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

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PREFACE

The present submission analyses States’ Parties obligations to regulate and adjudicate corporate activities under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The submission was prepared by Daniel Augenstein in support of the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Entities (SRSG).

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EXECUTIVE SUMMARY

The present submission analyses States’ Parties obligations to regulate and adjudicate corporate activities under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The submission was prepared in support of the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Entities (SRSG).

Over the last decade, issues of human rights, business, and extraterritoriality have received increasing attention on the part of the European Court of Human Rights (ECtHR) and the Council of Europe (CoE). As regards State obligations to regulate and adjudicate corporate activities, the Court has decided a significant number of cases involving media corporations (defamation; freedom of expression), private banks (in particular non-payment of account debts following the financial crises), private hospitals and schools, trade unions (closed shop agreements, collective bargaining), and corporate human rights violations in the environmental sphere. In October 2010, the CoE Parliamentary Assembly adopted a resolution and a recommendation on human rights and business. As regards extraterritoriality, the ECtHR’s 2001 decision in Banković and subsequent case-law have stimulated a lively debate on the extraterritorial dimension of State obligations under the ECHR that concerns acts performed, and producing effects, outside the State’s territory.

The ECHR imposes two distinct types of obligations on States concerning corporate-related human rights violations: negative obligations to protect Convention rights against violations by corporations acting as State agents; and positive obligations to protect Convention rights against violations by corporations as third parties. While, in the former case, acts of corporations are attributed to the State so that the State is considered to directly interfere with Convention rights, in the latter case the State violates Convention rights by failing to take all reasonable measures to protect individuals against corporate abuse.

As regards negative State obligations, the ECtHR uses a combination of different criteria to determine on a case-by-case basis whether corporate activities can be directly attributed to the State, including
- The corporation’s legal status (under public law / separate legal entity under private law)
- The rights conferred upon the corporation by virtue of its legal status (e.g. conferral of rights normally reserved to public authorities)
- Institutional independence (including state ownership)
- Operational independence (including de lege or de facto state supervision and control)
- The nature of the corporate activity (‘public function’ or ‘ordinary business’, including the delegation of core state functions to private entities), and
- The context in which the corporate activity is carried out (e.g. relevance of the activity for the public sector, privatised state industries with monopoly position in the market).
As regards positive State obligations, the Court’s case-law suggests that the ECHR requires Convention States to take all reasonable measures to protect the human rights of individuals within their jurisdiction against violations by private actors, including corporations. Three main principles are discernible from the Court’s case-law:
- States must secure the individual’s legal status, rights and privileges under domestic law necessary for an effective enjoyment of Convention rights
- States must ensure an effective protection of Convention rights in the sphere of relations between private parties
- The acquiescence of State authorities into acts of private parties that violate Convention rights can engage the State’s responsibility under the Convention.

The concrete measures States have to take to prevent and redress corporate human rights violations are to a certain extent contingent on the Convention rights and freedoms affected. Three types of State obligations that the ECtHR has derived from the Convention can be distinguished:
- Substantive obligations to regulate and control corporate activities including the licensing, setting up, operation, security, and supervision of dangerous activities, and the provision of essential information about dangerous activities to the general public
- Procedural obligations to enable public participation and ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments
- Obligations pertaining to law enforcement and judicial process, including the proper administration of justice and the provision of effective remedies.

Substantively, States are required to regulate and control corporate activities in a way that strikes a fair balance between the rights of individuals affected and the conflicting interests of the community as a whole. The Court examines whether the State could reasonably be expected to act, and whether it took the necessary steps to ensure the effective protection of the applicants’ rights. States generally enjoy a wide margin of appreciation as how to satisfy their positive obligations under the ECHR. Failures of national authorities to comply with domestic law and procedural irregularities reduce the margin of appreciation and are indicative of a violation of Convention rights.

Procedurally, State decisions in relation to corporate activities that may impact on Convention rights (e.g. licensing and supervision of dangerous activities) must be taken in a transparent and inclusive way that enables States to evaluate in advance the risks involved in the corporate activity. Procedural obligations that the Court has derived from the ECHR include:
- Duties to enable public participation in the decision-making process and to ensure that the views of affected individuals are taken into account
- Duties to ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments.

The ECHR also imposes obligations on States to provide effective enforcement measures in relation to corporate activities that violate Convention rights. The Court’s case-law suggests that States are duty-bound to investigate, punish and redress corporate
human rights violations when they occur. Where the legislative framework itself is
deficient, States can be obliged to introduce new, or amend existing legislation.
Administrative authorities are required to contribute to the proper administration of
justice and to uphold the rule of law. Finally, domestic courts can be under an
obligation to have due regard to Convention rights when adjudicating disputes
between corporations and victims of corporate human rights abuses.

The ECtHR’s case-law on the extraterritorial dimension of the European Convention is
informed by an ‘essentially territorial notion of jurisdiction’ laid down in Article 1 ECHR.
While, accordingly, the extraterritorial application of Convention rights is the exception
rather than the norm, the Court has given States’ obligations to protect human rights
‘within their jurisdiction’ a broad interpretation that encompasses acts performed
outside the State’s territory, as well as acts performed inside the State’s territory that
produce effects outside the State’s territory. In its more recent case-law, the ECtHR
has corrected its restrictive approach to extraterritorial jurisdiction displayed in
Banković, reducing the scope of the ‘espace juridique’ doctrine and extending the
extraterritorial reach of Convention rights.

A State can be responsible for extraterritorial violations of Convention rights if it exercises
effective control over an area or a rights holder outside its territory. In cases of
effective control over territory, a State can also be responsible for extraterritorial
violations of Convention rights by private parties. The Court’s more recent case-law
suggests that in absence of effective control, a State may still have positive obligations
to take judicial and other measures in its power and in accordance with international
law to protect Convention rights extraterritorially. The ECtHR has justified this broad
approach to negative and positive extraterritorial State obligations considering that
Article 1 ECHR cannot be interpreted so as to allow a Convention State to perpetrate
violations of the Convention on the territory of another State which it could not
perpetrate on its own territory.

The best known examples of acts performed inside the State’s territory with extraterritorial
effects are cases involving the extradition, deportation or expulsion of an individual
from the territory of a Convention State. Where the extradited person is likely to be
subjected to, in particular, violations of Articles 2 and 3 ECHR the extraditing State’s
responsibility is engaged even though the violation is effectuated outside the State’s
territory and control. This also applies to cases in which the threat to Convention rights
in the receiving country emanates from private actors. In its more recent case-law, the
Court has also recognised State obligations to regulate and control private actors on its
territory with a view to protecting Convention rights outside its territory. Different
from the extradition cases, it appears that the presence of the rights holder on the
territory of the State is not a necessary condition for establishing State responsibility
under the Convention.
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I. INTRODUCTION

1. The present submission analyses States’ Parties obligations to regulate and adjudicate corporate activities under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The submission was prepared in support of the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Entities (SRSG). It complements the SRSG's reports on State responsibilities to regulate and adjudicate corporate activities under the United Nations' core human rights treaties,¹ and the reports on the Inter-American and the African regional human rights systems prepared to inform the mandate of the SRSG.²

2. The submission focuses on cases decided by the European Court of Human Rights (ECtHR) in the period from 2000 to 2010. Where necessary, earlier case-law of the ECtHR and the European Commission of Human Rights was taken into account. While priority was given to cases in which the ECtHR directly addresses State obligations to regulate and adjudicate corporate activities, a systematic analysis of these obligations also required the inclusion of case-law involving other non-State actors. The discussion of the extraterritorial dimension of the State duty to protect under the ECHR considers human rights violations by both State and non-State actors.

3. Over the last decade, the issues of human rights, business, and extraterritoriality have received increasing attention on the part of the ECtHR and the Council of Europe (CoE). As regards State obligations to regulate and adjudicate corporate activities, the Court has decided a significant number of cases involving media corporations (defamation; freedom of expression), private banks (in particular non-payment of account debts following the financial crises), private hospitals and schools, and trade unions (closed shop agreements, collective bargaining). The court has also considered a large number of cases concerning alleged violations of Article 6 ECHR due to the non-enforcement of judgements against private corporations. There is a growing body of case-law on human rights protection in relation to corporate activities in the environmental sphere that led to the adoption of a CoE Manual on Human Rights and the Environment in

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In 2009, the CoE Parliamentary Assembly called upon the Committee of Ministers to draft an additional protocol to the ECHR on the right to a healthy environment – a recommendation that has not (yet) been taken up by the Committee of Ministers. As regards extraterritoriality, the ECtHR’s 2001 decision in Banković and subsequent case-law have stimulated a lively debate on the extraterritorial dimension of State obligations under the ECHR that concerns both acts performed, and producing effects, outside the State’s territory. The case-law considered in this submission reflects these thematic developments.

4. In October 2010, the CoE Parliamentary Assembly adopted a resolution and a recommendation on human rights and business based on a report of its Committee for Legal Affairs and Human Rights that also makes reference to the UN ‘Protect, Respect, Remedy’ Framework developed by the SRSG. In its recommendation, the Parliamentary Assembly commends the Committee of Ministers to ‘explore ways and means to enhance the role of businesses in respecting and promoting human rights’, inter alia by way of
- Examining the feasibility of elaborating a complementary legal instrument, such as a Convention or an additional protocol to the European Convention on Human Rights
- Preparing a Recommendation on corporate responsibility in the area of human rights, possibly supplemented by flexible guidelines for national authorities, businesses and other actors;
- Developing co-operation between the Council of Europe and other international organisations, in particular the Organisation for Economic Co-operation and Development, its National Contact Points and the International Labour Organisation, with a view to promoting consolidation of coherent standards on corporate responsibilities in the area of human rights.

5. Part II of the submission provides an overview of the European Convention system of human rights protection, including the relationship between the ECHR and the European Union (EU). Part III analyses the nature and scope of State obligations to protect Convention rights in relation to corporate activities, while part IV examines the extraterritorial dimension of these obligations. Part V draws together some concluding remarks concerning the issues of business, human rights, and extraterritoriality under the European Convention on Human Rights.

6. The submission highlights existing obligations of Convention States to regulate and control corporate activities relevant to the protection of human rights, and to provide for effective enforcement mechanisms in case of their violation. When Convention States breach these obligations, they can be liable for failing to protect human rights.

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4. PACE, Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment (Recommendation 1885 (2009)); CoE Committee of Ministers, Reply to the Recommendations of the Parliamentary Assembly 1883 (2009) and 1885 (2009), adopted at the 1088th meeting of the Ministers’ Deputies (16 June 2010)
5. On this distinction see below, part IV
against corporate violations. Yet the submission also identifies procedural and substantive standards developed in the case-law of the ECtHR that can serve as guidance for States to enhance the protection of human rights in relation to corporate actors even where they are not legally required to do so. Finally, even though the ECHR does not directly impose obligations on private parties, the Court’s case-law is instructive for developing human rights standards corporations are expected to meet in areas such as public procurement, investment, trade, and export guarantee arrangements.

II. HUMAN RIGHTS PROTECTION UNDER THE ECHR

1. The European Convention system of human rights protection

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

8. The ECHR and its protocols predominantly protect civil and political rights. A number of provisions stray into the area of economic, social and cultural rights, including the right to life (Article 2), freedom from forced labour (Article 4), the right to respect for family life (Article 8), freedom of association (Article 11), the rights to property and education (Articles 1 and 2, Protocol 1), and the non-discrimination guarantees of Article 14 and the 12th Protocol. The ECtHR has clarified that there is no watertight division separating civil and political rights from economic, social and cultural rights, and has interpreted a number of Convention rights as also protecting socio-economic concerns.  

9. Article 1 ECHR requires States to ‘secure’ the rights and freedoms contained in the Convention. Read in conjunction with the substantive guarantees of the ECHR, the Court has interpreted Article 1 as imposing negative and positive obligations on States. A negative obligation is one by which the State is required to abstain from unjustified interference with, and thereby respect, human rights. A positive obligation is one whereby the State must ensure the effective realisation of human rights, that is, it must act through its organs to protect human rights even in the face of events for which it bears no direct responsibility.  

10. Convention States are not required to give direct effect to the ECHR in their domestic legal systems. What is sufficient is that they guarantee the substance of the Convention rights in a way that is equivalent to the standards of protection provided by the ECHR. Whether or not a State incorporates the ECHR, it is obliged to enforce the

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7 See Case of Airey v Ireland (Judgement of 9 October 1979) and below, part III
8 See, for example, Marckx v Belgium (Judgement of 13 June 1976); Goodwin (Christine) v United Kingdom (Judgement of 11 July 2002); X and Y v Netherlands (Judgement of 26 March 1985); Plattform ‘Aerzte fuer das Leben’ v Austria (Judgement of 21 June 1986); and below, part III

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substantial standards of the Convention in its domestic law for the benefit of victims of
corporate human rights violations. While States are thus required in international law
to ensure the effective protection of Convention rights, the status and rank of the
ECHR in national law is determined by their domestic legal systems. For example, the
ECHR has the status of constitutional law in Austria, yet only the status of statutory law
in Germany. In France, it has an intermediate status between ordinary legislation and
the Constitution. In the United Kingdom, the Human Rights Act 1998 incorporated the
ECHR into domestic law. Since its coming into force in October 2000, courts and
tribunals are empowered to set aside delegated legislation, administrative policies and
individual decisions for non-compliance with the ECHR. Superior courts must interpret
provisions of primary legislation in a way that ensures compatibility with the
Convention and, where this is not possible issue a declaration of incompatibility with
the ECHR.\(^9\)

11. What sets the ECHR apart from other international human rights treaties is its formal
and remarkably effective legal machinery. The Court is endowed with compulsory
jurisdiction over violations of the ECHR by Convention States. Pursuant to Article 34
ECHR, all State parties accept the right of any person, non-governmental organisation
or group of individuals regardless of nationality to bring an application under the
Convention. The Court’s judgements are legally binding in international law (Article
46(1)). Apart from declaratory relief, the Court is also empowered to award ‘just
satisfaction’ to the injured party (Article 41). The execution of judgements by States is
monitored by the CoE Committee of Ministers, which is composed of government
representatives of all Convention States.

12. Until 1999, the Strasbourg legal machinery consisted of a European Commission of
Human Rights and a European Court of Human Rights. The role of the Commission was
twofold: on the one hand, it was to shield the Court from inadmissible individual
applications, a function that also protected the traditional sovereignty of the
Convention States; yet on the other hand, it was to serve as an international institution
directly accessible to individuals, a radical departure from the traditional state-centred
international legal process.\(^10\) Protocol 11 to the ECHR abolished the Commission and
the Court in favour of a new permanent Court, which handles both the admissibility
and merits stages of applications. A three-judge Committee of the Court rules on the
admissibility of a case. Admissible cases are put before a seven-judge Chamber which
includes one judge sitting in respect of the defendant State. Cases of special difficulty
can be referred by the Chamber to a Grand Chamber of seventeen judges.

2. The ECHR and the European Union

13. All Member States of the European Union (EU), but not the EU itself, are parties to the
ECHR. In 1996, the European Court of Justice ruled that the European Union could not
accede to the ECHR without first amending the European treaties, given that ‘no treaty
provision confers on the Community institutions any general power to enact rules on

\(^9\) For a comprehensive analysis of the impact of the ECHR on the domestic law and politics of eighteen
Convention States see H. Keller & A. Stone Sweet (eds), A Europe of Rights (2008)

human rights or to conclude international conventions in this field’. 11 Article 6(2) of Treaty on the European Union, as amended by the Treaty of Lisbon, now explicitly provides for accession of the EU to the ECHR.

14. Article 6(3) of the Treaty on the European Union states that the EU ‘shall respect fundamental rights, as guaranteed by the European Convention ... as general principles of law’. The European Court of Justice (ECJ) has consistently treated the ECHR as one of the sources of EU human rights protection. It has ruled, for example, that rights under EU law concerning gender discrimination, data-protection and privacy are specific EU manifestations of Convention rights. It is possible to challenge EU action before the ECJ on the basis that it is inconsistent with the ECHR.

15. Until accession, the ECtHR will not admit complaints brought directly against the EU since the latter is not a party to the Convention. However, the court has entertained indirect complaints against EU acts that are brought against one or all EU Member States. The case-law of the Court in this area is characterised by a tension between facilitating the accession of Convention States to other international organisations, and ensuring an effective protection of Convention rights.

16. The most important ECtHR ruling concerning its jurisdiction over acts of the European Union is the Bosphorus case. 12 The application was brought by a Turkish company against Ireland for the impounding of two aircraft which the applicant company had leased from the national airline of the former Yugoslavia. The Irish authorities compounded the aircraft in compliance with an EU regulation implementing UN Security Council sanctions against the former Yugoslavia. Before the ECJ, the applicant company had argued without success that the EU Regulation violated EU fundamental rights. Before the ECtHR, the applicant submitted that the compounding of the aircraft violated its right to property (Article 1 Protocol 1). The Court held that Ireland remained in principle responsible for violations of the ECHR committed pursuant to a binding and non-discretionary EU law obligation. However, given that the European Union ensured human rights protection ‘equivalent’ to that of the ECHR, the Court would only review acts of Convention States in compliance with EU law if the protection of Convention rights could be considered ‘manifestly deficient’:

The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity. ...

On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. ...

In the Court’s view, State action taken in compliance with such [international] obligations is justified as long as the relevant organisation is considered to protect fundamental rights ... in a manner which can be considered at least equivalent to that for which the Convention provides. ...

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11 Opinion 2/94 on Accession by the Community to the ECHR, [1996] ECR I-1759
12 Case of Bosphorus v Ireland (Judgement of 30 June 2005); throughout the report, the Court’s cross-references are omitted.
If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.\(^\text{13}\)

17. The ECJ’s deference to the ECHR and the ECtHR’s presumption of equivalent human rights protection in the EU are indicative of the willingness of both courts to promote convergence and avoid conflict between the two systems. Whether the ECtHR will retain its presumption of compliance of EU law with the Convention after accession of the EU to the ECHR remains to be seen.

III. THE NATURE AND SCOPE OF STATE OBLIGATIONS TO PROTECT CONVENTION RIGHTS IN RELATION TO CORPORATE ACTIVITIES

1. The nature of State obligations to protect Convention rights against corporate violations

18. The text of the ECHR does not suggest that the Convention directly imposes obligations on corporations and other non-State actors to protect human rights. Article 1 ECHR only requires States to ‘secure’ the rights of the Convention to ‘everyone within their jurisdiction’. Article 34 ECHR only permits applications by individuals claiming to be a victim of a violation committed by a State.

19. Nevertheless, the Court tends to refer to private actors, including corporations, as ‘violating’ (as opposed to ‘abusing’) Convention rights. In a few cases, the Court’s reasoning could be interpreted as indicating that private corporations can have obligations correlative to the rights they enjoy under the ECHR. Balancing the privacy rights of the applicant against the rights of a media corporation to freedom of expression, the Court considered that ‘although [the press] must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest’.\(^\text{14}\)

20. More importantly for the purpose of the present submission, States can be responsible for human rights violations committed by private corporations if there is a sufficiently strong nexus between the corporate activity and the State. As the SRSG notes in his 2010 Report, ‘the closer an entity is to the State, or the more it relies on the statutory authority or taxpayer support, the stronger is the State’s policy rationale for ensuring that the entity promotes respect for human rights’. Moreover, ‘where companies are owned by and/or act as mere state agents, the State itself may be held legally responsible for such entities’ wrongful acts’.\(^\text{15}\)

\(^\text{13}\) Ibid, at paras 151-56
\(^\text{14}\) Von Hannover v Germany (Judgement of 24 June 2004), at para 58
\(^\text{15}\) Report of the SRSG, Business and Human Rights: Further steps towards the operationalisation of the ‘protect, respect, and remedy’ framework, UN Doc A/HRC/14/27 (9 April 2010), at paras 26-7
21. The ECHR imposes two distinct types of obligations on States concerning corporate-related human rights violations: negative obligations to protect Convention rights against violations by corporations acting as State agents; and positive obligations to protect Convention rights against violations by corporations as third parties. While, in the former case, acts of corporations are attributed to the State so that the State is considered to directly interfere with Convention rights, in the latter case the State violates Convention rights by failing to take all reasonable measures to protect individuals against corporate abuse.

22. In *Fadeyeva v Russia*, the Court elaborates on the distinction between negative and positive State obligations, and on the conditions under which States are required to protect Convention rights against corporate violations. The applicants lived in the vicinity of the largest Russian steel plant owned and operated by a private corporation. Pollution levels from the plant had for many years exceeded permitted levels and were found to cause the applicant severe health problems. The applicant had applied numerous times without success to be resettled outside the plant’s ‘sanitary security zone’ that separated the plant from the town’s residential areas:

The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant’s private life or home. At the same time, the Court points out that the State’s responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant’s complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant’s rights under Article 8(1) of the Convention. …

The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State’s positive obligation under Article 8 of the Convention.¹⁶

23. *Fadeyeva* is also instructive as regards the different levels of scrutiny the Court applies depending on whether what is at stake is the breach of a negative obligation or the breach of a positive obligation. Considering that in cases of a ‘direct interference by the State’ (breach of a negative obligation) and in cases of ‘the breach of a positive duty’, the applicable principles regarding the justification of the interference under Article 8(2) ECHR ‘are broadly similar’, the Court holds that

Direct interference by the State with the exercise of Article 8 rights will not be compatible with paragraph 2 unless it is ‘in accordance with the law’. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention.

However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation. There are different avenues to ensure ‘respect for private life’, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by

¹⁶ *Fadeyeva v Russia* (Judgment of 9 June 2005), at paras 89, 92
other means. Therefore, in those cases ‘in accordance with the law’ of the justification test cannot be applied in the same way as in cases of direct interference by the State.\textsuperscript{17}

a. **Negative State obligations to protect Convention rights in relation to corporations acting as State agents**

24. In the first constellation identified above, States are under a negative obligation to protect Convention rights in relation to corporations acting as State agents. The condition for such negative obligations to arise is that acts of corporations can be directly imputed to the State and can thus be treated as acts of the State itself.

25. Under the domestic law of many Convention States and under EU law, corporate activities can be directly attributed to the State by virtue of State ownership and control of corporations, by virtue of corporations exercising public functions, or by virtue of a combination of both. In Germany, for example, legal entities under private law which are wholly State owned are directly bound by Article 1 (3) German Basic Law. In mixed legal entities under private law, only the public shareholder is bound by fundamental rights. In the UK, by contrast, for the Human Rights Act 1998 to apply to private entities, these entities have to satisfy the ‘public function test’ of s. 6(3)(b) of the Act, according to which a ‘public authority includes any person certain of whose functions are functions of a public nature’. Expanding the vertical direct effect of European directives,\textsuperscript{18} the ECJ held in \textit{Foster} that British gas, at the time a nationalised industry with a monopoly of the gas-supply system in the UK, was an ‘organ of the State’ for the purpose of the 1976 EC Equal Treatment Directive. According to the Court, the provisions of the directive could be relied on against an organisation or body ‘whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals’.\textsuperscript{19}

26. The ECtHR uses a combination of different criteria to determine on a case-by-case basis whether corporate activities can be directly attributed to the State, including
- The corporation’s legal status (under public law / separate legal entity under private law)
- The rights conferred upon the corporation by virtue of its legal status (e.g. conferral of rights normally reserved to public authorities)
- Institutional independence (including state ownership)

\begin{flushleft}
\textsuperscript{17} \textit{Ibid}, at paras 95-6
\textsuperscript{18} Directives are one of the main instruments of harmonization used by the European Union. Generally, directives are not directly effective because they require national implementation. Furthermore, even where they have direct effect, directives could traditionally not be invoked against a private actor, but only against the State.
\textsuperscript{19} ECJ, Case C-188/89 A. Foster and Others v British Gas plc [1990] ECR I-3313, at para 20; \textit{Foster} did not provide an authoritative definition, but merely indicated that a body which has been made responsible for providing a public service under the control of the State was included within the European Union definition of a public body, see P. Craig & G. de Burca, \textit{EU Law} (4\textsuperscript{th} edition, 2008), p. 286-87 with further references to subsequent ECJ case law.
\end{flushleft}
- Operational independence (including *de lege* or *de facto* state supervision and control)
- The nature of the corporate activity (‘public function’ or ‘ordinary business’, including the delegation of core state functions to private entities)
- The context in which the corporate activity is carried out (e.g. relevance of the activity for the public sector, privatised state industries with monopoly position in the market).

27. In *Yershova*, the applicant complained that her former employer, a municipal corporation, had failed to pay her a sum of money awarded in a judgment following her dismissal. The ECtHR had to decide whether the State was directly responsible for the acts of the municipal corporation as a state agent, or merely responsible for enforcing a judgment against the municipal corporation as a private entity:

In deciding whether the municipal company’s acts or omissions are attributable under the Convention to the municipal authority concerned, the Court will have regard to such factors as the company’s legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities. The Court will notably have to consider whether the company enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions.\(^{20}\)

Notably, the Court dismissed the defendant Government’s argument that the municipal enterprise was incorporated under domestic law as a separate legal entity, which absolved the State from the responsibility for its debts. It held that the company’s legal status under domestic law, while important, was ‘not decisive for the determination of the State’s responsibility for the company’s acts or omissions under the Convention’.\(^{21}\) Instead, the Court focused on company’s strong ties with the municipality and the public nature of its functions:

The Court notes that the company’s independence was limited by the existence of strong institutional links with the municipality and by the constraints attached to the use of the assets and property. ...  
The company’s institutional links with the public administration were particularly strengthened in the instant case by the special nature of its activities. As one of the main heating suppliers in the city of Yakutsk, the company provided a public service of vital importance to the city’s population.\(^{22}\)

On this basis, the Court concluded that ‘notwithstanding the company’s status as a separate legal entity, the municipal authority, and hence the State, is to be held responsible under the Convention for its acts and omissions’.\(^{23}\)

28. Of relevance for determining whether a corporation acts as a State agent is also the Court’s case-law on what constitutes a ‘governmental organisation’ in the context of

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\(^{20}\) ECtHR, *Yershova v Russia* (Judgement of 8 April 2010), at para 55  
\(^{21}\) *Ibid*, at para 56  
\(^{22}\) *Ibid*, at paras 57-8  
\(^{23}\) *Ibid*, at para 62
admissibility decisions under Article 34 ECHR. In *Radio France*, the applicants challenged a criminal conviction for defamation under Article 7 and Article 10 ECHR. The defendant State submitted that the application was inadmissible due to the fact that the applicant was a ‘governmental organisation’ within the meaning of Article 34 ECHR. According to the Court,

The category of ‘governmental organisation’ includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person ... falls within this category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of independence from the political authorities.

29. Finally, the Court’s case-law suggests that direct attribution of corporate activities to Convention States can stem from the privatisation of State functions. The State can remain directly responsible for violations of the Convention if it delegates public functions to private actors, including corporations. The seminal case of *Costello-Roberts v UK* concerned corporate punishment in a private school. The defendant State claimed that it had fulfilled its positive obligations to secure the Convention rights of the applicant. It denied being directly responsible for the acts of the administering headmaster. According to the Court,

The State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1. ... Secondly, in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two. Thirdly, the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.

30. In *Woś v Poland*, the defendant State had entrusted a private law foundation the administration of a compensation scheme for victims of forced labour during the Nazi occupation of Poland. The private law foundation had been established under an international agreement with Germany. The applicant, a victim of forced labour, petitioned the Court on the basis of alleged procedural inequities regarding the administration of the scheme. The defendant State submitted that the foundation had been established as a private entity, that it did not exercise substantial control over its

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24 In *Novoseletskiy v Ukraine* (Judgement of 22 February 2005), the Court applied its ‘governmental organisation test’ to a case concerning the direct responsibility of a Convention State for corporate activities.
25 *Radio France & Others v France* (Admissibility Decision of 23 September 2003); applied by *Oesterreichischer Rundfunk v Austria* (Judgement of 7 December 2006)
26 *Costello-Roberts v UK* (Judgement of 25 March 1993), at paras 27-8; Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edition, 2009) appear to treat this case as an example of positive State obligations, although they also note that ‘it would be consistent with this reasoning [of the Court] for the State to be directly responsible under the Convention for the acts of private companies and other persons to whom powers that are traditionally State powers have been transferred by privatisation’ (p. 21). According to Clapham, *Human Rights Obligations of Non-State Actors* (2006), the case shows parallels ‘with the rule on State responsibility which attributes to the State the conduct of persons or entities empowered by the law of the State to exercise elements of governmental authority’ (p. 356-7).
operations, and that it therefore could not be held responsible for its actions. The Court held that

The fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility *ratione personae*. In the Court’s view, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law. ... The responsibility of the respondent State thus continues even after such a transfer.\(^\text{27}\)

b. **Positive State obligations to protect Convention rights against violations by corporations as third parties**

31. In the second constellation identified above, the ECHR imposes positive obligations on Convention States to take all reasonable measures to protect the human rights of individuals within their jurisdiction against violations by private parties, including corporations. In *Guerra & Others v Italy*, the applicants lived in the proximity of a privately-owned factory which produced fertilisers. The factory was classified as ‘high-risk’ due to the danger of chemical explosions. The applicants claimed that the defendant State had violated Article 8 ECHR by failing to inform them of the risks presented by the factory and to develop an action plan in the event of an emergency:

   The Court considers that Italy cannot be said to have ‘interfered’ with the applicants’ private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it 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 the effective respect for private or family life.\(^\text{28}\)

32. A number of positive State obligations to protect human rights against violations by private parties already flow from the text of the European Convention, including Article 1 (States obligation to ‘secure’ to everyone within their jurisdiction’ the Convention rights and freedoms), Article 2 (the right to life ‘*shall be protected*’) and Article 6 (*‘everyone is entitled* to a fair and public hearing’). Others have been developed in the case law of the ECtHR on Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour), Article 5 (liberty and security of the person), Article 8 (private & family life and home), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 13 (effective remedy), Article 1 Protocol 1 (peaceful enjoyment of possessions and property), and Article 2 Protocol 1 (right to education). The general obligation of Article 1 to secure Convention rights to everyone within the State’s jurisdiction together with the wide range of substantive rights already considered by the Court may suggest that in principle all Convention rights and freedoms that can be infringed by private actors are capable of imposing positive obligations on States.

\(^{27}\) *Woś v Poland* (Admissibility Decision of 01 March 2005), at para 72

\(^{28}\) *Guerra & Others v Italy* (Judgement of 19 February 1998), at para 58
33. In Appleby, the Court elaborates on the test for determining the existence and scope of positive State obligations. The applicants had set up a stall in a local shopping centre owned and run by a private corporation to publicise their views regarding plans of a municipal authority to build over a local green area. They complained that the corporation’s request for them to leave the shopping centre infringed their rights under Article 10 ECHR:

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.29

34. Three main principles are discernible from the Court’s case-law:
- States must secure the individual’s legal status, rights and privileges under domestic law necessary for an effective enjoyment of Convention rights
- States must ensure an effective protection of Convention rights in the sphere of relations between private parties
- The acquiescence of State authorities into acts of private parties that violate Convention rights can engage the State’s responsibility under the Convention.

35. States are under a positive obligation to take all reasonable measures to secure in their domestic law the individual’s legal status, rights and privileges necessary for an effective enjoyment of Convention rights.30 In Wilson, the applicants petitioned the Court on grounds of violations of Articles 10 and 11 ECHR because their employer corporations had offered them financial incentives to renounce their rights to collective bargaining. The House of Lords did not find the actions of the corporations in violation of UK law. The ECtHR, by contrast, ruled that the State must uphold the rights of workers to use trade unions to represent them in negotiations with employers:

The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applicants complain ... did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention. ...

Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union’s ability to strive for the protection of its members’ interests. ...

[The Court] considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention.

29 Appleby & Others v United Kingdom (Judgement of 06 May 2003), at para 40
30 See, for example, Airey v Ireland (Judgement of 9 October 1979); Marckx v Belgium (Judgement of 13 June 1976); and Goodwin (Christine) v United Kingdom (Judgement of 11 July 2002)
This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.\(^{31}\)

36. Moreover, States are under a positive obligation to secure Convention rights ‘in the sphere of the relations of individuals between themselves’, including the relationship between individuals and private corporations. The Court has recognised this principle in the context of the right to respect for private life (Article 8),\(^{32}\) freedom of expression (Article 10),\(^{33}\) and freedom of association (Article 11).\(^{34}\) In Ouranio Toxo, the Court justifies it having regard to the purpose of the ECHR to guarantee a ‘practical and effective’ protection of Convention rights:

The Court has often reiterated that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. It follows from that finding that a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association even in the sphere of relations between individuals.\(^{35}\)

37. Finally, the Court has recognised that States can be liable for failures to regulate and control acts of private parties that violate Convention rights. In Cyprus v Turkey, an inter-State complaint, the Court was petitioned with allegations that Turkish settlers had racially harassed Greek Cypriots living in northern Cyprus with the connivance and knowledge of authorities of the Turkish Republic of Northern Cyprus (TRNC) for whose acts Turkey was considered responsible. The Court held that ‘the acquiescence or connivance of the authorities of a Contracting State in acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention’.\(^{36}\)

38. The case of Iliașcu and Others v Moldova & Russia arose out of alleged acts of agents of the ‘Moldovan Republic of Transdniestria’ (MRT), a separatist regime controlling the area of Transdniestria, situated within the territory of Moldova, which had declared its independence. It was accepted by the Court that the area in question was within the exclusive sovereignty of Moldova, although Moldova did not exercise de facto control over it. The applicants alleged that Moldova had violated the ECHR by failing to fulfil its positive obligations to secure the rights of persons against the acts of private parties

\(^{31}\) Wilson, NUJ & Others v United Kingdom (Judgement of), at paras 41, 48
\(^{32}\) X and Y v The Netherlands (Judgment of 27 February 1985), at para 23; applied by Verliere v Switzerland (Admissibility Decision of 25 November 1994); Stubbings & Others v UK (Judgement of 22 October 1996), at para 62; Von Hannover v Germany (Judgement of 24 June 2004), at para 57
\(^{33}\) Khurshid Mustafa & Tarzibachi v Sweden (Judgement of 16 December 2008), at para 32
\(^{34}\) Plattform ‘Ärzte fuer das Leben’ v Austria (Judgement of 21 June 1986), at para 23; applied by Christian Democratic People’s Party v Moldova No 2 (Judgement of 2 February 2010), at para 25
\(^{35}\) Ouranio Toxo and Others v Greece (Judgement of 20 October 2005), at para 37
\(^{36}\) Cyprus v Turkey (Judgement of 10 May 2001), at para 81
within its jurisdiction.\textsuperscript{37} Reiterating that ‘the acquiescence or connivance of the authorities of a Contracting State in acts of private individuals which violate Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention’,\textsuperscript{38} the Court held that ‘even in absence of effective control over the Transniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economical, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicants the rights guaranteed in the Convention’.\textsuperscript{39}

The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining \textit{de facto} situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State’s positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it \textit{vis-à-vis} foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.\textsuperscript{40}

2. The scope of State obligations to protect Convention rights against corporate violations

39. As the previous section indicates, the ECHR imposes obligations on Convention States to take all reasonable measures to regulate and control corporate activities to prevent the violation of Convention rights, and to take effective enforcement measures, that is, to investigate, adjudicate and redress violations of Convention rights when they occur.

40. The concrete measures States have to take to prevent and redress corporate human rights violations are to a certain extent contingent on the Convention rights and freedoms affected. The Report focuses the growing body of ECtHR case-law on violations of Convention rights in the environmental sphere that most commonly involve Article 2 (right to life), Article 8 (private & family life and home) and Article 1 Protocol 1 (peaceful enjoyment of possessions and property).

41. There is a discernible general pattern in cases involving corporate human rights violations in the environmental sphere. A corporation produces an environmental nuisance, most commonly in the areas of extractive industry, waste disposal and air pollution, which interferes with Convention rights. The State fails to take all reasonable measures to regulate and control the corporate activity, generally in violation of

\textsuperscript{37} \textit{Illaşcu and Others v Moldova & Russia} (Grand Chamber Judgement of 08 July 2004); the Court’s assessment of \textit{Russia’s} responsibility for violations of Convention rights in the area of the ‘Moldovan Republic of Transdniestria’ is considered below, part IV.

\textsuperscript{38} \textit{Ibid}, at para 318

\textsuperscript{39} \textit{Ibid}, at para 331

\textsuperscript{40} \textit{Ibid}, at para 333
domestic law. Finally, the State fails to effectively investigate, adjudicate and redress the corporate violation.

42. Three types of State obligations that the ECtHR has derived from the Convention can be distinguished:
- Substantive obligations to regulate and control corporate activities including the licensing, setting up, operation, security, and supervision of dangerous activities, and the provision of essential information about dangerous activities to the general public
- Procedural obligations to enable public participation and ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments
- Obligations pertaining to law enforcement and judicial process, including the proper administration of justice and the provision of effective remedies.

a. Substantive State obligations to protect Convention rights through the regulation and control of corporate activities

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

44. Substantively, States are required to regulate and control corporate activities in a way that strikes a fair balance between the rights of individuals affected and the conflicting interests of the community as a whole. The Court assesses whether ‘the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant’s rights’, or whether ‘the national authorities took the necessary steps to ensure the effective protection of the applicants’ rights’. The Court examines for example whether the State authorities were aware of the environmental problems, and exercised sufficient control over the corporate activity by imposing certain operating conditions and supervising their implementation.

45. In Lopez-Ostra, the Court found the defendant State responsible for violations of Article 8 ECHR caused by pollution (including fumes, noise and foul smells) emanating

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41 Hatton & Others v United Kingdom (Grand Chamber Judgment of 7 August 2003), at para 99
42 See, for example, the early case of Lopez Ostra v Spain (Judgment of 09 December 1994), at para 51
43 Fadeyeva v Russia (Judgment of 9 June 2005), at para 89
44 Lopez Ostra v Spain (Judgment of 09 December 1994), at para 55; Guerra & Others v Italy (Judgement of 19 February 1998), at para 58
45 Lopez Ostra v Spain (Judgment of 09 December 1994), at paras 52-3; Fadeyeva v Russia (Judgment of 9 June 2005), at para 90
from a waste treatment plant owned and operated by a private corporation. The Court pointed out that while the national and local authorities ‘were theoretically not directly responsible for the emissions in question ... the town allowed the plant to be built on its land and the State subsidised the plant’s construction’.\textsuperscript{46} Subsequently, the State authorities repeatedly failed to effectively secure the Convention rights of the applicants against the environmental nuisances emanating from the plant. Having regard to these facts, the Court considered that ‘the State did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life’.\textsuperscript{47}

\textbf{46.} Öneriyildiz, a case concerning an explosion in a waste-collection site that killed numerous of the applicant’s relatives, is instructive as to what the Court considers ‘reasonable’ or ‘necessary’ in the context of industrial activities in the light of Article 2 (right to life) and Article 8 (respect for private life).\textsuperscript{48}

The positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction ... must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites. ... The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.\textsuperscript{49}

\textbf{47.} Tatar concerned a massive cyanide spill at the Baia Mare gold mine in northern Romania owned and operated by a private corporation. The spill released 100,000 cubic metres of contaminated water into a series of rivers crossing Romania, Hungary, Serbia and Bulgaria to the Black Sea. In its judgement, the Court emphasised that the State obligations under Article 8 ECHR regarding the licensing, setting up, security, and supervision of dangerous activities also apply in relation to private corporations.\textsuperscript{50}

\textsuperscript{46} Lopez Ostra v Spain (Judgment of 09 December 1994), at para 53
\textsuperscript{47} Ibid, at para 58
\textsuperscript{48} Öneriyildiz v Turkey (Judgement of 30 November 2004), applied by Budayeva and Others v Russia (Judgement of 20 March 2008). In both cases, the Court emphasises that in the context of dangerous activities the scope of positive obligations under Article 2 ECHR largely overlap with those under Article 8 ECHR, see Öneriyildiz at paras 90, 160 and Budayeva at para 133
\textsuperscript{49} Öneriyildiz v Turkey (Judgement of 30 November 2004), at paras 71, 89, 90
\textsuperscript{50} Tatar v Romania (Judgement of 27 January 2009), at para 88
48. Another important aspect of substantive State obligations to prevent corporate human rights violations in the environmental sphere is the duty of States to provide essential information to the general public about dangers involved in corporate activities. In Guerra, the Court found Italy in violation of Article 8 ECHR because it had waited until the production in the factory had ceased to provide the applicants ‘with essential information that would have enabled them to assess the risks they and their family might run if they continued to live [in the town] particularly exposed to danger in the event of an accident in the factory’. In Öneryildiz, the Court stressed that among the preventive measures, ‘particular emphasis should be placed on the public’s right to information ... which has already been recognised under Article 8 [and] may also, in principle, be relied on for the protection of the right to life’. In Tatar, one critical consideration for finding Romania in violation of Article 8 ECHR was that the State had failed to inform the public in advance of risks bound up with the mining project (among others by withholding the results of an environmental impact assessment), and to inform the public after the accident of the dangers posed by the cyanide spill.

49. In cases involving State failures to regulate and control corporate activities in the environmental sphere, States generally enjoy a wide margin of appreciation. As the Court says in Hatton regarding Article 8 ECHR,

In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation. In Powell and Rayner, for example, it asserted that it was ‘certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere’, namely the regulation of excessive aircraft noise and the means of redress to be provided to the individual within the domestic legal system.

However, the margin of appreciation will be reduced in scope if the State measure interferes with a ‘particularly intimate aspect of the individual’s private life’.

50. Moreover, a failure of national authorities to comply with domestic law reduces the State’s margin of appreciation and is indicative of a violation of Convention rights. For example, in Lopez Ostra, the waste-treatment plant at issue was illegal in that it operated without the necessary licence; in Guerra, the violation was predicated on the inability of the applicants to obtain information about the factory that the State was under a statutory obligation to provide; and in Taskin, the local authorities failed to

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51 Guerra & Others v Italy (Judgement of 19 February 1998), at para 60
52 Öneryildiz v Turkey (Judgement of 30 November 2004), at para 90
53 Tatar v Romania (Judgement of 27 January 2009), at paras 113-16, 121-24
54 Pursuant to the ‘margin of appreciation’ doctrine, States generally enjoy a certain degree of discretion, subject to European supervision, when taking legislative, administrative, or judicial action to protect Convention rights.
55 Hatton & Others v United Kingdom (Grand Chamber Judgment of 7 August 2003), at para 100, applying Powell and Rayner v United Kingdom (Judgement of 21 February 1990); see also Fadeyeva v Russia (Judgment of 9 June 2005), at para 96
56 Hatton & Others v United Kingdom (Grand Chamber Judgment of 7 August 2003), at para 102
effectuate the closure of a gold-mine operated by a private corporation although the operating permit had been annulled by the Supreme Administrative Court.\textsuperscript{57}

51. In absence of domestic irregularities, ‘it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities to strike a fair balance between the competing interests of different private actors’.\textsuperscript{58} The Court will only in ‘exceptional circumstances ... revise the material conclusions of the domestic authorities’.\textsuperscript{59} Nevertheless, the State is under an obligation to prove that it acted with due diligence and gave appropriate consideration to the competing interests of the individual and the community as a whole:

It is certainly within the Court’s jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to the competing interests. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which individuals bear a heavy burden on behalf of the rest of the community.\textsuperscript{60}

b. Procedural State obligations to protect Convention rights through ensuring an informed decision-making process

52. Procedurally, State decisions in relation to corporate activities that may impact on Convention rights (e.g. licensing and supervision of dangerous activities) must be taken in a transparent and inclusive way that enables States to evaluate in advance the risks involved in the corporate activity. Procedural obligations that the Court has derived from the ECHR include:
- Duties to enable public participation in the decision-making process and to ensure that the views of affected individuals are taken into account, and
- Duties to ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments.

53. Similarly to domestic legal irregularities, violations of procedural State obligations can reduce the State’s margin of appreciation and be indicative of a violation of Convention rights.

54. In Hatton, the Court notes that in connection with the procedural element of its review of cases involving environmental issues, it is necessary ‘to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available’.\textsuperscript{61} Moreover, ‘a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate

\textsuperscript{57} See, respectively, Lopez Ostra v Spain (Judgment of 09 December 1994), at paras 16-22; Guerra & Others v Italy (Judgement of 19 February 1998), at paras 25-27; Taskin & Others v Turkey (Judgement of 10 November 2004), at para 117
\textsuperscript{58} Fadeyeva v Russia (Judgment of 9 June 2005), at para 105
\textsuperscript{59} Ibid, at paras 105, 128
\textsuperscript{60} Ibid, at para 128
\textsuperscript{61} Hatton & Others v United Kingdom (Grand Chamber Judgment of 7 August 2003), at para 104
investigations and studies in order to strike a fair balance between the various conflicting interests at stake.62

55. Taskin involved the decision by local authorities to grant a licence to a private corporation for the extraction of gold. On appeal by local residents, the Turkish Supreme Administrative Court quashed the decision due to dangers posed to the environment by the use of cyanide in the mine. With considerable delay, the State ordered the closure of the mine, only to authorize the resumption of mining after a number of subsequent developments. The applicants petitioned the Court alleging violations of, inter alia, Article 8 ECHR:

The Court reiterates that, according to its settled case law, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8. It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available.63

56. Building on Hatton, the Court held in Taskin that the decision-making process must involve ‘appropriate investigations and studies’ that allow States ‘to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals’ rights’.64 Moreover, the Court considered that Article 8 ECHR was also engaged ‘where the dangerous effects of an activity to which individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life’.65

57. A final element of the procedural test of the Court is whether the general public had access to the conclusions of studies conducted during the decision-making process,66 and whether individuals concerned ‘were able to appeal to the courts against any decision, act, or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process’.67

c. State obligations pertaining to law enforcement and judicial process in relation to corporate violations of Convention rights

58. The ECHR imposes obligations on States to provide effective enforcement measures in relation to corporate activities that violate Convention rights. The ECtHR’s case-law suggests that States are duty-bound to investigate, punish and redress corporate

62 Ibid, at para 128
63 Taskin v Turkey (Judgment of 10 November 2004) at para 118
64 Ibid, at para 119
65 Ibid, at para 113
66 Taskin v Turkey (Judgment of 10 November 2004) at para 119; Tatar v Romania (Judgement of 27 January 2009), at paras 113-16
67 Taskin v Turkey (Judgment of 10 November 2004) at para 119; Hatton & Others v United Kingdom (Grand Chamber Judgment of 7 August 2003), at para 127
human rights abuses when they occur. Where the legislative framework itself is deficient, States can be obliged to introduce new, or amend existing legislation. Administrative authorities are required to contribute to the proper administration of justice and uphold the rule of law. Finally, domestic courts can be under an obligation to have due regard to Convention rights when adjudicating disputes between corporations and victims of corporate human rights abuses.

59. Most significant in cases involving corporate human rights abuses in the environmental sphere is the obligation of States to ensure compliance with domestic law, both on the part of public authorities and on the part of private corporations. The characteristic feature of cases such as Guerra, Lopez Ostra, Taskin, Fadeyeva, Öneryildiz and Tatar is that the industrial activities in question were either operated illegally or in violation of environmental laws and emission standards.

60. In Taskin, the Court emphasised in the context of violations of Article 8 ECHR stemming from a cyanide spill in a gold-mine owned and operated by a private corporation that ‘the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose’. 68 The Court furthermore found the defendant State in violation of Article 6 ECHR (fair trial) because the national authorities had ‘failed to comply in practice and within reasonable time’ with the judgements of the Turkish Administrative Court and Supreme Administrative Court, ‘thus depriving Article 6(1) of any useful effect’. 69

61. As seen, in Öneryildiz the Court stressed that Article 2 ECHR requires States to ‘put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life’, regardless of whether the activity in question is of a public or a private nature. 70 From this obligation, the Court derives a number of prerequisites regarding the judicial response required in the event of alleged infringements of the right to life. The Court notes that ‘where lives have been lost in circumstances potentially engaging the responsibility of the State, [Article 2] entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished’. 71 In particular,

The judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as the result of dangerous activities if and to the extent that this is justified by the

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68 Taskin v Turkey (Judgment of 10 November 2004) at para 124
69 Ibid, at para 137
70 Öneryildiz v Turkey (Judgement of 30 November 2004), at paras 71, 89; for a case involving the State duty to prevent, investigate, and ensure accountability for violations of Article 2 ECHR by non-State actors outside the environmental sphere see Ergi v Turkey (Judgement of 10 October 2000).
71 Ibid, at para 91
The findings of the investigation. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue.\(^{72}\)

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

The proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. ... The national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court’s task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.\(^{73}\)

62. The ECHR also imposes obligations on States to protect Convention rights in court proceedings between corporations and private individuals. The ECtHR considers domestic courts (as public authorities) directly bound by the European Convention when adjudicating private disputes.\(^{74}\)

63. In Kurshid Mustafa v Sweden, the applicants had been involved in a private-law dispute with their landlord corporation over the installation of a satellite dish on the tenancy building to receive TV programmes in their native language. The Swedish Court of Appeal found against the applicants and ruled that their tenancy agreement should be terminated, as a consequence of which they were evicted from the flat. The applicants petitioned the ECtHR alleging violations of Article 10. The Government contended that the case concerned a dispute between two private parties over a contractual obligation and that there had been no intervention by a public authority to bring any positive obligation of the State into play. The ECtHR reiterated that Article 10 applies to judicial decisions preventing a person from receiving transmissions from telecommunications satellites. Moreover, the genuine and effective exercise of freedom of expression under Article 10 may require positive measures of protection, even in the sphere of relations between individuals.\(^{75}\) Regarding the protection of Convention rights by the Swedish Court of Appeal in the proceedings between the tenants and the landlord corporation, the ECtHR held:

Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an

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\(^{72}\) Ibid, at para 94

\(^{73}\) Ibid, at para 95-6

\(^{74}\) Pla and Puncernau v Andorra (Judgment of 13 July 2004)

\(^{75}\) Kurshid Mustafa & Tarzibachi v Sweden (Judgement of 16 December 2008), at para 32
administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.

In the present case ... the applicant’s eviction was the result of the [domestic] court’s ruling. The Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis. ... The responsibility of the respondent State having been established, the Court of Appeal’s ruling that the applicants’ tenancy agreement should be terminated because of their refusal to dismantle the satellite dish in question amounted to an ‘interference by a public authority’ in the exercise of the rights guaranteed by Article 10.\textsuperscript{76}

\textbf{64.} In \textit{Steel and Morris}, the Court had to consider fair trial rights under Article 6 and Article 10 ECHR in defamation proceedings brought by a multinational corporation against NGO campaigners in the UK.\textsuperscript{77} The proceedings were complex and protracted, yet the campaigners had not qualified for legal aid, had represented themselves throughout most of the case, and had encountered difficulties in paying various administrative costs. In its judgement, the ECtHR recalled that ‘the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side’.\textsuperscript{78} Furthermore, the Court ruled that whether the provision of legal aid was necessary for a fair hearing depended, \textit{inter alia}, ‘upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant’s capacity to represent him or herself effectively’.\textsuperscript{79} Applying these principles to the case at hand, the Court held that

\begin{quote}
The disparity between the respective levels of legal assistance enjoyed by the applicants and [the corporation] was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness ... The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.\textsuperscript{80}
\end{quote}

\textbf{65.} Finally, the Court’s case law suggests that Convention States are under an obligation to organise an effective system for the enforcement of judgments against private corporations. In \textit{Fuklev}, the applicant was awarded a judgement against his former employer for non-payment of wages. By the time of the judgement, the employer corporation had become insolvent. The government submitted that they had taken all the measures prescribed by domestic legislation to enforce the judgement in the applicant’s favour. Nevertheless, the court found that the non-enforcement of the judgement against the employer corporation constituted a violation of Article 6 ECHR because the defendant State had failed in its ‘positive obligation to organise a system

\begin{footnotes}
\item \textsuperscript{76} \textit{Ibid}, at paras 33-4, 36
\item \textsuperscript{77} \textit{Steel and Morris v United Kingdom} (Judgment of 15 February 2005)
\item \textsuperscript{78} \textit{Ibid}, at para 59
\item \textsuperscript{79} \textit{Ibid}, at para 61
\item \textsuperscript{80} \textit{Ibid}, at paras 69, 95
\end{footnotes}
for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay'.

66. The applicant in *Margushin v Russia* had been involved in complex legal proceedings with a commercial bank over the non-payment of money from his account following the financial crises of 1998. After numerous appeals and retrials, he was awarded and paid the full sum. Subsequently, he claimed and was awarded interest by a further judgement, which was upheld on appeal. However, the bank refused to pay, relying on a ‘friendly settlement’ with the association of its creditors which stipulated that no interest was to be paid on such sums. On petition by the bank, the domestic court discontinued enforcement proceedings, a decision that was upheld on appeal. Before the ECtHR, the applicant complained of violations of Article 6 and Article 1 Protocol 1 ECHR. The Court dismissed the defendant State’s objection that the application was inadmissible *ratione personae* because it was directed against a commercial bank. It held that ‘the applicant’s grievances concern non-enforcement of the judgement in his favour, which covered not only the Bank’s refusal to repay the judgement debt but also the discontinuation of the enforcement proceedings by domestic courts’.

By discontinuing the enforcement proceedings, the domestic authorities infringed the principle of legal certainty as protected by Article 6 ECHR. The Court furthermore found a violation of Article 1 Protocol 1 because the defendant State had failed its positive obligation to protect the applicant’s right to property, which was pertinent ‘even in cases involving litigation between private individuals or companies’.

67. In *Ülger*, the applicant was awarded damages against his former employer, a private construction corporation. The domestic court refused to serve the judgement on the ground that court fees, to be paid by the corporation, remained outstanding. The ECtHR found the respondent State in violation of Article 6:

> The issue here is the fact that the obligation to pay the charges in advance, which should have been born by the losing party, prevented [the applicant] from having the binding judgement in his favour served on him and, thereafter, from being able to initiate enforcement proceedings. ... 
> The Court finds that holding the applicant responsible for the payment of the charges before he could receive a copy of the judgement imposed an excessive burden on him and restricted his right of access to court to such an extent as to impair on the very essence of that right.

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81 *Fuklev v Ukraine* (Judgment of 7 June 2005), at para 84
82 *Margushin v Russia* (Judgement of 1 April 2010), at para 29
83 Ibid, at para 38
84 *Ülger v Turkey* (Judgement of 26 June 2007), at paras 40, 45
IV. THE EXTRATERRITORIAL DIMENSION OF STATE OBLIGATIONS TO PROTECT CONVENTION RIGHTS IN RELATION TO CORPORATE ACTIVITIES

68. In the context of the UN ‘Protect, Respect, Remedy’ Framework, the SRSG has suggested to distinguish between two dimensions of extraterritoriality: true extraterritorial jurisdiction that is exercised directly in relation to overseas actors or activities; and domestic measures with extraterritorial implications that are decided or carried out inside the territory, but have effects outside the territory of the State.85

69. To a certain extent, this distinction between ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’ can also be traced in the case-law of the ECtHR. As the Court says in Banković, ‘acts of the contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 ECHR’.86 Similarly, in Loizidou the Court held that ‘the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory’.87

70. The ECtHR’s case-law on the extraterritorial dimension of the European Convention is informed by an ‘essentially territorial notion of jurisdiction’ laid down in Article 1 ECHR. While, accordingly, the extraterritorial application of Convention rights is the exception rather than the norm, the ECtHR has given States’ obligations to protect human rights ‘within their jurisdiction’ a broad interpretation that encompasses acts performed outside the State’s territory, as well as acts performed inside the State’s territory that produce effects outside the State’s territory.

1. State obligations to protect Convention rights against acts performed outside the State’s territory

71. The most discussed, and disputed, ECtHR decision on the extraterritorial application of Convention rights is Banković v Belgium.88 The applicants petitioned the Court with

85 Report of the SRSG, Business and Human Rights: Further steps towards the operationalisation of the ‘protect, respect and remedy’ framework, UN Doc/A/HRC/14/27 (9 April 2010). The SRSG has integrated the distinction between ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’ into an extraterritoriality matrix to illustrate the range of permissible measures States can take to protect human rights extraterritorially. Apart from the two ‘rows’ of ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’, the matrix consists of three ‘columns’, namely ‘public policies’, ‘regulation’, and ‘enforcement action’, together yielding six ‘cells’ of extraterritoriality.

86 Banković & Others v Belgium & Others (Admissibility Decision of 12 December 2001) at para 67

87 Loizidou v Turkey (Judgement of 23 March 1995, preliminary objections), at para 62

violations of Articles 2, 10, and 13 ECHR allegedly committed by several Convention States in the course of NATO airstrikes on the former Republic of Yugoslavia (FRY) in 1999. At the outset, the Court notes that ‘the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside the territory of those States (the “extra-territorial act”).’ Accordingly, the decisive question was ‘whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States’. The Court first considered the meaning of the words ‘within their jurisdiction’ in Article 1 ECHR:

As to the ‘ordinary meaning’ of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.

The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in particular circumstances of each case.

On this basis, the Court held that an extraterritorial application of Convention rights was premised on State authorities exercising ‘effective control of the relevant territory and its inhabitants abroad’, thereby arguably omitting the separate test of control over persons developed in its earlier case-law. Moreover, and most controversially, the Court limited the extraterritorial scope of the ECHR to the territories of the Convention States: ‘In short, the Convention is a multi-lateral treaty operating ... in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Convention States’.

The Court’s reference in Banković to the rules of jurisdiction under general public international law, while substantiating the ‘essentially territorial notion of jurisdiction’ contained in Article 1 ECHR, also appears to conflate the extraterritorial reach of Convention rights with permissible jurisdictional competence under public international law. However, consistent with the Court’s earlier and later case-law, an extraterritorial act comes within the jurisdiction of a Convention State if that State exercises effective control outside its territory, regardless of whether this exercise of control is permissible or ‘lawful’ under general public international law.

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89 Ibid., at para 54
90 Ibid., at paras 59, 61
91 Ibid., at para 71
92 Ibid., at para 80
73. *Cyprus v Turkey* is an early example of the Court’s ‘effective control over territory’ test.\(^93\) The Court found that human rights violations in Northern Cyprus fell within the jurisdiction of Turkey and entailed its responsibility for securing the Convention rights against acts of local authorities, as well as against acts of private parties:

Having effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey. ... 

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 notes] that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention.\(^94\)

74. In *Al-Saadoon & Mufdi*, the United Kingdom had agreed to transfer custody over the applicants it had detained in Iraq to the Iraqi armed forces pursuant to a Memorandum of Understanding that formed part of the transfer of full sovereignty. The applicants alleged violations of, *inter alia*, Articles 2, 3 and 6 ECHR and Article 1 Protocol 13 (right not to be subjected to the death penalty) on the basis that in case of a transfer to the Iraqi authorities, they were likely to face the death penalty. The defendant State contended that it was under an obligation under international law to surrender the applicants to the Iraqi authorities. Recalling *Bosphorus* and *Soering*, the Court considered that ‘it has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party’s “jurisdiction” from the scrutiny under the Convention’.\(^95\) Having established that the international agreement with Iraq did not absolve the United Kingdom of its responsibility under the Convention, the Court first held that the defendants were within the United Kingdom’s extraterritorial jurisdiction: ‘The respondent State’s armed forces, having entered Iraq, took active steps to bring the applicants within the United Kingdom’s jurisdiction by arresting them and holding them in British-run detention facilities’. From this assertion of extraterritorial jurisdiction, the Court derived a ‘paramount obligation’ of the defendant State ‘to ensure that the arrest and detention did not end in a manner which would breach the applicants’ rights under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13’.\(^96\)

\(^93\) *Cyprus v Turkey* (Judgment of 10 May 2001), for the facts of the case see above, part III section 1.b

\(^94\) *Ibid*, at paras 77, 81

\(^95\) *Al-Saadoon and Mufdi v United Kingdom* (Judgement of 2 March 2010), at para 128

\(^96\) *Ibid*, at para 140
75. The Grand Chamber judgement of Illaşcu and Others v Moldova & Russia already considered in part III is now the leading authority on the extraterritorial scope of Article 1 ECHR. Apart from ruling that Moldova was under a positive obligation to secure the applicants’ Convention rights within the part of its territory controlled by the separatist movement (MRT), the Court also considered the responsibility of Russia for violations committed by the MRT in this part of Moldova’s territory. Reiterating the exceptional nature of extraterritorial jurisdiction under the ECHR, the Court considered that one such exception was a State party exercising ‘effective control of an area situated outside its national territory. Obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control’. Illaşcu thus not only sets the ‘effective control over territory’ test apart from public international law rules on permissible jurisdictional competence, but also broadens its scope to include the provision of very substantial political, military and economic support to non-State actors operating in a part of the territory of another State. Finally, the Court held that the applicants came within Russia’s jurisdiction even though at the time ‘the Convention was not in force with regard to the Russian Federation’, thus indicating that the ‘espace juridique’ doctrine developed in Banković may not apply to cases where a non-Convention State (Russia) commits violations on the territory of a Convention State (Moldova).

76. The earliest cases with an extraterritorial dimension under the ECHR concerned the exercise of State authority and control over persons outside the State’s territory. For example, in X v the United Kingdom, the European Commission of Human Rights considered it ‘clear ... from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic and consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.

77. The ECtHR continued to apply the ‘control over persons’ test in its post-Banković case-law. In Öcalan, the applicant was arrested in Kenya by Turkish agents acting in cooperation with Kenyan authorities, and forcibly transferred to Turkey where he was detained, subjected to unfair trial and sentenced to death. According to the Chamber judges, ‘the applicant was under effective Turkish authority and was therefore brought within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory’. Moreover, both the Chamber and the Grand Chamber distinguished the case from Banković and applied the Convention to Öcalan’s arrest in Kenya, despite the fact that Kenya is not a State party to the ECHR and thus outside its ‘espace juridique’.

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97 Illaşcu and Others v Moldova & Russia (Grand Chamber Judgement of 08 July 2004), for the facts of the case see above, part III section 1.b
98 Ibid, at para 314
99 Ibid, at para 384
100 X v United Kingdom (Decision of 15 December 1977), at p. 74
101 Öcalan v Turkey (Chamber Judgement of 12 March 2003 & Grand Chamber Judgement of 12 May 2005)
102 Öcalan v Turkey (Chamber Judgement of 12 March 2003), at para 93
Issa also concerned the applicability of the ECHR to the activities of a Convention State in a non-Convention State, namely alleged violations of Convention rights by Turkish army officials during military operations in Northern Iraq. Issa is instructive for a number of reasons. First of all, it casts doubts on the continuing relevance of the *espace juridique* doctrine developed in *Banković* as the Court applies the ECHR to alleged violations committed by a Convention State outside the territories of the Member States of the Council of Europe. Reading Issa in conjunction with *İlloşçu* may suggest that the application of the *espace juridique* doctrine is now confined to cases in which the perpetrator of the human rights violation is not a Convention State and the violation is not committed on the territory of a Convention State. Secondly, the Court applies a broad ‘control over territory’ test next to the ‘control over persons’ test. Thirdly, the Court emphasises that for the purpose of both tests, the responsibility of a Convention State for extraterritorial violations of Convention rights is determined according to *de facto*, and not *de lege* control:

According to the relevant principles of international law, a State’s responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.

It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.

Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.\(^{103}\)

The Court justifies this comparatively broad approach to extraterritorial jurisdiction with the consideration that ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.\(^{104}\)

The Court’s evolving post-*Banković* jurisprudence has been consolidated in its more recent case-law. In *Pad*, the Court confirmed that ‘a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States, but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.’\(^{105}\) In *Medvedyev*, the applicants were crew members on a merchant ship (the ‘Winner’) that had been intercepted by France on the high seas. The applicants complained that they had been arbitrarily deprived of their liberty following the boarding of the ship by French authorities, and that they had not been brought ‘promptly’ before a judge or

\(^{103}\) *Ibid*, at paras 69-71

\(^{104}\) *Ibid*, at para 71

\(^{105}\) *Pad and Others v Turkey* (Admissibility Decision of 28 June 2007)
other officer authorised by law to exercise judicial power. Sitting as Grand Chamber, the Court distinguished Medvedyev from Banković and held unanimously that given the defendant State had ‘exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention’.106

80. While the case-law considered above does not explicitly address human rights violations by transnational corporations, the Court’s jurisprudence is indicative of potential extraterritorial State obligations in the area of business and human rights. Where a corporation acts as a State agent outside the territory of the State, it appears that it will be, on the same grounds as a public authority, under a (negative) obligation not to violate Convention rights extraterritorially.107 Pursuant to Cyprus v Turkey, States can also be under a positive obligation to protect human rights against violations by private corporations outside the State’s territory, provided that the other conditions of extraterritorial jurisdiction under the Convention are met.108

81. In Isaak, the Court reaffirms and elaborates its approach to extraterritorial positive State obligations. The case concerned a demonstration in Northern Cyprus in the course of which one participant was beaten to death by private actors (the ‘Turkish mob’), while the Turkish Northern Cypriot authorities were present yet allegedly did not intervene to protect him. The Court reiterates that ‘the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals may engage that State’s responsibility under the Convention’. As in Issa regarding negative extraterritorial State obligations, the Court emphasises in Isaak that positive extraterritorial State obligations stem ‘from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.109

82. In Treska, the applicants complained inter alia that Italy had violated their rights under Article 1 Protocol 1 by purchasing premises from the Albanian Government in Albania which Italy knew or should have known had been confiscated without compensation. While on the basis of the alleged facts the Court did not find the applicants within Italian jurisdiction, it applied its Illașcu jurisprudence on positive State obligations to an extraterritorial situation in which a Convention State did not exercise effective control over foreign territory: ‘Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention’.110 This potentially very wide scope of extraterritorial

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106 Medvedyev and Others v France (Grand Chamber Judgement of 29 March 2010), at para 67
107 See above, section III.1.a
108 See above, section III.1.b
109 Isaak and Others v Turkey (Admissibility Decision of 28 September 2006); confirmed at the merits stage, see Isaak and Others v Turkey (Judgement of 24 June 2008)
110 Treska and Treska v Albania and Italy (Admissibility Decision of 29 June 2006)
jurisdiction could imply that provided there exists a sufficiently tangible link between the extraterritorial act of a Convention State and the individual right bearer residing outside the State’s territory, the State is under a positive obligation to take the necessary steps within its power and in accordance with international law to protect Convention rights against violations by private parties, including corporations.  

2. State obligations to protect Convention rights against acts performed inside the State’s territory that produce effects outside the State’s territory

83. *Drozd & Janousek v France and Spain* is an early example of the Court’s jurisprudence on acts performed inside the State’s territory that have extraterritorial implications. The case arose from an alleged unfair trial of the applicants by Andorran courts. At the time, there existed significant nexuses between the legal system of Andorra and those of France and Spain, including French and Spanish judges sitting on Andorran courts. The applicants submitted that the responsibility of the defendant States was engaged by virtue of their influence on the Andorran legal system, though Andorran territory could not be said to have come within the jurisdiction of either State. The ECtHR ruled that pursuant to Article 1, the responsibility of Convention States ‘can be involved because of acts of their authorities producing effects outside their own territory’. While the Court did not consider that the defendant States had to verify the proceedings before the Andorran Courts in the light of Article 6 ECHR, it emphasised the obligation of Convention States ‘to refuse their cooperation’ with other States if it emerges that an act of the other State is ‘the result of a flagrant denial of justice’.

84. The best known examples of acts performed inside the State’s territory that result violations of Convention rights outside the State’s territory are cases involving the extradition, deportation or expulsion of an individual from the territory of a Convention State. Where an extradited or deported expelled person is likely to be subjected to violations of Articles 2 and 3 ECHR, in some cases in conjunction with Article 6 ECHR, the extraditing State’s responsibility is engaged even though the violation manifests itself outside the State’s territory and effective control. While the jurisdiction of the extraditing State under Article 1 ECHR appears to be grounded in the act performed inside the State’s territory, its responsibility stems from the likelihood of violations of Convention rights on the territory of the receiving State. As the Court

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111 A similarly broad approach to extraterritorial State obligations has been adopted by the Committee on Economic, Social and Cultural Rights in its General Comment 15 (2002) on the Right to Water E/C.12/2002/11 of 20 January 2003, at para 33: ‘Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law’.  
112 *Drozd & Janousek v France & Spain* (Judgement of 26 June 1992)  
113 Ibid, at para 91  
114 Ibid, at 97  
115 See, for example, *Soering v United Kingdom* (Judgement of 7 July 1989); *Vilvarajah and Others v United Kingdom* (Judgement of 30 October 1991); *H.L.R. v France* (Grand Chamber Judgement of 29 April 1997); *Mamatkulov and Askarov v Turkey* (Grand Chamber Judgement of 4 February 2005); *Bader and Kanbor v Sweden* (Judgement of 8 November 2005); *Garabayev v Russia* (Judgement of 7 June 2007); *Soldatenko v Ukraine* (Judgement of 23 October 2008)
notes in *Banković*, because ‘liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, ... such cases do not concern the actual exercise of a State’s competence or jurisdiction abroad’.  

85. In *Soering v the United Kingdom*, the applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of America would, if implemented, give rise to a breach by the United Kingdom of Article 3 of the Convention (prohibition of torture).  

\[116\] The Court first reiterates that the ECHR must be interpreted in a way that renders the protection of Convention rights ‘practical and effective’:

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed in the Convention must be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.  

On this basis, the Court examined whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture could engage the responsibility of the extraditing Convention State under Article 3 ECHR:

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

The Court furthermore considered that ‘an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’.  

86. In cases like *Soering*, the extraditing/deporting State’s obligation to protect the applicant’s Convention rights also extends to threats in the receiving State that

\[116\] *Banković & Others v Belgium & Others* (Grand Chamber Admissibility Decision of 12 December 2001), at para 68.
\[117\] *Soering v United Kingdom* (Judgement of 7 July 1989)
\[118\] *Ibid*, at para 87
\[119\] *Ibid*, at para 91
\[120\] *Ibid*, at para 113
emanate from private actors. In *Ahmed v Austria*, the applicant complained that his expulsion to Somalia would put him at risk of torture by a non-State actor (a faction of General Aideed). According to the European Commission of Human Rights, the defendant State’s responsibility under the Convention could also be engaged by virtue of threats to the applicant’s life and security emanating from ‘those who hold substantial power within the State, even though they are not the Government’. In *H.L.R. v France*, the applicant complained that his deportation to Columbia would put him at risk of torture from a criminal organisation involved in drug trafficking. The defendant State submitted that threats emanating from private parties were outside the scope of Article 3 ECHR. The Court disagreed and held that ‘owing to the absolute character of the right guaranteed, the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection’. Hence, the existence of the obligation of the extraditing/deporting State to protect the applicant’s Convention rights ‘is not dependent on whether the source of the risk ... stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country’.

87. State obligations to protect Convention rights against acts performed inside the State’s territory that produce effects outside the State’s territory are not confined to extradition cases. In its more recent case-law, the Court has also recognised State obligations to regulate and control private actors on its territory with a view to protecting Convention rights outside its territory. *Rantsev v Cyprus and Russia* concerned the death of a woman who had allegedly been illegally trafficked by a non-State actor from Russia to Cyprus to work as a prostitute. Of interest for the present submission is the Court’s assessment of Russia’s responsibility for the death of Ms Rantseva which occurred in Cyprus. The applicant, Ms Rantseva’s father, complained *inter alia* under Articles 2 and 4 ECHR about the failure of the Russian authorities to investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. The Russian Government submitted that the events forming the basis of the application took place outside its territory, and that the application was therefore inadmissible *ratione loci*. In particular, the Russian Federation had no ‘actual authority’ over the territory of the Republic of Cyprus, and its actions were limited by the sovereignty of the Republic of Cyprus. Recalling *Banković*, the Court first reiterates the ‘essentially territorial notion’ of jurisdiction inherent in Article 1 ECHR:

As the Court has previously emphasised, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. Accordingly, a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State’s territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter’s consent, invitation or acquiescence.

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121 *Ahmed v Austria* (Report of the European Commission of Human Rights of 5 July 1995), at para 68; confirmed by the Court in *Ahmed v Austria* (Judgement of 27 November 1996)  
122 *H.L.R. v France* (Grand Chamber Judgement of 29 April 1997), at para 40  
123 *T.I. v United Kingdom* (Judgement of 7 March 2000), at para 17  
124 *Rantsev v Cyprus & Russia* (Judgment of 7 January 2010)
Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction. However, the ECtHR does not proceed – as in cases of acts performed outside the State’s territory – by employing its effective control over territory/persons test. Rather, the Court focuses on Russia’s failure to take appropriate measures to protect Ms Rantseva against threats by private actors within its own territory, and to investigate failures of its State authorities that contributed to Ms Rantseva’s death in Cyprus:

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

In conclusion, the Court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant’s daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death.

At the merits stage, the Court found that Russia had not violated its procedural obligations under Article 2 ECHR regarding the investigation of Ms Rantseva’s death, or its positive obligations under Article 4 ECHR to take operational measures to protect Ms Rantseva against the trafficking by a non-State actor. The Court did, however, find Russia in violation of its procedural obligation under Article 4 ECHR to investigate the alleged trafficking.

88. Marković arose out of the same incident as Banković, and eventually also found its way to the Grand Chamber of the ECtHR. The applicants had brought an action for civil liability of the Italian Government for the death of their relatives in the course of the NATO airstrikes on the Former Republic of Yugoslavia in the Italian courts. The Italian Supreme Court of Cassation eventually dismissed the action for lack of jurisdiction. The applicants petitioned the ECtHR with alleged violations of Article 6 ECHR (fair trial).

125 Ibid, at para 206
126 Ibid, at paras 207-8
127 Marković and Others v Italy (Grand Chamber Judgement of 14 December 2006); it should be noted that this case is somewhat at the crossroads of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications as distinguished by the SRSG. While subject of the proceedings before the Italian courts was an extraterritorial act (the NATO airstrikes on the FRY), the alleged violations of Article 6 ECHR with which the applicants petitioned the ECtHR were committed within the jurisdiction of the defendant State.
While the Court did not find a violation of Article 6 ECHR, it held that the initiation of domestic proceedings relating to an extraterritorial act established a jurisdictional link for the purpose of Article 1 ECHR that could give rise State obligations to protect the Convention rights of the applicants:

[In Banković, the Court] did not find any “jurisdictional link” for the purposes of Article 1 of the Convention between the victims of the act complained of and the respondent States and held that the action concerned did not engage the latter’s responsibility under the Convention. ...

The Court does not share the view of the Italian and the British Governments that the subsequent institution of proceedings at the national level does not give rise to any obligations on the part of the State towards the person bringing the proceedings. Everything depends on the rights which may be claimed under the law of the State concerned. If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level.

Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6.

The Court considers that once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a ‘jurisdictional link’ for the purposes of Article 1.128

89. *Kovačić*, a case that concerned the domestic regulation of business activities that allegedly violated Convention rights outside the State’s territory, may indicate that what is decisive for establishing jurisdiction is not the presence of the rights holder on the territory of the State but the performance of the act that brings the individual under the State’s jurisdiction.129 The Croatian applicants complained that they were prevented by a Slovenian law from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank. The Slovenian government submitted that its obligation to secure property rights under Article 1 Protocol 1 was confined to property within its jurisdiction, and that none of the instances of extraterritorial jurisdiction recognised by the ECtHR was applicable in the present case. The Court, after reiterating that ‘the responsibility of the High Contracting Parties may be engaged by acts of their authorities that produce effects outside their own territory’, accepted that the banking legislation introduced by the Slovenian National Assembly ‘affected’ the applicants’ property rights (Article 1 Protocol 1) in Croatia. ‘This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged’. While this case concerned Slovenia’s negative obligations not to violate the applicants’ Convention rights in Croatia, there appear no conclusive reasons against extending the

128 Ibid, at paras 50, 53-6
129 Kovačić & Others v Slovenia (Admissibility Decision of 1 April 2004); the case was struck out at the merits stage due to new facts that had come to the Court’s attention.
Court’s reasoning to positive State obligations to regulate private actors on the State’s territory with a view to preventing violations of Convention rights of individuals outside the State’s territory.¹³⁰

V. CONCLUDING REMARKS

90. Over the past decade, the ECtHR has increasingly been petitioned with cases involving human rights violations by private actors and cases involving an extraterritorial dimension. The Court’s evolving jurisprudence in both areas is of direct relevance to, and may reflect a growing awareness of the challenges posed by, human rights protection in relation to transnational corporations.

91. The Court’s case-law on the protection of Convention rights in relation to corporate activities, particularly in the environmental sphere, stipulates comparatively detailed substantive and procedural State obligations. States are required to regulate and control corporate activities harmful to human rights in a way that strikes a fair balance between the rights of those affected by the regulation, and the interests of the community as a whole. Moreover, State decisions in relation to corporate activities that may impact on Convention rights (e.g. the licensing and supervision of dangerous activities) must be taken in a transparent and inclusive way that enables States to evaluate in advance the risks involved in the corporate activity. States are also obliged to pay due regard to Convention rights when adjudicating disputes between corporations and victims of corporate human rights violations, and to provide for effective civil and criminal redress mechanisms.

92. Despite the growing number of cases with an extraterritorial dimension, the Court’s jurisprudence in this area is still far from providing clear and unequivocal guidance to States concerning their obligations to protect Convention rights outside their territories. A review of the Court’s case law suggests that States can be under an obligation to protect Convention rights against acts performed outside the State’s territory, as well as against acts performed inside the State’s territory that produce effects outside the State’s territory. In both constellations, States may also be under positive obligations to protect Convention rights against violations by private actors, including corporations. The Court’s approach to positive State obligations in Il làşcu and Treska and its interpretation of State obligations to protect individuals against acts

¹³⁰ For a comparable approach to positive State obligations see, for example, Committee on the Elimination of Racial Discrimination, Seventeenth Session (19 February – 9 March 2007), Consideration of Reports submitted by States parties under Article 9 of the Convention, CERD/C/CAN/CO/18 (25 May 2007), at para 17: ‘The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts. 2.1 (d), 4 (a) and 5 (e)). In light of article 2.1 (d) and article 4 (a) and (b) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.’
performed inside the State’s territory that violate Convention rights outside the State’s territory in *Rantsev* and *Kovačić*, move beyond the classical control over territory/persons test as constitutive of an ‘extraterritorial act’, as well as the traditional extradition cases, arguably gradually extending the extraterritorial reach of Convention rights.