# MASTER THESIS

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„The European Court of Human Rights and its impact on the duty of Private Actors to respect human rights“

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# I. INTRODUCTION

With growing economic inter-dependence, increase in cross-border trade and reduced obstacles to the entry into new markets, enterprises have emerged as powerful entities, capable of both major contributions to sustainable development and of inflicting great harm. Some of the largest multinationals easily rival nation states in terms of economic power and influence. This development has resulted in increased efforts to impose stricter duties to respect human rights on private actors, and when they do not, to enact remedies through which they are held accountable.[1] When corporations and other business entities do not comply with human rights obligations, the consequences are often irreversible. There may be a loss of reputation and higher costs for the business entity and apologies, time or new management do not always reverse the situation. Executives of companies often struggle to enact and adhere to a human rights policy in their operations and even unknowingly make themselves complicit in human rights violations. As an example, in the February 2011 protests in Egypt, the government forced Vodafone to cut off mobile and Internet services. The Mubarak regime took over the service to send pro-government text messages and demand actions against democratic protestors. While Vodafone claims they had no choice but to follow the Egyptian government´s orders, human rights activists hold the view that they were indirectly accountable for these human rights infringements.[2]

It is a primary responsibility of all states to protect and promote human rights. Still, as the Vodafone example shows, businesses and multinational corporations continue to contribute to, or are complicit in, human rights infringements. Private entities may be faced with a difficult situation when human rights violations are committed by other actors in their supply chains, for example when third world companies use forced labour, discriminate and commit their workers to working conditions that pose a risk to their life and health. This is a common problem in the environmental sphere, where their industries may have damaging effects on the environment or demand the relocation of persons to the point where, in extreme instances,

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[1] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn. Oxford University Press 2015) 51-52

[2] Susan Ariel Aaronson and Ian Higham, ´Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms`[2013] Human Rights Quarterly, 334. Reference to Salil Tripathi, *How Should Internet and Phone Companies Respond in Egypt?*, Institute for Human Rights and Business Commentary, 4 Feb. 2011, <http://www.institutehrb.org/blogs/staff/internet_providers_in_egypt.html.>

communities can be ruined.[3] This is due to the fact that, in developing countries in particularly, there is often a lack of resources or capacity to control companies which extract natural resources such as oil or water. This lack of capacity has been explained by the ´weak governments, poor regulation, lax enforcement, corruption or a too close relationship between business and governments´[4]

In addition, in the context of conflicts, states may also entrust private security forces with the task of providing their citizens with security. This may be ill founded, as there is an uneasy balance between that aim and the private entities main economic goal of maximising profits. These private actors can even become complicit in human rights violations by way of ignoring them and not keeping appropriate human rights policies.[5] Furthermore, in many countries, work relating to social welfare services, prisons, schools, health care and supply of natural resources such as water, is being delegated to private actors.[6]

As a response to this increased focus on privatization, the framework "Protect, Respect and Remedy: A Framework for Business and Human Rights", was established and approved by the United Nations Human Rights Council in 2008. Under this framework, created by UN Special Representative John Ruggie, general principles were developed and published in 2011. Their purpose was to encourage and enable private companies to implement the framework. The framework has been seen as a model for corporations and a motivation for them to protect their public image, a tool to encourage them in taking voluntary steps and implementing human rights policies in their operations. Nevertheless, its efficiency has been questioned. Lack of clarity regarding human rights violations in host states, complications such as the limited liability of corporations and jurisdictional issues, are among the concerns that have been mentioned in this context. The most important problem however is that while

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[3] G. Chandler, ´Corporate Liability, Human Rights and the Modern Business`, Conference organized by Justice and Sweet & Maxwell, 12 June 2006,1 and Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, politics, morals,* (3rd edn, Oxford University Press 2008) 1387-1388

[4] Alan Boyle, ´Human Rights and the Environment: Where Next?` [2012] The European Journal of International Law (EJIL) 619

[5] G. Chandler, ´Corporate Liability, Human Rights and the Modern Business`, Conference organized by JUSTICE and Sweet & Maxwell, 12 June 2006 and Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, politics, morals,* (3rd edn. Oxford University Press 2008) 1387-1388

[6] Clare Ovey and Robin C.A, Jacobs and White: European Convention on Human Rights, (4th edn. Oxford University Press 2006) 17

companies are considered to be bound by human rights rules in their functions, it remains difficult to establish evidence of *legally binding* obligations.[7]

At the same time, the European Court of Human Rights has found that ´a state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals`.[8] Therefore, it is worth reflecting whether the European Court of Human rights (hereinafter ´the Court`), which is considered one of the most effective tools to deal with human rights violations in the international and regional legal system, could guide the way in the future. While the Court is neither a direct appellate body for domestic judicial systems, nor provides advisory opinions to national judges on human rights issues, it is consistently becoming more embedded into the domestic legal systems.[9] This is for example evident from the fact that the Court has, in its rulings, found that *private actors have human rights obligations*, and thus extended the scope of the obligation to uphold human rights indirectly into the private sphere.

Although almost none of these cases deal explicitly with corporations and businesses as perpetrators, they still give rise to the following question for the future: Could the Court be *an effective tool* to address and remedy human rights violations of corporations and other business entities? There are two factors that can be considered in order to address this question:

Firstly, how has the Court placed *ECHR obligations on private actors* within its jurisdiction? As will be elaborated in the thesis, the method used by the Court for this purpose is called the ´horizontal` effect or ´Drittwirkung` effect (hereinafter referred to as the latter). This entails that the Court finds an act or omission, by a private third-party, to be a violation of an ECHR right, but holds the State liable for the violation through its positive obligations.[10] There is an increasing number of cases where the Court either rules on legal

7 Professor Jörg Polakiewicz, Corporate Responsibility to Respect human rights, Challenges and Opportunities for Europe and Japan, Discussion Paper No. 9, October 2012, Nagoya University, Center for Asian Legal Exchange, 8

8 August Reinisch, ´Underlying Causes of the perceived changes`, in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 80. Reference to *Costello-Roberts v United Kingdom*, App no. 13134/87 (ECtHR 25 Mar 1993) para 27

9 Laurence R. Helfer, ´Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime` [2008] The European Journal of International Law (EJIL) 135

10 Dawn Oliver and Jörg Fedtke (ed) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007)165 and 617; Oliver de Schutter, ´Human Rights in Employments Relationships: Contracts as Power` in Filip Dorssemont, Klaus Lörscher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (A&C Black 2014) 118. Schutter states that ´Drittwirkung`, is a typically Germanic compound word indicating – in abstract terms – the effect ( wirkung ) of something which is regarded as essentially bipolar in nature (in this case fundamental rights) on an outsider to the relationship in question (a third party or Dritter )", originally developed in Germany to justify reliance,

relations in the private sphere or explicitly states that the relevant rules apply regardless of whether it involves a public or private actors or entity and it is more and more common that the Court gives a detailed description of how companies should behave in relation to human rights.

Secondly, it should be asked whether the Court *applies the principles identified in the Ruggie Framework, directly or implicitly***,** in instances where it addresses ECHR violations of private actors. If it does, that must be an indicator that the Court is moving in the way paved by the framework or at least acknowledging its guiding effects.

In order to address the questions raised, it is necessary to examine *the nature and scope of the positive obligations* that the ECHR places on Member States when corporations or other private entities are the human rights violators. Studies of the Court´s case law will demonstrate how far the Court ´stretches` the positive obligations of states into the private sphere, and the way it *describes the standards* that private actors are required to comply with. In the assessment, *the UN General Principles* are applied to each case and the way they have been employed by the Court will be examined, if it does so at all.

Clearly, many corporations have their parent- or holding companies situated within the territory of the ECHR contracting parties (hereinafter ´Member States`) while their subsidiaries; branches or subcontractors, are located outside the geographical jurisdiction of the ECHR. It is therefore also necessary to discuss the legal principles and precedents relating the ECHR´s *extraterritorial application* in such circumstances. The last part of this thesis is dedicated to general conclusions from the observations.

## II. THE ´RUGGIE FRAMEWORK`: UN GENERAL PRINCIPLES ON BUSINESSES

### 1. The Ruggie Framework and its background

In 2005, Harvard Professor John Ruggie was appointed UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. In light of previous failed attempts by policymakers and the general opposition of executives to have mandatory human rights obligations in place, he was determined to develop applicable human rights norms for businesses. In 2006, he addressed

particularly in Labour Disputes of fundamental rights in German basic law. In English this would be called ´Third Party Effect` the topic of corporate accountability and gave the following summary which received a generally positive action:

> "[A] fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other.
>
> This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed"[11]

He emphasized that the failure of companies to meet the responsibility to comply with human rights norms, would call for the judgment of *public opinion*, through media, employees, communities, consumers, civil society and investors. Then he drew attention to the lack of international binding obligations of corporations:

> "There are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become directs bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended. Moreover, there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firms, or by establishing some form of international jurisdiction. [...]." [12]

During the next years he began working on the framework "Protect, Respect and Remedy: A Framework for Business and Human Rights", approved unanimously by the Human Rights Council in 2008 (hereinafter ´the Ruggie Framework`).[13] Ruggie sought to understand what local companies in home states and firms in host states were doing in respect of human rights. In this complex task he was confronted with various obstacles such as:

- The diversity of companies: different human rights rules apply to different firms. While a textile firm for example should ensure its workers right to water and honour the ban on forced labour, an internet company would need to focus on the right to privacy
- Managers are in many cases unaware of human rights obligations
- Governments decide whether human rights obligations should be mandatory or voluntary within their states domain

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[11] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2007) UN Doc A/HRC/4/035

[12] Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other business Enterprises, ´Promotion and Protection of Human Rights`(2006) UN doc. E/CN. 4/2006/97, para 65

[13] John Ruggie, Special Representative of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights,* Human Rights Council (2008) U.N. Doc. A/HRC/8/5, 9

- Difficulties holding firms in home states accountable since they operate mostly through subsidiaries and indirect suppliers, located in a host state
- Different cultures and views of states towards human rights[14]

In 2008, the framework was published. It was based on the following three pillars:

1. The **state´s duty to protect** against human rights abuses by third parties, including business;
2. The **corporate responsibility to respect** human rights; and
3. Victims access to **effective remedy**, both judicial and non-judicial[15]

According to the background explanations that accompanied the framework, the first pillar on the state duty to protect, highlights the states´ *"primary role in preventing and addressing corporate-related human rights abuses."* In reports on the issue to the Human Rights Council, Ruggie had pointed out that in respect of ´state duty to protect`, businesses "lack adequate policies and regulatory arrangements to manage the complex business and human rights agenda." He concluded that there was "substantial legal and policy incoherence and gaps", such as non-enforcement of existing laws, with "serious consequences for victims, companies and states themselves." Ruggie proposed "five priority areas" where states should fulfil this role:

1. striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own ability to protect rights when entering into economic agreements;
2. promoting respect for human rights when states do business with businesses, whether as owners, investors, insurers, procurers or simply promoters;
3. fostering corporate cultures respectful of human rights at home and abroad;
4. devising innovative policies to guide companies operating in conflict-affected areas; and
5. examining the cross-cutting issue of extraterritoriality.[16]

As for the ´corporate responsibility to respect`, it is considered "a global standard of conduct for all business enterprises wherever they operate, independent of any existing or non-existing willingness of states to comply with their own human rights obligations."[17]

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[14] Susan Ariel Aaronson and Ian Higham, ´Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms`[2013] Human Rights Quarterly, 338-339

[15] John Ruggie, Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy"* Framework, Human Rights Council (2011) U.N. Doc. A/HRC/17/31, para 5 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>

[16] United Nations Human Rights Office of the High Commissioner, ´Background` (2010) <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf, 2-3

[17] John Ruggie, Special Representative of the Secretary-General, *Guiding Principles on Business and Human*

In the background report, Ruggie explains that the word ´respect` is used instead of ´duty to protect`, because respecting human rights is not a *direct* obligation of companies under international human rights law. It is however reflected in the domestic laws and international soft law instruments ratified by states. This responsibility of corporations covers all business activities and third parties connected thereto, while taking into account the different challenges in various countries.

Lastly, the report emphasizes that although the state is not directly liable for human rights abuses committed by private individuals, it breaches its obligations to protect if those acts can be attributed to it, or if it fails to take positive measures to prevent them. [18]

## 2. The United Nations' General Principles on businesses under the Ruggie framework

An implementation of the Ruggie Framework was carried out through the development of the "Guiding Principles on Business and Human Rights" (hereinafter the ´General Principles`) with resolution 17/4 on June 16, 2011.[19] For the purposes of examining whether the European Court of Human Rights applies these General Principles in its case law on legal relations between private actors, only those of the principles, which the Court has relied on, will be examined and used for comparison in Chapter 3.

### *2.1. "State duty to protect human rights"*

**The 1st General Principle** focuses on *preventive measures.* It is the fundamental principle in the context of the European Court of Human Rights´ rulings in the private sphere and its ´Drittwirkung` effects:

> 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.

In meeting their duty, the state must i.a.:

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*Rights: Implementing the United Nations "Protect, Respect and Remedy"* Framework, Human Rights Council (2011) U.N. Doc. A/HRC/17/31, para 5 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> 13

[18] United Nations Human Rights Office of the High Commissioner, ´Background` September 2010 <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf, accessed 18 January 2017, 2-3

[19] John Ruggie, Special Representative of the Secretary-General, *Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework* (2010)

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps

(b) Ensure that other laws and policies governing the creation and on-going operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

[…]

A state, which fails to enforce the laws and regulations on respect for human rights in businesses, leaves a legal gap in this area, which may include non-discrimination, labour laws, environment, privacy etc. The state is *required to make a reform* in cases where there is a lack of enforcement, and decide the appropriate steps needed to remedy these shortcomings. Moreover, states *should provide guidance* to business enterprises on respecting human rights and "advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families."[20]

Other General Principles in this relation, such as the **7th General Principle**, include for example assisting business enterprises, which operate in conflict-affected areas, due to high risk of human rights abuses. This means helping them to identify, prevent or mitigate the abuses, address the risk of abuse and focus especially on gender-based sexual violence. States should also deny access to public support and services for those enterprises that are involved in human rights abuses and ensure that they are taking effective measures when assessing the risk of involvement in such abuse.[21]

### *2.2. ′Corporate responsibility to respect human rights`*

The second part of the General Principles, on corporate responsibility, includes a number of Principles applied by the Court. It begins with **the 11th General Principle,** also one of the fundamental principles in relation to private actors. It states:

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[20] John Ruggie, Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy"* Framework, Human Rights Council (2011) U.N. Doc. A/HRC/17/31, para 5 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> 3-6

[21] Ibid, 7 ( a-d), 8-9

> Business enterprises should respect human rights. This means that they should **avoid infringing** on the human rights of others and should **address adverse human rights impacts** with which they are involved.

In order to address adverse human rights impacts, the business enterprises must take adequate action to prevent, mitigate and provide for remediation if necessary.

According to **the 12th Principle**, the human rights enjoying protection are *at minimum* those in the international Bill of Human Rights and in the International Labour Organization´s Declaration on Fundamental Principles and the Rights at Work. There may be additional standards for example where specific groups of persons are affected, such as women, ethnic, religious minorities, children, persons with disabilities etc.

**The 13th Principle** requires that business enterprises avoid having adverse human rights impacts through their activities and address them if they occur. Further, it requires that they seek to prevent or mitigate human rights *directly linked* with their operations, products or services by their business relationships, even though they did not contribute to them themselves.

**The 15th Principle** places an obligation on states to keep in place *a policy* on their commitment to respect human rights, a due diligence process to identify what needs to be prevented, mitigated or remedied. They must be aware of their human rights obligations and how they will attain compliance.

Lastly, **the 23rd Principle** emphasizes *the universality* of human rights rules, regardless of different challenges and rules in each location. This means applying all applicable laws and internationally recognized human rights rules.

### *2.3. ´Access to Remedy`*

The third part, to ensure ´access to remedy`, is the basis for the first part on ´state duty to protect`. Without it, the latter is rendered meaningless and ineffective.

**The 25th Principle** expresses:

> As **part of their duty to protect** against business-related human rights abuse, States must take appropriate steps to **ensure, through judicial, administrative, legislative** or other appropriate means, that when such abuses occur within their territory and/or jurisdiction **those affected have access to effective remedy.**

**The 26th Principle** takes the former a step further and states that, when fulfilling the requirement to provide access to remedy, it must ensure that legal or practical barriers do not lead to *a denial of justice*. The legal barriers could be the way legal responsibility is attributed among members of a corporate group to avoid criminal accountability, there could be a denial of justice in the host state and the home state is inaccessible and certain groups of persons might be excluded from enjoying the same level of protection as others. The practical and procedural barriers could for example be inappropriate costs for bringing claims or lack of resources for legal representation. Particular attention should be given to individuals from vulnerable groups that face cultural, social, physical and financial impediments to access and benefit from these mechanisms. Special attention is needed for these groups in terms of access, procedure and outcome, as part of the remedial process.[22]

### 3. Reactions to the General Principles and corporations

During the years 2008-2011, Ruggie and his team went through great effort in order to get firms to adopt the Framework and the General Principles. They i.a. publicised information with a transparent, multinational process on how to apply the rules and made it accessible to companies. In spite of efforts to promote and encourage implementation, human rights groups, governments and firms remained sceptical. Although the Framework received seemingly positive reactions from NGO´s and civil society, these same parties and international organizations and other human rights´ groups expressed their concerns that that General Principles did not oblige states to regulate the over-seas activities of companies domiciled in their own jurisdiction. There were no measures on how states should give human rights law a primacy status, especially when they take part in international trade and foreign investments. In general, these groups found the General Principles inadequate, lacking both binding international legal commitments and an enforcement process to ensure accountability of companies.[23]

Ruggie´s team then did surveys on the responses of governments and corporations to the Principles. It turned out that a large part of responding governments did not monitor human

[22] Ibid, 29-30

[23] *See, e.g.*, Joint Note from the Business and Human Rights Resource Centre et al. to the SRSG (Business & Human Rights), Follow-Up Action in South-East Asia (1 June 2011) <http://www.business-humanrights.org/Links/Repository/1006456> and *Group Urges International Community to Address Human Rights Abuses by Corporations*, Ghana Bus. News, 1 June 2011, <http://www.ghanabusinessnews.com/2011/06/01/group-urges-international-community-to-address-human-rights-abuses- by-corporations/>. See also Daniel Blackburn, ´Ruggie and the European Court of Human Rights: business on trial or blue rinse?`, 12

rights practises by local and overseas firms, or educate them about these responsibilities. The same applied to any coherent economic and human rights policies.[24]

It still remains unclear which governments will implement the Framework and Principles, and how they will do it. However, there are some who definitely encourage their firms to respect these rules. Aaronson and Higham draw two examples of such governments in their analysis:

<u>Example 1: The use of conflict minerals in Congo by US companies</u>
"In 2010, the US Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act). It requires companies to file annual reports delineating if the company used certain conflict minerals that originated in the Democratic Republic of the Congo or adjoining countries. The report must also describe the measures taken to exercise due diligence as to the source and chain of custody of the minerals. Such transparency would help the firm determine "whether the minerals used by the company financed or benefitted armed groups identified as perpetrating serious human rights abuses in certain US government reports."

<u>Example 2: Advanced Internet freedom and ban on sale of goods and services censoring Internet in Syria</u>
"In March 2010, the US Department of State convened the first meeting of information technology companies to discuss ways in which the private sector and government can work together to advance Internet freedom. State Department officials hoped to expand access to information and freedom of speech, while protecting citizens' rights to privacy. The United States also announced it would ban sale of goods and services that could be used to censor the Internet in Syria or enable human rights abuse. Soon thereafter, the EU announced a similar ban."[25]

Out of 80.000 multinational corporations, 381 can be found listed on the Business and Human Rights Resource centres' website as having a human rights policy in place.[26] Only a small part refers to the Ruggie Framework in their policies and in many cases they do not

[24] Susan Ariel Aaronson and Ian Higham, ′Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms`[2013] Human Rights Quarterly, 346-348
[25] Susan Ariel Aaronson and Ian Higham, ′Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms`[2013] Human Rights Quarterly, 351-352
[26] <https://business-humanrights.org/en/company-policy-statements-on-human-rights>

meet the minimum standards set by the framework. Also, International Conventions such as the International Bill of Rights and those under ILO are in most cases not referred to.[27]

Daniel Blackburn gives a critical view on the efficiency of the Ruggie Framework. He points out that there remain major barriers in holding companies accountable for human rights infringements. He counts factors such as legal personality, limited liability, corporate group structures and the veil of incorporation, jurisdictional problems between home and host States, the fact that Host State courts may be ineffective or inaccessible, problems of direct jurisdiction of international courts over private actors. In his words, he concludes:

> "The problem is precisely that Multinationals operate outside the jurisdiction of home States, and that host States have insufficiently strong and / or accessible legal systems. This is exacerbated massively by corporate group structures and limited liability, which largely defeat the whole project of holding corporations liable anyway. These are the problems, and Ruggie's Guiding Principles do nothing to change that. In fact, the Principles just don't address these issues in any serious or substantial way at all.

However, as Blackburn notes, regardless of the fact that it fails to address some important barriers, it still contains strategies, which serve to increase corporate liability. Voluntary negotiation and self-regulation is perhaps more suited to improve corporate behaviour than litigation.

Blackburn then raises the question whether the European Court of Human Rights can be a "vehicle" for implementing the Ruggie Framework. This is also the issue of this thesis.[28]

## III. THE EUROPEAN COURT OF HUMAN RIGHTS – AN EFFECTIVE TOOL TO BRING PRIVATE ACTORS TO ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS?

### 1. The European Court of Human Rights

The European Convention on Human Rights (hereinafter ´ECHR`), formally named ´Convention for the Protection of Human Rights and Fundamental Freedoms`, was signed in Rome in 1950 and ratified in 1953. By May 2012, all 47 Member States of the Council of Europe were parties to the convention, representing almost a quarter of the world´s countries. There are several factors that give the ECHR a special status as one of the most efficient existing regional human rights treaties within Human Rights Law. It established the first

[27] Susan Ariel Aaronson and Ian Higham, ´Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms`[2013] Human Rights Quarterly, 355-356
[28] Daniel Blackburn, ´Ruggie and the European Court of Human Rights: business on trial or blue rinse?`, 12-14

individual complaint procedure and became the most developed and productive judicial mechanism in the field to this day.[29] It has proved to be a ´living instrument` in two ways: A number of human rights have been added to the convention through protocols which were not in the original convention, such as the right to property, education and election. These protocols are however only binding to those parties who have ratified them. Also, the scope of its protection has expanded through a broader interpretation by the Court. The Court interprets the ECHR in light of present day conditions and applies a dynamic approach.[30]

According to Articles 1 and 13 of the ECHR, all parties (hereinafter the ´Member States`) are required to secure the rights protected therein, and to ensure that there are *effective remedies* before national authorities for those who´ s rights have been violated.[31] The wording "shall secure the rights to everyone within their jurisdiction the rights and freedoms defined in the Convention" in Article 1, illustrates the convention´s binding character. This enforcement system is unique in the sense that protocol 11, which provides for intra-state applications, also enables *individuals* to seek redress before the European Court of Human Rights (hereinafter the ´Court`).[32] According to Article 34 of the ECHR, individual complaints can be applications submitted by individuals, Non-governmental Organizations and, in certain instances, corporations or other ´group of individuals`. These individuals can only bring their claims of human rights violations against *the Member States,* the parties to the ECHR, and any claim against individuals or companies is dismissed *ratione personae*.[33]

## 2. Positive obligations of member states and the ´Drittwirkung` effect

### *2.1. The ´Positive obligations` doctrine*

The ECHR mainly focuses on limiting interferences by governments and public authorities with the rights protected therein. Member States have therefore various *negative obligations*, such as the traditional obligation not to torture under Article 3 of the ECHR. However, there are many areas where the state authorities are considered to have *positive*

[29] See e.g. Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, politics, morals,* (3rd edn. Oxford University Press 2008) 933

[30] Jan Klabbers, *International Law*, Cambridge (University Press 2013) 112; Philip Leach, *Taking a Case to the European Court of Human Rights*: *Blackstone´s Human Right´s series* (3rd edn, Oxford University Press 2011) 164

[32] Louwrens Rienk Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Asser Press 2014) 29

[33] Jörg Polakiewicz, ´Corporate Responsibility to Respect human rights, Challenges and Opportunities for Europe and Japan`, (2012) Nagoya University, Center for Asian Legal Exchange, Discussion Paper No. 9, October 2012, 8. Reference to Andrew Clapham, *Human Rights in the Private Sphere* (Oxford University Press 1993) 180

*obligations* to take action in order to prevent ECHR violations and to make a human right effective. This was established in ***Airey v Ireland*** where the right of access to the Court under Article 6(1) would only be made effective if measures were taken by the state to provide legal aid in civil proceedings.[34] The doctrine was also established in 1979 in relation to Article 8 on the right to privacy when the Court found that although a state refrains from infringing rights under the convention, it has not necessarily complied with its provision in Article 1. It held that "[…] nevertheless it (Article 1) does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."[35] Further reasoning for the doctrine can be found in its subsequent case law, such as in ***X and Y v. the Netherlands* (1985)**:

> "Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures **even in the sphere of the relations of individuals between themselves**. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection."[36]

In the context of Article 3 of the convention, the Court has on many occasions confirmed the ´positive obligations` doctrine. For instance, in ***A. V. v the United Kingdom (1998)*** the Court held:

> "... the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to **ensure** that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, **including such ill-treatment administered by private individuals."[37]**

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[34] *Airey v Ireland*, App no. 6289/73 (ECtHR, 9 October 1979) para 24
[35] *Marckx v. Belgium*, App no. 6833/74 (ECtHR, 13 June 1979) 14-15, para 31
[36] *X and Y v. the Netherlands*, App no. 8978/80 (ECtHR, 26 March 1985) paras 23, 24 and 27. See also e.g. *M.C. v. Bulgaria*, App no. 39272/98 (ECtHR, 4 December 2003)
and *August v. the United Kingdom,* App no. 36505/02 (ECtHR, 21 January 2003)
[37] *A. v. the United Kingdom*, App no. 25599/94 (ECtHR, 23 September 1998) para 22; *Z and Others v. the United Kingdom*, App no. 29392/95 (ECtHR, 10 May 2001) paras 73-75; *E. and Others v. the United Kingdom*, App no. 33218/96 (ECtHR, 26 November 2002) and *M.C. v. Bulgaria*, App no. 39272/98 (ECtHR, 4 December 2003) para 149

Another example is when a public or private individual or entity goes beyond what is necessary or performs an illegal act against a citizen, and the domestic court does not investigate, prosecute or punish the perpetrator, or rules no compensation for the victim. In such circumstances, the Court re-evaluates the act or omission of the relevant state and reviews the domestic ruling. This coheres with the accepted practise that, in order for the Member States to ´secure` the rights in the ECHR in accordance with Article 1, they must have certain obligations to take measures to ensure that human rights are not violated within their jurisdictions.[38]

Generally, the substantive human rights protected under Articles 2 to 11 of the ECHR, coupled with the general provision in Article 1, form the legal basis for positive obligations of Member States.[39] They may be expressed directly in these Articles or they may be developed in the Court´s precedents.[40] Some types of positive obligations only arise when it involves private actors. For example, in cases where the right to peaceful assembly under Article 11 is invoked, the state has the duty not interfere with the assembly, while also having to take action to protect demonstrators.[41]

To simplify, Keir Starmer has classified ´positive obligations` into five categories. They are:

1. A duty to *establish a legal framework* providing for the effective protection for Convention rights
2. A duty to *prevent unlawful interferences* with the Convention rights,
3. A duty to *provide information and advice* on matters concerning the Convention rights
4. A duty to *respond to breaches* of Convention rights and
5. A duty to *provide resources to individuals* to ensure respect for their rights.[42]

As for the extent of these duties, the Court has stated that the boundaries between positive and negative obligations are not always clear. But regardless of any clash between the two, it finds that the same principles apply. This includes balancing the competing public against

[38] Philip Leach, *Taking a Case to the European Court of Human Rights*: *Blackstone´s Human Right´s series* (3rd edn, OUP Oxford 2011) 166

[39]See for example: paper - Radu Mares, Defining the Limits of Corporate Responsibilities against the concept of legal positive obligations, Raoul Wallenberg Institute of Human Rights, Lund University, 40 Geo. Wash. Int'l L. Rev. 1157 (2008-2009), 1198

[40] Louwrens Rienk Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Asser Press 2014) 36

[41] Philip Leach, *Taking a Case to the European Court of Human Rights*: *Blackstone´s Human Right´s series* (3rd edn, OUP Oxford 2011) 166 - 167

[42] K. Starmer, 'Positive Obligations Under the Convention' in J. Jowell and J. Cooper (eds), *Understanding Human Rights Principles* (Oxford, Hart Publishing 2001) 146

private interests in each case.[43] The application of the ´proportionality test` is used similarly in both cases except for two aspects: When it comes to positive obligations, the domestic authorities are considered to enjoy *a wider margin of discretion* and there is *a prohibition of excessive inaction* by the state authorities as opposed to prohibition of excess action in a vertical relationship.[44]

The Court expressed its view on the ´positive obligations` doctrine of states in ***Ärzte für das Leben v. Austria (1988)****,* which involved the exercise of the right to freedom of association. In the case, the Court found that the Austrian state had not taken action in preventing the interference from the state during demonstrations by the people. It stated:

> *´Genuine, effective* freedom of peaceful assembly 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 object and purpose of Article 11** [which] sometimes requires **positive measures** to be taken, **even in the sphere of relations between individuals, if need be […]`**[45]

The Court shifted from ruling that Member States only had negative obligations under the ECHR, to a teleological, evolutionary interpretation of the convention. It ´created` positive obligations in order to make the Convention effective and practical, and not illusory and theoretical.[46]

The rationale for ´positive obligations` has not been explained thoroughly by the Court but they are considered to base on the theory that every basic right has three correlative duties: A duty to avoid depriving the right, a duty to respect the right and a duty to aid the deprived.[47] This method of ´creating obligations` by the Court makes it one of the most effective tools to protect human rights. Still, it has not been left without criticism. It has been pointed out by David Bilchitz that if the state is seen as the ´originator` of fundamental rights, and they apply to all individuals as a ´universality of rights`, then it would result in the creation of ´different legal frameworks that impose different obligations on private actors`.

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[43] See e.g. *Stjerna v Finland*, App no. 18131/91 (ECtHR, 25 November 1994) 60–61, para 38; see also *Keegan v Ireland*, App no. 16969/90 (ECtHR, 26 May 1994) 19, para 49

[44] Human Rights and the Private Sphere vol 1, A Comparative Study, Dean Spielmann, edited by Dawn Oliver and Jörg Fedtke, published in the Taylor & Francis e-Library, 2007, 530-531

[45] *"Ärzte für das Leben" v. Austria*, App no. 10126/82 (ECtHR, 21 June 1988) See also *Velasquez Rodriguez v Honduras*, judgment, series C No. 4, 172, 174 (Inter-American Court of Human Rights, July 29 1988)

[46] A paper - Radu Mares, Defining the Limits of Corporate Responsibilities against the concept of legal positive obligations, Raoul Wallenberg Institute of Human Rights, Lund University 40 Geo. Wash. Int'l L. Rev. 1157 (2008-2009), 1199-1201

[47] Henry Shue, *Basic Rights: Substance, Affluence and US Foreign Policy* (2nd edn Princeton University Press 1996) 52-53; Henry Shue ´The Interdependence of Duties` in P. Alston and K Tomasevki (eds): *The Right to Food* (Marytinus Nijhoff Publishers 1984) 84-85

That this may lead to corporations having fundamental-rights obligations in some states and not in others. Another flaw could be that the protection is not absolute in relation to private actors within ECHR jurisdiction. First of all, it does not reach the action of every non-state actor and secondly, the requirements ´created` by the Court for the State are not exhaustive. The behaviour of all non-state actors cannot be foreseen, they might breach human rights in a way that is not covered by the state´s reasonable legal framework.[48]

Even though the doctrine of ´positive obligations` has been criticized, it has been considered "a robust tool for the enforcement of the Convention rights, in conferring indirect horizontal effect on the substantive provisions of the ECHR."[49] This will be discussed in more detail in the following chapter.

### *2.2. The ´Drittwirkung`effect*

As previously noted, a complaint that is directed against an individual is inadmissible in accordance with ECHR *ratione personae*, i.e. Articles 19, 32, 33 and 34 and the Court´s jurisprudence.[50] Only *Member States* can be held accountable by the Court. But what if the perpetrator is *not an actor of the Member State* but the violation takes place within its jurisdiction? In that case, the perpetrator is a *´private actor`*. A private actor within the context of this paper can be described as:

> "An individual or collective participants in economic or social life which are not controlled by the state and usually act for profit."[51]

A private actor could therefore be *an individual* or *a corporation* working in *pure economic* interests or *an entity* with the additional aim of serving social interests such as health, media, internet use etc. A corporation or legal entity is established under private law

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[48] David Bilchitz, Corporations and the Limits of State-Based Models for Protection of Human Rights in International Law, Article, Indiana Journal of Global Legal Studies, Volume 23, Issue 1, 2016, published by Indiana University Press, 153-155

[49] Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007) 523

[50] Aalt Willem Heringa, Arien Van Rin, Ben Vermeulen, Cees Flinterman, Edwin Bleichrodt, Fried Van Hoof, Jeroen Schokkenbroek, Leo Zwaak, Marc Viering, Pieter Van Dik,Yutaka Arai, *Theory and practice of the European Convention on Human Rights* (Eds. Arjen van Rijn, Fried van Hoof, Leo Zwaak, Peter van Dijk, 4th edn, Antwerpen-Oxford, Intersentia 2006) 29

[51] <https://understandingsocialscience.wordpress.com/2010/11/11/key-term-definition-private-actorsbusiness-sector/> The term ´private actor` will be used in this paper since it is narrower than that of ´non-state actor`. The latter has been defined in various ways, although in its simplest definition it is ´an entity which is not a state` and often includes ´benign civil socitey groups` such as NGO´s. See e.g. Andrew Clapham, ´Non-State Actors`, in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, with David Harris (eds.) *International Human Rights Law* (3rd edn.Oxford University press 2014)

and has no attribution to the state. Since applications for the Court´s assessment against private actors fall *outside its jurisdiction* and can only be directed against states, there is a gap in the protection against ECHR violations when the perpetrator is a private actor.[52] In the Court´s earlier case law, ***Florin Mihăilescu v. Romania***, the responding government argued that Article 1 ECHR was inapplicable since the case concerned the contractual relationships between a private company and the applicant. The Court reacted by stating that according to Article 34 of the Convention, it could only deal with applications alleging a violation of the rights guaranteed by the Convention, claimed to have been committed by State bodies. It had therefore no jurisdiction to consider applications directed against private individuals or businesses.[53]

In an attempt to fill this gap, the Court has since developed the method of applying the ´positive obligations` doctrine in legal relations between private actors. The Court has on a number of occasions asserted that *measures must be taken by states* in order to safeguard human rights *also in the private sphere of relations between individuals themselves.* As Oliver de Schutter describes it:

> "ECHR provisions are transposed into ´horizontal` relationships between private parties by applying directly the rights and freedoms in the convention to the inter-individual relations…by empowering domestic courts to adjudicate private law disputes on the basis of the substantive guarantees of the convention."

This is sometimes called ´direct third-party liability`; ´Drittwirkung` or ´horizontal effect` in European Law. Still, the legal grounds on which it is based remain debatable.[54] The following arguments have been set forward:

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52 Stéfanie Khoury,´Transnational Corporations and the European Court of Human Rights: reflections on the indirect and direct approaches to accountability` [2010] Sortus: Oñati Journal of Emergent Socio-legal Studies, 75-76

53 *Florin Mihăilescu v. Romania,* App no. 47748/99 (ECtHR, 26 August 2003)

54 Oliver de Schutter, ´Human Rights in Employments Relationships: Contracts as Power` in Filip Dorssemont, Klaus Lörscher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (A&C Black 2014) 118; Aalt Willem Heringa, Arien Van Rin, Ben Vermeulen, Cees Flinterman, Edwin Bleichrodt, Fried Van Hoof, Jeroen Schokkenbroek, Leo Zwaak, Marc Viering, Pieter Van Dik,Yutaka Arai, *Theory and practice of the European Convention on Human Rights* (Eds. Arjen van Rijn, Fried van Hoof, Leo Zwaak, Peter van Dijk, 4th edn, Antwerpen-Oxford, Intersentia 2006) 29; Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007) 522-523

Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007)

### 2.2.1. *Arguments against ´Drittwirkung`*

Some legal scholars define the term ´Drittwirkung` as the "possibility for an individual to enforce their ECHR rights against other individuals" or "enforce the observance of law concerning human rights via some procedure or other". However, this definition is unclear in the light of the fact that rights of private actors cannot be effectuated directly under any procedures of the ECHR, and the Court´s case law only concerns a supervisory system and responsibilities of the Member States. In *Verein gegen Tierfabriken*, it was stated that it was neither necessary nor desirable to create a general theory on the extent to which the Court guarantees the ECHR rights in relations between private individuals.[55] Therefore, Leo Zwaak would rather find this method as having an ´indirect Drittwirkung` effect. Another ambiguity is that the convention itself does not state that it has direct application to legal relations of private individuals.[56]

### 2.2.2. *Arguments for ´Drittwirkung`*

So where is it implied that there exists such a phenomenon as ´Drittwirkung` effect? First of all, although the drafters of the ECHR did not necessarily intend to create it when drafting the convention, it is considered to lead from the rights and freedoms enshrined therein. The preamble does not make a distinction between public and private relations but states that that it "[…] aims at securing the universal and effective recognition and observance of the rights therein declared." This general respect of the drafters for the fundamental rights and freedoms is an argument for the existence of ´Drittwirkung`.[57] Secondly, as noted by Dean Spielmann, "Article 1 of the ECHR has constituted one of the basic provisions implementing state responsibility for private action, notably by forming the foundation of the doctrine of 'positive obligations'." This view was established in ***Cyprus v Turkey***, where the Court reasoned:

> "As to the applicant Government's further claim that this 'jurisdiction' must also be taken to extend to the acts of private parties in northern Cyprus who violate the rights of Greek Cypriots or Turkish Cypriots living there, the Court … confines itself to noting … that

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[55] *Verein gegen Tierfabriken v Switzerland*, App no. 24699/94 (ECtHR, 28 June 2001) para 40

[56] Aalt Willem Heringa, Arien Van Rin, Ben Vermeulen, Cees Flinterman, Edwin Bleichrodt, Fried Van Hoof, Jeroen Schokkenbroek, Leo Zwaak, Marc Viering, Pieter Van Dik,Yutaka Arai, *Theory and practice of the European Convention on Human Rights* (Eds. Arjen van Rijn, Fried van Hoof, Leo Zwaak, Peter van Dijk, 4th edn, Antwerpen-Oxford, Intersentia 2006) 29

[57] Aalt Willem Heringa, Arien Van Rin, Ben Vermeulen, Cees Flinterman, Edwin Bleichrodt, Fried Van Hoof, Jeroen Schokkenbroek, Leo Zwaak, Marc Viering, Pieter Van Dik,Yutaka Arai, *Theory and practice of the European Convention on Human Rights* (Eds. Arjen van Rijn, Fried van Hoof, Leo Zwaak, Peter van Dijk, 4th edn, Antwerpen-Oxford, Intersentia 2006) 31

> 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 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.[58]

Thirdly, its existence is produced from the *principle of effectiveness* of the rights contained in the ECHR and the consideration that private actors have human rights obligations, which *lead directly from the ECHR*.[59] This was recently reiterated by judge Pinto de Albuquerque´s dissenting opinion in ***Barbalescu v Romania***:

> "Convention rights and freedoms have **a horizontal effect**, insofar as they are not only directly binding on public entities in the Contracting Parties to the Convention, **but also indirectly binding on private persons or entities, the Contracting State being responsible for preventing and remedying Convention violations by private persons or entities.** This is an **obligation of result,** not merely an obligation of means.[60]

David Bilchitz also summarized this in the following manner:

> "The state not only assumes an obligation not to violate rights itself (the duty to respect) and to provide concrete goods (the duty to fulfil), but it is also required to ensure that other, **non-state actors** do not imperil the interests protected by fundamental rights (the duty to protect). The state is thus **responsible for imposing obligations on non-state actors that they would otherwise not have** in relation to fundamental rights and creating enforcement mechanisms to ensure they are realized."[61]

Lastly, the wording of some of the substantive provisions of the convention are also an indicator of the drafters´ intention to cover relations between private actors. For example, Article 13 suggests that violations may be committed by private parties (an effective remedy is required 'before a national authority *notwithstanding that the violation has been committed by persons acting in an official capacity'*). Similarly, Article 17 prohibits ´any state, group or person` to go against the rights secured in the convention or go beyond its limits, implying it refers to private groups or persons.[62]

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[58] *United Communist Party of Turkey and others v Turkey*, App No. 19392/92 (ECtHR, 30 January 1998) 17–18, para 29

[59] See e.g. Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007) 626

[60] *Barbalescu v Romania*, App no. 61496/08 (ECtHR, 12 January 2016) para 23

[61] David Bilchitz, ´Corporations and the Limits of State-Based Models for Protection of Human Rights in International Law` [2016] Indiana Journal of Global Legal Studies, 8

[62] Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere vol 1, A Comparative Study* (Taylor & Francis e-Library 2007) 527. Referring i.a. to *Norwood v United Kingdom*, App no. 23131/03 (ECtHR, 16 November 2004)

## 3. Attribution

Jurisdictional issues discussed above, rarely cause complications when the alleged violator is a state-owned corporation or entity. However, when it is not established under public law or it is unclear whether it is attributed to the state, an issue of establishing state attribution arises. Daniel Augenstein analysed the criteria that needs to be fulfilled for attribution to be established.[63] If the corporation or other entity may be established under private law or if it has been delegated rights or obligations usually given to public authorities, then its acts could still be attributable to the state. It could also be public but enjoy institutional or operational independence, or the nature and context of its functions represent a public function.[64] This was also established by the International Law Commission, which concluded in its final Commentary to the draft articles on State Responsibility, that states were responsible at an international level for conduct of private companies, ´empowered by the law of the state to exercise elements of governmental authorities` and ´acting in that capacity in that particular instance`.[65]

Finally, Member States cannot avoid responsibility by delegating their tasks to private actors. In a recent judgment, the case of ***Vokota-Bojic v. Switzerland***, 18 October 2016, the Court emphasized:

> "[…] A State cannot absolve itself from responsibility under the Convention by delegating its obligations to private bodies or individuals […] Given that the insurance company was operating the State insurance scheme and that it was regarded by the domestic regime as a public authority, the company must thus be regarded as a public authority and acts committed by it must be imputable to the respondent State.[66]

[63] Daniel 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 (2011) 7-9

[64] Ibid, 3.

[65] ILC, ´Report of the ILC, adopted at its 53rd session, Commentary to the draft articles, Article 5 para. (1) of the Commentary` (2001) UN Doc A/56/10, 92

[66] *Vukota-Bojic v. Switzerland*, App no. 61838/10 (ECtHR, 18 October 2016) para 47. See also e.g. *Oregon v. Republic of Moldova*, App no. 22743/07 (ECtHR, 25 October 2016)
and *Costello-Roberts v United Kingdom*, App no. 13134/87 (ECtHR, 25 March 1993) para 27

## IV. CASE STUDY: DOES THE EUROPEAN COURT OF HUMAN RIGHTS APPLY THE RUGGIE FRAMEWORK?

As previously noted, the Court has not given a general definition of what the positive obligations entail. They vary, depending on the sector in question, the legal sphere and the relevant margin of discretion that the Member States enjoy. Private actors most commonly breach convention rights within the fields they operate, i.e. in *social* and *economic* sectors and much of the affected substantive rights concern *health and safety violations (health facilities and the environment), privacy issues and freedom of expression (internet use, data protection and media) and forced labour*. Therefore, for the purposes of answering the questions discussed in the Introduction, examples from the Court´s case law in these areas will be scrutinized. The cases selected include infringements of articles 2 on the right to life, 4 on forced labour and slavery, 8 on the right to privacy and 11 on the freedom of expression. These articles are typically violated when corporations and other private actors are involved. Article 4 is relevant in light of the fact that it is increasingly common that businesses run by private actors employ persons under conditions amounting to forced labour or slavery. When interpreting these Articles, the Court often needs to find a balance between the interests of the applicant and of the other individuals, or those of the public.[67]

In the Court´s case law, the contents of the positive obligations can be categorized according to the different duties they relate to. It should be noted that ***only some or all*** these obligations may be addressed by the Court, depending on the facts of each individual case. They may entail:

- Promoting certain values and policies in the relevant area
- Setting laws to protect and ensure compliance
- Setting a legal framework which provide legal remedies
- Assessing the alleged violation by applying a certain interpretation and particular criteria (the Court goes as far as carrying out its own fact finding and evaluating evidence)
- Ensuring compliance with procedural rules

Also, instances will be identified where the Court recalls the contents of the human rights standards and gives instructions on how private actors are to ´supposed to behave` in the eyes of the Court.

[67] See e.g. Clare Ovey and Robin C.A, Jacobs and White: European Convention on Human Rights, (4th edn. Oxford University Press 2006) 289

## 1. Companies working in the environmental sphere

### *1.1. The right to have access to health-related information: The case of Vilnes and others v. Norway, 24/3/2014*[68]

#### 1.1.1. *Facts*

This case was brought before the court by a total of seven applicants, five Norwegians a Swede and an Icelandic national, who were all former deep-sea divers. The events that led to their complaint concerned an oil drilling operation in the North Sea in June 1966 after the Norwegian government proclaimed sovereignty over the seafloor and the ground beneath it around Norway. The divers participated in the oil drilling operation for the benefit of the petroleum industry and worked for different diving companies on various diving vessels. The work was carried out between the years of 1966 to 1990. The applicants complained that they were suffering from serious health issues, such as lung diseases, encephalopathy, reduced hearing, decompression sickness, bends and post traumatic syndrome disease (PTSD), due to unsafe working conditions which had put their lives and health at risk. They claimed that there had been deviations from safety regulations, for example when the period of saturation diving was extended, the breathing gas supply was increased and standardized decompression tables were not used. This lowered the companies´ labour costs and gave them an advantage on a competitive level with other oil companies. One of the applicants, Mr. Vilnes, suffered extreme disabilities such as permanent brain and spinal injuries as a result of decompression sickness. According to a report published in December 2002, between 350 and 400 deep sea divers had developed long-term health problems due to these diving operations and although the Government did not assume legal liability for these injuries, it set up a compensation scheme to assume its political and moral duties. All applicants received disability pension from the oil companies involved. On a domestic level, the Oslo City Council found, in August 2007, that the State was to pay additional damages to Mr. Vilnes and Mr. Mueldal. The decision was however overturned by the High Court and the Supreme Court on the basis that the State had no strict liability in the case due to an absence of a close link between the diving and the health injuries. It concluded that the State could not be responsible for the employer´s liability, in this case the oil companies for which the applicants worked, and found that the State had already carried out its duties by implementing safety regulations, inspection and supervision.

The Court found that the main issue was the use of excessively rapid decompression

[68] *Vilnes and others v. Norway*, App no. 52806/09 and 22703/10 (ECtHR, 24 March 2014)

tables, leading to long-term illness and not the sudden decompression, which could be lethal. Therefore, it decided to assess the case from the angle of the State´s positive obligations under Article 8 ECHR[69]. It partially rejected the applicant´s claims but in regard to the issue of the decompression tables, the Court disagreed with the authorities and held that it was "less convinced that, as argued by the Government, the respondent State bore no responsibility for the fact that diving companies continued to use rapid decompression tables for as long as they did."[70] The State had failed to meet its obligations to respect the applicants´ right to privacy under Article 8[71] and had therefore violated that provision.[72]

### 1.1.2. *The responsibility of the oil and diving companies to respect human rights*

The decompression tables were the essential in managing health risks to the applicants and contained the necessary information to assess those risks. According to the Court, the diving companies could have prevented or mitigated the damage by standardizing the decompression tables, making diving safe. However, *they had not standardized the tables* and handled them instead as their business secrets, using those that gave them *a competitive advantage* and served them economically.[73] In other words, *transparency regarding the tables was not in place*, so that the applicants and other divers could have all the information needed for their health-risk assessment.[74] The companies should have ensured transparency and provided the applicants with the information needed to assess their life and health risks[75]. Here, the Court clearly applied the **11th General Principle** and the duty of corporations to prevent or mitigate human rights breaches.[76]

[69] Para 234
[70] Para 233
[71] When environmental hazards are an endangerment to life and health, Article 2 may be invoked. The Court will assess whether the state did everything it could to prevent a life from being put at risk, whether duties to provide information, monitor health conditions or set necessary regulations. However, Article 8 on the right to privacy, is increasingly invoked instead of Article 2, when it involves environmental health risks and access to information. See e.g. *Guerra and others v Italy,* App no. 14967/89, (ECtHR, 19 February 1998) In the case, 40 applicants lived within 1 kilometer of a chemical factory which was classified as high risk to health. The applicant´s right to private life and familiy life under Article 8 was breached when they suffered direct effects from the toxic emissions and had not been provided with the necessary information by the state to assess the risk of living there to their health.
[72] Para 244
[73] Paras 237-238
[74] Para 244
[75] Paras 242 and 244
[76] Para 236

### 1.1.3. *The Norwegian State´s duty to ensure* ***the corporation´s compliance with safety regulations and that individuals are provided with necessary information for health-risk assessment***

As for safety regulations, the Court found that the Labour Inspection Authority and the Petroleum Directorate had not sought information, as a prerequisite for a safety standard proof. It stated: *"It seems that the diving companies were left with little accountability vis-à-vis the authorities, and were allowed to deal with the tables as their business secrets and thus enjoyed for a considerable period a wide latitude in opting for decompression tables that offered competitive advantages serving their own business interests."*[77] The Norwegian authorities tried to maintain that only information concerning risks that have *already materialized* should be taken into account when Article 8 was challenged. The Court found this reasoning to be without merit. On the contrary, similarly to the interpretation of Article 2 ECHR, the Court concluded that *a particular emphasis should be on preventive measures* when it involved the right to access information.[78] They *should have ensured* that the companies kept full transparency regarding the tables.[79]

Regarding information access, the Court declared *that the state authorities neither took measures* with a view to give the applicants "*information enabling them to appreciate* whether a table used in a diving operation was comparatively fast or whether it was conservative" nor did they take steps to *inform them of their concerns regarding the important differences* between decompression tables and the risk of health problems leading there from.[80] The State should have protected the applicants and other divers *by ensuring that they had all the information needed for their health-risk assessment.*[81]

In both instances in the reasoning above, the Court relies on the **1st General Principle** and preventive measures in order to protect. When corporations have environmental effects or operate in the environment, which lead to the health of persons being endangered, the state has the responsibility to ensure that safety regulations are complied with and that information access is in place. The Court even declares explicitly that ´*a particular emphasis should be on preventive measures*` when it involves the right to access information for health

[77] Paras 237-238
[78] Para 235
[79] Para 244
[80] Paras 242 and 244
[81] Para 244

risk assessment. The Court provides further guidance by advising that protective measures *could have been taken* in the course of *inspections and granting of licenses*.[82]

### 1.1.4. ***Commentary***

This is a classic example of a ´Drittwirkung effect`. After ´creating` indirect liability of the companies, the Court states that the state *failed its positive obligations* to take appropriate measures and gives instructions on how the surveillance could have been carried out.

The Court could have applied the **12th General principle** according to which corporations should implement a policy referring i.a. to the International Labour Organization´s Declaration on Fundamental Principles and the Rights at Work. Nevertheless, this judgment is precedence for any company, to have in place safety standards for their workers, in particularly where the work involves a possible a threat to their health.

## ***1.2. The right to enjoy protection from natural disasters: Özel and others v. Turkey, 2/5/ 2016***[83]

### 1.2.1. ***Facts***

On 17 August 1999, the city of Izmit and surrounding area of the Marmaris region in Turkey, was hit by deadly earthquake, one of the most serious ever recorded. The region was classified as a "major risk zone" for earthquakes and its buildings were subject to specific building requirements. The applicants in the case were eight relatives of persons buried alive under buildings in the earthquake. According to expert reports, there were grave deficiencies in the building structures, such as incorrect use of sand and sea-gravel, too many floors without appropriate adjustments etc. Domestically, only two persons (an associate and a scientist) out of five working for the construction company were indicted by the Turkish Prosecutor. While the criminal proceedings lasted 12 years, a statute of limitation prevented further convictions against the other three individuals. The Turkish court ruled a small amount of damages to the relatives and did not allow for prosecution of the government officials who neglected to enforce the building regulation, under which the construction company was bound by law. The Court found that there had been a violation of Article 2 of the ECHR, since the State had not met its positive obligations to protect its nationals.[84] In the case, the Court emphasized what it has stated in a number of cases, that the positive

[82] Para 244
[83] *Özel and others v. Turkey*, App no. 14350/05, 15245/05 and 16051/05 (ECtHR, 2 May 2016)
[84] Paras 191-200

obligations of states under Article 2 of the European Convention to protect the right of every person to his or her life, *apply to all activities, whether public or not*, that are capable of endangering life, including natural catastrophes.[85]

### 1.2.2. ***The responsibility of the construction company to respect human rights***

Interestingly, the Court´s assessment does not mention the liability of the construction company, and how it was bound by ECHR rights, or any instructions for that matter. Without ´correcting` the national court´s decision and its interpretation or fact-finding, all of its argumentation is directed towards the state.

### 1.2.3. ***The Turkish State´s duty to ensure that regulations and spatial planning give adequate protection and ensure effective and impartial investigation, punishment and redress***

The local authorities that issued the construction permits were under a primary responsibility to act in *preventing the lethal effects* of a potential earthquake in the region. The Court noted that the state was fully aware of the area being a "major risk zone" and of the risks of an earthquake. Thus, it was obliged to strengthen regulations and spatial planning to be able to respond in lethal, natural disasters. [86]

As recalled in the judgment, there is an independent and distinct obligation under Article 2 ECHR *to carry out an independent, impartial investigation and to lead effective proceedings*, also in cases of natural disasters.[87] The authorities had charged the private individuals that promoted and took part in the construction of the buildings, which collapsed in the earthquakes, causing the death of 195 individuals. In the Court´s view, the State had the positive obligation to prevent tolerance or collusion of illegal acts, by investigating deficiencies in implementations of the regulatory framework and identify implicated state actors. The criminal proceedings lasted 12 years, but resulted in only two individuals being convicted out of five who were prosecuted. This was not in compliance with the obligation to *carry out prompt investigation and proceedings*. Moreover, the Court found that the *refusal to prosecute governmental officials* raised fundamental concerns.[88]

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[85] Para 170
[86] Para 173
[87] Para 189
[88] Paras 170-199, 189 in particular

Similarly to the ***Vilnes case***, the Court focuses on the **1st General Principle** whereby preventive measures and a thorough investigation and effective proceedings are the main duty of the State. Another point of consideration is the comment made by the Court that the "refusal to prosecute governmental officials, raised fundamental concerns". Although too vague to be seen a part of the argumentation, the Court may be indicating its opinion that the positive obligation to provide impartial legal remedy in the **26th General Principle** under the 3rd pillar of the framework, i.e. a remedy *absent of any corruption,* should have been complied with in the case.

#### 1.2.4. *Commentary*

This decision has raised a number of questions among scholars. The development has been that the Court increasingly embeds itself into the national system and directs its human rights standards to private actors in a precise manner. In this recent case however, there is no sign of the court mentioning human rights obligations of the construction company. In fact, this case would have been a good opportunity for the Court to take its stand on the issue of business and human rights, and give its view on the extent of the corporate conduct as a human rights violation and on the enforcement of corporate accountability.[89] It neither specified the duties of the construction company nor did it elaborate on enforcement options.

In light of the high-risk of natural disasters in the area where the buildings were constructed, a reference to **the 15th General Principle** would not have been unusual in these circumstances. It obliges companies to have policies on their commitment to respect human rights and to have a due diligence process to identify what needs to be prevented, mitigated or remedied. This very recent judgment gives rise to the question whether the Court is trying to take a step backwards in terms of the private sphere and companies or whether this is simply a one case incident.

## 2. Health facilities

### *2.1. Strict obligations of health specialists: Altug and others v. Turkey, 30/9/2015*[90]

#### 2.1.1. *Facts*

The complaint was submitted to the Court by eleven Turkish relatives of Ms. Ruhsar Keşoğlu, their grandmother. The events leading to the application began when Ms. Keşoğlu

[89] <https://strasbourgobservers.com/2015/12/07/it-is-time-for-the-european-court-to-step-into-the-business-and-human-rights-debate-a-comment-on-ozel-others-v-turkey/#more-3094>
[90] *Altug and others v. Turkey*, App no. 32086/07 (ECtHR, 30 September 2015)

attended a private medical centre due to stomach pain and high tension. The doctors prescribed her ampicillin, a penicillin-based medication. Six days later, she suffered a cardiac arrest and passed away. During criminal proceedings in which the private medical centre and the health workers were charged for manslaughter and negligence, the relatives claimed that they had specifically informed the doctors that Ms. Keşoğlu was allergic to penicillin. The applicants went through two procedures. The first criminal procedure was unsuccessful since the prescription period lapsed. During the second procedure, a civil one, the domestic court acquitted the doctors on the basis of three expert reports, which concluded that they had made no mistakes.[91]

There was no dispute between the parties regarding the existence of a regulatory framework which obligates doctors and other health professionals to give patients access to the information necessary about a possible fatal allergic reaction, so they can evaluate whether to give their consent for certain medical procedures. The issue was whether the applicants had received *an effective legal remedy* before the domestic courts since they claimed that the doctors involved had not complied with the rules on providing information about health risks and getting informed consent, prior to administering the drug.

In the Court´s view, the domestic courts had not sought to establish in a precise manner the chain of events that led to the death of the patient. There was no possibility to evaluate whether the doctors had respected the obligations included in the applicable regulation.[92] Therefore, Article 2 ECHR had been violated. The Court emphasized specifically the ´Drittwirkung` effect of its jurisprudence in this area and iterated the positive obligation of the state under Article 2 ECHR, to ensure [...] – *whether in private or public* hospitals:

> "Les obligations positives que l'article 2 de la Convention fait peser sur l'État impliquent la mise en place par lui d'un cadre législatif et réglementaire imposant aux hôpitaux, **qu'ils soient privés ou publics […]**

It also gave a description of how the State could be held directly liable for the third party´ s behaviour:

> […] lorsqu'un risque prévisible de cette nature se réalise sans que le patient en ait été dûment informé au préalable par **ses médecins** et que **les dits médecins** exercent au sein d'un hôpital public[93], **l'État partie concerné peut être directement responsable** du fait

[91] Para 76
[92] Paras 77-80
[93] The Court has numerously stated, as in its previous paragraph 64, that the State must set laws and regulations for hospitals *whether public or private*. The wording ´and these work within a public hospital`, therefore undoubtedly was also intended to mean private hospitals.

de ce défaut d'information."[94]

([...]when events behind this kind of risk become real, without the patient having been priorly informed by its doctors and these work within a public hospital, **the concerned contracting State can be directly responsible for this lack of information.)**[95]

The Court continued to affirm its *horizontal effect on actors in the private sphere* and referred to the *Principle of Effectiveness.* It held that under Article 2 ECHR, the State has positive obligations to set up *an efficient and independent judiciary system* to investigate deaths caused by health professionals *whether they work in the public or the private sector.*[96]

### 2.1.2. *The responsibility of the health facility and its staff to respect human rights*

According to the Court, doctors must reflect on foreseeable consequences of their medical intervention on the physical integrity of their patients. They are required to give them access to necessary information so that they are able to assess their health risks before giving prior consent to a medical intervention.[97]

The Court applied the **11th General principle** according to which private actors are responsible for taking adequate action to prevent or mitigate harm, e.g. provide for information access. It goes as far as instructing doctors directly by stating that they should approach their patients and ´reflect on foreseeable consequences`.

### 2.1.3. *The Turkish State´s duty to ensure **that they give patients access to information***

Firstly, contrary to the **1st General Principle**, the State had not protected the patient by ensuring that doctors complied with regulations and gave **access to necessary health information** prior to agreeing with a medical intervention. This is made clear by the Court, similar to the argumentation in the ***Vilnes case*** on information access:

[…] de prendre les mesures légales et réglementaires nécessaires pour que **les médecins** s'interrogent sur les conséquences prévisibles que l'intervention médicale projetée peut avoir sur l'intégrité physique de leurs patients et **qu'ils** en informent préalablement ceux-ci de manière à ce qu'ils soient en mesure de donner un accord éclairé. […][98]

([...] to take necessary legislative and regulatory measures so that doctors reflect upon the foreseeable consequences, which medical intervention may have on the physical integrity of their

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[94] Paras 64-65
[95] Translation by author
[96] Paras 66-67
[97] Para 64 and reiterated in para 72
[98] Para 64 and reiterated in para 72

patients and so that they keep their patients informed in a way that allows them to give an informed consent. [...])[99]

Secondly, the judgment sets out a judicial efficiency requirement in accordance with the **1st General Principle** that States must take steps to prevent, investigate, punish and redress such abuse, i.a. through **adjudication.** This involves verifying that the Court procedures initiated provided for *an actual examination* of the applicant´s allegations and *sanctioning any disregard by the doctors* of the regulations in place.[100] The Court does not revise scientific, medical proof. Instead, the State´s domestic court system must *sufficiently elaborate on the allegations* brought forward by the applicants. According to the applicant, the medical staff had not interrogated the patient or her relatives about her prior medical history, informed them about the possible health risks resulting from the use of the anti-biotic in question or obtained the patient´s consent in accordance with the existing legislation and regulation.

### 2.1.4. ***Commentary***

Regarding the ´Drittwirkung` effect, the Court says explicitly that "the concerned state can be directly responsible" when doctors neglect to provide patients with vital information, whether they work within a private or public facility. Furthermore, it can be understood from the Court´s assessment that doctors are required to interrogate their patients or their relatives about their medical history, to ensure that information on prescribed doses of medication is mediated properly and that the patient gives his prior consent. This case is an example of how the Court describes what the ´correct` conduct of health professionals is when dealing with patients. The wording that doctors must ´reflect on foreseeable consequences` reaches *a subjective level* of human rights obligations.

[99] Translation by author
[100] Para 75

### 2.2. *Special protection of vulnerable groups: The Centre for legal resources o.b.o. Valentin Campeanu v. Roumania, 17/7/2014*[101]

2.2.1. ***Facts***

Mr. Cempeanu, was born in 1985 and was of Roma origin. He had been placed in an orphanage at a young age. In 1990 it was found that he was HIV-positive and he was diagnosed with intellectual and mental disabilities. He was also affected by diseases such as tuberculosis, pneumonia and chronic hepatitis. After reaching 18 years of age, a local Panel decided that Mr. Campeanu should be placed in Cetate-Dolj Medical and Social Care Centre ("the CMSC"). When the Applicant showed aggressive behaviour while living at the CMSC, he was examined and eventually transferred to Poiana Mare Neuropsychiatric Hospital ("PMH"). In PMH his condition deteriorated and he refused to eat and to take his medication. In 2004, staff of a Romanian non-governmental organization, the Centre for Legal Resources ("CLR", who filed the complaint to the Court on behalf of mr. Campeanu) visited mr. Campeanu at the PMH. His condition was as described by the CLR in the judgment:

> *"Mr Câmpeanu was alone in an isolated room, unheated and locked, which contained only a bed without any bedding. He was dressed only in a pyjama top. At the time he could not eat or use the toilet without assistance. However, the staff at the PMH refused to help him, allegedly for fear that they would contract HIV. Consequently, the only nutrition provided to Mr Câmpeanu was glucose, through a drip. The report concluded that the hospital had failed to provide him with the most basic treatment and care services. The CLR representatives stated that they had asked for him to be immediately transferred to the Infectious Diseases Hospital in Craiova, where he could receive appropriate treatment. However, the hospital's manager had decided against that request, believing that the patient was not an "emergency case, but a social case", and that in any event he would not be able to withstand the trip."*[102]

Mr. Campeanu died that evening. The minimum requirements were not in place in Romania and Mr. Campeanu suffered as a result. Neither was the cause of death considered suspicious by the PMH nor was any autopsy performed.

The Court stated that *the burden of proof* was on the state to demonstrate that events leading to the death of a patient had a natural explanation, and to use medical reports to support that allegations of the opposite were false. Since it failed to do so, the Court concluded that Article 2 had been breached by the Romanian authorities both substantively and procedurally.

[101] *Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, App no. 47848/08 (ECtHR, 17 July 2014)
[102] Para 23

Similar to the statements in ***Vilnes and others*** and ***Özel and others,*** the Court reiterated that positive obligations in this context apply, *regardless of whether the perpetrator is a public or private actor*;

> "The positive obligations under Article 2 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. This is the case, for example, in the health-care sector as regards the acts or omissions of health professionals […] States being required to make regulations compelling hospitals, **whether public or private,** to adopt appropriate measures for the protection of their patients' lives. This applies especially where patients' capacity to look after themselves is limited in respect of the management of dangerous activities in connection with school authorities, which have an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under their exclusive control; or, **similarly, regarding the medical care and assistance given to young children institutionalized in State**."[103]

Judgments by the Court dealing with human rights violations in the *public health-sector,* must therefore also set a precedent for *private entities* which provide medical care and assistance.

### 2.2.2. *The responsibility of the health institutions to respect human rights*

The Court recalls the minimum health standards secured under the ECHR in its reasoning. It relies on the **11th General Principle** and emphasizes which particular actions need to be taken by the private actor to prevent human rights infringements: Health institutions and caretakers *for disabled persons, are required to give the necessary assistance, provide adequate heating, food and medicine to its patients***.** The healthcare in the hospital and the other medical institutions was inadequate, without staff to assist Mr. Cumpeanu and without adequate heating and nutrition. Although this was under the responsibility of the domestic authorities, the health workers failed to give him the appropriate antiretroviral he needed. In the Court´s opinion, "the continuous failure of the medical staff to provide Mr Câmpeanu with appropriate care and treatment *was yet another decisive factor* leading to his untimely death." [104]

It also applies the **12th General Principle, which** provides that the minimum standards (besides the international Bill of Human Rights and in the International Labour Organization´s Declaration on Fundamental Principles and the Rights at Work) may include additional standards where specific groups of persons are affected, such as persons with

[103] Para 130
[104] Para 143

disabilities etc. It dedicates an entire chapter to ´Relevant International Law Material` in which it quotes the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) and reports on Romania by The United Nations Special Rapporteur on the Right to Health.

### 2.2.3. *The Romanian State´s duty to protect and prevent infringements of ECHR rights and provide access to legal remedy, by:*

*1) Establishing a mechanism for redress and ensuring access to independent representation.*

Before listing the failures to act, the Court recalled a number of ´general positive duties` of states in this context. While referring to Article 46 on binding force and execution of judgements, the Court noted that there was *no mechanism for redress for mentally disabled people in Romania*. This was a general problem and the need for independent representation was imminent.[105]

In the present case, Mr. Campeanu was an orphan with a life-threatening disease and disabilities, leaving him in a severely vulnerable situation. In spite of statutory requirements to provide him with guardianship, he had never been appointed any kind representation for his protection or vis-à-vis the hospital authorities.[106]

*2) Having in place an effective, independent judicial system*

It is the State´s duty to ´take reasonable measures to ensure the safety of individuals in public places but also, in the event of serious injury or death, having in place *an effective independent judicial system* securing the availability of legal means capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim`.[107]

*3) Ensuring that vulnerable persons enjoy special protection against ill-treatment*

The State must *regulate the work* carried out by *public and private hospitals* through adoption of protective measures. This obligation arises when it is known or should have been known to the authorities, that there is *a real and immediate risk of criminal behaviour by a third party*. In addition, Member States are compelled to provide *special protection* of

[105] Paras 134-144
[106] Para 111
[107] Para 132

´vulnerable persons from ill treatment of which authorities ought to have knowledge`.[108] In doing so, the government authorities had i.a. to give Mr. Campeanu *a proper diagnosis before transporting* him between different health facilities. On this point, the Court articulated:

> […] the domestic authorities' response to the generally difficult situation at the PMH at the relevant time was inadequate, seeing that the authorities were fully aware of the fact that the lack of heating and appropriate food, and the shortage of medical staff and medical resources, including medication, had led to an increase in the number of deaths during the winter of 2003.
>
> The Court considers that in these circumstances, it is all the more evident that by deciding to place Mr Câmpeanu in the PMH, notwithstanding his already heightened state of vulnerability, the domestic authorities unreasonably put his life in danger […][109]

**With regard to points 1)-3),** the Court applies the **25th and 26th General Principles**, on the duty to protect through access to effective remedy. While the former provides for the general obligation of states to ensure i.a. effective judicial means for victims, the latter states that for its fulfilment, there may not be any denial of justice, in particular for groups of vulnerable persons who may be excluded from enjoying the same level of protection as others. The Court explicitly dedicates this principle to persons who face social and physical impediments to this access to remedy and reiterates the specific attention needed for them, in terms of judicial process and outcome. Thus, the Court clearly applies these two principles to the fullest to the facts in the case. Furthermore, **the 23rd Principle** on the duty to apply all applicable laws and internationally human rights rules, regardless of different challenges and rules in each location, is equally a standard applied by the Court. The Romanian State had neither met its statutory obligation to provide the applicant with legal representation nor provided him with the adequate protection while in the care of the health institutions, under the ECHR and other human rights instruments. Justifications such as economic difficulties do not appear to be taken into account.

*4) Ensuring effective investigation, punishment and redress*

The traditional approach under the **1st General Principle** is the guidance for the Court in this respect, in near all aspects: Prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

[108] Para 131
[109] Para 143

The Romanian State had failed to meet its positive duties in a number of ways in this regard. Besides the positive obligation to *provide a judicial mechanism and regulate a safe environment* for mentally disabled people, it had breached article 13 in conjunction with article 2 since it failed to carry out an effective investigation into the circumstances of mr. Cumpeanu´s death and identify those responsible for it.[110] In fact, there were serious procedural shortcomings such as lack of collecting evidence, medical records and interrogations of the medical staff. Further, the Court recalled that national courts have *to punish* for life-endangering offences to ensure the rule of law and prevent tolerance of unlawful acts.[111] This obligation was not met either in the case.[112]

### 2.2.4. ***Commentary***

It is clear from this judgment that particularly vulnerable groups of persons should enjoy special protection and states have strict duties to protect those who have no means to seek legal reform. Not only through monitoring the work of health professionals but also by guaranteeing legal aid and providing for independent legal representation. States cannot argue that they are dealing with socio-economic problems or lack of resources. There were several prior cases alike the one of mr. Cumpeanu, where the Romanian government had not ensured that disabled persons were treated in accordance with the human rights standards under the ECHR. The Court therefore reiterated the government´s duty to react and that lack of funds could not justify any failure of honouring its prior judgments.[113] Since the same rules apply to private health institutions, one can conclude that these requirements are the same for such private parties.

This case reflects the Court´s attitude towards particularly vulnerable groups of persons. There is no reason why the Court should not maintain the same policy when for example dealing with persons working for corporations in poverty, lack of education and good health. That is yet to be tested before the Court.

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[110] Paras 134-144
[111] Paras 130-133
[112] Paras 145-146
[113] Philip Leach, *Taking a Case to the European Court of Human Rights*: *Blackstone´s Human Right´s series* (3rd edn, OUP Oxford 2011) 171

## 3. Forced labour and slavery

### *3.1. The first ´forced labour case` extended into the private sphere: The Case of Siliadin v France, 26/10/2005*[114]

#### 3.1.1. ***Facts***

In this case, a child from Togo who was allegedly exploited as a domestic worker in France. Miss Siliadin, was held in servitude and required to perform forced labour there for a period of four years. The events leading to her exploitation took place when she was 15 years old living in Togo. Her aunt and uncle arranged, in accord with her parents, for her to come to Paris and work as a domestic servant in their home until her airfare had been reimbursed. She would eventually be provided with a legal immigration status and be allowed to apply for a school. After arriving in France, her uncle and aunt "lent" her to another couple for whom she started working. The working conditions included work from 7.30 am to 10.30 pm every day, without holidays or free time. She took care of the couple´s four children, took them to nursery, cooked and cleaned. The couple confiscated her passport and did nothing about her immigration status. While not receiving any payments, she had very limited freedom of movement and lived in constant fear of being deported. After finally escaping from her employers, she was able to receive legal assistance and took her case before the French domestic courts. The applicant, Miss Siliadin, relied on Article 4 of the ECHR and submitted that French criminal law did not afford her sufficient and effective protection against the "servitude", or at the very least against the "forced and compulsory" labour which in practice had made her a domestic slave.[115] The Court of Cassation acquitted the couple on the basis that the Court of Appeal had not proved that her working conditions were incompatible with human dignity. It had not reached the legal benchmarks required in the existing French criminal code.[116]

The Court reiterated the ´positive obligations` doctrine of Member States and considered that Article 4, together with Articles 2 and 3 of the ECHR, enshrine one of the basic values of the democratic societies making up the Council of Europe.[117] It referred to numerous international conventions intended to protect human beings from slavery, servitude and forced labour and recalled that although slavery was officially abolished more than 150 years

[114] *Siliadin v France*, App no 73316/01 (ECtHR, 26 October 2005)
[115] Ibid, para 71
[116] Ibid, para 43
[117] Ibid, paras 77-82

ago, “domestic slavery” persists in Europe and concerns thousands of people, the majority of whom are women.[118]

When assessing the alleged violation of Article 4, the Court interpreted the provision in light of present-day conditions and the fact that it was a fundamental value in democratic society. First, it found that the criterion *´forced or compulsory labour`* was met, since there had been work “exacted ... under the menace of any penalty” and also performed against her will. It noted that although the applicant was not threatened by a “penalty”, she was in an equivalent situation in terms of the perceived seriousness of the threat. Secondly, it found that the requirement of *´servitude or slavery`* was fulfilled. “Slavery” according to the 1927 Slavery Convention is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. Although in the present case, this was not “slavery” in the traditional sense, it was a condition where all powers attached to ownership were exercised, reducing her to the status of an “object”. [119] It also concluded that the concept “servitude” was met. The criteria were a “particularly serious form of denial of freedom” the obligation to perform certain services for others, the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition”. The Court referred i.a. to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, according to which parties to the convention must take all necessary legislative to abandon the following institutions and practices:

> “(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.” [120]

Miss Siliadin had no freedom of movement and no free time. She had not been allowed to attend school and as a minor was totally depended on the employers for her visa status and accommodation. Accordingly, as a minor in these circumstances, she had been held in servitude. While the circumstances in the case fulfilled the application of Article 4 ECHR, Articles 225-13 and 225-14 of the French Criminal Code, had not provided adequate protection. According to the provisions it is an offence to exploit an individual's labour and to submit him or her to working or living conditions that are incompatible with “human dignity”. These provisions did not help the Applicant since slavery and servitude were not

[118] Ibid 111
[119] Ibid 121-122
[120] Ibid, paras 123-125

classified as offences under French criminal law.[121] Thus, there was a breach of Article 4 of the ECHR.

### 3.1.2. ***The responsibility of the ´employers` to respect human rights***

This case from 2005 was the first time in history that the Court found a breach of Article 4 ECHR. The Court does not comment on the employer´s conduct or how it should have been, except as part of the facts in the case. Neither does it say specifically that the obligations of Member States should reach the private sphere here as well as the public, however, it accepts to give a ruling where there is a violation in this type of private individual relations. That in itself must be interpreted as a message to the employers of domestic workers that they must respect their employees´ human rights.

### 3.1.3. ***The French State´s duty to protect and prevent ECHR violations by ensuring that:***

1) forced or compulsory labour *for the benefit of private individuals, companies or associations* is not permitted. The Court referred to Article 4, paragraph 1 of the Forced Labour Convention, adopted by the International Labour Organization (ILO) on 28 June 1930 and ratified by France on 24 June 1937.[122]

2) necessary legislative measures are taken to abolish practice whereby *children are exploited for labour* by parents, guardians or other persons. The Court referred to Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which came into force in respect of France on 26 May 1964.[123]

3) all measures are taken to protect *children from all forms of violence, maltreatment or exploitation, including sexual abuse* by parents, guardians or other persons. With regard to children in particular, a reference was made to Article 19, paragraph 1 of the International Convention on the Rights of the Child of 20 November 1989, which came into force in respect of France on 6 September 1990. In addition, it noted Article 32 of the same convention which states that state parties must protect children "from economic

[121] Ibid, paras 131 and 141
[122] Ibid, para 85
[123] Ibid, para 86

exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." In doing so, they "shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. Having regard to the relevant provisions of other international instruments, this includes providing for a minimum age/ages and appropriate regulation of the hours and conditions. Further, appropriate penalties or sanctions must be in place to give effect to all of these elements.

4) criminal-law provisions which *penalize the practices in Article 4 ECHR* are taken into force and applied in practice. It is insufficient for state liability to be limited to direct action by the Member State. There is a positive obligation on states to set laws which penalise violations of Article 4, in the same way as for other substantive Articles of the ECHR, an apply them in practise.[124]

With regard to points **1)-4),** the Court applies **the 11th and 12th General Principles.** The Member States must ensure that forced labour is not permitted and by taking all necessary measures, through prevention under **the 11th General Principle**. This is reflected in the Court´s expression; "*all* appropriate legislative, administrative, social and educational measures should be taken to protect children from all forms of violence, maltreatment or exploitation, including sexual abuse by parents, guardians or other persons". It is also applied by the Court when it declares that the State was required to ensure that criminal law provisions penalizing Article 4 ECHR are taken into force and applied effectively.

Also, in accordance with **the 12th General Principle**, the ILO declaration serves the Court as a legal basis along with other legal instruments on the rights of specific groups of persons.

### 3.1.4. *Commentary*

As Virgina Mantouvalou has analysed, although Article 4 ECHR is considered an important provision in modern time Europe, it is only applied under very strict conditions. For example, for a complete prohibition on slavery and servitude, the worker in question must have been treated as an object by the employer. Still, in cases dealing with sex trafficking and domestic

[124] Ibid, para 89

workers, the Court has been lenient in applying Article 4. The reason may be that in these cases, freedoms of the individuals are severely restricted.[125]

The Siliadin case established that, similarly to other ECHR provisions, Article 4 applies, not only when governments keep individuals under forceful working conditions (vertical effects) but more importantly, *in private relations* (horizontal effect or Drittwirkung). Mantouvalou expresses her conclusion:

> "As the employment relation is most of the time **a private relation**, it is not primarily regulated by human rights law, unless it has horizontal application. The Court has a long-established jurisprudence on positive obligations and Siliadin showed that, like other provisions, Article 4 does not only involve vertical relationships; it is relevant to private relations and imposes a duty on the authorities to criminalize non-state conduct that falls short of human rights standards. **Given that most instances of forced labour occur in the private economy, the decision of the Court to extend human rights principles in the private sphere is crucial."**

Finally, the Court established that the most vulnerable workers that have been subjected to abuse enjoy protection under the ECHR. While giving a voice to the victims, it also brought attention to the problem in general and the need for legal frameworks and regulations to prevent it.[126]

This interpretation by the Court seems to have the potential to apply to any sorts of forced labour where there is restriction of freedom and violence, perpetrated by private entities and individuals.

### *3.2. The issue of ´forced labour` revisited – sex trafficking: The Case of Rantsev v Cyprus and Russia, 10/5/2010*[127]

#### 3.2.1. *Facts*

The applicant in the case was Mr. Nikolaj Rantsev who brought a complaint before the Court on the behalf of his daughter Ms. Oxana Rantsev. Both were Russian nationals. In 2001 Ms. Rantsev moved from Russia to Limassol, Cyprus, to work as a ´cabaret artist` in a nightclub. She received a Visa and her employer, ´M.A.`, got her a work permit. After a few months she

[125] Oliver de Schutter, ´Human Rights in Employments Relationships: Contracts as Power` in Filip Dorssemont, Klaus Lörscher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (A&C Black 2014) 154-157
[126] Ibid, 146
[127] *Rantsev v Cyprus and Russia*, App no. 25965/04 (ECtHR, 10 May 2010)

left the apartment where she was living with other ´cabaret artists` (in most part these were prostitutes) and expressed to her fellow workers that she wanted to return to Russia. Her employer kept looking for her and when he eventually found her, he reported her to the police and demanded for her arrest. The police refused M.A.´s request since she still had a residence permit in Cyprus and sent her back to her employer. One night, on 28 March 2001, while trying to escape M.A.´s apartment, she fell off the balcony, which resulted in her death. Autopsy showed that she had suffered physical violence prior to her death.

The Court assessed whether the two states had breached Articles 2 and 4 of the ECHR. Regarding Article 4, it found that ´sex trafficking` fell under the scope of that provision. The concept, although not included in the Article, had to be interpreted in the light of the object and purpose of the ECHR, the principle of effectiveness and in harmony with other relevant applicable international law.[128] The conclusion was that both Articles had been breached in various ways by Cyprus and Russia had also not upheld its duty under Article 4 ECHR to investigate.

### 3.2.2. *The responsibility of the employer (the cabaret owner) to respect human rights*

No specific discussion is given on the conduct of the employer, except describing the known facts. The Court puts all focus on the part of the states to prevent and protect against criminal behaviour of private individuals.

### 3.2.3. *The duty of Cyprus to protect and prevent ECHR violations by:*

1) *taking preventive control measures such as putting in place an appropriate legislative and administrative framework*

Although Cyprus had enacted a legislation to prohibit sexual exploitation and trafficking, in accordance with the Palermo protocol, there were a number of practical weaknesses in the legal and administrative framework and the Cypriot immigration policy. The Council of Europe´s Commissioner for Human Rights had in 2003 raised awareness of these shortcomings. Firstly, the visa process made the artiste dependent on her employer, and made her an easy target for traffickers. Secondly, it should be the role of the authorities to monitor compliance of immigrants and not have measures in place that motivate cabaret owners to take personal responsibility for artistes or track them down. Lastly, the Court found that the

[128] Paras 272-274

practice to require cabaret owners to lodge a bank guarantee for future costs leading from the employee, “particularly troubling”.[129]

*2) taking protective measures in light of the knowledge of the current issue of sex trafficking*

As for protective measures, the Cypriot government had not taken sufficient action. It had been established in a 2003 report by the Ombudsman that it was known that foreign women, (especially from the former Soviet Union) were being trafficked to Cyprus and forced to work there as sex slaves, and a lenient immigration policy had made it easy for traffickers to keep up their operations. The Council of Europe´s Commissioner for Human Rights also raised the problem in a 2006 report. The Cypriot authorities were therefore fully aware of it.

The Police should have been informed about the current issue and dealt with Ms. Rantseva´s case with scrutiny and investigated whether she was the subject of human trafficking. The police officers, instead, handed her over to her employer without taking any measures to provide her with protection.[130]

*3) carrying out a full and effective investigation into the death of Ms. Ratseva*

The Court also held that Cyprus had violated Article 2. The authorities had not investigated inconsistencies in both testimonies and forensic reports, the strange circumstances surrounding her death or the events at the police station. The applicant had not been informed about the date of the inquest, and was therefore absent on the day of the verdict and the applicant´s attempts to request investigation by the Cypriot authorities were ignored. It was also iterated by the Court that Member States must secure evidence when carrying out an investigation and this could have been done with the assistance of the Russian authorities, as set out in the Mutual Assistance Convention and the bilateral Legal Assistance Treaty to which both are parties. Nevertheless, the Cypriot authorities did not seek such assistance, and therefore failed their positive obligation to lead an effective investigation in the case.[131]

In relation to Russia´s part in the case, the Court held that Russia had violated the obligation to investigate potential trafficking under Article 4. In accordance with the Palermo Protocol, there is a need for a full and effective investigation into all trafficking allegations from recruitment to exploitation. *This applies to offences in the country of origin and the country of destination.* Russia was the former in the present case, and the recruitment of Ms.

[129] Paras 291-292
[130] Paras 294-298
[131] Paras 234 - 242

Rantseva took place in Russia. However, the Russian authorities failed to investigate the recruitment, especially since it resulted in the tragic death of Ms. Rantseva.[132]

The application by the Court under the elements in **1) -3)** above, involves the obligations to prevent, protect and investigate breaches of Article 4 ECHR, where the protective measures fall within the preventive acts. **The 1st General Principle** therefore reflects the legal basis. According to the principle, the states must enforce certain laws and regulations and *make a reform* where there is a lack of such enforcement.

The facts involve a violation against a particularly vulnerable group of persons, namely women. Although no reflections are made on ´obligations` of the cabaret owners to respect human rights, the Court refers on several occasions to other international instruments such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol"), supplementing the United Nations Convention against Transnational Organized Crime. This is the precisely the content of **the 12th General Principle**. Lastly, as set forward in **the 15th General Principle**, it can be deducted from the Court´s reasoning that Cyprus and Russia was lacking a policy on their commitment to respect human rights in this context and to identify what was needed to be prevented, mitigated or remedied.

### 3.2.4. ***Commentary***

The broadening of the Court´s approach in cases of forced labour is evident from these two cases alone. From focusing on the positive obligation to penalize and prosecute acts that violate Article 4 ECHR in the ***Siladin*** case, the Court expanded the scope of the positive obligations to prevent and protect in ***Matseva***. It is a clear example of how the Court ´creates` these obligations and articulates in a detailed manner how Member States should handle the recent problem of sex trafficking. It is also explained how the obligations of both the state of origin and the state of destination were, what the weaknesses in the legislative and administrative framework were and what the inefficiencies in the work carried out by the police were. The Court´s case law is a landmark in the combat against sex trafficking and other transnational crimes.

As Virginia Mantouvalou notes in her analysis, "even though case law of the Court under Article 4 is limited, it contributes significantly to academic debates on labour rights as human rights." The ECHR primarily contains civil and political rights, while labour rights are

[132] Paras 307-308

considered social rights. One might therefore be sceptical of whether labour rights enjoy its full protection. However, as the previous decisions demonstrate, there is interplay between the convention and other international covenants such as the ILO conventions and other international soft law documents from the United Nations and the Council of Europe. This has been called an ´integrated approach` where social and labour rights are integrated in a civil rights document. Also, the Court and other international labour law bodies such as the European Committee of Social Rights (ECSR) decide in accordance with the case law of each other and interpret in harmony with their materials.

## 4. Internet use in companies and website operators

### *4.1. Employers´ right to access Internet use by employees v the right to privacy: The case of Barbalescu v Romania 12/1/2016 and dissenting opinion of judge Albuquerque*

#### 4.1.1. *Facts*

On 12 January 2016, the Court passed its judgement in the case of ***Barbalescu v Roumania***. The case related to the data protection of employees and their right to privacy in their work.[133] (The case was referred to the Grand Chamber Panel on 6 June 2016 where it is still pending when these words are written). In the case, the applicant had been dismissed from his position at a private company where he worked as an engineer, for using the company´s Internet for personal matters while at work. The employer discovered the employer´s Internet use by accessing his yahoo account with the justification that he assumed that it had also been used for work-related activities. After claiming that this was a breach of internal regulations, the company ended his employer´s contract. The applicant alleged however that this was an infringement of his right to privacy under Article 8 of the ECHR.

The Court found that there had been no violation of Article 8 of the ECHR since the domestic court in Romania had *exercised a fair balance between the interests of the applicant to a right to privacy and the ones of the company***.** It was pointed out that the Applicant had been able to raise his arguments before domestic courts, which concluded that the employer had acted within its disciplinary powers provided for in the Labour Code. The Court´s finding was mostly based on the assumptions that the local courts had "attached particular importance to the fact that the employer had accessed the applicant's Yahoo Messenger

[133] *Barbalescu v Romania*, App no. 61496/08 (ECtHR, 12 January 2016)

account in the belief that it had contained professional messages." Also, the contents of the data had not been a decisive factor for the dismissal of the Applicant.[134]

#### 4.1.2. *A partly dissenting opinion of judge Pinto de Albuquerque*

Judge Pinto reasoned in his final statement for his dissent:

> "Convention rights and freedoms *have a horizontal effect*, insofar as they are not only directly binding on public entities in the Contracting Parties to the Convention, *but also* ***indirectly binding on private persons or entities****, the Contracting State being responsible for preventing and remedying Convention violations by private persons or entities*. This is an ***obligation of result*****,** not merely an obligation of means. The *domestic courts did not meet this obligation in the present case when assessing the legality* of the employer's dismissal decision, adopted in the disciplinary proceedings against the employee. Although they could have remedied the violation of the applicant's right to respect for private life, they opted to confirm that violation. This Court did not provide the necessary relief either. For that reason, I dissent."[135]

He emphasized the ´Drittwirkung` effect of the ECHR and reiterated the importance of the effectiveness of these obligations by recalling that they are *obligations of result* and not solely of means.

#### 4.1.3. *The responsibility of the private company (the employer) to respect human rights*

First, Judge Pinto made the following remarks on the conduct of the employer of the company in question:

> "Given that in modern societies Internet communication is a privileged form of expression, including of private information, **strict limits apply to an employer's surveillance of Internet usage by employees** during their work time and, even more strictly, outside their working hours, be that communication conducted through their own computer facilities or those provided by the employer." […] The Convention principle is that Internet communications are not less protected on the sole ground that they occur during working hours, in the workplace or in the context of an employment relationship, or that they have an impact on the employer's business activities or the employee's performance of contractual obligations[136]

[134] Ibid, paras 56-63
[135] Ibid, para 23
[136] Paras 4-5

Secondly, Judge Pinto points out that the internal regulations referred to by the employer in the case, did *not include any Internet surveillance policy to be implemented in the workplace*. The government only referred to a notice, which it claimed had been signed by the applicant. Allegedly, the notice stated that a work policy on Internet use during working hours was in place and that a former employee had been dismissed for disregarding it. However, the facts around this notice were disputed in the case.[137]

Thirdly, a large part of his discussion contains a summary of instructive rules for employers of companies on *how to conduct their Internet policy*, taken from EU legislation. These are for example the obligations of company employers to:

- *Warn the employee* that communications are being monitored
- Not interfere into the employees´ online personal data *without justification* by certain specific interests covered by the ECHR[138]
- Have *a comprehensive internet usage policy* in the workplace, including specific rules on the use of email, instant messaging, social networks, blogging and web surfing.
- Set out clearly *the rights and obligations of employees*, with *transparent rules* on how the Internet may be used, how monitoring is conducted, how data is secured, used and destroyed, and who has access to it.
- *Ensure* that there is not *a blanket ban* on personal use of the Internet by employee, or any policy of blanket, automatic, continuous monitoring of Internet usage by employees.
- *Inform employees of the existence of an Internet usage policy* in force in their workplace, outside it and during out-of-work hours.
- Be guided by *principles of necessity and proportionality* when enforcing the Internet usage policy. An assessment must be made whether the benefits of the monitoring measure outweigh the impact on the right to privacy of the employee and the third persons who communicate with him/her.[139]

By emphasizing the requirement to implement Internet surveillance policy to protect employees and referring to the EU legislation, judge Pinto is in many aspects complying with **the 15th General Principle**. It requires employers to i.a. keep in place *a policy* on their commitment to respect human rights, a due diligence process to identify what needs to be prevented, mitigated or remedied. This Principle is one of the tools used to fulfil **the 11th General Principle** on preventing human rights violations. In addition, the reference to EU

[137] Paras 16-18
[138] Para 5
[139] Paras 10-13

legislation can be seen as falling under **the 23rd General principle** on the application of all applicable laws and existing human rights rules.

### 4.1.4. ***The Bulgarian State´s duty to protect and prevent ECHR infringements by promoting Internet access and simultaneously ensuring the right to privacy***

Interestingly, Judge Pinto refers to access to the Internet as *a human right*. First, while justifying such access with the importance of being able to participate in democracy and express ideas, he stated:

> "[…] States have a positive obligation ***to promote and facilitate universal Internet access***, including the creation of the infrastructure necessary for Internet connectivity. In the case of private communications on the Internet, the obligation to promote freedom of expression is coupled with the obligation to protect the right to respect for private life."[140]

He does not consider the matter of *how* the state should fulfil its positive obligations in this regard, but limits his comment to the state´s obligation to ensure that a certain Internet policy is kept in place and that privacy is intertwined with the freedom of expression. This corresponds to one part of the **1st General Principle** that states must take appropriate steps prevent, investigate, punish and redress such abuse through *effective policies* […].

### 4.1.5. ***Commentary***

One cannot help but feel that the Court only ´scratched the surface` in its review of the domestic court´s conclusion, re-evaluating it to a very limited extent. The dissenting opinion on the other hand, is more progressive and in line with the Court´s previous judgements.

In judge Pinto´s opinion, access to Internet is a human right, which enjoys protection under the ECHR. It should be respected through strict liability of employers to interfere with such access and through a transparent Internet use policy in workplaces. Pinto also recalls the ´Drittwirkung` effect and how the courts are bound by the obligation of result when interpreting the ECHR, which he considers was neglected.

The dissenting opinion in this recent case is a reminder that the Court´s obligation to rule on legal relations between private individuals is *clear and current.* It also shows that the judges of the Court feel that it falls within their role to set out precisely the human rights obligations of private actors and how they can fulfil them.

[140] Ibid, para 17

### *4.2. The right to expression on Internet websites by third parties v the right to good reputation: Magyar Tartalomszolgáltatók Egyesülete and Index.hu zrt. v Hungary, 2/5/2016*[141]

#### 4.2.1. *Facts*

MTE, a self-regulatory body and Index.hu., an internet news portal, were two entities operating websites in Hungary. Users could post comments online on these websites. In 2010, a real estate company sued the website operating companies for offensive comments posted by anonymous readers on their websites, which they claimed violated their right to good reputation. The comments included criticism on the business practices of the real estate company. The national court ruled that the comments had been insulting and that the website operating companies were objectively liable for the publication. The website operators complained to the Court that objective liability in this context was an infringement of the right to freedom of expression under article 10 ECHR. They would be forced to modify the comments before publication or disable the commenting system completely. Both alternatives would go against the freedom of expression.[142]

The Court found that the Hungarian courts had not ruled in compliance with Article 10 ECHR, and held that it had *not found a fair balance between the applicants´ right to express themselves freely and the interests of the real estate company to have its commercial reputation respected*. It disagreed that the comments were damaging and unlawful, i.a. since they had an effect on public interests. There was a difference between a reputation of commercial nature and a reputation of individuals, specifically in light of the fact that there were inquiries being made into the work of the real estate company, which had already had an impact on its reputation. Also, the courts had not made an assessment on the consequences of objective liability for the comment environment of an Internet news portals and effects on the freedom of speech. After applying the Delfi AS test, the Court concluded that the present case did not involve the utterances in Delfi AS and Article 10 ECHR had consequently been infringed.[143] A more thorough description and analysis of the conclusion will be discussed below.

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141 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu zrt. v Hungary*, App no. 22947/13 (ECtHR, 2 May 2016)
142 Ibid, paras 5-25
143 Para 180

### 4.2.2. ***The responsibility of website operators (journalists) to respect human rights***

The reasoning of the Courts focuses on describing the rights and duties of the media and the role of Internet access. It refers several times to ***Delfi AS v Estonia*** where the liability of online news portal for offensive comments by its readers, was confirmed. It held:

> "By referring to its Grand Chamber's judgment in Delfi AS again, the Court confirms that **Internet news portals**, in principle, **must assume duties and responsibilities**. However, because of the particular nature of the Internet, these duties and responsibilities **may differ** to some degree from those of a traditional publisher, **notably as regards third-party content."**[144]

According to the Court, the press has an *obligation to inform the public of all matters in their interest*. The Internet is an *important platform* to disseminate this information, ´in the light of its accessibility and its capacity to store and communicate vast amounts of information`.[145]

Journalists, in their work, are *free to exaggerate or provoke* in their discussions to a certain extent. At the same time, they have *particular obligation* to respect boundaries when the reputation of others is involved and to prevent confidential information from being exposed. Here, criticism on private individuals is permitted in a more limited manner than when the subject is a political figure.[146]

### 4.2.3. ***When has a journalist ´crossed the lines` to the level of violating the right to privacy in these circumstances?***

The Court applied the criteria set forward in the case of ***Delfi AS*** in order to establish whether objective liability of the Internet operator for offensive comments was invoked.[147]

*1) The context and content of the impugned comments*

It can be deduced from the Court´s reasoning that it mattered that the comments were a matter of *public interest* and that the role of MTE, was a self-regulatory body *with no economic interest* and not likely to ´provoke heated discussions`, seeing it was an internet operator of a purely professional nature. In addition, whether *the language used* is vulgar or

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[144] *Delfi AS v Estonia*, App no. 64569/09 (ECtHR, 16 June 2015) para 113
[145] Para 56
[146] Para 55
[147] Paras 69-88

not, is not a decisive factor for the assessment of an offensive expression. The style used is considered a part of their form of expression and thereby protected together with its contents.[148]

*2) The liability of the authors of the comments*

The national courts only analysed the liability of the applicants and not *the authors* of the comments. Even though the applicants provided platform for private parties to express themselves, as a part of their journalistic activity, they are not necessarily liable. This is reflected in the Court´s case law, which has found that *journalists should not be punished for assisting in releasing statements of private individuals,* without particularly strong reasons for it. Such punishment would also have a seriously damaging effect on the Press, which contributes to the public discussions.[149] It appears that the Court hints that the private parties who commented should be considered accountable.

*3) The measures taken by the website operators and the conduct of the injured party*

According to the applicant´s disclaimer, the readers who posted comments on their websites were accountable for them and comments damaging to a third private party were prohibited. In addition, the applicants had a ´takedown system` according to which anyone could report unlawful comments to the operators for them to be removed. The Court pointed out that the domestic courts had not examined these players´ conduct when they decided in the case. [150]

*4) The consequences of the comments for the injured party*

The injuries caused by the comments were inflicted on the real estate company, e.g. its commercial reputation. It is not the same moral dimension for a private actor who is a legal person, as when dealing with a reputation of a private individual. However, as mentioned, there had already been inquiries into the company´s conduct. Therefore, it was uncertain whether the comments had any further damaging effects on its reputation. The domestic courts did not scrutinize the level of seriousness required in this context and whether it caused prejudice to the real estate´s company right to a professional profession.[151]

[148] Para 76
[149] Para 79
[150] Paras 81-83
[151] Paras 84-85

*5) The consequences for the applicants*

Regarding this last criterion, the Court stated the following:

> "In any event, the Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but **the manner in which Internet portals such as theirs can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet.** This effect could be particularly detrimental for a non-commercial website such as the first applicant (compare and contrast *Delfi AS*, cited above, para 161)."[152]

As for **parts 1)-5)** and the role of the website owners and journalists, the Court gives some instructions regarding their duties. In spite of their duty to inform the public on all matters, they must respect the reputation of others and prevent that confidential information is unleashed. Besides prevention, it can also mitigate any violations by having a disclaimer, as they rightfully did in the case, and keep a ´takedown system`. These elements clearly fall within the duties mentioned in **the 11th General Principle.** Similarly, **the 13th General Principle** equally applies to the Court´s application. It contains the obligation to seek to prevent or mitigate human rights directly linked with their operations *even though they did not contribute to it themselves.*

### 4.2.4. *The Hungarian State´s duty to protect and* ***prevent ECHR infringements by*** *restricting the freedom of expression* ***although it may be justifiable if there is a fair balance to the interests of the employer***

It was reiterated that this was a question of striking a fair balance between the right to expression under Article 10 ECHR and the right to private life in Article 8 ECHR, which protects the right to reputation. The latter would only be triggered if *a certain level of seriousness* was attained and if the *personal enjoyment* of the right is threatened. There should be *a dual respect* for these two rights and the states have *a wide margin of discretion* in this regard.[153]

The message to the State´ s judicial system is that it did not rule in accordance with the ´correct` standards, mentioned above. The Court reviews the domestic Court´s decision and

[152] Para 86
[153] Paras 57-59

rules it wrong. This was lack of efficient adjudication under **the 1st General Principle.**

4.2.5. ***Commentary***

It can be interpreted from this judgment that, *the level of vulgarity* in the contents of the disputable comments, is a decisive factor in these circumstances. Comments, which are vulgar, are not necessarily a breach of the right to privacy and reputation, although they might be if containing hate speech and encouragement to violence, as in the ***Delfi AS*** case.

In ***Delfi AS***, the applicant was a public limited liability company. Similarly, in the present case, one of the applicants (Index hu.zrt) was the owner of a large media outlet with economic interests. However, the Court recalled that the second applicant was a non-profit, self-regulatory association of Internet service providers with no economic interests. Although not entirely clear from the Court´s wording, *the legal status* of Internet service providers therefore appears to play a role when evaluating third-party liability.

Lastly, the Court mentions that the ´notice-and-take-down-system` could serve as deciding intermediary liability in this situation and points out that the real estate company had not asked for the insulting comments to be taken down. Another interesting point is the conclusion, which can be drawn from the Court´s statement that even though the applicants provided a platform for private parties to express themselves, as a part of their journalistic activity, they are not necessarily liable. It appears that the Court hints that the private parties who commented should be under consideration as being accountable.

This case is a step into the right direction following the ***Delfi AS*** case. Nevertheless, the Court could have been clearer on the responsibility of Internet service providers for vulgar comments by private parties. In particular in the context of their legal status, whether they actively use ´notice-and-take-down-systems` or whether the liability should be shifted directly to the authors of the comments.

## 5. Conclusions from the Court´s jurisprudence

It is evident from the cases studied in this chapter, that it is well-established jurisprudence that the Court rules on legal disputes between private actors in the same way as it does in the public sphere. The ´Drittwirkung effect` is elaborated explicitly by the Court in practically all of the cases studied. As already noted, the Court´s case law has, to this day, not dealt purely with businesses and corporations, a part from a very few exceptions. However, a parallel can be drawn between such adjudication and its rulings in the private sphere. The principal question in this thesis, whether the General Principles of the Ruggie Framework are being applied by the Court in its rulings, can be answered in the positive, to a certain extent.

First of all, both main General Principles for states and corporations, **the 1st and the 11th,** are applied almost without exception. They may entail:

- Access to information, efficient adjudication, providing adequate minimum healthcare, ensuring that legislation is applied effectively (including a thorough investigation being carried out) or the creation of human rights policies.

It is interesting to see the extents to which the Court goes to provide a detailed description of these positive obligations and to provide precise instructions on how to fulfil them. For the Member States, the following examples illustrate what may be required of them to satisfy their obligations:

- Granting licences, carrying out inspections, examining allegations or providing the necessary material to ensure adequate health conditions.

With regard to the private actors' duties to respect human rights, the Court has taken a far-reaching approach. They may have to:

- Subjectively ´reflect on foreseeable consequences`, ensure access to vital information, give appropriate medical treatment, implement Internet surveillance policies and keep in place disclaimers or ´take-down systems`.

**The Court also generally applies the 12th and 23rd General principles**, in particular where the subject concerns a vulnerable group of persons such as women or persons with disabilities. Human rights conventions, ILO declarations and EU legislation are consistently referred to in the Court´s assessments and are even the main legal basis for its conclusions in this regard. A good example is the Courts application of the Palermo Protocol in the ***Ratseva*** case.

In accordance with **the 15th General Principle**, the Court often finds that there is a duty on private actors to keep in place policies on how to respect human rights in the course of their operations. For example, these might be policies on something specific such as Internet use, or policies relating to a broader spectrum, such as the protection of human rights in a certain area, such as how to avoid human trafficking. Similarly, the court also applies **the 13$^{th}$**

**General Principle** in its assessments. That Principle contains the obligation to seek to prevent or mitigate human rights violations directly linked with the operations of private actors, *even though they did not contribute to it themselves.*

Finally, the case study demonstrates that the Court applies the **25th and 26th General Principles** on the duty to protect through access to an effective remedy. It is the Member States´ duty to ensure access to effective remedies, legal representation for vulnerable persons and to make sure that there is no denial of justice, e.g. by means of corruption.

In conclusion, these results show that the Court applies the main General Principles under the Ruggie Framework in its judgments that touch upon or have a strong connection with the private sphere. It must be considered likely that the Court would apply the same Principles if seized with a case where the factual circumstances involved businesses or transnational corporations.

# V. EXTRATERRITORIAL JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

## 1. General

The world economy is increasingly characterized by multinational corporations. This means that private actors affect human rights globally on a larger scale than before. One of the challenges under these circumstances is that parent corporations manage to evade accountability for human rights breaches in their operations, which commonly take place on foreign territory in foreign subsidiaries. Lee James McConnell gives the following description of the complexity in terms of accountability:

> "The sprawling corporate structures boasted by many multinational corporations (MNCs) span multiple jurisdictions, often incorporating holding companies, wholly and partially-owned subsidiaries and external contractors. As such, complex challenges concerning selection of an appropriate forum, the allocation of jurisdictional competence, and the application of a particular State's domestic law frequently arise. The situation is further exacerbated by the variety of tangentially relevant laws, including human rights, tort, employment, and company law."[154]

[154]Lee James McConnell, ´Establishing liability for multinational corporations: lessons from Akpan` [2014] International Journal of Law and Management, 88

In short, human rights violations by businesses and corporations therefore increasingly take place *outside* the territories of the Member States (´host states`). In these circumstances, the owners or directors of such entities are situated in the ´headquarters` in the Member States (´home states`). This situation raises the issue of whether and how the ECHR is applicable if private actors in host states commit human rights violations.

State jurisdiction is generally considered primarily territorial in nature. As McConnell points out, while states or even non-state armed groups can have control over a territory, business actors do not. Business operators which perpetrate human rights violations may therefore avoid responsibility since there is no jurisdiction over them to challenge their liability. Corporate liability can be called for through the ´Principle of Due diligence` (the 15th General Principle of the Ruggie Framework) or more importantly, through the ´sphere of influence` or ´functional control` over individuals. The approach in the Court´s jurisprudence reflects the last two options considered available.[155]

Again, the case-law of the Court which deals with extraterritorial application does not specifically deal with violations by corporations, but it gives indication as to the ***potential application of the ECHR*** in such cases. The cases deal in great part with military actions by Member States abroad and is therefore directly relevant for circumstances when warfare is conducted by private entities. In the context of extraterritoriality and private actors, the most relevant examples are companies which provide security forces, acting abroad in state conflicts, as well as incidents of extradition or deportation of individuals from the territory of a Member State. Private military companies are increasingly common for tasks such as protection of convoys, the organization of logistics, security at prisoner camps or even postwar reconstruction. Most frequently there are alleged breaches of Articles 2 and 3 of the ECHR. In these situations, the Court has found that Member States have both negative and positive obligations to take certain measures, in order to comply with the ECHR and international law. This development calls for a determination of responsibility when human rights are violated in their work and raises questions of jurisdiction.[156]

Under the ECHR system, general rules on extraterritorial jurisdiction have been modified through the case law of the Court when interpreting Article 1 of the Convention:

> "The High Contracting Parties shall secure to **everyone within their jurisdiction** the rights and freedoms defined in Section I of this Convention."

[155] Lee James McConnell, *Extracting Accountability from Non-State Actors in International law: Assessing the Scope for Direct Regulation* (Routledge 2017) 246
[156] Jan Klabbers, *International Law*, (Cambridge University Press 2013) 213-214

This means that the Member State is obligated to respect the rights under Section 1 of the ECHR (Articles 2-18) of everyone, regardless of a person´s nationality, residence or other characteristics. Moreover, Article 1 neither makes any distinction with regard to the type of rules or measure nor does it exclude any parts from jurisdiction expressly. The only condition is jurisdiction and the convention does not elaborate the limits and scope of the "jurisdiction" further.[157]

It is however stated in the preamble to the Convention that it "[…] aims at securing the **universal** and **effective** recognition and observance of the rights therein declared." Further that, "the aim of the Convention is to secure a **universal** and effective recognition of Human Rights, and maintain and realise **Human Rights and Fundamental freedoms** to achieve greater unity between members". As has been demonstrated by the Court, it has given **a teleogical and broad interpretation** of Article 1. In fact, it is a fundamental principle that the ECHR should be interpreted to guarantee rights which are practical and effective, rather than theoretical or illusory.[158] For example, in ***Issa v Turkey (2004),*** in which the basis of the complaint was the actions of Turkish armed forces in Northern Iraq, and six Iraqi women alleged the soldiers had infringed the human rights of their relative, secured by the Convention. The Court declared that it was a General principle that Member States were *not allowed to commit Convention violations on other territories which it could not perpetrate on its own territory*.[159]

According to the UN General Principles and the Court´s case law, extraterritorial application of the ECHR covers both *activities directly carried out* outside the Member State´s boundaries and *acts which produce effects therein*.[160] It has also been declared that a Member State can be accountable for extraterritorial human rights violations by both *public and private actors.* Extraterritorial jurisdiction can be divided into two categories: spatial jurisdiction and personal jurisdiction. The former involves a situation when a Member State has ´effective control` over *foreign territory*[161] while the latter entails personal jurisdiction, when *a person* is ´under the effective authority and control` of a Member State.

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157 Philip Leach, *Taking a Case to the European Court of Human Rights*: *Blackstone´s Human Right´s series* (3rd edn, Oxford University Press 2011) 179

158 See e.g. *Soering v UK*, App no. 14038/88 (ECtHR, 7 July 1989) para 87; *Cruz Varas v Sweden*, App No 15576/89 (ECtHR, 20 March 1991) para 99

159 *Issa and Others v. Turkey* ('Issa'), App no. 31821/96 (ECtHR, 16 November 2004) para 71

160 *Banković & Others v Belgium & Others* (Admissibility Decision of 12 December 2001) para 67 and *Loizidou v. Turkey* ('Loizidou'), App no. 15318/89 (ECtHR, 23 February 1995) para 62

161 *Cyprus v Turkey,* App No 6780/74 and 6950/75 (ECtHR, 26 May 1975) para 8; *Loizidou v. Turkey* ('Loizidou'), App no. 15318/89 (ECtHR, 23 February 1995) paras 62-63: "Bearing in mind *the object and*

## 2. Principal judgments of the European Court of Human Rights establishing extraterritorial jurisdiction

Extraterritorial personal jurisdiction was first applied in ***Sanchez Ramirez (1996)***[162] and then in ***Öcalan v Turkey (2006)***[163], where it was *expanded to instances where persons were arrested and detained by the Member State*. In the latter case the respondent was Abdullah Öcalan, a Turkish national who had been wanted by Interpol and the Turkish authorities for committing terrorist acts. He was captured in the airport of Nairobi, Kenya. He later complained that several Convention rights had been violated in his treatment during his arrest and detention. The Court found that since he had been handed over by the Kenyan police to Turkish officials and returned to Turkey, the applicant was *under the control and authority of Turkey*, even though that control was executed outside its territory. The physical control, during the arrest and the return, was enough to establish extraterritorial jurisdiction under these circumstances.

### *2.1. Al-Skeini and others v the United Kingdom (2011)*

Other important scenarios when private security forces from a Member State act abroad, are situations where it *invades another territory*, followed by military presence.[164] An example is the ***Al-Skeini case*** which concerned the deaths of six relatives of the applicants in Southern Iraq in 2003, at the hands of British soldiers while the UK had the territory under occupation. The essential argument of the Court for finding that the acts had taken place within British jurisdiction, was that the United Kingdom, during the period between the removal of the Ba´ath regime until the Iraqi Interim Government took over**,** exercised some of the ´public powers` normally exercised by a sovereign government. Among those powers was the responsibility for maintaining security in South East Iraq. Since "the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security

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*purpose* of the Convention, the responsibility of a Contracting party may also arise when as a consequence of military action –whether lawful or unlawful –*it 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.*"

162 European Commission of Human Rights: *Illich Sánchez Ramirez v. France,* App no. 28780/95 (European Commission of Human Rights: Decision on the admissability, 24 June 1996) para 161

163 *Öcalan v. Turkey* (´Öcalan`) App no. 46221/99, (ECtHR, 12 May 2005) para 91

164 See for example *Louzidou* and *Cyprus v Turkey*

operations", there was consequently *a jurisdictional link* between individuals killed during security operations and the United Kingdom.[165] In its reasoning, the Court said:

> "[w]hat is decisive in such cases is the exercise of physical power and control over the person in question."[…] "It is clear that, whenever the state through its agents, exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art. 1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention can be "divided and tailored"."[166]

The Court therefore applied a mixture of the ´authority and control` rationale in ***Issa*** and direct ´physical control` over individuals in ***Öcalan***. More importantly, it reversed the statement in ***Bankovic*** that the rights and freedoms of the Convention could "not be divided and tailored" in accordance with particular circumstances of the extraterritorial act.

Although it is of concern that the Court left a blank space in terms of defining ´public powers, this judgment has been considered to constitute a major development in the definition of extraterritorial jurisdiction.

### *2.2. Hassan v the United Kingdom (2014)*

Three years later, in ***the Hassan judgment,*** the Court made a concise application of the personal control test. The factual background was the arrest and detention of the brother´s applicant by British forces, following the invasion in Iraq. Later, the body was found with obvious marks of torture and execution under suspicious circumstances. The Court declared the application admissible with regard to jurisdiction. It held that, similarly to the decision in ***Al Skeini***, *it was unnecessary to invoke jurisdiction with reference to the effective control test.* It sufficed that the applicant, Tarek Hassan, was *from his capture on the morning of 23 April 2003 until his admittance to Camp Bucca later that day, "within the physical power and control of the United Kingdom soldiers"* and therefore fell within the State´s jurisdiction.[167] The Government´s argument that this should not apply in an active hostilities phase of an *international armed conflict*, was rejected by the Court.

Here, as in ***Al-Skeini***, the Court does not make an attempt to establish whether there was effective control on the territory. The sole fact that they were under the physical military control of British soldiers in a security operation, established personal extraterritorial jurisdiction under Article 1 of the Convention.

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[165] *Al Skeini and Others v the United Kingdom*, App no 55721/07 (ECtHR, 7 July 2011) paras 135-136, 149
[166] Ibid, paras 136-137
[167] *Hassan v the United Kingdom*, App no 29750/09 (ECtHR, 16 September 2014) para 76

### *2.3. Jaloud v. the Netherlands (2014)*

The Court took the ´personal control test` even a step further in ***Jaloud.*** Mr. Sabah Jaloud was an Iraqi national who´s brother had died of gun wounds inflicted in a shooting incident at a vehicle check point in south-eastern Iraq. The checkpoint was patrolled by six soldiers from the Netherlands, under the command of their leading officer, lieutenant A. Mr. Jaloud complained to the Court that the incident had not been independently and effectively investigated. *The Court established that this incident fell within the jurisdiction of the Netherlands. The reasoning for its approach is interesting in many aspects.*[168]

*First of all,* the Netherlands argued, that it could not be blamed for the events and claimed that the authority was either with the United States and the United Kingdom together, being the "occupying powers" designated by the United Nations Security Council resolution 1483, or the United Kingdom alone as a "lead nation" in south-eastern Iraq, holding command over the Netherlands contingent of SFIR."[169] However, the Court concluded:

> "Although Netherlands troops were stationed in an area in south-eastern Iraq where SFIR forces were *under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area,* to the exclusion of other participating States, and retained full command over its contingent there. […]
>
> That being so, the Court cannot find that the Netherlands troops were *placed "at the disposal" of any foreign power,* whether it be Iraq or the United Kingdom or any other power, or that they were "*under the exclusive direction or control" of any other State* […].[170]

In other words, the fact that the Netherlands executed and took its day-to-day orders from an authority of a foreign State was not in itself sufficient to relieve a Contracting State of obligations under the Convention.

*Secondly*, as noted by scholars, this was regardless of the fact that the documents in the case revealed that the Netherlands had no exclusive control and operated only in support of the occupying powers. The Netherlands was able to formulate policy in some matters regarding its position, only through adjustment of multinational rules of engagement, but that was hardly a proof of independent policy making by Netherlands. Another interesting point is

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[168] *Jaloud v the Natherlands*, App no 47708/08 (ECtHR, 20 November 2014)

[169] Ibid, para 140

[170] Ibid, paras 149-151. In para 143, the Court had further stated: "Furthermore*, the fact of executing a decision or an order given by an authority of a foreign State is not in itself sufficient to relieve a Contracting State of the obligations which it has taken upon itself under the Convention.* The respondent Party is therefore not divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE), a United Kingdom officer. The Court notes that the Netherlands retained "full command" over its military personnel, as the Ministers of Foreign Affairs and of Defense pointed out in their letter to Parliament […]

the weight given to the concept "full command", whereby the Court says that although the Netherlands accepted operation control from a United Kingdom officer, it still retained full command over its military personnel.[171] It is interesting to consider how this reasoning would apply in cases where a national contingent serves as a part of a multinational force, under the leadership of an official appointed by a Supra National Organisation, and exercises powers that do not come from any individual sending state, but derive from international mandates.

*Thirdly,* the Netherlands maintained that the firing at a person was insufficient to decide that the violation took place within its jurisdiction. However, the Court, while not rejecting this argument, simply found that the incident fell under Netherlands jurisdiction on the grounds that the shooting had taken place while passing through a checkpoint, which was specifically set up as a part of asserting authority and control.

*Lastly*, the reasoning in the ***Al Skeini*** case is an interesting comparison in this context. There, the violation of Convention rights fell within United Kingdom jurisdiction since the individuals were killed in the course of security operations, regardless of whether the crimes took place as a result of effective control of the British troops. In ***Jaloud***, on the other hand, the fact that the shootings happened in an area of security operations carried out by Netherlands troops, was not on its own the basis for the Court´s decision. Instead, it mainly reasoned that the event occurred at a checkpoint "manned by personnel under the command and direct supervision of a Netherlands Royal Army officer". This analysis shows that the geographical factor was not a decisive point, but rather the authority and control over the checkpoint, applying a personal extraterritorial jurisdiction.[172]

This is a new variant of personal jurisdiction, placed next to the criteria of arrest and detention. It seems the Court is reaching further in the application of ´physical control` under personal jurisdiction.[173]

[171] Ibid, para 148
[172] Ibid, para 152. In his blog article, Aurel Sari finds this a troubling argument since it had been expressly denied by the the Netherlands that they exercided control over the Iraqi personnel manning the checkpoint, para 117 <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>
[173] <https://strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/>

## VI. CONCLUSION

Who knows why humans treat each other with a level of dignity and avoid causing harm or humiliation to others or exploit them? There are myriad factors that come into play such as empathy, religion, conviction and, perhaps the least noble of all, to avoid detrimental consequences to one self. Democracy is not a new concept. It is tried and tested. Today's form of representative democracy traces back to ancient Greece and has had a lot of time to mature. We, the individuals, the true source of democratic power, have had almost three millennia to make sure that our representative governments reflect our values and convictions. And we have been successful. Mostly. In the majority of cases governments respect human rights and undertake binding, multilateral obligations to increase the protection of the most sacrosanct of our basic entitlements. A patchwork quilt of national, bilateral, regional and supranational courts adjudicates on the rights of citizens and actively contributes to fleshing out and elaborating these rights. Corporations on the other hand do not have a long history. The idea of limited liability for example only stretches back around 200 years. Corporations have thus not had the time to mature and grow for a long time in a historical sense. When it comes to human rights, the big problem that incorporation poses is that it reduces accountability. Executives of corporations are shielded from personal liability by the veil of incorporation and in most cases don't face any personal harm even if the company they govern violates moral values. Usually, the ultimate responsibility that executives owe is to the shareholders who, quite naturally, are mostly focused on maximising the profit of their investment. This leads to many western legal entities behaving in way that would be categorized as megalomaniacal if demonstrated by a natural person. It only stands to reason that in order to get entities that are so financially driven to respect human rights, what is needed is either financial incentives or penalties. The focus of this thesis is on one of the aspects that contribute to the latter.

The basic research questions that the thesis aims to address are whether the ECHR can be an **effective tool** to address and remedy human rights violations of corporations and other business entities. As demonstrated in the case studies of the thesis, the ECHR has not shied away from ruling that the conduct of legal entities violates human rights. The Court has also clearly applied the General Principles of the Ruggie Framework when addressing these issues. Through the ´Drittwirkung´ effect, this leads to Member States of the European Convention on Human Rights becoming responsible for the human rights violations of companies within their jurisdiction. One can only hope that this will create an incentive for states to introduce laws that pass the financial burden of such violations onto the companies responsible. Compared to natural persons, corporations have a limited and naïve outlook on their existence. If the maximisation of profit is their sole goal, then the only viable way to get them to honour the basic rights we demand for our fellow citizens is to make the consequences financial. The first step in this journey is to establish a duty. All responsibility and liability is based on a breach of duty. This thesis shows that the ECHR actively addresses the duty of corporations and provides unequivocal answers as to whether these duties have been breached. The next logical step is to enact laws that pass the burden on to the party that has already been held responsible. Then we can reasonably expect that the fundamentals of corporate governance shift towards more socially responsible aims.

## A. SUMMARY IN ENGLISH

It is a primary responsibility of all states to protect and promote human rights. Still, businesses and multinational corporations continue to contribute to, or are complicit in, human rights infringements. As a response to an increased focus on privatization globally, the framework “Protect, Respect and Remedy: A Framework for Business and Human Rights”, was established and approved by the United Nations Human Rights Council in 2008. Under this framework, created by UN Special Representative John Ruggie, general principles were developed and published in 2011. Their purpose was to encourage and enable private companies to implement the framework. The framework has been seen as a model for corporations and a motivation for them to protect their public image, a tool to encourage them in taking voluntary steps and implementing human rights policies in their operations. Nevertheless, its efficiency has been questioned. Lack of clarity regarding human rights violations in host states, complications such as the limited liability of corporations and jurisdictional issues, are among the concerns that have been mentioned in this context.

The most important problem however is that while companies are considered to be bound by human rights rules in their activities, it remains difficult to establish evidence of *legally binding* obligations. At the same time, the European Court of Human Rights has found that ´a state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals`. Therefore, it is worth reflecting whether the European Court of Human rights (hereinafter ´the Court`) could guide the way in the future. That depends on the answer to two questions in particular.

First, how has the Court found *private actors to have ECHR obligations*? The thesis elaborates on the method used by the Court for this purpose, called the ´horizontal` effect or ´Drittwirkung` effect. It entails that the Court finds an act or omission, by a private third-party, to be a violation of an ECHR right, but holds the State liable for the violation through its positive obligations.

Secondly, the thesis examines whether the Court *applies the principles identified in the Ruggie Framework, directly or implicitly,* in instances where it addresses ECHR violations of private actors. If it does, that must be an indicator that the Court is moving in the way paved by the framework or at least acknowledging the value of its guidance (The Ruggie framework is not an instrument or convention and does not have binding effect).

In order to address the questions raised above, it is necessary to understand *the nature and scope of the positive obligations* that the ECHR places on Member States when human

rights are violated by corporations or other private entities. Studies of the Court´s case law will demonstrate how far the Court ´stretches` the positive obligations of states into the private sphere, and the way it *describes the standards* that private actors are required to comply with. In the assessment, *the UN General Principles* are applied to each case and the way they have been employed by the Court is examined.

While many corporations have their parent- or holding companies situated within the territory of the ECHR contracting parties, the case may be that their subsidiaries, branches or subcontractors are located outside the geographical jurisdiction of the ECHR. This requires a discussion on the legal principles and precedents relating the ECHR´s extraterritorial application in such circumstances. The last part of this thesis contains general conclusions drawn from these observations.

## B. ABSTRAKT AUF DEUTSCH

Es ist ein wichtiger Teil der Verantwortung aller Staten, die Menschenrechte zu schützen und zu fördern. Firmen und multinationale Unternehmen tragen jedoch weiterhin dazu bei oder haben Anteil daran, Menschenrechtsverletzungen zu begehen. Als Antwort auf die zunehmende globale Fokussierung auf die Privatisierung verschiedenster Sektoren wurde 2008 die Rahmenvereinbarung „Protect, Respect and Remedy: A Framework for Business and Human Rights" durch den Menschenrechtsrat ins Leben gerufen und genehmigt. In dieser Rahmenvereinbarung, die vom UN-Sonderbeauftragten John Ruggie ausgearbeitet wurde, wurden im Jahre 2011 allgemeine Grundsätze entwickelt und veröffentlicht. Sinn und Zweck dieser Grundsätze war es, private Unternehmen zu unterstützen und zu befähigen, diese Rahmenvereinbarung umzusetzen. Die Rahmenvereinbarung wird als Vorbild für verschiedenste Unternehmen begriffen und als Ansporn für eben diese Unternehmen, um ihr öffentliches Image zu wahren. Ebenfalls ist sie ein Instrument, um die Unternehmen dazu anzuregen, auf freiwilliger Basis Schritte hin zur Implementierung von Menschenrechtsrichtlinien in ihrem Betrieb vorzunehmen. Dennoch ist die Wirksamkeit und Tauglichkeit dieser Rahmenvereinbarung verschiedentlich in Zweifel gezogen worden. Attestiert wurde ihr ein Mangel an Klarheit im Hinblick auf Menschenrechtsverletzungen in Gastgeberländern. Die eingeschränkten Möglichkeiten zur Haftbarmachung von Unternehmen und ungeklärte Zuständigkeitsfragen sind Teil der Probleme, die in diesem Kontext vorgebracht worden sind.

Das Hauptproblem liegt jedoch darin, dass davon ausgegangen werden muss, dass Unternehmen verpflichtet sind, Menschenrechte in ihren Tätigkeiten und Geschäften zu wahren. Jedoch ist es schwierig, den Nachweis zu erbringen, wie rechtsverbindliche Verpflichtungen institutionalisiert und durchgesetzt werden können. Gleichzeitig hat der Europäische Menschenrechtsgerichtshof entschieden, dass ein Staat sich selbst nicht aus der Verantwortung ziehen kann, indem er seine Verpflichtungen an private oder öffentiche Stellen delegiert. Folglich lohnt es sich, darüber nachzudenken, inwiefern der Europäische Menschenrechtsgerichtshof (nachfolgend: der Gerichtshof) in diesem Bereich den Weg in die Zukunft weisen könnte.

Erstens: inwiefern hat der Gerichtshof in seiner Rechtssprechung bezüglich der EMRK (Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten) privatwirtschaftliche Akteure in die Pflicht genommen? Diese Masterarbeit befasst sich vertieft mit der Methode, welche der Gerichtshof in diesem Fall anwendet, und die als

“Drittwirkungs-Effekt” bezeichnet wird. Sie beinhaltet, dass der Gerichtshof eine Handlung oder ein Versäumnis, verschuldet durch eine Drittpartei, als Menschenrechtsverletzung begreift; jedoch aber den betreffenden Staat für die Rechtsverletzung zur Verantwortung zieht aufgrund ihrer positiven Verpflichtung.

Zweitens geht die vorliegende Arbeit der Frage nach, inwiefern der Gerichtshof die Grundsätze, welche in der Rahmenvereinbarung von Ruggie ausgearbeitet und identifiziert worden sind, direkt oder implizit anwendet, und zwar in Fällen, in denen Verletzungen der EMRK durch privatwirtschaftliche Akteure angegangen werden. Ist dies der Fall, wäre dies ein Indikator dafür, dass der Gerichtshof sich im Bezug auf die Rechtssprechung in eine Richtung bewegt, welche durch die Rahmenvereinbarung vorgegeben wird, oder der Gerichtshof zumindest deren Leitung anerkennt.

Um auf die oben angesprochenen Fragen eingehen zu können ist es notwendig, den *Charakter und den Umfang der positiven Verpflichtungen* zu verstehen, welche die EMRK ihren Mitgliedstaaten auferlegt, wenn Unternehmen oder andere private Einrichtungen Menschenrechtsverletzungen begehen. Studien, die sich mit dem Präzedenzrecht des Gerichtshofes befassen, zeigen auf, wie weit der Gerichtshof positive Verpflichtungen von Staaten in deren privaten Bereich ausdehnt und wie der Gerichtshof Standards beschreibt, denen private Akteure nachkommen müssen. In der vorliegenden Beurteilung werden die allgemeinen Grundsätze der UN (der Vereinten Nationen) auf jeden Fall angewandt. Ebenfalls wird analysiert, wie sie vom Gerichtshof angewandt worden sind, falls dies überhaupt der Fall sein sollte.

Es ist offensichtlich, dass sich die Tochter- oder Holdinggesellschaften vieler Unternehmen innerhalb des Hoheitsgebietes von Staaten (in der Folge: Mitgliedstaaten) befinden, welche die Konvention zum Schutze der Menschenrechte und Grundfreiheiten ratifiziert haben. Gleichzeitig befinden sich jedoch deren Tochtergesellschaften, Filialen oder Zulieferer ausserhalb der geographischen Gerichtsbarkeit der EMKR. Dies erfordert folglich eine Diskussion über die Rechtsgrunsätze und Präzedenzfälle im Hinblick auf die extraterritoriale Anwendung der EMKR unter solchen Umständen. Der letzte Teil der vorliegenden Arbeit befasst sich in der Folge mit grunsdätzlichen Schlussfolgerungen der vorgenommenen Analysen.

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