



Nov 3rd, 9:30 AM - 10:45 AM

Corporations and the European Convention on Human Rights

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Corporations and the European Convention on Human Rights

*Winfried H.A.M. van den Muijsenbergh** and *Sam Rezai***

Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.

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A prominent Dutch law Professor in the field of human rights was once asked which historical figure, in his opinion, had contributed the most to the development of human rights. Pondering the possible answers to this question, one is tempted to think the Professor would mention Mandela's courageous battle against Apartheid, Dr. King's endless struggle for civil rights or perhaps Ghandi's brave fight against imperial rule. But the Professor did not say any of the above. Instead, perhaps surprisingly, the Professor convincingly argued that no one has done more to inspire and ignite the ambitious international human rights programmes than Adolf Hitler and Joseph Stalin. It was their crimes against humanity, said the Professor, which fuelled the international human rights endeavours to protect human beings from the brutality of the State.

Because of these dark origins, the human rights discourse is a historically highly laden subject. And against the background of the horrendous crimes which lie at its cradle, it may be a bold statement, perhaps even an affront to the human rights movement, to claim that profit-seeking corporations should also benefit from human rights protection.

We argue that it does not need to be.

Our argument takes us from the early post-World War II era which saw the establishment of the European Convention on Human Rights (often described as the most effective international human rights regime)¹ to an examination of the high profile *Yukos* case against the Russian Federation before the European Court of Human Rights in Strasbourg.

1. MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES* 3 (2006).

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I. THE COUNCIL OF EUROPE: WINSTON CHURCHILL'S CALL FOR UNITY

Let us begin with the development of human rights on the European continent. The story of this development must begin with the establishment of the Council of Europe, an organization which arose out of the ashes of World War II.² The origin of the Council of Europe can be traced back to a speech delivered in 1946 at the University of Zurich by none other than Winston Churchill.³ In this speech, the former British Prime Minister launched a call for a 'United States of Europe'. A call for unity and integration in a Europe once again devastated by nationalist zeal. But this time, in the wake of the Second World War, as the European Nation-States found themselves marked by massive killings and immeasurable human suffering, it was apparent to victor and vanquished alike that the continent's leaders ought to construct a new Europe.⁴ A Europe based on a common legal order that ensures the respect for human rights, democracy, and the rule of law. The Council of Europe's founding fathers, like Winston Churchill, Konrad Adenauer, and Robert Schuman, yielded to this call.⁵ The Council was established by ten States in 1949. Today, it consists of forty-seven European States, among them the Russian Federation.⁶ Its primary aim is to achieve a common legal and democratic area throughout the European continent which ensures respect for the member States' common fundamental values.⁷ The Council's greatest and most celebrated achievement in this regard is the European Convention on Human Rights.

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

The European Convention on Human Rights was a direct response to the grave human rights abuses during World War II.⁸ The Convention is a multilateral treaty signed in Rome on November 4, 1950.⁹ All forty-seven

2. DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1 (2nd ed. 2009).

3. For the complete text of Winston Churchill's speech entitled 'United States of Europe,' given on September 19, 1946, refer to Winston S. Churchill, A 'United States of Europe,' Address Before the Zurich University, Switzerland (Sept. 19, 1946), in WINSTON S. CHURCHILL, *NEVER GIVE IN!: THE BEST OF WINSTON CHURCHILL'S SPEECHES* 427-30 (2003).

4. *Id.* at 427-28.

5. *Founding Fathers*, COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=peresFondateurs&l=en> (last visited Feb. 29, 2012).

6. *Who We Are*, COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> (last visited Feb. 29, 2012).

7. *Our Objectives*, COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> (last visited Mar. 18, 2012). For a brief history of the Council of Europe and information on its organization, refer to the Council of Europe's website, available at COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> (last visited Mar. 18, 2012).

8. HARRIS ET AL., *supra* note 2, at 1.

9. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+>

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member States of the Council of Europe—thus including the Russian Federation—are parties to the Convention.¹⁰ The Convention’s binding character is clearly stated in its first article which says that all member States of the Council of Europe “*shall*” secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.¹¹ The difference between the Convention and other international human rights instruments (such as the International Covenant on Civil and Political Rights) is that the Convention confers a broad protection to corporations in addition to individuals.¹²

True to the universality of the values contained therein, the Convention also makes no difference between aliens and nationals. It requires the member States of the Council of Europe to honour the Convention not only with respect to their own citizens but with respect to everyone within their jurisdiction.¹³ To secure the due compliance with the Convention’s provisions, Article 19 of the Convention establishes a European Court of Human Rights.

III. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights was originally set up in 1959 and, for a long time, it operated in conjunction with the European Commission of Human Rights. At the time, applicants had to lodge their application with the Commission which would proceed to decide on the application’s admissibility and—if need be—refer the application to the Court. This dual adjudicatory system has been abolished since November 1, 1998 by the addition of Protocol 11 to the Convention. This protocol established the Court as the singular adjudicatory body of the Convention’s system. The Commission ceased to exist.¹⁴

The Court consists of a number of judges equal to the number of member States of the Council of Europe, currently forty-seven.¹⁵ Each member State of the Council of Europe can submit a list of three candidates eligible to be its judge at the Court. Subsequently, the Parliamentary Assembly will select one of these candidates.¹⁶ They are selected for a period of nine years.¹⁷

additional+protocols/The+European+Convention+on+Human+Rights/ [hereinafter European Convention on Human Rights].

10. HARRIS ET AL., *supra* note 2, at 2.

11. European Convention on Human Rights, *supra* note 9, at art. 1.

12. EMBERLAND, *supra* note 1, at 3.

13. European Convention on Human Rights, *supra* note 9, at art. 1.

14. HARRIS ET AL., *supra* note 2, at 811. The complete text of Protocol 11 to the European Convention on Human Rights is available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=7&DF=22/05/2011&CL=ENG>.

15. European Convention on Human Rights, *supra* note 9, at art. 20.

16. *Id.* at art. 22.

17. *Id.* at art. 23.

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The Court sits in judgment over cases of alleged human rights violations brought before it through the Court's application procedure by an applicant against a member State of the Council of Europe.¹⁸

IV. THE APPLICATION PROCEDURE

In general terms, proceedings before the Court will be initiated as follows. Under Article 34 of the Convention any victim of a violation of the Convention's provisions may lodge an application with the Court to hear its case.¹⁹ If the application is clearly inadmissible, the case will be swiftly dismissed by a single judge.²⁰ In the absence of such clear inadmissibility, the single judge will refer the application to a Committee of three judges or to a Chamber of seven judges for further examination.²¹ When, pending the procedure before a Chamber, a serious question arises concerning the interpretation of the Convention or when the resolution of a case might conflict with prior case law, the Chamber may relinquish its jurisdiction in favour of the Grand Chamber of seventeen judges.²² Under exceptional circumstances this Grand Chamber can also function as an internal appellate body to which a victim may refer within three months from the receipt of a judgment by a Chamber.²³

Further to Article 26(4) of the Convention, a Chamber and the Grand Chamber, when sitting in judgment, will include (as an *ex officio* member) the judge of the State party to the dispute.²⁴ In case of Committees, a judge of the State party to the dispute may at any time be invited to take the place of one of its members.²⁵ This can never be the case in single judge formations.²⁶

Committees and Chambers that decide on the admissibility of the application will (generally) also render the judgment on the merits.²⁷

V. THE ADMISSIBILITY OF APPLICATIONS BY CORPORATIONS

The admissibility criteria are summed up in Article 35 of the Convention.²⁸ In the interest of brevity, we will not dwell on all of them, but we must discuss one aspect of an application's admissibility which is also relevant to the *Yukos* case.

18. *See id.* at art. 34. Article 33 also provides for the possibility of inter-State applications. *Id.* at art. 33.

19. *Id.* at art. 34.

20. *Id.* at art. 27(1).

21. *Id.* at art. 27(3).

22. *Id.* at art. 30.

23. *Id.* at art. 43.

24. *Id.* at art. 26(4).

25. *Id.* at art. 28(3).

26. *Id.* at art. 26(3).

27. *Id.* at art. 28(1)(b), 30 (exceptions to this general rule).

28. *Id.* at art. 35.

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As we have seen, Article 1 of the Convention obliges the member States of the Council of Europe to secure the Convention's rights and freedoms with respect to everyone within their jurisdiction.²⁹ But what does that mean? How spacious is the term 'everyone'?

For some, it may be difficult to grasp—and understandably so—that a mighty Russian oil company managed to successfully lodge an application with the Court alleging the violation of *its* human rights by the Russian Federation. But the drafters of the Convention always intended to include corporations within the Convention's protective confines.³⁰ The Court has never doubted the capability of corporations to bring claims before it and does not view corporate claims with suspicion.³¹ Its very first encounter with a corporate claimant already took place in 1978 when it sat in judgment over a private media corporation's dispute with the United Kingdom.³²

If we look at the category of persons which the Convention allows to lodge an application with the Court, we see that Article 34 of the Convention, in case of individual applications, enumerates: "*any person, non-governmental organization or group of individuals . . .*"³³ Corporations are included within the scope of the term "*non-governmental organization.*"³⁴ In fact, the very first version of the Convention mentioned as possible applicants "*any natural or corporate person.*" Later versions changed the terminology to "*corporate body*" and finally settled on the term "*non-governmental organization.*" Nothing, however, indicates that this final settlement was meant to exclude corporations from the Convention's protective ambit.³⁵

But do all the Convention's Articles confer rights to corporations? The Court adheres to a practical operation in this matter and evaluates per provision whether it can attribute any rights to corporations. A great amount of the Convention's rights have already been considered to extend their protection to corporations.

29. *Id.* at art. 1.

30. See EMBERLAND, *supra* note 1, at 3-4.

31. *Id.* at 4; see also Marius Emberland, *Protection Against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The Colas Est SA v. France Approach*, 25 MICH. J. INT'L L. 77, 82 (2003).

32. See *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979).

33. European Convention on Human Rights, *supra* note 9, at art. 34.

34. Alan Dignam, *Companies and the Human Rights Act 1998*, in 26 THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 473, 487 (Dennis Campbell & Susan Woodley eds., 2004) (stating that the European Court of Human Rights has long established the right of corporations to bring claims under Article 34 of the Convention); Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y, Spring 2007, at 197, 215.

35. EMBERLAND, *supra* note 1, at 35.

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VI. CONVENTION RIGHTS DEEMED APPLICABLE TO CORPORATIONS

An inexhaustive enumeration of Convention rights deemed applicable to corporations includes, first and foremost, the Convention's procedural rights, which, because of their very nature, do not militate against the inclusion of corporations within their scope.³⁶ Among the Convention rights always and easily deemed applicable to corporations are the right to a fair trial under Article 6 of the Convention, the right to no punishment without law under Article 7 of the Convention, the right to limitations on the use of restrictions on rights under Article 18 of the Convention, and the right to an effective remedy under Article 13 of the Convention. Furthermore, the right to peaceful enjoyment of one's possessions laid down in Article 1 of Protocol 1 to the Convention is indisputably applicable to corporations.³⁷ This is the sole article which according to its own text is applicable to legal persons.³⁸ Other rights attributable to corporations include the protection against discrimination under Article 14 of the Convention and the freedom of assembly and association under Article 11 of the Convention. Though not applied to profit-seeking corporations, the freedom of religion under Article 9 of the Convention has also been deemed applicable to legal persons (i.e. churches) and thus considered capable of conferring rights to non-human entities.³⁹

36. Dignam, *supra* note 34, at 487 (stating in his discussion of Article 6 of the Convention that rights which are procedural in nature may be applicable to both legal and natural persons); A.L.J. van Strien, *Rechtspersonen en mensenrechten*, 1 RM THEMIS 3, 9 (1996) (stating that procedural rights, in general, because of their importance for the quality and fairness of court procedures, should be considered attributable to legal persons).

37. Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 187, 192-95 (Michael K. Addo ed., 1999).

38. Article 1 of Protocol 1 to the European Convention on Human Rights provides in its relevant part: "every natural or legal person is entitled to the peaceful enjoyment of his possessions." European Convention on Human Rights, *supra* note 9, at 33.

39. Addo, *supra* note 37, at 194-95 (mentioning the applicability to corporations of Articles 6, 7, 8, and 1 of Protocol 1 to the Convention and Articles 13 and 9 of the Convention (with respect to freedom of religion)); EMBERLAND, *supra* note 1, at 63, 110 (mentioning the applicability to corporations of articles 6, 9 (with respect to freedom of religion) 13, and 1 of Protocol 1 to the Convention); Mark Bovens, *Hebben Rechtspersonen Morele Plichten en Fundamentele Rechten?*, 47 *Ars Aequi* 7/8 651, 656 (1998) (stating that legal persons should enjoy the right to freedom of religion); Levinus Timmerman, *Hebben Rechtspersonen Mensenrechten?*, in 26 RECHTSPLEGING IN HET ONDERNEMINGSRECHT 46 (1997) (mentioning the applicability to legal persons of Article 11 of the Convention); Tom Barkhuysen, *Grondrechten en Ondernemingsrecht: Het Juridisch Kader*, in GESCHRIFTEN VANWEGE DE VERENIGING CORPORATE LITIGATION 2010-2011, at 342 (2011) (mentioning the applicability to corporations of Articles 6, 13, 7, 11, 10, and 14 of the Convention); EMBERLAND, *supra* note 1, at 84 (mentioning the applicability to corporations of Article 11 of the Convention). With respect to case law, see *Agosi v. United Kingdom*, 108 Eur. Ct. H.R. (ser. A) (1986) (discussing Article 6 of the Convention); *Church of Scientology v. Sweden*, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979) (discussing Article 9 of the Convention concerning the freedom of religion); *Stallarholmens Plåtslageri o Ventilation Handelsbolag v. Sweden*, App. No. 12733/87, Eur. Comm'n H.R. Dec. & Rep. (1990), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=664889&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (discussing Article 11 of

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In addition to the above-mentioned rights, there are some Convention rights which have been much less easily accepted as capable of conferring protection to corporations, such as the freedom of expression under Article 10 of the Convention, the right to privacy under Article 8 of the Convention and the right to compensation for non-pecuniary damages under Article 41 of the Convention.⁴⁰ These provisions presented the Court with so called “hard cases.”⁴¹ Their applicability to corporations has been controversial due to difficulties in reconciling the provisions with the corporate interests at issue in the specific cases. We will closely examine two of these hard cases in a little while when we discuss the Court’s interpretative methodology with respect to corporate claims.

A large number of the Convention’s provisions (some with more difficulty than others) have thus already been deemed applicable to corporations. There is, however, also a group of Convention provisions which is explicitly and widely (one is almost tempted to say unanimously) considered unable to, in any way, expand its scope to include corporations.

VII. CONVENTION RIGHTS DEEMED INAPPLICABLE TO CORPORATIONS

Certain Convention provisions are deemed exclusively applicable to human beings and remain inaccessible for corporations. The artificial and essentially inhuman nature of corporations impedes their inclusion within the protective confines of these provisions which seek to protect individuals of flesh and blood. The archetypes of such provisions encompass the right to life under Article 2 of the Convention and the prohibition against torture, inhuman or degrading punishment under Article 3 of the Convention. These provisions aim to exclusively protect human beings.⁴² There seems to be no (serious) discussion on this point.

the Convention); *OAQ Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R. (Sept. 20, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=14902/04&sessionId=88721526&skin=hudoc-en> (discussing Articles 6, 7, 13, 14, 18, and 1 Protocol 1 to the Convention).

40. *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990) (Article 10 of the Convention); *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 (Article 8 of the Convention); *Comingersoll S.A. v. Portugal*, 2000-IV Eur. Ct. H.R. 355 (Article 41 of the Convention).

41. EMBERLAND, *supra* note 1, at 110-11.

42. Dignam, *supra* note 34, at 487; Timmerman, *supra* note 39, at 45; Dhooge, *supra* note 34, at 239; van Strien, *supra* note 36, at 9; Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 545-46 (2002); EMBERLAND, *supra* note 1, at 33; *Verein “Kontakt-Information-Therapie” (KIT) v. Austria*, App. No. 11921/86, Eur. Comm’n H.R. Dec. & Rep. 81, 81 (1988) (stating that the right not to be subjected to degrading treatment or punishment (Article 3 of the Convention) is by its very nature not susceptible to be exercised by a legal person); *Comingersoll S.A.*, 2000-IV Eur. Ct. H.R. at 365 (stating in the concurring opinion that the right to life under Article 2 of the Convention and the prohibition of torture under Article 3 of the Convention may not be applicable to corporations); Barkhuysen, *supra* note 39, at 341 (stating that the right to life under Article 2 of the Convention cannot be applicable to corporations).

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Other rights which are also considered inapplicable to corporations include the freedom from arbitrary detention under Article 5 of the Convention,⁴³ the right to marry under Article 12 of the Convention,⁴⁴ and the freedom of conscience under Article 9 of the Convention.⁴⁵

We agree that there are good arguments to support the apparent (perhaps even unanimous) contention that such fundamental and profoundly human natured rights, as the right to life, do not protect corporations. To hold otherwise could equate corporations with human beings on a level which borders the incredible. Would the next step entail a crafty lawyer to argue that a government's wholesale nationalization and liquidation of foreign (oil) companies amounts to kidnapping and genocide? Do we really want to go down this path?

Neither is there a practical argument to scrutinize this issue since corporations seemingly do not tend to invoke a right to life (or the prohibition against torture for that matter) in their proceedings. This merits the assumption that present day circumstances do not call for the establishment of a corporate right to life and that corporations are apparently able to attain their sought-after protection through the invocation of other Convention rights.

Furthermore, an expansion of the scope of the right to life could pose all kinds of difficulties. Conceptually, according to Dhooge, such expansion may have to eliminate any necessary governmental action (such as registrations) needed for the establishment of a corporation, since the entity's creators can claim that their creation enjoys existence based on an inherent right to life regardless of any governmental actions.⁴⁶ Practically, the attribution of a right to life to corporations may obstruct necessary governmental regulations which foresee in the liquidation of a corporation as a penalty for various kinds of corporate misconduct.⁴⁷ The lawful continuance of such penalties would call for an extensive list of exceptions to the respect for life demanded by Article 2 of the Convention. Such profound watering and weakening of the provision may be difficult to reconcile with the absolute and fundamental nature of this most pre-eminent human right.

The possibility of a corporate right to life remains an interesting issue. We will put it to rest for now and get back to it after our examination of the Court's method of interpretation.

43. EMBERLAND, *supra* note 1, at 54; van Strien, *supra* note 36, at 9.

44. See Dignam, *supra* note 34, at 487; Timmerman, *supra* note 39, at 45; EMBERLAND, *supra* note 1, at 33.

45. See Verein "Kontakt-Information-Therapie" (KIT), App. No. 11921/86, Eur. Comm'n H.R. Dec. & Rep. at 81; EMBERLAND, *supra* note 1, at 54.

46. Dhooge, *supra* note 34, at 239.

47. *Id.* Dhooge, *inter alia*, mentions the interference with charter revocations by States in cases of corporate failure to pay taxes.

*2012 / Corporations and the European Convention on Human Rights*VIII. “NO SOUL TO BE DAMNED, AND NO BODY TO BE KICKED”⁴⁸

The Court’s acceptance of corporations as beneficiaries of human rights has not escaped criticism. As the heading of this paragraph illustrates, the criticism ranges from conceptual incompatibilities (human rights can only be extended to human beings and not to corporations), to practical horror scenarios (the Court will be flooded by a tsunami of corporate applicants), to *quid pro quo* assertions (if companies refuse to accept human rights obligations, they should not be able to benefit from their protection).⁴⁹

With a focus on the Convention and its drafting, these points of criticism can be countered with relative ease. For one, as we have seen, the drafters of the Convention never intended to exclude corporations from the conceptual cover of the established human rights. Critics also tend to negate the fact that the Court operates selectively in its inclusion of corporate complaints under the various Convention provisions. For instance, we have just discussed that certain fundamental rights, such as the right to life, are considered outside of corporate reach.

Notions that the Court’s acceptance of corporate applicants will instigate a flood of complaints fail to convince since the overwhelming majority of claims are brought before the court by individuals, rendering corporate claims a relative manageable number of the total.⁵⁰

Furthermore, though the indignation caused by corporate violators of human rights is justified and understandable, this may not be a reason to deny corporations the benefits of human rights protection. Such reasoning presupposes that the enjoyment of human rights should be dependent on the conduct of the applicant seeking protection. The Convention system, however, does not allow for such a conditional application of human rights which would (by the same logic) have us to exclude murderers and terrorists, because of their conduct, from human rights protection. This is clearly an undesirable outcome.

IX. THE COURT’S INTERPRETATIVE METHODOLOGY

In order to more readily accept the Convention’s application to corporations, it is essential to appreciate the Court’s method of interpretation. This method is deeply rooted in the Convention’s underlying value system of Democracy and

48. EMBERLAND, *supra* note 1, at 27 (quoting Edward, Baron Thurlow).

49. For a discussion of such criticism, see Anna Grear, *Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights*, 7 HUMAN RIGHTS L. REV. 511, 515-17 (2007); EMBERLAND, *supra* note 1, at 27-28.

50. EMBERLAND, *supra* note 1, at 14.

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the Rule of Law.⁵¹ The Court's case law lends credence to a method of interpretation which aims to bring these underpinning values to the fore and which will not hesitate to eliminate obstacles of textualism and intentionalism which might obstruct the Court in achieving this aim.⁵²

The Court, for example, easily accepted an unenumerated right of 'access to a court' as part of the right to a fair trial under Article 6 of the Convention, despite the article's clear textual failure to mention such a right. The Court simply explained that "one can scarcely conceive of the [R]ule of [L]aw without there being a possibility of having access to the courts."⁵³

More boldly, the Court—in direct contravention to the intentions of the Convention's drafters—explained that the right to freedom of association under Article 11 of the Convention may include the negative right not to be forced to join an association. It stated that the notion of 'freedom' after all denotes some freedom of choice as to the exercise of the right.⁵⁴

Indeed, instead of adhering to a textual method of interpretation which mainly focuses on semantics and wordings, and instead of yielding to the intentions of the Convention's drafters in construing the provisions' scope of applicability, the Court pledges allegiance to the principles of effective and dynamic (or evolutive) interpretation as the two main tools in its value-based teleological quest to ascertain the substance of the Convention's provisions.⁵⁵

The principle of effective interpretation is a thoroughly pragmatic way of interpreting the Convention. Formulated in the 1979 *Airey* judgment, it holds that the Convention must be interpreted in a fashion which renders its rights "practical and effective," not "theoretical or illusory."⁵⁶

The principle of dynamic interpretation perceives the Convention not as a static document, but as a "living instrument" which "must be interpreted in the light of present-day conditions." This (one may perhaps even say) creed of the Court's interpretative methodology was first formulated in the Court's 1978 *Tyrer* judgment⁵⁷ and emphatically rejects an interpretative exercise which places the prevailing convictions and values at the time of the Convention's conclusion at the center of its outcome. Instead, a dynamic interpretation of the Convention's

51. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. 1 (1975); George Letsas, *Strasbourg's Interpretative Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 516-17 (2010). The Convention's preamble also mentions the Rule of Law as part of the common heritage of the signatory States. *Id.* at 516.

52. For a discussion of textualism, intentionalism, and the Court's interpretative methodology, see Letsas, *supra* note 51, at 512-20.

53. *Golder*, 18 Eur. Ct. H.R. at 1, 14 (1975) (emphasis added).

54. *Young v. United Kingdom*, 44 Eur. Ct. H.R. 1, 21-22 (1981).

55. For a discussion of the principles of effective and dynamic (or evolutive) interpretation, see Letsas, *supra* note 51, at 518-20.

56. *Airey v. Ireland*, 32 Eur. Ct. H.R. 4, 12-13 (1979).

57. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. 1, 15-16 (1978).

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rights focuses on present-day values and convictions as its guiding principle of interpretation.⁵⁸

The principle stood center stage in the 1979 *Marckx* judgment in which the Court was confronted with Belgian legislation which did not confer maternal affiliation to children born out of wedlock (so called illegitimate families).⁵⁹ While admitting that at the time of the Convention's establishment in 1950 it was deemed permissible to make distinctions between legitimate and illegitimate families, the Court stated that European attitudes and beliefs have evolved towards a conferral of maternal affiliations based solely on the birth of a child.⁶⁰ Heeding to this changed normative standard, the Court argued that Belgium breached the right to respect for family life under Article 8 of the Convention.⁶¹

Let us take a closer look at two cases which might clarify the Court's value oriented method of interpretation. Both these cases are so-called 'hard cases,' i.e. they concern Convention rights which *prima facie* may not seem applicable to corporations.⁶² The first case pertains to the right to privacy under Article 8 of the Convention.

X. SOCIÉTÉ COLAS EST AND OTHERS V. FRANCE

Suspected by the French government of anti-competition activities, the offices of, *inter alia*, the French construction company Colas Est was raided by French government investigators. The operation was instigated to search for evidence and did not enjoy the consent of the management of the company nor—more importantly—was it based on an acquired judicial authorization. Indeed an important peculiarity of the case is that effective French law at the time (i.e. a 1945 French ordinance) did not require the investigators to acquire a judicial authority prior to the raid.⁶³

Colas Est alleged a violation of its 'home' under Article 8 of the Convention which provides in paragraph 1:

*"Everyone has the right to respect for his private and family life, his home and his correspondence."*⁶⁴

The term 'home' seems to denote characteristics that are more peculiar to human beings than to corporations.

58. *Id.*

59. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 4, 8-9 (1979).

60. *Id.* at 19-20.

61. *Id.* at 20.

62. *See generally* EMBERLAND, *supra* note 1, at 110.

63. *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. at 131, 136.

64. European Convention on Human Rights, *supra* note 9, at art. 8.

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This assumption is reinforced by the textual context in which the term is located since it is preceded by the right to respect for ‘private’ and ‘family’ life.⁶⁵

The Court’s reasoning concerning this issue leaned heavily on its prior *Niemietz v. Germany* judgment in which it had created the necessary space for the inclusion of corporate offices within the confines of the term ‘home’ in Article 8 of the Convention.⁶⁶ The Court’s handling of this aspect in the *Niemietz* case was highly informed by its pragmatism, as required by its interpretative principle of effectiveness. The *Niemietz* case concerned the privacy protection of a lawyer’s professional office which was situated within his private residence.⁶⁷ The German government maintained, *inter alia*, that Article 8 of the Convention was not applicable because the provision clearly draws a distinction between private activities (which are protected) on the one hand and business and professional activities (which are not protected) on the other.⁶⁸ Unwilling to plunge itself in the endless conceptual gymnastics of defining the terms ‘home’ and (business or private) ‘activities,’ the Court took a very practical stand and just accepted the inclusion of the lawyer’s office within the reach of the term ‘home,’ because:

it may not always be possible to draw precise distinctions [between business activities and private activities], since activities which are related to a profession or business may well be conducted from a person’s private residence and activities which are not so related may well be carried on in an office or commercial premises.⁶⁹

Though the Court’s reference to its *Niemietz* case is informative of its practical approach to the interpretation of the term ‘home,’ it cannot be directly transposed to the facts of the *Colas Est* case since the latter does not concern a private residence which also encompasses an office but relates exclusively to corporate business premises. The Court thus had to overcome this novel hurdle, but it again showed little difficulties in doing so as it sought to bring the Convention’s underlying value of the Rule of Law to the fore.

The Court’s approach in ascertaining the substance of Article 8 of the Convention appears to demonstrate the dominance of the objective elements of its teleological method. This objective approach takes the emphasis away from the circumstances and concerns of the specific applicant and rather focuses on the

65. EMBERLAND, *supra* note 1, at 114-15.

66. *Niemietz v. Germany*, App. No. 13710/88, Eur. Ct. H.R. (Dec. 16, 1992), <http://emiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=13710/88&sessionId=88837440&skin=hudoc-en>.

67. *Id.* at para. 10.

68. *Id.* at para. 27.

69. *Id.* at para. 30.

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extent to which the application of the claim in question may be conducive to the promotion of the values of the Convention.⁷⁰

As we have discussed above, the protection of the Rule of Law is a pre-eminent Convention value and the freedom from arbitrary interference by public authorities is a cornerstone of the Rule of Law. The freedom from arbitrary interference is also long established as the essential object and purpose of Article 8 of the Convention.⁷¹ In the *Colas Est* case, the Court found Article 8 of the Convention to include the protection of the applicant's business premises, because the applicant (regardless of its corporate nature) had become the victim of unrestricted governmental arbitrariness.⁷² The Court easily rid itself of conceptual difficulties pertaining to the meaning of the term 'home' in yielding to its overriding mandate of effectively protecting and promoting the Rule of Law by combating governmental arbitrariness.⁷³

To further illustrate the Court's interpretative ethic concerning the inclusion of corporate claims within the confines of the Convention's provisions, we will now turn to another 'hard case' in which a different fundamental Convention value—the principle of Democracy—stood center stage.

XI. AUTRONIC AG V. SWITZERLAND

Autronic AG was a Swiss company engaged in the business of selling aerial (telecommunications) dishes. It sought permission from the Swiss government to receive and demonstrate (television) signals from a Russian satellite for the purpose of showing and promoting the capabilities of its dish at an electronics fair. The Swiss government refused its permission and Autronic AG lodged an application with the Court seeking protection under the Convention's right to freedom of expression under Article 10.⁷⁴

Article 10 paragraph 1 states:

*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*⁷⁵

We should note that the controversial element in this case (the reason why it may be termed a 'hard case') does not concern the corporate status of the

70. See *EMBERLAND*, *supra* note 1, at 135-36.

71. *Id.* at 115.

72. *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131, 151.

73. *EMBERLAND*, *supra* note 1, at 141.

74. *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990).

75. *European Convention on Human Rights*, *supra* note 9, at art. 10.

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applicant. The Court's prior case law already attests to the acceptability of corporate complaints under this article—especially by corporations in the media sector.⁷⁶ Corporations that in any way convey statements which are relevant for societal or political discourse may count on the protection offered under Article 10 of the Convention. The dissension with respect to the reach of Article 10 of the Convention occurs when the expressions sought protected are of a pure commercial nature.⁷⁷

The difficulty in the current case therefore pertains to the question whether pure commercial activity, by which we mean an activity exclusively conducted for aims of marketing a product (the dish in question) and for purposes of pecuniary gain, may qualify as an 'expression' worthy of protection under Article 10 of the Convention.⁷⁸ The controversy is further augmented by the additional complexity that the underlying activity did not even encompass any written or unwritten statement. The activity sought protected was solely the receipt and transmission of satellite signals through an aerial dish, i.e. the content of the (television) programmes to which the signals would lead were frankly immaterial to the interests of the corporate applicant.⁷⁹ In sum, it all boiled down to the million dollar question of whether the applicant's exclusively commercial activity, comprising the receipt and transmission of satellite signals, constituted an 'expression' as protected in Article 10 of the Convention.⁸⁰ The Court's reasoning, again, evinces its pragmatism and its value-ridden approach.

The Court did not in any way embark on a doctrinal discussion of the concept of 'expression' to subsequently determine whether any conceptual deductions may or may not allow for the inclusion of the contested activity within the scope of this term. Instead, the Court's characteristic pragmatism led it to argue that the provision's protective ambit—in order to offer a practical and effective (in contrast to 'illusory') protection to applicants—must be understood to encompass not only the content of expressions but also the means by which they are communicated, since any restrictions on the means by which expressions are communicated necessarily also interfere with the right to receive and impart information.⁸¹ To the extent corporate complaints can help secure the effective enjoyment of Convention rights and principles by society as a whole, the Convention's value system may support the acceptance of such complaints.⁸²

The Court's 'objective' teleology, furthermore, again yields a shift away from the corporate status and concerns of the specific applicant and seemingly

76. *E.g.*, *Groppera Radio AG v. Switzerland*, 173 Eur. Ct. H.R. (ser. A) (1990); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979).

77. *EMBERLAND*, *supra* note 1, at 118.

78. *Id.* at 118-19.

79. *Autronic AG*, 178 Eur. Ct. H.R. (ser. A) at 10.

80. *Id.* at 21.

81. *Autronic AG*, 178 Eur. Ct. H.R. (ser. A) at 23.

82. *EMBERLAND*, *supra* note 1, at 145.

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emphasizes the effects which the corporate applicant's claim can have in promoting the values of the Convention.⁸³ The pre-eminent principle underlying the Convention's right of freedom of expression is 'Democracy.'⁸⁴ Adherence to this principle rendered it crucial to offer the corporate applicant in question the protection it sought under Article 10 of the Convention, since that protection is vital for the protection of the freedom of expression of the broader public and therefore conducive to the establishment of an effective democracy. A free public discussion is paramount for the health of any democracy, and the right of freedom of expression therefore not only creates a right of expression for the applicant but also a right of the general public to receive information—which subsequently must be made possible through the protection of the means of transmission of information.⁸⁵

XII. ASSESSING THE COURT'S METHODOLOGY

The *Colas Est* and *Autronics* cases demonstrate that corporate claims and interests may confront the Court with difficult matters of interpretation. It is understandable that lawyers who adhere to a traditional interpretative methodology which emphasizes textualism, concepts and semantics, may find the Court's easy bypassing of semantic difficulties (such as the precise meaning of 'home' in Article 8 of the Convention or the meaning of 'expression' in Article 10 of the Convention) troubling. However, the Court's value based methodology strikes us as a more modern approach to law making, which is intent on reconciling ever-changing societal practices with the Convention's terminology and which is—most of all—intent on guarding the supremacy of the Convention's fundamental values.

The Court's method is also constructive and understandable if we choose to regard the Court as a judicial organization which aims to contribute to a process of normative development which emphatically and categorically rejects (arbitrary) governmental action in violation of core Convention values. This fundamental rejection of a society in which governments resort to such (arbitrary) action should be all-encompassing and blind to the (corporate or human) status of the person who is targeted by a government. Would the resolve of this principled rejection not be weakened if governments, due to formalistic arguments, would be allowed to invade corporate premises arbitrarily and at will? Such weakening of pre-eminent values ought to be reasonably avoided and therefore we have little trouble in accepting the Court's sacrifice of doctrinal exercises on the altar of fundamental principles such as Democracy and the Rule of Law.

83. *Id.* at 134-36.

84. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

85. *EMBERLAND*, *supra* note 1, at 145-46.

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XIII. A CORPORATE RIGHT TO LIFE?

We are not ready to leave our discussion of the Court's methodology just yet, for there is another very interesting facet to the Court's reasoning in the *Colas Est* judgment which demands our attention. As explained above, the Court, in adhering to the principle of dynamic interpretation, considers the Convention to be a 'living instrument' which must be interpreted in light of 'present-day conditions.' However, the *Colas Est* judgment seems to give a new (broader) meaning to the term 'present-day conditions' which not only covers present societal needs and developments but also appears to refer to the evolution of the Court's own case law (and the dynamics therein). We can clarify this by quoting the Court's following paragraph (insofar relevant):

The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions. As regards the rights secured to companies by the Convention, it should be pointed out that the Court [in its Comingersoll judgment]⁸⁶ has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention. Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises.⁸⁷

The Court interestingly appears to use the sheer internal dynamics of its own case law, i.e. its gradual case-by-case extension of the scope of rights to corporations, as an evolutive (snowball) argument justifying yet another expansion which seeks to include corporations within the protective ambit of Article 8 of the Convention.⁸⁸ The Court implies, through its reference to the *Comingersoll* judgment (which has little relevance with respect to the right of privacy under Article 8 of the Convention), that since the Court has already accepted that corporations, like human beings, can suffer non-pecuniary damages (another 'hard case'), it is just a small step further to attribute corporations with a right to privacy as well.⁸⁹

This steady evolution of the Court's case law apparently signifies a dynamic process of gradual humanization of corporations.

We have mentioned above that there are good arguments to assert that certain fundamental human natured rights, such as the right to life, should not confer any

86. *Comingersoll S.A. v. Portugal*, 2000-IV Eur. Ct. H.R. 355.

87. *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131, 148-49 (internal citations omitted).

88. EMBERLAND, *supra* note 1, at 93.

89. *See id.* at 92.

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protection to corporations. The Court's understanding of the principle of dynamic interpretation in the *Colas Est* case, however, sheds another light on this issue as it brings a potent new argument into play, i.e. the inherent dynamics of the Court's own case law. It merits the question how far this dynamics will take the Court and whether it can bridge the previously assumed intractable divide between the nature of corporations and the understanding of fundamental rights such as the right to life. The Court's case law already concludes that corporations (quite like human beings) can organize themselves, that they are able to express themselves, that they can enjoy their privacy and that they can even suffer non-pecuniary loss.⁹⁰ It may not be too far-fetched to assume that the Court's dynamic (snowballing) humanization of corporations, combined with possible future corporate demands, will in due time allow corporations to also enjoy a right to life.

This assumption is fortified by Judge Rozakis', Bratza's, Caflish' and Vajic's explicit description of a corporation as "*an independent living organism.*"⁹¹ Well, all living organisms can die and—though the Court currently does not seem willing to expand the right to life to corporations—it will be interesting to see whether the arguments not to offer this expansion can withstand scrutiny in the face of the inherent dynamics of the Court's own case law.

So far, we have discussed the establishment of the Council of Europe, The European Convention on Human Rights as its main achievement, the workings of the European Court of Human Rights, as well as its method of interpretation. Let us now move on to the intersection of all of this with the story of Yukos.

XIV. KHODORKOVSKY AND THE STORY OF YUKOS

A mere four years after the establishment of the Court, Michail Khodorkovsky was born on June 26, 1963 in Moscow.⁹² In the nineties, with the expansion of opportunities due to Gorbachev's Perestroika and the advent of Russian capitalism, Khodorkovsky focused his efforts on the oil industry and worked his way up to become the CEO of the previously State owned Yukos Oil Company which was established in 1993.⁹³ Under Khodorkovsky's leadership Yukos flourished and accumulated tremendous wealth and influence, making Khodorkovsky one of Russia's most powerful men. As it is well known, his politics and views, however, collided with those of then Prime Minister Putin and

90. *Id.* at 90-92.

91. *See* Comingersoll SA v. Portugal, 2000-IV Eur. Ct. H.R. 355, 368 (Rozakis, Bratza, Caflish, & Vajic concurring).

92. *See* RICHARD SAKWA, THE QUALITY OF FREEDOM: KHODORKOVSKY, PUTIN, AND THE YUKOS AFFAIR 31 (2009).

93. *Id.* at 30, 33-34, 37-38.

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at the end of the year 2003 the Russian Federation wondered whether Yukos had diligently paid its due taxes.⁹⁴

XV. THE ACTIONS AGAINST YUKOS

The Russian Federation launched the attacks in 2003, arresting Khodorkovsky on October 25th and then setting its sights on his company. After the earlier issuance of several certificates by the Russian Tax Ministry in which Yukos was cleared of any tax debt, the Tax Ministry decided to announce a re-audit on December 8, 2003. In a mere three weeks the audit led the Tax Ministry to conclude that Yukos owed EUR 2.9 billion (USD 4.1 billion) in back taxes, interest, and fines over the year 2000. On April 14, 2004, Yukos was summoned to pay this amount within an absurd period of just two days.⁹⁵ But the Russian Federation was unwilling to outwait even this ridiculously short grace period.⁹⁶ The very next day the Tax Ministry requested a Moscow Court to order Yukos to pay the claimed amount and to issue a freezing order to attach Yukos' assets. The court issued the order the same day, making it simply impossible for Yukos to free up any assets in order to pay the very debt the Tax Ministry claimed it wanted settled.⁹⁷ The hearings on the merits were scheduled to begin on May 21, 2004. Yukos' request for an adjournment was denied.⁹⁸ Just a couple of days before the hearings (on May 17th, 18th, and 20th), the Tax Ministry provided Yukos with over 71,000 pages of unnumbered documents in order to prepare its defense.⁹⁹ In contrast, the Tax Ministry submitted a numbered and well ordered file to the court. Yukos received no copy of this file. It was however granted a thirty minute period to study the file during lunch break.¹⁰⁰ On May 26, 2004, the court finally ordered Yukos to settle a large part of the claim.¹⁰¹ After disappointing appeal proceedings for Yukos, the Tax Ministry moved to enforcement measures. It auctioned off Yukos' prime asset, its crown jewel

94. For information on the life of Michail Khodorkovsky, see *id.* at 30-66.

95. Rb. 31 oktober 2007, BB 2007, 6782, m.nt., para. 1.7 (Yukos Finance B.V./Defendant 1 (in his capacity of receiver in the bankruptcy of OAO Yukos Oil Company)) (Neth.).

96. *Id.* at para. 1.8.

97. *Id.* at paras. 1.8-1.9. For a discussion of the tax matters in the Russian Federation's attack against Yukos, see SAKWA, *supra* note 2, at 178-84.

98. Rb. 31 oktober 2007, BB 2007, 6782, m.nt., para. 1.9 (Yukos Finance B.V./Defendant 1 (in his capacity of receiver in the bankruptcy of OAO Yukos Oil Company)) (Neth.).

99. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. at paras. 38-39 (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

100. Rb. 31 oktober 2007, BB 2007, 6782, m.nt., para. 1.10 (Yukos Finance B.V./Defendant 1 (in his capacity of receiver in the bankruptcy of OAO Yukos Oil Company)) (Neth.).

101. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. at para. 40 (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

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production company Oil Company Yuganskneftegaz, for a fraction of its worth.¹⁰² Through an unknown bidder called Baikal Finance Group, Yuganskneftegaz finally ended up in the hands of the State-owned Rosneft Oil Company.¹⁰³ Rosneft would later play an instrumental role in the initiation of proceedings leading to Yukos' bankruptcy on August 4, 2006 and the appointment of Eduard Rebgun as the receiver.¹⁰⁴ Rebgun proceeded to sell all of Yukos' assets. The company was finally liquidated on November 12, 2007 and Yukos ceased to exist.¹⁰⁵

The 2000 tax assessment proved to be only the first as the Tax Ministry subsequently, in a similarly flawed fashion, demanded payment of back taxes over the years 2001-2004, totaling EUR 20.1 billion (USD 28.4 billion).¹⁰⁶ However, already on April 23, 2004, after the issuance of the first demands for payment by the Tax Ministry, Piers Gardner, as Counsel on behalf of Yukos Oil, lodged an application with the European Court of Human Rights under Article 34 of the Convention.¹⁰⁷

XVI. YUKOS' APPLICATION WITH THE COURT

At the outset, we should note that the interesting aspect of the Yukos case does not concern the question of whether the invoked human rights provisions may be applicable to corporations. Indeed, none of the human rights in question presented the Court with any interpretative difficulties in this regard. Their applicability to corporations has never been a topic of discussion. Instead, the interesting feature of this high profile case entails its potent and compelling demonstration of the importance of the mere availability of the Court, as an international independent judicial venue, for a brutalized corporation which simply had nowhere else to go.

In order to decide on the admissibility of Yukos' application with the Court, the case was referred to a Chamber presided over by Mr. Christos Rozakis and which included Mr. Valeriy Musin as the Russian Federation's judge with the

102. Rb. 31 oktober 2007, BB 2007, 6782, m.nt., para. 1.12 (Yukos Finance B.V./Defendant 1 (in his capacity of receiver in the bankruptcy of OAO Yukos Oil Company)) (Neth.).

103. *Id.* at para. 1.13.

104. *Id.* at paras. 1.17, 1.18; OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R. at para. 283 (Sept. 20, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

105. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. at para. 439 (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

106. Rb. 31 oktober 2007, BB 2007, 6782, m.nt., para. 1.14 (Yukos Finance B.V./Defendant 1 (in his capacity of receiver in the bankruptcy of OAO Yukos Oil Company)) (Neth.).

107. *Id.* at para. 1.16.

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Court. Nearly five years after the application was lodged, the Chamber rendered its decision of admissibility on January 29, 2009.¹⁰⁸

In its application, Yukos contends that the Russian Federation has breached various provisions of the Convention. Before turning our attention to the principal complaints and their assessment by the Court, we want to address an important objection which was made by the Russian Federation with respect to the Court's jurisdiction. In December 2007, the Russian Federation claimed that the Court had lost jurisdiction *ratione personae* to hear the case because Yukos, as the applicant corporation, ceased to exist on November 12, 2007 following its bankruptcy and subsequent liquidation by the Russian government.¹⁰⁹

The Court acknowledged that the presence of a 'victim' is indispensable for the initiation of the Convention's protective mechanisms, but refused to adhere to a rigid application of this criterion throughout the proceedings. To hold otherwise would, according to the Court, undermine the very essence of the right of individual applications by legal persons since it would encourage governments to deprive entities of the possibility to pursue an application which was submitted at a time at which they enjoyed legal personality. Arguing that this very issue in itself transcends the interests of the applicant, the Court rejected the Russian Federation's objection.¹¹⁰

It is somewhat tempting to ask the 'what if' question here. What if Yukos had not lodged the application before its liquidation? Would its forced liquidation on November 12, 2007 (its 'killing' by the Russian government) then have precluded it from taking its plight to the Court? This is a difficult hypothetical to entertain and the facts (as they are) are vexing enough. Nonetheless, this does again raise the question of the desirability of a corporate right to life under such circumstances. This right would plausibly enable the argument that the Russian government's final dagger of liquidation was unjustified and could not have reasonably led to the ending of Yukos' existence and, thus, of its capability to take its plight to a court of law.¹¹¹ Fortunately for Yukos, none of this came into play since it did lodge its application before its liquidation on November 12, 2007.¹¹²

108. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

109. *Id.* at para. 439.

110. *Id.* at paras. 441-44.

111. An argument based on the right to life under such hypothetical circumstances may perhaps also entail a claim for damages stemming from the mere unlawful act of ending Yukos' existence. This, however, comprises the subsequent complexity of who can institute the claim for the no longer existing corporation.

112. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. at para. 273 (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

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A. Alleged Breach of Article 6 of the Convention

Yukos' main complaint concerns the breach of its right to a fair trial pursuant to Article 6 of the Convention, in particular with respect to the 2000 tax assessment proceedings. It argued, among other things, that the Russian Federation had brought the action within the grace period; that it had too little time to prepare its defense; that it was not granted the opportunity to familiarize itself with all the filed evidence; that the courts, in first and second instance, erred in refusing to adjourn the proceedings, and that the first instance court pronounced its judgment without studying all the evidence.¹¹³

The Court found that these arguments raised serious questions of fact and law which required an examination of the merits.¹¹⁴

B. Alleged Breach of Article 1 of Protocol 1 to the Convention

In its relevant part, Article 1 of Protocol 1 to the Convention states that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”¹¹⁵ Yukos claimed that the 2000-2003 tax assessments breached its right to a peaceful enjoyment of its possessions: (i) it argued that the tax liabilities and proceedings were tools meant to disguise a *de facto* expropriation; (ii) that the seizure of its assets was disproportionate as the issued freezing order targeted assets worth considerably more than the corporation's liability at the time; (iii) that the authorities refused to use realistic means for the settlement of the debt; and (iv) that the sale of its shares in Yuganskneftegaz (at a gross undervaluation) through a controlled auction by a bogus bidder was unlawful.¹¹⁶

The Court also found this part of the application admissible.¹¹⁷

C. Alleged Breach of Article 1 Protocol 1 to the Convention in Conjunction with Articles 7, 13, 14 and 18 of the Convention

Yukos finally argued that the Russian Federation's described selective actions, as well as its adherence to an unforeseeable and unprecedented interpretation of relevant laws, amounted to a violation of Article 7 of the Convention (no punishment without law); Article 14 of the Convention

113. *Id.* at paras. 434-35.

114. *Id.* at para. 471.

115. Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>.

116. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/4 Eur. Ct. H.R. at para. 491 (Jan. 29, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=14902/04&sessionId=88837440&skin=hudoc-en>.

117. *Id.*

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(prohibition of discrimination); Article 13 of the Convention (right to an effective (national) remedy); and Article 18 of the Convention (the prohibition to apply the restrictions permitted under the Convention to the rights therein for any purpose other than those permitted under the Convention).¹¹⁸

The Court found that these alleged breaches also required an examination of the merits.¹¹⁹

Thus, aside from minor dismissals,¹²⁰ the overwhelming bulk of Yukos' application has been rendered admissible, paving the way for a much anticipated judgment on the merits.¹²¹

XVII. THE COURT RENDERS ITS JUDGMENT

On September 20, 2011, the Court rendered its long awaited judgment on the merits.¹²² Considering the aim and size of our Article, the opportunity given to us does not lend itself to an in-depth analysis of this very interesting judgment of the Court. We will leave it to others to discuss the many fascinating angles from which the judgment may be approached and examined. One such angle, in our view, comprises the Court's methodology in harmonizing its primary task, as Europe's highest guardian of human rights, with the tremendously and inevitably political surroundings in which the Court's able judges are charged to conduct this task. The Court has little choice but to walk a fine line here, since the very existence of this enormously important and appreciated Court ultimately depends entirely on the consent of the States that are parties to the Convention. The Yukos judgment on the merits may be seen as a product of such a finely tuned balancing act, as carried out by the Court to the best of its abilities. Leaving a detailed study of this aspect of the Court's workings to others, we will limit ourselves to a short discussion of the Court's main findings.

With respect to Article 6 of the Convention, the Court accepted Yukos' claim that the Russian Federation had breached its duty to provide Yukos with a fair trial. The Court based this decision on the Russian Federation's failure to offer Yukos sufficient time to adequately study and prepare for its case and on the unjustifiable restriction of Yukos' ability to present its case on appeal.¹²³

With respect to Article 1 of Protocol 1 to the Convention, the Court found that in relation to the imposition and calculation of penalties concerning the 2000 Tax Assessment proceedings (which were to be enforced against Yukos), the

118. *Id.* at paras. 475, 490, 495.

119. *Id.* at para. 494.

120. *Id.* at paras. 446-47, 455-60, 472-73, for a discussion of minor dismissals of Yukos' application.

121. *Id.* at para. 471.

122. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R. (Sept. 20, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=14902/04&sessionid=88837440&skin=hudoc-en>.

123. *Id.* at para. 551.

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interference with Yukos' property was unlawful on account of an unforeseen change in the interpretation of a statutory time bar setting out the period during which Yukos could have been held liable.¹²⁴ The Court furthermore found that the Russian Federation's enforcement proceedings against Yukos breached the latter's rights under Article 1 of Protocol 1 to the Convention by failing to strike a fair balance between the legitimate aim of the proceedings and the undertaken measures.¹²⁵ One factor informing the Court's decision on this point is the Russian authorities' failure to seriously consider other options of enforcement before targeting Oil Company Yuganskneftegaz, which was Yukos' primary asset and its only hope for survival.¹²⁶

Aside from the above claims, which were accepted by the Court, the Court also proceeded to reject various claims of Yukos.¹²⁷ Among these, the Court dismissed Yukos' allegation under the heading of Article 1 of Protocol 1 to the Convention—that the interpretation of domestic law in the tax assessments was unreasonable and unforeseeable. It ruled that the tax assessments complied with the requirements of lawfulness of Article 1 of Protocol 1 to the Convention.¹²⁸ The Court furthermore rejected Yukos' claims that the tax assessments pursued an illegitimate aim and that they were disproportionate.¹²⁹

With respect to Article 14 of the Convention, taken in conjunction with Article 1 of Protocol 1 to the Convention, the Court also rejected Yukos' claim of discriminatory treatment, finding that Yukos failed to convince the Court that other companies upheld similar tax arrangements without being targeted by the Russian authorities.¹³⁰

With respect to Article 18 of the Convention taken in conjunction with Article 1 of Protocol 1 to the Convention, the Court rejected Yukos' claim that the proceedings against it were misused by the Russian Federation with a view to expropriate and destroy the company.¹³¹ It merits mentioning here that the Court requires a very exacting standard of proof for the establishment of a violation of Article 18 of the Convention, described in an earlier case as “an incontrovertible and direct proof.”¹³²

124. *Id.* at paras. 573-74.

125. *Id.* at para. 657.

126. *Id.* at para. 645.

127. *Id.* at para. 667 (stating that in light of the Court's findings with respect to Article 6 of the Convention and Article 1 of Protocol 1 to the Convention, it found no cause for a separate examination from the standpoint of Articles 7 and 13 of the Convention.)

128. *Id.* at para. 605.

129. *Id.* at para. 606.

130. *Id.* at paras. 615-16.

131. *Id.* at paras. 665-66.

132. *Khodorkovskiy v. Russia*, App. No. 5829/04, Eur. Ct. H.R. at para. 260 (May 31, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=5829/04&sessionid=88837440&skin=hudoc-en>.

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Considering the judgment in its entirety, it may perhaps be best summed up as a mixed blessing for Yukos. On some important issues—mainly the allegations concerning questions of the fairness of the trial and the legitimacy of the enforcement procedures—Yukos (to a degree) received what it wanted. On other points—especially the nature and aim of the tax proceedings—the Court did not decide in Yukos’ favour.

The Court has reserved the question of compensation for the damages suffered by Yukos and has invited the parties to notify the Court of any agreement that they may reach on this matter.¹³³

XVIII. THE COURT’S GREAT ADVANTAGE

If we take a moment to assess the importance to Yukos of the mere availability of recourse to the Court, we see that the Convention’s great advantage is that it allowed Yukos to take its claim to the international level. It was apparent to all that Yukos’ luck in the Russian Federation had run out and that if there was any justice to be obtained, it would have to come from an international judicial body.

Since Yukos was a Russian corporation (and thus a Russian national), it did not have a (home) State to take up its cause in proceedings against the Russian Federation before the International Court of Justice. Yukos’ home State after all was its very adversary, the Russian Federation itself.

Yukos furthermore could not bring a claim before an international arbitral tribunal under a bilateral investment treaty, because such a tribunal only has jurisdiction over claims brought against a State (i.e. the Russian Federation in the Yukos case) by nationals of the other State which is a party to the bilateral investment treaty.¹³⁴ Since Yukos was a Russian corporation (and not a national of any other State), its investment in the Russian Federation could not be governed by any bilateral investment treaty concluded by the Russian Federation with another State.

Yukos was thus essentially cut off from all international channels of judicial review because its case simply concerned an internal Russian matter.

This is when the European Convention on Human Rights revealed its great significance, namely its establishment of an international court which (also) adjudicates thoroughly national cases when the values in dispute are of such a

133. For a discussion and summary of the Court’s findings, refer to the commentary in Bob Wessels, Commentary, *ECHR 20-09-2011, 14902/04 (OAO Neftyanaya Kompaniya YUKOS v. Russia)*, para. 4, <http://bobwessels.nl/wordpress/wp-content/uploads/2011/11/YukosNootWessels.pdf> (last visited Mar. 17. 2012).

134. See, for example, Article 25 of the Convention of the International Centre for the Settlement of Investment Disputes (“ICSID”) which governs the Centre’s arbitral dispute resolution jurisdiction. The text of the ICSID Convention is available at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

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fundamental nature that their protection transcends the national legal orders and concerns the international community as a whole.¹³⁵ Without the Convention—and its inclusion of corporations within its protective ambit—Yukos would have been left powerless in its quest to seek justice. It would simply not have been able to hold the Russian government accountable for its actions. Surely, few can dispute that, regardless of Yukos' corporate nature, its endeavor to hold the Russian government accountable for its flawed behavior and to combat arbitrary governmental action, is conducive to strengthening the Rule of Law in Russia and therefore beneficial to the Russian people as a whole.

XIX. CONCLUSION

A long time has passed since the Convention's establishment in the aftermath of the Second World War. Though the laden circumstances of the Convention's birth explain the moral indignation with which the corporate invocation of human rights has often been regarded, it is our contention that the Court, through its value-based interpretative ethic, has found a way to use corporate human rights claims in order to further strengthen the adherence to the fundamental principles which lie at the heart of the Convention. In the end, this is also beneficial—and not detrimental—to the human rights of the millions of people under the Court's jurisdiction.

Nowhere is this more apparent than in the Yukos case, as the Convention's human rights system enabled this former corporation to hold the Russian government accountable for its violation of the most basic norms of the Rule of Law.

The Yukos case clearly shows that knowledge of the workings of human rights has become a critical tool in any corporate lawyer's arsenal and should neither be ignored nor underestimated. This case exemplifies the importance of the applicability of human rights to corporations and is a testament to the significance of the European Court of Human Rights. As so convincingly demonstrated by the circumstances in the Yukos case, the overriding advantage of the Court is that it offers a corporation, victimized by its own State, an often otherwise nonexistent international venue for judicial review.

135. See QUESTIONS AND ANSWERS, EUR. CT. HUM. RTS, http://www.echr.coe.int/NR/rdonlyres/BB10719C-D747-4862-AE44-8A54D9B316D5/0/ENG_Questions_and_Answers.pdf (last visited on Mar. 13, 2012).