is carried out (for example, the relevance of the activity for the public good; privatised state industries with a monopoly position in the market).

In *Yershova*, the applicant complained that her former employer, a municipal corporation, had failed to pay her a sum of money awarded in a judgment following her dismissal.[42] The ECtHR had to decide whether the State was directly responsible for the corporation's failure to serve its debts or whether it had merely failed to enforce a judgment against the corporation as a third party:

> In deciding whether the municipal company's acts or omissions are attributable under the Convention to the municipal authority concerned, the Court will have regard to such factors as the company's legal status, the rights that such status gives, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities. The Court will notably have to consider whether the company enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions.[43]

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[40] See further M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press: 2006).

[41] In Germany, for example, legal entities under private law which are wholly State owned are directly bound by fundamental rights, whereas in mixed legal entities this only applies to the public shareholder. For the UK Human Rights Act 1998 to apply to private entities, these entities have to satisfy the 'public function test' of s. 6(3)(b), according to which a 'public authority includes any person certain of whose functions are functions of a public nature'. The European Court of Justice has held that a nationalised private energy provider can be considered an 'organ of the state' if, 'whatever its legal form [it] has been made responsible, pursuant to a measures adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals; E. C. J., Case C-188/89 *A. Foster and Others v. British Gas plc* [1990] ECR I-3313, para 20.

[42] E. Ct. H. R., *Yershova v. Russia* (Judgment of 8 April 2010); applied by *Alisic and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (Grand Chamber Judgment of 16 July 2014).

[43] *Id.* para 55.

Notably, the Court dismissed the defendant Government's argument that the municipal company was incorporated under domestic law as a separate legal entity, which should absolve the State from responsibility for its debts. The **corporation's legal status**, **while important, was 'not decisive for the determination of the State's responsibility for the company's acts or omissions under the Convention'**.[44] The Court instead focused on the corporation's lack of institutional and operational independence and the public nature of its functions:

> The Court notes that the company's independence was limited by the existence of strong institutional links with the municipality and by the constraints attached to the use of the assets and property. …
>
> The company's institutional links with the public administration were particularly strengthened in the instant case by the special nature of its activities. As one of the main heating suppliers of the city of Yakutsk, the company provided a public service of vital importance to the city's population.45

The ECtHR's case law on what constitutes a 'governmental organisation' in the context of admissibility decisions under Article 34 ECHR is also of relevance for determining the conditions under which a corporation can be treated as an agent of the State. In *Radio France* the Court considered that

> [t]he category of 'governmental organisation' includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person … falls within this category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of independence from political authorities.[46]

In *State Holding Company Luganskvigillya* the Court held that the applicant corporation was a governmental organisation within the meaning of Article 34 ECHR because it was owned and managed by the State, had participated in the exercise of governmental powers, and exercised a public function.[47] In *Islamic Republic of Iran Shipping Lines*, by contrast, the ECtHR considered that even though 'the applicant company was wholly owned by the State and currently an important part of its shares still belong to the State', it should be considered a non-governmental organisation because it was run as a commercial business enterprise with sufficient institutional and operational independence from the State.[48]

Positive obligations to protect human rights in relation to corporations acting as third parties

As duties of (diligent) conduct, positive human rights obligations require States to take all reasonable and appropriate steps in protecting individuals against violations by non-state actors, including corporations. A number of positive obligations flow directly from the text of the European Convention, most prominently Article 1 ECHR that requires States to 'secure' human rights to everyone within their jurisdiction. Other positive obligations have been developed through the Court's case-law on Article 2 ECHR (right to life), Article 3 ECHR (freedom from torture), Article 4 ECHR (prohibition of slavery and forced labour), Article 5 ECHR (liberty and security of the person), Article 6 ECHR (access to justice), Article 8 ECHR (right to private and family life and home), Article 9 ECHR (freedom of thought, conscience and religion), Article 10 ECHR (freedom of expression), Article 11 ECHR (freedom of assembly and association), Article 13 ECHR (right to an effective remedy), Article 1 Protocol 1 (right

[44] *Id.* para 56.

[45] *Id.* para 57-58.

[46] E. Ct. H. R., *Radio France & Others v. France* (Admissibility Decision of 23 September 2003) para 26; applied by *Oestereichischer Rundfunk v. Austria* (Judgment of 07 December 2006).

[47] E. Ct. H. R., *State Holding Company Luganskvugillya v. Ukraine* (Admissibility Decision of 27 January 2009).

[48] E. Ct. H. R., *Islamic Republic of Iran Shipping Lines v. Turkey* (Judgment of 13 December 2007) paras 78-82.

to property), and Article 2 Protocol 1 (right to education). It would appear that all human rights that can be infringed by non-state actors impose corresponding positive obligations on States.[49]

In *Appleby*, the ECtHR elaborates the conditions under which States incur positive human rights obligations. The applicants had set up a stall in a local shopping centre owned and operated by a private corporation to publicly criticise plans of the municipal authority to build over a local recreation area. Before the Strasbourg Court, the applicants complained that the corporation's request for them to leave the shopping centre infringed their rights to freedom of expression (Article 10 ECHR):

> In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[50]

It has been argued that the existence of positive obligations is furthermore conditioned by the State exercising full and effective control over the area in which the human rights violation takes place. Different from negative obligations that merely require the State to control the conduct of its own agents, positive obligations necessitate 'a far greater degree of control over the area in question, control which allows the state to create institutions and mechanisms of government, to impose its laws, and punish violations thereof'.[51] The ECtHR's Grand Chamber judgment in *Ilascu & Others versus Moldova & Russia* mitigates this requirement. The case arose out of human rights violations committed by agents the 'Moldovan Republic of Transdniestria' (MRT), a separatist regime that controlled an area within the territory of Moldova. The Court held that 'even in absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that are in its power to take and are in accordance with international law to secure the applicants the rights guaranteed in the Convention'.[52]

Three main consequences flow from the recognition of positive state obligations:

- States must take positive measures to secure in their domestic law the effective enjoyment of human rights;
- States must protect human rights in the relationship between non-state actors;
- States must use their position as public shareholders to ensure corporate compliance with human rights.

States are under a positive obligation to secure in their domestic laws the individual's legal status, rights and privileges necessary for an effective enjoyment of her human rights.[53] In *Wilson*, the applicants petitioned the Strasbourg Court on grounds of alleged violations of Articles 10 and 11 ECHR (freedom of expression & assembly) because their employer corporations had offered them financial incentives to renounce their rights to collective bargaining. The UK House of Lords (now: UK Supreme Court) did

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[49] This corresponds to the view taken by the UN Human Rights Committee, according to which positive obligations attach to all human rights that 'are amendable to application between private parties or entities', see 'General Comment No. 31' (n 30) para 8.

[50] E. Ct. H. R., *Appleby & Others v United Kingdom* (Judgment of 06 May 2003) para 40.

[51] M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press: 2011) 210.

[52] E. Ct. H. R., *Ilascu & Others v. Moldova & Russia* (Grand Chamber Judgment of 08 July 2004) para 331. Critical O. De Schutter, 'Globalisation and Jurisdiction: Lessons from the European Convention on Human Rights' 9 *Centre for Human Rights and Global Justice Working Paper* (New York University: 2005).

[53] See, for example, E. Ct. H. R., *Airey v Ireland* (Judgment of of 9 October 1979); *Marckx v Belgium* (Judgment of 13 June 1976).

not find the companies' actions contrary to domestic law. The ECtHR, by contrast, ruled that the State must uphold the rights of workers to use trade unions to represent them in negotiations with employers:

> The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applicants complain ... did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention.
>
> [The Court] considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.[54]

States also have to **protect human rights in the sphere of the relations between individuals themselves**. The Court has recognised this principle *inter alia* in the context of the right to respect for private and family life (Article 8 ECHR),[55] freedom of expression (Article 10 ECHR),[56] and freedom of association (Article 11 ECHR).[57] In *Ouranio Toxo*, the Court justifies this principle having regard to the purpose of the European Convention to guarantee a 'practical and effective' protection of human rights:

> The Court has often reiterated that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. It follows from that finding that a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association even in the sphere of relations between individuals.[58]

It follows that a privatisation of state functions or a delegation of public responsibilities to private bodies and individuals cannot absolve the State from its human rights obligations under the European Convention.[59] Moreover, States can be held accountable for failures to regulate and control acts of private parties that violate the human rights of other individuals:

> The acquiescence or connivance of the authorities of a Contracting State in acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention'.[60]

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[54] E. Ct. H. R., *Wilson, National Union of Journalists and Others v. The United Kingdom* (Judgment of 02 July 2002) para 41, 48.

[55] E. Ct. H. R., *X and Y v. Netherlands* (Judgment of 26 March 1985) para 23; applied by *Verliere v Switzerland* (Admissibility Decision of 25 November 1994); *Stubbings & Others v UK* (Judgment of 22 October 1996) para 62; *Von Hannover v. Germany* (Judgment of 24 June 2004) para 57.

[56] E. Ct. H. R., *Khurshid Mustafa & Tarzibachi v Sweden* (Judgment of 16 December 2008) para 32.

[57] E. Ct. H. R., *Plattform 'Ärzte für das Leben' v. Austria* (Judgment of 21 June 1986) para 23; applied by *Christian Democratic People's Party v Moldova No 2* (Judgment of 2 February 2010) para 25.

[58] E. Ct. H. R., *Ouranio Toxo and Others v Greece* (Judgment of 20 October 2005) para 37

[59] E. Ct. H. R., *Costello Roberts v. United Kingdom* (Judgment of 25 May 1993); *Woz v. Poland* (Admissibility Decision of 01 March 2005).

[60] E. Ct. H. R., *Cyprus v Turkey* (Judgment of 10 May 2001), para 81; applied by *Ilascu & Others v. Moldova & Russia* (Grand Chamber Judgment of 08 July 2004) para 318.

One category of human rights obligations that does not neatly fit into the distinction between negative and positive duties concerns cases in which **the state assumes the role of a public shareholder in a private corporation**. *Heinisch* concerned an alleged violation of Article 10 ECHR (freedom of expression) due to the dismissal of an employee from a nursing home for whistle blowing.[61] The nursing home was operated by Vivantes Netzwerk für Gesundheit GmbH, a limited liability company majority-owned by the Land of Berlin. German domestic courts upheld dismissal of the employee. According to the Strasbourg Court, this decision violated Article 10 ECHR because it failed to strike a fair balance between the need to protect the employer's reputation and the applicant's right to freedom of expression. In the case at hand, public ownership did not lead to a direct attribution of corporate human rights violations to the State. Nor did the State simply appear as a public regulator in relation to the corporation as a third party. Rather, when balancing the interests of the employer and the employee, the ECtHR focussed on human rights obligations that the State incurs as a public shareholder of the corporation:

> The Court finds it relevant to note in this context that in the case at hand the employer is a State-owned company providing, inter alia, services in the sector of institutional care for the elderly. While the Court accepts that State-owned companies also have an interest in commercial viability, it nevertheless points out that the protection of public confidence in the quality of the provision of vital public service by State-owned or administered companies is decisive for the functioning and economic good of the entire sector. For this reason the public shareholder itself has an interest in investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate.
>
> In the light of these considerations, the Court finds that the public interest in receiving information about the shortcomings in the provision of institutional care for the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter's business reputation and interests.[62]

It remains to be seen to what extent this approach is generalizable beyond a (German) context where public shareholders in mixed legal entities are constitutionally bound to respect human rights.

The scope of State obligations to secure human rights in relation to corporate activities

The concrete scope and content of State obligations to prevent and redress corporate-related human rights violations depends to some extent on the human right in question. The study focuses on the growing body of case law concerning **human rights violations in the environmental sphere**.[63] The ECHR offers protection against human rights violations caused by, among others, dangerous industrial activities; industrial emissions and pollution; waste collection, management, and disposal; and natural disasters. Cases in this area most commonly involve the right to life (Article 2 ECHR), the right to respect for private and family life and home (Article 8 ECHR), the protection of property (Article 1 Protocol 1 ECHR) and the right to access to court (Article 6 ECHR). There is a discernible general pattern in cases involving corporate-related human rights violations in the environmental sphere. Corporate activity causes an environmental nuisance that interferes with the human rights of the applicant. The State fails to take all reasonable and appropriate measures to regulate and control the corporate activity, usually in violation of domestic law. The State fails to effectively investigate, adjudicate and redress the corporate human rights violation.

Three types of State obligations to prevent and redress corporate human rights violations in the environmental sphere can be distinguished:

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[61] E. Ct. H. R., *Heinisch v. Germany* (Judgment of 21 July 2011).

[62] *Id.* paras 89, 90.

[63] See further C. o. E., 'Manual on human rights and the environment' (Council of Europe Publishing: 2012, 2nd edn.); E. Ct. H. R., 'Factsheet: Environment and the European Convention on Human Rights' (June 2016).

- Substantive obligations to regulate and control corporate operations including the licensing, setting up and supervision of dangerous activities and the provision of information about such activities to the general public;
- Procedural obligations to ensure an informed decision-making process that involves public participation, public investigations, scientific studies and environmental impact assessments;
- Obligations relating to law enforcement and the judicial process, including access to justice and the provision of effective remedies.

Substantive and procedural State obligations to prevent corporate-related human rights violations

The state obligation to prevent human rights violations in the environmental sphere through the regulation and control of corporate activities has a substantive and a procedural dimension. In *Hatton*, a case involving alleged violations of Article 8 ECHR due to an increase of night flights at privately owned and run Heathrow Airport, the ECtHR considered that 'in cases involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual'.[64]

As concerns **the substantive limb of the ECtHR's human rights supervision**, States are under an obligation to regulate and control corporate activities in a way that strikes a fair balance between the rights of the individual affected by environmental pollution and the interests of the community as a whole. The ECtHR assesses whether 'the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights',[65] or whether 'the national authorities took the necessary steps to ensure the effective protection of the applicants' rights'.[66] Of relevance in this assessment is whether the State authorities were aware of the environmental problems, and whether they exercised sufficient control over the corporate activity by imposing operating conditions and supervising their implementation.[67]

In *Dubetska* the applicants complained that the operation of a State-owned coalmine that was subsequently privatised negatively affected their health and their living environment (Article 8 ECHR). The Court found against the State because the Ukrainian authorities had been aware of the environmental harms caused by the mine for more than 12 years yet failed to take effective steps in protecting the applicants' rights.[68] In *Lopez Ostra*, the ECtHR held the defendant State responsible for violations of Article 8 ECHR caused by pollution (including fumes, noise and foul smells) emanating from a waste treatment plant owned and operated by a private corporation. The Court pointed out that while the national and local authorities 'were theoretically not directly responsible for the emissions in question ... the town allowed the plant to be built on its land and the State subsidised the plant's construction'. Subsequently, the State authorities repeatedly failed to secure the applicant's rights against environmental pollution emanating from the plant. Accordingly, the Court held that 'the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home

[64] E. Ct. H. R., *Hatton & Others v. United Kingdom* (Grand Chamber Judgment of 7 August 2003) para 99; applied by *Hardy and Maile v. United Kingdom* (Judgment of 14 February 2012) para 217.

[65] E. Ct. H. R., *Fadeyeva v Russia* (Judgment of 9 June 2005) para 89.

[66] E. Ct. H. R., *Lopez Ostra v Spain* (Judgment of 09 December 1994) para 55; *Guerra & Others v Italy* (Judgment of 19 February 1998) para 58.

[67] See, for example, E. Ct. H. R., *Lopez Ostra v Spain* (Judgment of 09 December 1994) para 51; *Zammit Maempel v Malta* (Judgment of 22 November 2011) para 61.

[68] E. Ct. H. R., *Dubetska and Others v. Ukraine* (Judgment of 10 February 2011).

and her private and family life'.[69] *Tatar* concerned human rights violations caused by a massive cyanide spill in a goldmine owned and operated by a private corporation. The spill released 100,000 cubic metres of contaminated water into rivers crossing Romania, Hungary, Serbia and Bulgaria to the Black Sea. The Court held that there had been a violation of Article 8 ECHR because the Romanian authorities had failed in their duty to assess the risks of the corporate activity and to take suitable measures to protect the rights of the applicants.[70]

Öneryildiz, a case concerning an explosion in a waste-collection site that killed numerous of the applicant's relatives, is instructive as to what the Court considers **'reasonable' and 'necessary' measures** in the context of Article 2 and Article 8 ECHR:

> The positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction ... must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites. ...
>
> The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.
>
> This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[71]

Another important aspect of state obligations to prevent human rights violations in the environmental sphere is the **provision of essential information** to the public about risks involved in the corporate activity. In *Öneryildiz*, the Court stressed that among the preventive measures, 'particular emphasis should be placed on the public's right to information ... which has already been recognised under Article 8 [and] may also, in principle, be relied on for the protection of the right to life'.[72] The state obligation to provide essential information is of a prospective and precautionary nature. In *Guerra* the Court found the State in violation of Article 8 ECHR because it had waited until the production in the factory had ceased to provide the applicants 'with essential information that would have enabled them to assess the risks they and their family might run if they continued to live [in the town] particularly exposed to danger in the event of an accident in the factory'.[73] In *Tatar,* one decisive consideration for finding Romania in violation of Article 8 ECHR was that the State had failed to inform the public about the risks bound up with the mining project (among others, by withholding the results of an environmental impact assessment), and to issue warnings after the accident.[74] The applicants in *Vilnes* were divers employed by a private corporation to explore oil fields in the Norwegian Continental Shelf. The Norwegian authorities had failed to ensure that the applicants were sufficiently informed about the dangers of decompression sickness, as a consequence of which they suffered serious health damage

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[69] E Ct. H. R., *Lopez Ostra v. Spain* (Judgment of 09 December 1994) paras 53, 58.

[70] E. Ct. H. R., *Tatar v Romania* (Judgment of 27 January 2009).

[71] E. Ct. H. R., *Öneryildiz v Turkey* (Judgment of 30 November 2004) paras 71, 89, 90; applied by *Budayeva and Others v. Russia* (Judgment o 20 March 2008) and *Kolyadenko and Others v. Russia* (Judgment of 22 February 2012). In all of these cases, the Court emphasises that the scope of positive obligations under Article 2 ECHR largely overlaps with those under Article 8 ECHR.

[72] E. Ct. H. R., *Öneryildiz v Turkey* (Judgment of 30 November 2004) para 90.

[73] E. Ct. H. R., *Guerra & Others v Italy* (Judgment of 19 February 1998) para 60.

[74] E. Ct. H. R., *Tatar v Romania* (Judgment of 27 January 2009) paras 113-16, 121-24.

resulting in disabilities. The ECtHR held that 'the public's right to information' should not be confined to risks that have already materialised but should count among the preventive measures to be taken, including in the sphere of occupational risks.[75] Moreover, having regard to

> [t]he authorities' role in authorising diving operations and in protecting the safety of such operations as well as the lack of scientific consensus at the time regarding the long-term effects of decompression sickness … a very cautious approach was called for. In the Court's view it would therefore have been reasonable for the authorities to take the precaution of ensuring that the companies observe full transparency about the diving tables used and that the applicants, and other divers like them, receive information on the differences between tables, as well as on their concerns for the divers' safety and health, which constituted essential information that they needed to be able to assess the risk to their health and to give informed consent to the risks involved. … By failing to do so the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private life, in violation of Article 8 of the Convention. [76]

As concerns **the procedural limb of the ECtHR's human rights supervision**, State decisions in relation to corporate activities that may impact on human rights must be taken in a transparent and inclusive way that enables public authorities to evaluate in advance the risks involved in the corporate activity. Procedural obligations that the Court has derived from the ECHR include duties to enable public participation and to take into account the views of affected individuals; and duties to ensure an informed decision-making process that involves investigations, scientific studies, and environmental impact assessments.

In *Zammit Maempel*, the ECtHR noted in connection with the procedural limb of its review that in cases involving environmental nuisances it is necessary 'to consider all the procedural aspects, including the type of policy or decision involved'.[77] Moreover, 'a governmental decision-making process concerning issues of cultural, environmental and economic impact such as in the present case must necessarily involve appropriate investigations and studies in order to allow [public authorities] to strike a fair balance between the various conflicting interests at stake'.[78] *Taskin* involved the decision by local authorities to grant a licence to a private corporation for the extraction of gold. On appeal by local residents, the Turkish Supreme Administrative Court quashed the decision due to dangers posed to the environment by the use of cyanide in the mine. With considerable delay, the State ordered the closure of the mine, only to authorize the resumption of mining after a number of subsequent developments. The applicants petitioned the Court alleging violations of, *inter alia*, Article 8 ECHR:

> The Court reiterates that, according to its settled case law, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8. It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available.[79]

The Court furthermore held that the decision-making process must involve 'appropriate investigations and studies' that allow States 'to predict and evaluate in advance the effects of those activities which

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[75] E. Ct. H. R., *Vilnes and Others v. Norway* (Judgment of 05 December 2013) para 235.

[76] *Id.* para 244.

[77] E. Ct. H. R., *Zammit Maempel v. Malta* (Judgment of 22 November 2011) para 62; applying *Hatton & Others v United Kingdom* (Grand Chamber Judgment of 7 August 2003) para 104; applied by *Udovičić v. Croatia* (Judgment of 24 April 2014) para 151.

[78] *Id.* para 70.

[79] E. Ct. H. R., *Taskin v Turkey* (Judgment of 10 November 2004) para 118.

might damage the environment and infringe individuals' rights'.[80] Article 8 ECHR can also be engaged 'where the dangerous effects of an activity to which individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life'.[81] Finally, state regulation 'must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels'.[82] The Court will verify whether individuals concerned 'were able to appeal to the courts against any decision, act, or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process'.[83]

States generally enjoy a wide **margin of appreciation** in deciding how to regulate and control corporate activities endangering human rights protection in the environmental sphere.[84] In *Hardy and Maile*, a case concerning the regulation of the construction and regulation of liquefied natural gas (LNG) terminals, the ECtHR accepted that

> [n]ational authorities are in principle better placed than an international court to assess the requirements relating to the transport and processing of LNG in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community. The Court has therefore repeatedly stated that in cases raising environmental issues the State must be allowed a wide margin of appreciation.[85]

The margin of appreciation shrinks if State measures interfere with a 'particularly intimate aspect of the individual's private life',[86] as well as in cases of very severe threats to human rights. In *Brincat*, shipyard repair workers had been exposed to asbestos for a period of five decades. Despite being aware of the health risks caused by asbestos, the Maltese authorities failed to inform the workers about these risks and to take adequate measures to protect them. The ECtHR concluded that 'in view of the seriousness of the threat at issue, despite the State's margin of appreciation as to the choice of means', the Government had failed 'to satisfy its positive obligations, to legislate or to take other practical measures, under Articles 2 and 8 in the circumstances of the present case.[87] A failure of national authorities to comply with domestic law also reduces the State's margin of appreciation. In *Lopez Ostra* the waste-treatment plant operated without the necessary licence; in *Guerra* the applicants were prevented from obtaining information that the State was under a statutory duty to provide; and in *Taskin* the local authorities failed to close the goldmine despite the fact that its operating permit had been annulled by the Supreme Administrative Court.[88]

In other cases, 'it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities to strike a fair balance between the competing interests of

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[80] *Id*. para 119.

[81] *Id*. para 113.

[82] E. Ct. H. R., *Öneryildiz v Turkey* (Judgment of 30 November 2004) para 90.

[83] E. Ct. H. R., *Taskin v Turkey* (Judgment of 10 November 2004) para 119; see also *Hatton & Others v United Kingdom* (Grand Chamber Judgment of 7 August 2003) para 128*; Hardy and Maile v United Kingdom* (Judgment of 14 February 2012) para 221.

[84] According to the 'margin of appreciation' doctrine, States enjoy a certain degree of discretion when taking legislative, administrative, or judicial action to protect human rights under the European Convention system.

[85] E. Ct. H. R., *Hardy and Maile v. United Kingdom* (Judgment of 14 February 2012) para 218; applying *Hatton and Others v. United Kingdom* (Judgment of 14 February 2012).

[86] E. Ct. H. R., *Hatton & Others v United Kingdom* (Grand Chamber Judgment of 7 August 2003) para 102.

[87] E. Ct. H. R., *Brincat and Others v. Malta* (Judgment of 24 July 2014) para 116.

[88] See, respectively, E. Ct. H. R., *Lopez Ostra v Spain* (Judgment of 09 December 1994) paras 16-22; *Guerra & Others v Italy* (Judgment of 19 February 1998) paras 25-27; *Taskin & Others v Turkey* (Judgment of 10 November 2004) para 117.

different private actors'.[89] The ECtHR will only in 'exceptional circumstances … revise the material conclusions of the domestic authorities'.[90] Nevertheless, the State is under an obligation to prove that it acted with due diligence in striking a fair balance between the rights of the individual and the interests of the community as a whole: 'It is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to the competing interests'.[91] Both as regards substantive and procedural human rights obligations, 'the onus is on the State to justify, using detailed and rigorous data, a situation in which individuals bear a heavy burden on behalf of the rest of the community'.[92]

State obligations to redress corporate-related human rights violations

Under the European Convention, States are duty-bound to investigate, punish and redress corporate human rights violations when they occur. Where the domestic legal framework itself is deficient, States can be obliged to introduce new or amend existing legislation. Administrative authorities are required to contribute to a proper administration of justice and to uphold the rule of law. Finally, domestic courts must have due regard to the European Convention when adjudicating private disputes between corporations and individual victims of human rights violations.

Of particular significance in cases involving corporate-related human rights violations in the environmental sphere is the **obligation of States to ensure that public authorities and private corporations comply with domestic law**. A characteristic features of cases such as *Guerra*, *Lopez*, *Taskin*, *Fadeyeva, Öneryildiz, and Tatar* is that the industrial activities in question were conducted without the necessary licence and/or in violation of public safety requirements and domestic environmental laws and emission standards. In *Taskin,* the ECtHR emphasised that 'the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need for a proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose'.[93] The Court furthermore found Turkey in violation of Article 6 ECHR because the national authorities had 'failed to comply in practice and within reasonable time' with the judgments of the Turkish Administrative Court and Supreme Administrative Court, 'thus depriving Article 6(1) of any useful effect'.[94]

As seen, in *Öneryildiz* the Court stressed that Article 2 ECHR requires States to 'put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life', regardless of whether the activity in question is public or private.[95] From this obligation, the Court derives a number of more concrete requirements concerning the State's response to violations of the right to life: 'Where lives have been lost in circumstances potentially engaging the responsibility of the State, [Article 2] entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished'.[96] In particular,

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[89] E. Ct. H. R., *Fadeyeva v Russia* (Judgment of 9 June 2005) para 105.

[90] *Id.* paras 105; see also E. Ct. H. R., *Dubetska and Others v. Ukraine* (Judgment of 10 February 2011) para 142.

[91] *Id.* para 128.

[92] *Id.* para 128.

[93] E. Ct. H. R., *Taskin v Turkey* (Judgment of 10 November 2004) para 124.

[94] *Id.* para 137.

[95] E. Ct. H. R., *Öneryildiz v Turkey* (Judgment of 30 November 2004) paras 71, 89; applied by *Kolyadenko and Others v Russia* (Judgment of 22 February 2012) paras 157-158.

[96] *Id.* para 91

> The judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as the result of dangerous activities if and to the extent that this is justified by the findings of the investigation. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue.[97]

The requirements of Article 2 ECHR also extend to criminal proceedings before domestic courts:

> The proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. ... The national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.[98]

As public institutions of the State, domestic courts adjudicating private disputes between corporations and victims of human rights violations are directly bound by the European Convention. In *Pla and Puncernau*, the applicants complained that judgments by the Andorran High Court of Justice and the Constitutional Court concerning the regulation of succession in a private will violated their human rights under Article 8 ECHR in conjunction with Article 14 ECHR (prohibition of discrimination). While the ECtHR accorded the national courts a wide margin of appreciation in the interpretation of domestic private law, it left no doubt that such interpretation must be compatible with the requirements of the European Convention:

> The applicants confined themselves to challenging a judicial decision that had declared a private deed disposing of an estate to be contrary to the testatrix's wishes. The only outstanding issue is that of the alleged incompatibility with the Convention of the Andorran courts' interpretation of domestic law. …
>
> When ruling on disputes of this type, the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation. Accordingly, an issue of interference with private and family life could only arise under the Convention if the national courts' assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention.[99]

In *Kurshid Mustafa and Tarzibachi*, the applicants had been involved in a private-law dispute with their landlord corporation over the installation of a satellite dish on the tenancy building to receive TV programmes in their native language. The Swedish Court of Appeal found against the applicants and ruled that their tenancy agreement should be terminated, as a consequence of which they were evicted from the flat. The applicants petitioned the Strasbourg Court alleging a violation of Article 10 ECHR. The Government contended that the case concerned a dispute between two private parties over a contractual obligation and that there had been no intervention by a public authority. The ECtHR, by

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[97] *Id.* para 94; see further *M. Özel and Others v. Turkey* (Judgment of 17 November 2015) para 189. The latter case concerned violations of building regulations by corporations in the construction industry and a related lack of oversight by Turkish authorities leading to the construction of buildings that did not withstand the effects of a major earth quake in Turkey's Izmit region in 1999.

[98] E. Ct. H. R., *Öneryildiz v Turkey* (Judgment of 30 November 2004) paras 95-6; applied by *Kolyadenko and Others v. Russia* (Judgment of 22 February 2012) paras 192-193.

[99] E. Ct. H. R., *Pla and Puncernau v. Andorra* (Judgment of 13 July 2004) paras 45-46.

contrast, stressed that 'Article 10 applies to judicial decisions preventing a person from receiving transmissions from telecommunications satellites'.[100] Moreover, the decision of the Swedish Court of Appeal was subject to European human rights supervision:

> Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.
>
> In the present case ... the applicant's eviction was the result of the [domestic] court's ruling. The Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis. ...
>
> The responsibility of the respondent State having been established, the Court of Appeal's ruling that the applicants' tenancy agreement should be terminated because of their refusal to dismantle the satellite dish in question amounted to an 'interference by a public authority' in the exercise of the rights guaranteed by Article 10.[101]

Of particular relevance to the business and human rights domain is the **right of access to justice (Article 6 ECHR) and the right to an effective remedy (Article 13 ECHR)**.[102] Article 6(1) ECHR requires that litigants have effective access to court to vindicate their civil rights protected under domestic law: 'In civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts. … The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised fundamental principles of law; the same is true of the principle in international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles'.[103] Article 13 ECHR guarantees an 'effective remedy before a national authority' to everyone who claims that their rights under the European Convention have been violated: 'Where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress'.[104] Where the scope of protection of both provisions overlaps, Article 13 ECHR is absorbed by Article 6 ECHR.

Article 6 ECHR protects the right of access to court and a fair trial not only for the benefit of natural persons but also for the benefit of non-governmental organisations representing the interests of their members.[105] In *Gorraiz Lizarraga,* the applicant association relied on Article 6(1) ECHR to complain that they had not been accorded a fair hearing in domestic judicial proceedings brought by them to hold the construction of a dam. The ECtHR accepted that the applicant association could be considered a 'victim' within the meaning of Article 34 ECHR because 'it was established for the specific purpose of defending its members' interests against the consequences of the dam's construction on their environment and homes', including 'the project's impact on the property rights and lifestyles of [its] members due to the change in their place of residence'.[106] In *L'Erablière A.S.B.L.*, the French *Conseil*

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[100] E. Ct. H. R., *Khurshid Mustafa and Tarzibachi v. Sweden* (Judgment of 16 December 2008) para 32.

[101] *Id.* paras 33-4, 36.

[102] On the extraterritorial application of Article 6 ECHR in cross-border tort litigations for corporate human rights abuse see *infra*, PART C, section 4.

[103] E. Ct. H. R., *Golder v. United Kingdom* (Judgment of 21 February 1975) paras 34-35.

[104] E. Ct. H. R., *Silver v. United Kingdom* (Judgment of 25 March 1983) para 113; applied by *Leander v. Sweden* (Judgment of 26 March 1987).

[105] On the Court's interpretation of non-governmental organisation under Article 34 ECHR see further *infra*, PART B section 2.1.

[106] E. Ct. H. R., *Gorraiz Lizarraga and Others v. Spain* (Judgment of 10 November 2004) para 38.

d'Etat had dismissed on procedural grounds the application of an environmental non-profit organisation to review a planning permission for expanding a waste collection site. The ECtHR found in favour of the applicant association because the limitation of its right to access to court was disproportionate to the requirements of legal certainty and the proper administration of justice, and therefore contrary to Article 6(1) ECHR.[107]

In *Steel and Morris*, the Court had to consider fair trial rights under Article 6 in defamation proceedings brought by a multi-national corporation against NGO campaigners in the UK. The proceedings were complex and protracted, yet the campaigners had not qualified for legal aid, had represented themselves throughout most of the case, and had encountered difficulties in paying various administrative costs. In its judgment, the ECtHR recalled that 'the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side'.[108] Furthermore, the Court ruled that whether the provision of legal aid was necessary for a fair hearing depended, *inter alia*, 'upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant's capacity to represent him or herself effectively'.[109] Applying these principles to the case at hand, the Court held that

> The disparity between the respective levels of legal assistance enjoyed by the applicants and [the corporation] was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness … The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.[110]

Finally, States are under a human rights obligation **to ensure an effective and timely enforcement of domestic judgments against private corporations**. In *Fuklev* the applicant won a domestic lawsuit against his former employer for non-payment of wages. By the time of the judgment the employer corporation had gone insolvent. The ECtHR found the State in violation of Article 6 ECHR because the Ukrainian authorities had failed in their 'positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay'.[111] The applicant in *Margushin* had been involved in complex legal proceedings with a commercial bank over the non-payment of money from his account following the 1998 financial crisis. After numerous appeals and retrials he was awarded and paid the full sum. Subsequently, he was awarded interests by a further judgment which was upheld on appeal. Upon petition by the bank, the domestic courts discontinued the enforcement of the judgment. The ECtHR dismissed Russia's objection that the application was inadmissible *ratione personae* because it was directed against a commercial bank: 'the applicant's grievances concern non-enforcement of the judgment in his favour, which covered not only the bank's refusal to repay the judgment debt but also the discontinuation of the enforcement proceedings by domestic courts'.[112] The latter constituted a violation of Article 6 and Article 1 Protocol 1 of the European Convention because the State had failed in its positive obligation to protect the applicant's right to property, which was pertinent 'even in cases involving litigation between private individuals or companies'.[113]

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[107] E. Ct. H. R., *L'Erablière A.S.B.L. v. Belgium* (Judgment of 24 February 2009).

[108] E. Ct. H. R., *Steel and Morris v United Kingdom* (Judgment of 15 February 2005) para 59.

[109] *Id.* para 61.

[110] *Id.* paras 69, 95.

[111] E. Ct. H. R., *Fuklev v Ukraine* (Judgment of 7 June 2005) para 84; applied by *EVT Company v Serbia* (Judgment of 13 January 2015) paras 31-33.

[112] E. Ct. H. R., *Margushin v Russia* (Judgment of 1 April 2010) para 29.

[113] *Id.* para 38.

Extraterritorial State obligations to prevent and redress corporate-related human rights violations

Introduction

As noted at the outset, the UN Guiding Principles on Business and Human Rights have taken a rather cautious approach to the extraterritorial dimension of the state duty to protect against corporate-related human rights violations:

> At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse by business enterprises within their jurisdiction.[114]

Absent a 'general requirement' to protect human rights against extraterritorial corporate abuse, the SRSG focussed on the permissibility of State action to regulate and control corporate activities outside their territories in accordance with a recognised basis of jurisdiction in public international law:

> In the heated debates about extra-territoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures with extraterritorial implications; for example, requiring corporate parents to report on the company's overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.[115]

The SRSG's distinction between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications' shifts the focus from States' extraterritorial human rights obligations to their legal competence to assert authority outside their borders.[116] As acknowledged by the UNGPs, the UN Treaty Bodies have taken a more progressive approach to extraterritorial human rights obligations. In its 2016 draft General Comment, for example, the Committee on Economic, Social and Cultural Rights considered that 'extraterritorial obligations arise when a State Party may exercise control, power or authority over business entities or situations located outside its territory, in a way that could have an impact on the enjoyment of human rights'. Moreover, these obligations extend 'to any business entity over which [a State Party] may exercise influence by regulatory means or by the use of incentives'.[117] The other UN Treaty Bodies have expressed similar views.

The starting point for considering the extraterritorial dimension of State obligations to prevent and redress corporate-related human rights violations under the European Convention system is the jurisdiction clause of Article 1 ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Although Article 1 contains no explicit reference to 'territory', the ECtHR has traditionally favoured a primarily territorial interpretation of States' international human rights obligations. As the Court said in its (at the time hotly debated) admissibility decision in *Bankovic*, the European Convention reflects an 'essentially territorial

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[114] See UNGPs (n 3) para 2 and further *infra* A.1.

[115] H. R. C., 'Business and Human Rights: Further Steps towards the Operationalisation of the "Protect, Respect and Remedy" Framework', A/HRC/14/27 (9 April 2010) para 48.

[116] On this shift see further D. Augenstein & D. Kinley, 'Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power', 19(6) *The International Journal of Human Rights* (2015) 828-848.

[117] See 'Draft General Comment' (n 9) paras 33, 36.

notion of jurisdiction', with the consequence that 'acts of Contracting Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them … only in exceptional circumstances'.[118] Extraterritorial human rights jurisdiction requires a qualified jurisdictional link between the State and an individual located outside its borders. The decisive question is whether **an act that was performed, or produced effects, outside the State's territory brought the individual under that State's jurisdiction** within the meaning of Article 1 ECHR:

> The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States ("the extra-territorial act"). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States.[119]

While the bulk of *Bankovic* has meanwhile been overruled, the ECtHR still holds on to a 'primarily territorial' interpretation of Article 1 ECHR.[120] Not dissimilar from the approach taken by the UNGPs, the ECtHR justifies this territorialisation of human rights obligations with reference to the rules of jurisdiction in general public international law and the sovereign territorial rights of third States:

> As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of jurisdiction … are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[121]

Yet different from the UNGPs, the Strasbourg Court ties States' jurisdictional competence in public international law to extraterritorial human rights *obligations*. With this caveat in mind, the SRSG's distinction between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications' can be mapped onto the ECtHR's distinction between acts 'performed' outside the State's territory and acts 'producing effects' outside the State's territory.

The ECtHR's Grand Chamber judgment in *Al Skeini* – now the leading case on the extraterritorial application of the European Convention – outlines a number of constellations in which a State may be found to exercise jurisdiction outside its borders:

> The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory. …
>
> Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others. …
>
> Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. …

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[118] E. Ct. H. R., *Bankovic & Others v. Belgium & Others* (Grand Chamber Admissibility Decision of 12 December 2001) para 67; *Loizidou v Turkey* (Judgment of 23 March 1995, preliminary objections) para 62. For the early debate surrounding *Bankovic* see the contributions to F. Coomans & M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia: 2004).

[119] *Id.* para 54.

[120] E. Ct. H. R., *Al-Skeini and Others v. United Kingdom* (Grand Chamber Judgment of 7 July 2011) para 131.

[121] E. Ct. H. R., *Bankovic & Others v. Belgium & Others* (Grand Chamber Admissibility Decision of 12 December 2001) para 59.

> In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. …
>
> Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory.[122]

Al Skeini concerned the death of six Iraqi nationals in an area in Southern Iraq that was under the military occupation and effective control of the United Kingdom. Recalling *Bankovic*, the ECtHR reiterated that 'a State's jurisdictional competence under Article 1 is primarily territorial' and that 'jurisdiction is presumed to be exercised normally throughout the State's territory'. Accordingly, 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional circumstances'.[123] The most notable developments in *Al Skeini* as compared to the Court's admissibility decision in *Bankovic* are, first, a **rejection of the '*espace juridique*' doctrine** according to which (extraterritorial) jurisdiction is confined to the territories of the Member States of the Council of Europe (as High Contracting Parties to the European Convention).[124] And secondly, a clarification that jurisdiction is not an all or nothing concept but **can be divided and tailored**. This yields a more context-sensitive approach to extraterritorial jurisdiction that requires States to secure to an individual all human rights that are 'relevant to the situation of that individual'.[125]

The following discussion of extraterritorial state obligations to prevent and redress corporate-related human rights violations follows **the ECtHR's distinction between acts 'performed' and acts 'producing effects' outside the State's territory**. The study thus discusses:

- State obligations to prevent corporate-related human rights violations in relation to acts performed outside the State's territory;
- State obligations to prevent corporate-related human rights violations in relation to acts producing effects outside the State's territory; and
- State obligations to redress corporate-related human rights violations committed outside the State's territory.

The overall focus is on what is a core concern in the business and human rights domain, namely the jurisdictional relationship as carved out by international human rights law between home states of corporate investment and victims of human rights violations committed by corporations as private (non-state) actors on the territory of a third (host) state. As the ECtHR has not yet had many opportunities to pronounce on human rights violations involving 'foreign' corporations, the discussion of extraterritorial human rights obligations under the European Convention draws on cases involving both state- and non-state actors.

State obligations to prevent corporate-related human rights violations in relation to acts performed outside the State's territory

Following *Al Skeini*, the circumstances in which acts performed outside the State's territory bring an individual under that State's jurisdiction can be subsumed under three broad categories: effective control

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[122] E. Ct. H. R., *Al-Skeini and Others v United Kingdom* (Grand Chamber Judgment of 7 July 2011) paras 134-138; cited by E. Ct. H. R., *Jaloud v The Netherlands* (Judgment of 20 November 2014) para 139; *Güzelyurtlu and Others v Cyprus and Turkey* (Judgment of 04 April 2017) paras 185-187.

[123] *Id.* para 131.

[124] *Id.* para 141.

[125] *Id.* para 137.

over persons located outside the State's territory; effective control over an area located outside the State's territory; and the exercise of public powers on the territory of another State with the latter's invitation, consent or acquiescence. The three categories can overlap and are not always clearly distinguished in the Court's case-law.

The earliest cases of extraterritorial jurisdiction under the European Convention concerned the **exercise of State authority and control over persons located outside the State's territory**. In *X versus the UK*, for example, the (now defunct) European Commission of Human Rights considered it 'clear ... from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic and consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged'.[126] *Öcalan* is a prominent example of the ECtHR's 'control over persons' test. The applicant, PKK leader Abdullah Öcalan, was arrested in Kenya by Turkish officials acting in cooperation with Kenyan authorities. He was then forcibly transferred to Turkey where he was detained and sentenced to death. According to the Court, 'the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purpose of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.[127] In its more recent Grand Chamber judgment in *Jaloud*, the Court unanimously held that the Netherlands asserted authority and control, and thus jurisdiction, over individuals who passed through a checkpoint under the command of the Dutch army in Iraq.[128]

The same principles also apply to applicants on board of vessels outside the State's territorial jurisdiction. The applicants in *Medvedyev* were crew members on a merchant ship (the 'Winner') that was intercepted by French authorities on the high seas. The applicants complained that they had been arbitrarily deprived of their liberty, and that they had been denied access to justice while on board of the ship. Sitting as Grand Chamber, the ECtHR unanimously held that given the defendant State had 'exercised full and exclusive control over the Winner and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention'.[129] Similarly, the seminal case of *Hirsi Jamaa* concerned the interception by Italian authorities of protection seekers 35 nautical miles of the coast of Lampedusa, and their subsequent unlawful return to Libya. The applicants were forced to board boats flying the Italian flag and staffed with Italian military personnel. According to the Court, 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[130] In *Xhavara*, the ECtHR accepted that protection seekers on a vessel flying the Albanian flag came within Italy's jurisdiction because an Italian navy ship collided with the Albanian vessel, leading to fifty-eight deaths. Different from *Medvedev* and *Hirsi Jamaa*, the applicants could not be said to be under the State's 'continuous' control. The Court instead emphasised that the shipwreck was directly (albeit unintentionally) caused by the Italian vessel. In that context, it recalled that Article 2 ECHR not only obliges States to abstain from violating the right to life but also

[126] E. Cm. H. R., *X v United Kingdom* (Decision of 15 December 1977), at p. 74

[127] E. Ct. H. R., *Öcalan v Turkey* (Chamber Judgment of 12 March 2003) para 93; upheld by *Öcalan v Turkey* (Grand Chamber Judgment of 12 May 2005).

[128] E. Ct. H. R., *Jaloud v Netherlands* (Grand Chamber Judgment of 20 November 2014) para 152.

[129] E. Ct. H. R., *Medvedyev and Others v France* (Grand Chamber Judgment of 29 March 2010) para 67.

[130] E. Ct. H. R., *Hirsi Jamaa and Others v Italy* (Grand Chamber Judgment of 23 February 2012) para 81. Both in *Medvedyev* and *Hirsi Jamaa*, State authorities exercised effective control not only over individual persons but also over the vessel itself, and thus over an 'area' located outside the State's territory (the second constellation identified above); see also the recent case of *Kebe and Others v Ukraine* (Judgment of 12 January 2017) paras 74-76.

to take the necessary positive measures to protect the right to life of individuals within their jurisdiction.[131]

The second exception to the Court's 'primarily territorial' interpretation of Article 1 ECHR concerns **States exercising effective control of an area located outside their territory**. Effective control of a foreign area establishes a presumption that the State has jurisdiction over all persons located within that area. This also applies where control is exercised by a local administration that only survives as a result of the State's military or other (political, economic) support.[132] In these cases, 'the controlling State has the responsibility to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified'.[133] This applies not only to negative State obligations (to refrain from violating human rights) but also to positive State obligations (to protect human rights in the relationship between non-state actors).

In *Issa* – a case concerning alleged violations of human rights by Turkish army officials during military operations in Northern Iraq – the ECtHR applied the 'control over persons' test next to the 'control over an area' test. Moreover, the Court emphasised that for the purpose of both tests, **the illegality of state action (in international law) does not prevent an individual from coming within that State's extraterritorial human rights jurisdiction**:

> According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – *whether lawful or unlawful* – that State in practice exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration. …
>
> Moreover, a State may also be held accountable for violation of Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – *whether lawfully or unlawfully* – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[134]

In *Ilascu* already considered in PART B with regard to Moldova's human rights obligations, the ECtHR also found Russia in violation of the European Convention because it exercised, *via* the MRT, 'overall control' of the relevant area located on Moldovan territory:

> According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.
>
> It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.

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[131] E. Ct. H. R., *Xhavara et Quinze Autres contre l'Italy et l'Albanie* (Admissibility Decision of 11 January 2001).

[132] E. Ct. H. R., *Al-Skeini and Others v United Kingdom* (Grand Chamber Judgment of 7 July 2011) para 138.

[133] *Id.* para 138.

[134] E. Ct. H. R., *Issa and Others v Turkey* (Judgment of 14 November 2004) paras 69, 71, emphasis added.

> Where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.[135]

Effective control of an area outside the state's territory can also yield **positive obligations to protect human rights in the relationship between non-state actors**. In *Cyprus versus Turkey*, the ECtHR held that Turkey's human rights obligations as an occupying power in Northern Cyprus extended not only to acts of its own soldiers and officials as well as acts of the local administration (the Turkish Republic of Northern Cyprus, TRNC), but also to the acts of private parties violating the rights of Greek and Turkish Cypriots. As regards the latter, the Court noted that 'the acquiescence or connivance of authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention'.[136] In *Isaak*, the Court reaffirms and elaborates its approach to extraterritorial positive State obligations. The case concerned a demonstration in Northern Cyprus in the course of which one participant was beaten to death by private actors (the 'Turkish mob'), while the Turkish Northern Cypriot authorities were present yet allegedly did not intervene to protect him. The Court reiterates that 'the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals may engage that State's responsibility under the Convention'. As in *Issa* with regard to negative extraterritorial State obligations, the ECtHR emphasises in *Isaak* that positive extraterritorial State obligations stem 'from the fact that **Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory**'.[137]

The third exception to the 'primarily territorial' interpretation of Article 1 ECHR concerns **the exercise of public powers on the territory of another State** with the latter's invitation, consent or acquiescence: 'The Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government'.[138] Different from the first two constellations, jurisdiction under the 'public powers' approach is established not in virtue of '*de facto*' control of a foreign area or persons therein but in virtue of a State exercising '*de jure*' authority outside its borders. That *de jure* authority can serve to establish extraterritorial human rights obligations should not be confused with a point noted previously, namely that the illegality of State action in international law ('whether lawful or unlawful') does not prevent an individual from coming within that State's human rights jurisdiction.[139] As in the case of *Hirsi Jamaa* already considered above, the ECtHR sometimes uses the *de jure* authority test next to the *de facto* control test to establish a State's jurisdiction:

> The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed

[135] E. Ct. H. R., *Ilascu & Others v. Moldova & Russia* (Grand Chamber Judgment of 08 July 2004) paras 314-316; applied by E. Ct. H. R., *Mozer v Republic of Moldova and Russia* (Grand Chamber Judgment of 23 February 2016); *Chiragov and Others v Armenia* (Grand Chamber Judgment of 16 June 2015).

[136] H. Ct. H. R., *Cyprus v Turkey* (Judgment of 10 May 2001) para 81.

[137] E. Ct. H. R., *Isaak and Others v Turkey* (Admissibility Decision of 28 September 2006); confirmed at the merits stage, see E. Ct. H. R., *Isaak and Others v Turkey* (Judgment of 24 June 2008).

[138] E. Ct. H. R., *Al-Skeini and Others v. United Kingdom* (Grand Chamber Judgment of 7 July 2011) para 135.

[139] E. Ct. H. R., *Issa and Others v Turkey* (Judgment of 14 November 2004) para 69.

> over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.[140]

Following *Ilascu*, a State's human rights jurisdiction does not cease when that State loses effective control of a portion of its own territory. Even though the relevant part of Moldova's territory was controlled by a separatist regime (MRT), the Court considered that the State still had positive obligations 'to take the diplomatic, economic, judicial or other measures that are in its power to take and are in accordance with international law to secure the applicants the rights guaranteed in the Convention'.[141] Absent *de facto* control, jurisdiction is established on the basis of the de jure authority ('public powers') that a State is presumed to exercise within its own borders.[142] This approach was confirmed in the Court's more recent Grand Chamber judgment in *Sargsyan*:

> Even in exceptional circumstances, when a State is prevented from exercising authority over part of its territory, due to military occupation by the armed forces of another State, acts of war or rebellion or the installation of a separatist regime within its territory, it does not cease to have jurisdiction within the meaning of Article 1 of the Convention. …
>
> However, in cases in which a State is prevented from exercising its authority in part of its territory, its responsibility under the Convention is limited to discharging positive obligations. These relate both to measures needed to re-establish control over the territory in question, as an expression of its jurisdiction, and to measures to ensure respect for the applicant's individual rights. Under the first head, the State has a duty to assert or re-assert its sovereignty over the territory and to refrain from any acts supporting the separatist regime. Under the second head the State must take judicial, political, or administrative measures to secure the applicant's individual rights.[143]

In *Stephens*, the ECtHR applied this 'tailored' approach to positive human rights obligations in an extraterritorial scenario. The applicant complained that he had been prevented from entering his house located in a UN buffer zone established between the Turkish and Greek Cypriot cease fire lines in Northern Cyprus. The Court noted that neither Cyprus nor Turkey were in control of the area in question. Recalling *Ilascu*, the Court found the application inadmissible, yet not for lack of effective control but because the applicant had failed to challenge 'a particular action or inaction by these States or otherwise substantiated any breach by the said States of their duty to take all the appropriate measures with regard to the applicant's rights *which are still within their power to take*'.[144]

While the ECtHR's approach to extraterritorial human rights protection has evolved considerably since its 2001 admissibility decision in *Bankovic*, the first prong of its jurisdictional test that focuses on 'acts performed outside the State's territory' appears **of limited value to the business and human rights domain because it is premised on the physical presence of State agents outside the State's territory**. Traditional variations of the 'control over persons' test (diplomatic protection; abduction; interception of vessels), the 'control over an area test' (military intervention and interception) and the 'public powers' test focus on a jurisdictional link established between State agents operating abroad and victims of human rights violations located on the territory of another State. In the standard business and human rights scenario, by contrast, the extraterritorial human rights violation will be committed by a corporate (non-state) actor, a constituent part of which (the parent company) is domiciled within the State's territorial jurisdiction and thus under its *de facto* and *de jure* control. Where **corporate conduct is**

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[140] E. Ct. H. R., *Hirsi Jamaa and Others v Italy* (Grand Chamber Judgment of 23 February 2012) para 81.

[141] E. Ct. H. R., *Ilascu & Others v. Moldova & Russia* (Grand Chamber Judgment of 08 July 2004) para 331.

[142] In *Assanidze*, the ECtHR established Georgia's jurisdiction over parts of its territory occupied by the Ajarian Autonomous Republic on the basis of a 'presumption of competence' in respect of a State's territory; see E. Ct. H. R., *Assanidze v Georgia* (Grand Chamber Judgment of 08 April 2004) para 139.

[143] E. Ct. H. R., *Sargsyan v Azerbaijan* (Grand Chamber Judgment of 16 June 2015) paras 130-131.

[144] E. Ct. H. R., *Kyriakoula Stephens v Cyprus, Turkey and the United Nations* (Admissibility Decision of 11 December 2008), emphasis added; see also *Isaak and Others v Turkey* (Admissibility Decision of 28 September 2006).

directly attributable to the State (i.e., corporations acting as state agents), extraterritorial corporate human rights abuse can bring an individual under that State's human rights jurisdiction.[145] The Court's approach to positive extraterritorial human rights obligations in situations of military intervention and occupation can be of help in addressing **extraterritorial corporate human rights abuse in conflict-affected** areas.[146]

State obligations to prevent corporate-related human rights violations in relation to acts producing effects outside the State's territory

A further exception to the 'primarily territorial' interpretation of Article 1 ECHR concerns acts of public authorities performed inside the State's territory that produce effects outside the State's territory: 'The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its territory'.[147] This category is less well-defined than the previous ones and not always easy to distinguish as it can be difficult to determine whether (the relevant part of) an act was 'performed' inside or outside the State's borders.

The best known examples of 'extraterritorial effects' cases concern the extradition or deportation of an individual to a country where she faces substantial risks of being subjected to serious human rights violations (*non-refoulement*).[148] In these cases, the responsibility of the extraditing State is engaged in virtue of acts performed on its own territory that are likely to contribute to human rights violations in the receiving State:

> In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[149]

While the ECtHR's factsheet on extraterritoriality includes these *non-refoulement* cases,[150] they do not amount to an exercise of extraterritorial jurisdiction proper because the individual is at the relevant time of the act located on the State's territory. As the Court notes in *Bankovic*, because 'liability is incurred

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[145] Whereas the test for establishing jurisdiction under Article 1 ECHR cannot be equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law; see E. Ct. H. R., *Jaloud v The Netherlands* (Grand Chamber Judgment of 20 November 2014) para 154.

[146] According the UNGPs, corporations operating in conflict-affected areas should treat the risk of complicity in gross human rights violations as a legal compliance issue; see UNGPs (n 3) para 23.

[147] E. Ct. H. R., *Al-Skeini and Others v United Kingdom* (Grand Chamber Judgment of 7 July 2011) para 133.

[148] See, for example, E. Ct. H. R., *Soering v United Kingdom* (Judgment of 7 July 1989); *Vilvarajah and Others v United Kingdom* (Judgment of 30 October 1991); *H.L.R. v France* (Grand Chamber Judgment of 29 April 1997); *Mamatkulov and Askarov v Turkey* (Grand Chamber Judgment of 4 February 2005); *Bader and Kanbor v Sweden* (Judgment of 8 November 2005); *Garabayev v Russia* (Judgment of 7 June 2007); *Soldatenko v Ukraine* (Judgment of 23 October 2008).

[149] E. Ct. H. R., *Soering v United Kingdom* (Judgment of 7 July 1989) para 91.

[150] E. Ct. H. R., 'Factsheet: Extra-Territorial Jurisdiction of States Parties to the European Convention on Human Rights' (February 2016).

in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, … such cases do not concern the actual exercise of a State's competence or jurisdiction abroad'.[151] The Court's *non-refoulement* jurisprudence is nevertheless significant for the present purpose because it indicates that **a State can be held accountable for acts performed within its territorial jurisdiction that facilitate or contribute to human rights violations committed on the territory of another State**.

Significantly, the protection in *non-refoulement* cases extends to **threats to human rights that emanate from private (non-state) actors abroad**. In *Ahmed*, the applicant complained that his expulsion to Somalia – at the time plagued by an internal armed conflict – would put him at risk of serious human rights violations by the faction of General Aideed, a non-state actor. The European Commission of Human Rights unanimously found that the applicant's expulsion would amount to a violation of Article 3 ECHR: 'It is sufficient that those who hold substantial power within the State, even though they are not the Government, threaten the life and security of the applicant'.[152] In *HLR v. France*, the risk of human rights violations emanated from a criminal organisation involved in drug trafficking in Colombia. While the application was unsuccessful on the facts, the Court accepted that the protection of Article 3 ECHR could extend to threats emanating from private actors, particularly in situations where the public authorities of the receiving State are unable to afford sufficient protection to the individual.[153] This principle has been consolidated in the Court's more recent case-law. In *J.K. and Others v. Sweden*, for example, the applicants successfully argued that their deportation to Iraq would amount to a violation of Article 3 ECHR. The first applicant and his family found themselves targeted by al-Qaeda for having offered construction and transport services to American clients in Iraq. The ECtHR, sitting as Grand Chamber, held that Article 3 also applies 'where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[154]

The ECtHR has furthermore found States under an obligation **to regulate and control private actors within their territorial jurisdiction in order to prevent human rights violations committed outside their borders**. *Rantsev* concerned the death of a woman who had allegedly been illegally trafficked by a non-State actor from Russia to Cyprus to work as a prostitute.[155] Of interest for the present purpose is the ECtHR's assessment of Russia's responsibility for Ms Rantseva's death in Cyprus. The applicant, Ms Rantseva's father, complained that the failure of Russian public authorities to protect his daughter from human trafficking and to investigate her removal from Russian territory and subsequent death in Cyprus amounted to a violation of *inter alia* Article 2 and Article 4 ECHR. The Russian Government submitted that the application was inadmissible *ratione loci* because the relevant events took place outside its borders. In particular, the State had no 'actual authority' over the territory of the Republic of Cyprus. The Court instead focussed on Russia's responsibility for acts and omissions within its own territorial jurisdiction:

> The applicant's complaints against Russia in the present case concern the latter's alleged failure to take the necessary measures to protect Ms Rantseva from the risk of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and

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[151] E. Ct. H. R., *Banković & Others v Belgium & Others* (Grand Chamber Admissibility Decision of 12 December 2001), at para 68. An exception are extraterritorial non-refoulement cases, where an individual under the effective control of State agents operating abroad is transferred into the custody of another State; see E. Ct. H. R., *Al-Saadoon and Mufdi v United Kingdom* (Judgment of 2 March 2010).

[152] E. Cm. H. R., *Ahmed v Austria* (Admissibility Decision of 02 March 1995) para 68; upheld by E. Ct. H. R., *Ahmed v Austria* (Judgment of 17 December 1996) para 46.

[153] E. Ct. H. R., *HLR v France* (Grand Chamber Judgment of 29 April 1997) paras 39-44.

[154] E. Ct. H. R., *J. K. and Others v Sweden* (Grand Chamber Judgment of 23 August 2016) para 80.

[155] E. Ct. H. R., *Rantsev v Cyprus & Russia* (Judgment of 7 January 2010).

> her subsequent death. The Court observes that such complaints are not predicated on the assertion that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities. In the light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking, it is not outside the Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she has been trafficked. Similarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia. It is for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case.[156]

This approach was confirmed in the more recent case of *M. and Others v Italy and Bulgaria* where the Court considered itself competent 'to examine whether Bulgaria complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect the first applicant from trafficking and to investigate the possibility that she had been trafficked'.[157]

Both in *non-refoulement* cases (where the threat to human rights emanates from a private actor abroad) and in the Rantsev scenario (where a private actor within the State's territorial jurisdiction contributes to human rights violations that materialise in a third State), the necessary jurisdictional link is established through the victim's presence on the State's territory. This appears the main difference to the approach taken by the UN Treaty Bodies according to which a State's 'control, power or authority over *business entities*' is sufficient to trigger extraterritorial human rights obligations even if the individual is permanently located outside the State's borders.[158] However, there are a number of **extraterritorial effects cases in which the Strasbourg organs seem to dispense with the requirement that the applicant must be located on the State's territory**.

The ECtHR's Grand Chamber judgment in *Nada* concerned Switzerland's decision to enforce a UN Security Council travel ban by denying the applicant entry into Swiss territory from the Italian enclave of Campione. The ECtHR found the Switzerland in violation of Articles 8 and 13 of the European Convention without considering the issue of extraterritorial jurisdiction, even though the applicant was affected by a decision of Swiss public authorities while located on the territory of another State.[159] On the facts, the early case of *X and Y versus Switzerland* is rather similar to *Nada*. The applicant, a German citizen, complained that he was denied entry into Liechtenstein by order of the Swiss Federal Aliens' Police, based on an international treaty agreement between Liechtenstein and Switzerland.[160] According to the European Commission of Human Rights, Switzerland was 'responsible' under Article 1 ECHR not only 'for the effect which the prohibition of entry produced in its own territory' but also 'insofar as the prohibition of entry produced an effect in Liechtenstein'. According to the special treaty relationship between the two countries, 'it was Swiss jurisdiction which was used and extended to Liechtenstein'. Accordingly, 'acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention'.[161]

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[156] *Id.* para 107. On the merits, the Court found that Russia had not violated its procedural obligations under Article 2 ECHR to investigate Ms Rantseva's death, nor its positive obligations under Article 4 ECHR to take operational measures in protecting her against being trafficked by a non-State actor. The Court did, however, find Russia in violation of its procedural obligations under Article 4 ECHR to investigate the alleged trafficking.

[157] E. Ct. H. R., *M and Others v Italy and Bulgaria* (Judgment of 31 July 2012) para 167.

[158] See 'Draft General Comment' (n 9) para 33, emphasis added.

[159] E. Ct. H. R., *Nada v Switzerland* (Grand Chamber Judgment of 12 September 2012).

[160] E. Cm. H. R., *X and Y v Switzerland* (Admissibility Decision of 14 July 1977).

[161] *Id.*

Kovacic concerned the domestic regulation of business activities by Slovenian public authorities that had extraterritorial effects on the applicants' enjoyment of their human rights in Croatia. A Slovenian law prevented the applicants from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank. The Slovenian government submitted that its obligation to secure property rights under Article 1 Protocol 1 was confined to property within its jurisdiction, and that none of the instances of extraterritorial jurisdiction recognised by the ECtHR was applicable in the present case. The Strasbourg Court, after reiterating that 'the responsibility of the High Contracting Parties may be engaged by acts of their authorities that produce effects outside their own territory', accepted that the banking legislation introduced by the Slovenian National Assembly 'affected' the applicants' property rights in Croatia. 'This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged'.[162]

In *Treska*, the applicants complained that Italy had *inter alia* violated their rights under Article 1 Protocol 1 (the right to property) by purchasing premises from the Albanian Government in Albania which Italy knew or should have known had been confiscated without compensation. While on the basis of the alleged facts the ECtHR did not find the applicants within Italian jurisdiction, it applied its *Ilascu* jurisprudence on positive state obligations in an extraterritorial effects case: 'Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention'.[163] These cases may suggest **a gradual de-centring of human rights obligations from State territory**, which would bring the ECtHR's interpretation of Article 1 ECHR in line with the approach taken by the UN Human Rights Committee. According to the Committee, 'jurisdiction' under Article 2(1) ICCPR is established on the basis of 'the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, *wherever they occurred*'.[164] This approach, whether based on *de facto* control or *de jure* authority, finds further support in the Concurring Opinion of Judge Bonello in *Al Skeini*:

> Jurisdiction means no less and no more than 'authority over' and 'control of'. In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional … The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations *and from having the capacity to fulfil them* (or not to fulfil them.[165]

What is clear is that provided there is a tangible jurisdictional link between the State and an individual located outside its borders, that State can incur **obligations to secure human rights against extraterritorial corporate abuse**. What remains less clear is whether the necessary jurisdictional link with the victim can be established by virtue of (*de facto* or *de jure*) control that the State exercises over (constituent parts of) the corporate perpetrator of human rights violations domiciled within its territorial

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[162] E. Ct. H. R., *Kovaĉić & Others v Slovenia* (Admissibility Decision of 1 April 2004); the case was struck out at the merits stage due to new facts that had come to the Court's attention.

[163] E. Ct. H. R., *Treska and Treska v Albania and Italy* (Admissibility Decision of 29 June 2006) p. 12; see further *Manoilescu and Sobrescu v Romania and Russia* (Admissibility Decision of 93 March 2005); *Vrioni and Others v Albania and Italy* (Judgment of 29 December 2012).

[164] H. R. Cm., *Lopez Burgos v Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 (29 July 1981) para 12.2, emphasis added; see also I. A. Cm. H. R., *Coard et al v The United States*, Report No. 109/99 (29 September 1999) para 37, noting that 'the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control'.

[165] E. Ct. H. R., *Al-Skeini and Others v United Kingdom* (Grand Chamber Judgment of 7 July 2011), Concurring Opinion of Judge Bonello, paras 12, 13.

jurisdiction.[166] Also in this regard, Judge Bonello's 'capacity' approach to jurisdiction in *Al Skeini* could be helpful to accommodate the view of the UN Treaty Bodies, namely that extraterritorial obligations arise when States may exercise control, power or authority over business entities in a way that impacts on the enjoyment of human rights abroad.[167]

State obligations to redress corporate-related human rights violations committed outside the State's territory

The European Convention, as international human rights law more generally, imposes obligations on States to redress corporate-related human rights violations. This includes ensuring victims' access to justice and effective remedies in private (tort) litigations for corporate human rights abuse. According to the UNGPs, 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[168] In particular, States should 'ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of remedy are unavailable'. This also applies to cross-border litigations where 'claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim'.[169]

As public institutions of the State, domestic courts adjudicating disputes between private parties are directly bound by the European Convention on Human Rights.[170] Of particular relevance in this regard are Article 6 ECHR that requires States to ensure that victims have access to court to vindicate their civil rights protected under domestic law;[171] and Article 13 ECHR that guarantees an effective remedy before a national authority to everyone who claims that their rights under the European Convention have been violated.[172] **To the extent that the ECHR applies extraterritorially, States are duty-bound to ensure access to justice and effective civil remedies for third-country victims of corporate-related human rights violations.**

Many cases engaging Article 6 ECHR in an extraterritorial scenario concern the **involvement of the public organs of one State in judicial proceedings between private parties in another State**. These cases can be subsumed, as the ECtHR does in *Al Skeini*, under the category of acts of public authorities which 'produce effects' outside the State's territory.[173] They commonly also involve the (alleged) exercise of public powers on the territory of another State with the latter's invitation, consent, or acquiescence. In the early case of *Drozd & Jaousek v France and Spain*, the applicants had been convicted by Andorran courts for an armed robbery committed in Andorra. Before the ECtHR, the applicants submitted that France and Spain should be held accountable for alleged violations of their fair trial rights by Andorran courts because at the time both States were responsible for the appointment of judges and the administration of justice in Andorra. The Strasbourg Court considered that 'jurisdiction is not limited to the national territory of the High Contracting Parties; their responsibility can be involved

[166] See also Augenstein & Kinley (n 115) who argue that absent direct attribution of corporate conduct to the state, the jurisdictional link required by Article 1 ECHR is established in virtue of the control the state exercises over the corporation and indirectly over the third-country victim.

[167] See 'Draft General Comment' (n 9) paras 33, 36.

[168] See UNGPs (n 3) para 26.

[169] *Id.*

[170] See *infra*, PART B section 3.2.

[171] E. Ct. H. R., *Golder v. United Kingdom* (Judgment of 21 February 1975).

[172] E. Ct. H. R., *Silver v. United Kingdom* (Judgment of 25 March 1983) para 113.

[173] E. Ct. H. R., *Al-Skeini and Others v United Kingdom* (Grand Chamber Judgment of 7 July 2011) para 133.

because of acts of their authorities producing effects outside their own territory'. Accordingly, 'the question to be decided here is whether the acts complained of by Mr Drozd and Mr. Janousek can be attributed to France or Spain or both, even though there were not performed on the territory of those States'.[174] On the facts, the ECtHR did not find the applicants within France' or Spain's jurisdiction because the judges they had appointed acted in their capacity as members of the Andorran judiciary. While the Court did not consider that the defendant States had to verify the proceedings before the Andorran Courts in the light of Article 6 ECHR, it emphasised the obligation of Convention States 'to refuse their cooperation' with other States if it emerges that an act of the other State is 'the result of a flagrant denial of justice'.[175]

To date, applications following the reasoning of *Drozd & Janousek* have largely been unsuccessful. In *McElhinney*, the applicant complained that, by invoking and applying the doctrine of sovereign immunity, the United Kingdom violated his rights under Article 6 ECHR in judicial proceedings before Irish courts concerning his compensation claim for an alleged assault by a British soldier on the territory of the Republic of Ireland:

> In so far as the applicant complains under Article 6 § 1 of the Convention about the stance taken by the Government of the United Kingdom in the Irish proceedings, the Court does not consider it necessary to address in the abstract the question of whether the actions of a Government as a litigant before the courts of another Contracting State can engage their responsibility under Article 6 § 1 of the Convention. The Court considers that, in the particular circumstances of the case, the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring him within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention.[176]

Similarly, that the Swedish ambassador in *Naku* raised the defence of sovereign immunity in civil proceedings brought against Sweden in Lithuanian courts did not amount to an exercise of jurisdiction by the Swedish State over the applicant.[177] *Kalogeropoulou* concerned a civil action in Greek courts brought by 257 relatives of the victims of a massacre perpetrated by Nazi occupation forces, with a view to obtaining compensation from the German State. Despite Germany having raised the defence of sovereign immunity, the Greek courts found in favour of the applicants. Subsequently, the Greek Minister of Justice prevented the applicants from bringing enforcement proceedings against Germany, a decision that was confirmed by the Greek courts. The ECtHR did not find the applicants under German jurisdiction within the meaning of Article 1 ECHR because 'the proceedings were conducted exclusively in Greece and the Greek courts were the only bodies with sovereign power over the applicants', while 'the German courts had no direct or indirect influence over the decisions and judgments delivered in Greece'.[178]

Of greater relevance to the business and human rights domain are cases in which individuals located outside the State's territory seek redress for (corporate) human rights violations in the domestic courts of that State. The ECtHR's case-law in this area suggests that **States exercise jurisdiction within the meaning of Article 1 ECHR over third-country victims of (corporate-related) human rights violations that bring criminal or civil proceedings in their domestic courts.** In *Ben El Mahi*, the Morocco-based applicants complained about the publication of Muhammed cartoons in privately owned Danish newspapers. They alleged that the State's failure to prevent the publication of the caricatures which also circulated in Morocco violated their human rights under the European Convention. The ECtHR declared the application inadmissible for lack of jurisdiction:

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[174] E. Ct. H. R., *Drozd & Janousek v France & Spain* (Judgment of 26 June 1992) para 91.

[175] *Id.* para 97.

[176] E. Ct. H. R., *McElhinney v Ireland and the United Kingdom* (Grand Chamber Admissibility Decision of 09 February 2000).

[177] E. Ct. H. R., *Naku v Lithuania and Sweden* (Judgment of 08 November 2016).

[178] E. Ct. H. R., *Kalogeropoulou and Others v Greece and Germany* (Admissibility Decision of 12 December 2002).

> Here the applicants are a Moroccan national resident in Morocco and two Moroccan associations which are based in morocco and operate in that country. The Court considers that there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extraterritorial act. Accordingly, the Court has no competence to examine the applicants' substantive complaints under the Articles of the Convention relied upon.[179]

The case of *White versus Sweden* concerned a similar factual scenario and was decided within days after *Ben El Mahi*. The applicant lived in Mozambique and complained that two publications in Swedish newspapers associating him with various crimes (including the murder of Prime Minister Olof Palme) violated his right to private and family life (Article 8 ECHR). Different from the applicants in *Ben El Mahi*, Mr White had brought private prosecution for defamation against the newspapers in Sweden before turning to the Strasbourg Court. The responsible editors were acquitted by a Swedish District Court, a judgment that was upheld on appeal. Without further ado, the ECtHR found the applicant under Swedish jurisdiction, simply noting that 'this complaint is not manifestly ill-founded … [nor] inadmissible on any other grounds'.[180] With both the applicants in *Ben El Mahi* and *White* located outside the State's territory, the decisive difference appears to be that Mr White's attempt to vindicate his rights in Sweden had brought him under that State's jurisdiction within the meaning of Article 1 ECHR.

In *Markovic*, the Grand Chamber of the European Court of Human Rights had to consider whether individuals located outside the State's territory could benefit from Article 6 ECHR (access to court) when attempting to bring civil proceedings in the domestic courts of that State.[181] The facts of the case relate to the same events as those considered by the Court in *Bankovic*, namely the 1999 NATO airstrikes on the Former Republic of Yugoslavia. In 2000, the applicants had brought a civil action for damages against the Italian government in the Italian courts. The Italian Court of Cassation eventually dismissed the action for lack of jurisdiction because the claimants were not entitled under Italian law to seek reparation from the Italian State for civil damages incurred as a result of an alleged violation of public international law. In Strasbourg, the applicants complained that the Court of Cassation's ruling violated their human rights under Article 6 ECHR in conjunction with Article 1 ECHR. The Grand Chamber first distinguished *Markovic* from *Bankovic*:

> [In *Bankovic*, the Court] did not find any 'jurisdictional link' for the purposes of Article 1 of the Convention between the victims of the act complained of and the respondent States and held that the action concerned did not engage the latter's responsibility under the Convention. … However, as regards the complaint under Article 6 taken in conjunction with Article 1 of the Convention, the Court notes that in *Bankovic and Others* the respondent Government stressed that it was possible for proceedings to be brought in the Italian domestic courts, thus implying that the existence of a jurisdictional link could not be excluded for future complaints made on a different basis. …The Court does not share the view of the Italian and British Governments that the subsequent institution of proceedings at the national level does not give rise to any obligation on the part of the State towards the person bringing the proceedings.[182]

On that basis, the Court unanimously held that the applicants came within Italy's human rights jurisdiction:

> If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason

[179] E. Ct. H. R., *Ben El Mahi v Denmark* (Admissibility Decision of 11 December 2006).

[180] E. Ct. H. R., *White versus Sweden* (Judgment of 19 December 2006) para 16.

[181] E. Ct. H. R., *Marković and Others v Italy* (Grand Chamber Judgment of 14 December 2006).

[182] *Id.* paras 50-53.

> why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned.[183]

The Court's conclusions are rather far reaching: 'Once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a "jurisdictional link" for the purposes of Article 1'. Accordingly, 'if civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6'.[184]

At the merits stage, the Court gave some further indication as to what is required by the European Convention in such cases. On the one hand, the protection of Article 6 ECHR extends only to disputes over civil rights and obligations 'which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) rights and obligations in the substantive law of the Contracting State'.[185] Moreover, the right to access to court is not absolute but can be limited in domestic law, provided the limitation does not impair the essence of the right and pursues a legitimate aim through proportionate means.[186] Yet on the other hand, the ECtHR cautioned that undue restrictions of access to court in domestic law may result in a denial of justice incompatible with Article 6:

> It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.[187]

If a victim of corporate-related human rights violations located outside the State's territory brings civil proceedings in the domestic courts of that State, it comes under the latter's human rights jurisdiction within the meaning of Article 1 ECHR. This entails that decisions of domestic courts must be in conformity with the ECHR.[188] In exceptional cases where the **victim faces a flagrant denial of justice**, a domestic court's decision to decline jurisdiction may be found in violation of Article 6 ECHR (*forum necessitatis* jurisdiction).[189] Otherwise, the ECHR does not enshrine a right of victims to have their case decided by a civil court of a State party to the European Convention. But it does entail that **domestic courts have to consider Article 6 when deciding upon their jurisdiction in private international law**. Hence, while Article 6 ECHR does not oblige States to create any particular remedy, 'it can be relied upon by anyone who considers that an interference with the exercise of one of his (civil) rights is

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[183] *Id.* paras 53-54.

[184] *Id.* para 54.

[185] *Id.* para 93.

[186] *Id.* para 99.

[187] *Id.* para 97.

[188] On the applicability of Article 6 ECHR to States' private international law see E. Ct. H. R., *Prince Hans-Adam II of Liechtenstein v Germany* (Judgment of 12 July 2001).

[189] In *Gauthier*, the European Commission of Human Rights considered but did not decide this issue; see E. Cm. H. R., *Gauthier v Belgium* (Admissibility Decision of 16 October 1996). In non-refoulement cases, the Court has already accepted that an applicant may not be extradited in circumstances where she 'has suffered or risks suffering a flagrant denial of a fair trial in a requesting country'; see E. Ct. H. R., *Soering v United Kingdom* (Judgment of 7 July 1989) para 113. See further L. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Springer: 2014) 100-103, 141-143.

unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1'.[190]

In *Arlewin*, the ECtHR reviewed a domestic court's decision to decline jurisdiction in private international law in the light of the European Convention.[191] The applicant complained that the refusal of Swedish courts to accept jurisdiction in a defamation case he had brought against a television program that was produced in Sweden but broadcasted by a company domiciled in the UK violated his rights under Article 6 ECHR. The Strasbourg Court agreed:

> [T]here were strong connections between Sweden, on the one hand, and the television program and the UK company responsible for the program contents and involved in its broadcasts, on the other. These circumstances are sufficient to conclude that there was a prima facie obligation on the Swedish State to secure the applicant's rights, including the right to access to court.[192]

The ECtHR further noted that 'the possible access of the applicant to a court in a different country, namely the United Kingdom, does not affect Sweden's responsibility as such under Article 1, but is rather a factor to consider in determining whether the lack of access to a court in Sweden, in the particular circumstances of the case, was proportionate under Article 6'.[193] On the merits, the Court concluded that 'the Swedish State had an obligation, under Article 6, to provide the applicant with an effective access to court' because instituting defamation proceedings in the UK did not constitute a 'reasonable and practicable alternative'.[194]

Conclusion

The study reviewed case-law of the European Court of Human Rights in two areas of international legal doctrine of particular relevance to business and human rights: the application of international human rights law to corporate-related human rights violations (the public/private divide); and the jurisdictional reach of international human rights treaties (the territoriality/extraterritoriality divide). The overall focus of the study was on a scenario of particular relevance to the business and human rights domain, namely human rights obligations of the home state of the parent or controlling company of 'multi-national' corporations to protect third-country victims against extraterritorial corporate abuse.

While the European Convention does not directly bind corporations as non-state actors, it imposes negative and positive obligations on States to secure human rights against corporate abuse. Focussing on corporate-related human rights violations in the environmental sphere, the study distinguished three types of State obligations: substantive obligations to regulate and control corporate operations including the licensing, setting up and supervision of dangerous activities and the provision of information about such activities to the general public; procedural obligations to ensure an informed decision-making process that involves public participation, public investigations, scientific studies and environmental impact assessments; and obligations relating to law enforcement and the judicial process, including access to justice and the provision of effective remedies.

While the ECtHR's approach to extraterritorial human rights protection has significantly evolved over the past years, it remains premised upon an essentially territorial notion of jurisdiction. While, accordingly, the extraterritorial application of the European Convention remains the exception, the Court has given State obligations to secure human rights 'to everyone within their jurisdiction' (Article 1 ECHR) an increasingly broad interpretation that encompasses acts performed outside the State's

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[190] E. Ct. H. R., *Marković and Others v Italy* (Grand Chamber Judgment of 14 December 2006) para 98.

[191] E. Ct. H. R., *Arlewin v Sweden* (Judgment of 1 March 2016).

[192] *Id.* para 65.

[193] *Id.* para 65.

[194] *Id.* para 73.

territory and acts producing effects outside the State's territory. The category of acts performed outside the State's territory is of limited value to the business and human rights domain because it requires the physical presence of State agents on the territory of another State. While extraterritorial effects cases appear more promising in this regard the ECtHR has not (yet) endorsed the view of the UN Treaty Bodies according to which a State's exercise of authority and control over a corporation domiciled within its territory is sufficient to establish a jurisdictional link with a victim located outside its borders. The Court's approach to extraterritorial jurisdiction in the context of access to justice, finally, suggests that once an individual located outside the State's territory brings criminal or civil proceedings in the domestic courts of that State, it comes under the latter's human rights jurisdiction within the meaning of Article 1 ECHR.