



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING  
NETHERLANDS COMPARATIVE LAW ASSOCIATION

## **Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR**

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### **1. Introduction**

Both domestic law and international law are increasingly coming to recognize corporations, other private non-natural persons and even public juristic entities as subjects of criminal liability.<sup>1</sup> A significant question for theory and practice, therefore, is whether such private or public juristic entities can find direct protection under international fundamental human rights norms when criminal law and criminal procedure are being applied against them. Moreover, if this is not the case, then a second issue merits attention, *i.e.* that of indirect protection of legal persons: is it possible for individual stakeholders in these entities – such as owners, shareholders, employees, and members – to invoke the protection of human rights when the violation is in fact directed against the organization in which they have an interest? The outcome of an assessment of these questions is not only relevant to legal person themselves, it has also consequences for the natural individual stakeholders of the entity, as well as for democratic society and the rule of law.

Yet this is not the only aspect in which human rights are relevant as regards legal persons. There is a growing awareness that legal persons are responsible for human rights violations around the globe. This responsibility not only concerns gross, large-scale human rights violations by multinational companies in developing countries, it also includes all kinds of more or less separate breaches of human rights by all sorts of entities throughout the world. For example, a public legal entity seriously discriminates against ethnic or religious groups, a company uses slaves or produces inferior food products or medicines that cause people to die or become seriously ill, a newspaper violates individuals' right to privacy, a political party propagates hate speech, or an internet provider permits incitement to violence on sites it hosts. It is against this background that a third matter arises: do international human rights obligations to criminalize, prosecute and punish human rights violations by public and private authors apply analogously insofar as legal entities are responsible for such violations? This

<sup>1</sup> On corporate criminal liability in national legal systems, see for example Engle 2003, p. 288-292, with many further references, and the overview of some 35 countries in Lex Mundi Business Crimes and Compliance Practice Group 2008. For international law, see *e.g.*, OECD 1997 (Art. 2); UN 2000 (Art. 3 § 4); Council of Europe Convention 2005 (Art. 22).

question in fact asks whether international human rights law requires states to provide for the possibility that juristic entities may be held criminally liable.

The three principle questions just posed are dealt with in this contribution's Sections 2, 3, and 5 respectively. These sections entail detailed analyses and comparison of the four general international human rights instruments most relevant to criminal law, as well as of the international case law pronounced thereon. The instruments are the UN International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (AfChHPR). The assessment of these instruments and related case law should not only result in answers to the questions, it would also point at possible justifications – or the lack thereof – for differences in approach between these four systems. Before dealing in section 5 with the third question, that of the state's positive obligation to provide for criminal liability of legal persons, section 4 offers a rather comprehensive catalogue of human rights that are actually found to be relevant to legal persons. This also entails an explanation of the conditions under which these rights apply to them, and if possible the rationale underlying such application. Finally, section 6, presents a synthesis and conclusions. I assert there that international human rights law should recognize legal persons both as possible victims and as possible perpetrators of human rights violations. I then go on to explain why and how the four international human rights systems' approaches should be amended in this regard.

Finally, it seems useful to note that this contribution in principle understands legal persons – or juridical persons or juristic persons – in a rather broad sense, in that this term is intended to include all non-natural entities. Corporations are an important example of private legal persons, but the term also embraces other private organizations, such as associations, foundations, political parties, media organizations, churches, trades unions, banks and private medical institutions. Furthermore, it refers to public organs such as the government, state departments, municipalities, county councils, public conservancies, and other administrative bodies that are public legal persons.

## **2. Direct Protection of Private and Public Legal Persons under Human Rights Law?**

Private and public legal persons or similar entities cannot complain about the violation of their fundamental rights to the Human Rights Committee (HRC), which monitors the ICCPR, nor is it possible under article 1 of the Optional Protocol to complain on their behalf.<sup>2</sup> Legal persons thus do not have standing under the ICCPR. What is more, legal persons do not qualify as beneficiaries of the rights recognized in the Covenant (which does not as such follow from the procedural restriction that they may not submit a communication to the Human Rights Committee).<sup>3</sup> Legal persons can therefore not acquire victim status as to the violation of the rights under the Covenant. Moreover, it is not possible to circumvent this restriction by complaining in the abstract about a law or a practice that affects the legal

<sup>2</sup> HRC, View of 14 July 1989, *A newspaper publishing company v. Trinidad and Tobago*, Comm. 360/1989, par. 3.2 (company); HRC, View of 6 April 1983, *J. R. T. & the W. G. Party v. Canada*, Comm. 104/1981, par. 8(a) (political party); HRC, View of 9 April 1981, *Hartikainen v. Finland*, Comm. 40/1978, par. 3 (NGO). However, a number of individuals who each claim to be victim of violation of the ICCPR may collectively submit a complaint to the Committee; see HRC, View of 8 April 1993, *E.W. v. the Netherlands*, Comm. 429/1990, par. 6.3 (6,588 citizens).

<sup>3</sup> HRC, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, par. 9.

person, for the Committee does not consider *actio popularis* as a complaint.<sup>4</sup> That the ICCPR does not apply to legal persons does not necessarily follow from its purpose, although it does correspond to the preamble, which asserts that human rights derive from the inherent dignity of the human person. The exclusion of legal persons was moreover already the intention when the ICCPR was drafted.<sup>5</sup> The Committee, however, has not elaborated on the reasons why corporations and other legal persons fall outside the protection that the Covenant aims to guarantee.

The situation under the European Convention is very much the opposite. Under Article 34 ECHR it is possible for corporations and other private legal persons to submit cases on their own behalf to the ECtHR.<sup>6</sup> In order to be admissible in a complaint the plaintiff must qualify as a victim. This means that the legal person must be directly affected by the act or omission in issue.<sup>7</sup> So the ECHR does not allow for an *actio popularis*. Although only Article 1 First Protocol ECHR on the right to property expressly recognizes legal persons as recipients of fundamental rights, several of the other human rights in the European Convention are granted to them as well. This also applies to rights that are relevant to criminal justice (see further below). That most rights seem to refer to natural persons, since they include terms as ‘anyone has the right’ and ‘no one shall’, is not taken as an impediment, and never has been.<sup>8</sup> The ECHR always intended to include corporate entities and other non-natural persons.<sup>9</sup> Referring to its constant case law that the European Convention is ‘a living instrument which must be interpreted in the light of present-day conditions’, the European Court of Human Rights (ECtHR) even manages to expand the protection of juristic persons, notably corporations, under the Convention.<sup>10</sup> This might also apply to private legal persons caught in the criminal justice system. Nevertheless, this still does not mean that corporations and suchlike entities enjoy exactly the same protection under the rights as are applicable to them as individuals. All the same, private legal persons do have standing under the European Convention and they can claim to be victim of the human rights relevant to them. This harmonizes fairly well with the aim of the Convention as presented in its preamble, which emphasizes the value of human rights for maintaining and developing the rule of law as well as peace, unity and justice in Europe, rather than that human rights require protection because their basis lies in ideals of humanity and the value of human beings and humankind. An additional argument for the European Court is that in many cases it is not possible to draw distinctions between professional and non-professional activities.<sup>11</sup> Nevertheless, legal persons that are in fact

<sup>4</sup> HRC, View of 9 April 1981, *Mauritian women v. Mauritius*, Comm. 35/1978, par. 9.2.

<sup>5</sup> See Emberland 2004, p. 261.

<sup>6</sup> This provision holds that the Court may receive applications from ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation’.

<sup>7</sup> ECtHR, Decision of 12 May 2009, *Ernewein v. Germany*, Appl. 14849/08, par. 2(a); ECtHR, Decision of 23 March 2006, *NBTK & Swig Group Inc. v. Russia*, Appl. 307/02.

<sup>8</sup> See (the former European Commission): ECionHR, Report of 3 October 1968, *N.V. Televisier v. the Netherlands*, Appl. 2690/65, p. 4; ECionHR, Report of 21 March 1975, *Times Newspaper Ltd, The Sunday Times, Harold Evans v. the United Kingdom*, Appl. 6538/74, par. 1. Both cases concern the right to freedom of expression in Art. 10 ECHR.

<sup>9</sup> See Emberland 2006, p. 4 and p. 35-36.

<sup>10</sup> See, e.g., ECtHR, Judgment of 16 April 2002, *Société Colas Est v. France*, Appl. 37971/97, par. 41 (right to privacy in Art. 8 ECHR).

<sup>11</sup> Cf. for example ECtHR, Judgment of 16 December 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 29, 30 (right to privacy in Art. 8 ECHR). See also ECionHR, Decision of 5 May 1979, *X. & Church of Scientology v. Sweden*, Appl. 7805/77, par. 2.

principally criminal organizations might be excluded from the protection that non-criminal organizations enjoy under the Convention.<sup>12</sup>

Meanwhile, governmental organizations may in principle not submit individual complaints to the European Court, nor do the rights and freedoms embodied in the European Convention and Protocols apply to them.<sup>13</sup> It is, however, not always evident if a legal person should qualify as a governmental or non-governmental organization. In some cases legal entities that formally had to be considered as public legal persons (public law entities) were regarded as non-governmental organizations within the meaning of the Convention, because their objectives and powers were not such as to enable them to be classed with governmental organizations established for public-administration purposes.<sup>14</sup> The European Court's jurisprudence reveals that public-law entities, such as governmental bodies or public corporations, can have the status of a non-governmental organization insofar as they do not exercise governmental powers, were not established for public-administration purposes and are completely independent of the State.<sup>15</sup> Conversely, private legal persons, such as public companies that participate in the exercise of governmental powers or run a public service under government control will rank as governmental organizations.<sup>16</sup> In common with normal public legal persons, such public companies cannot derive protection within the international supervisory system from the rights embodied in the European Convention.

Yet another regime applies under the American Convention. Article 44 ACHR offers rather wide possibilities for non-governmental organizations, including corporations,<sup>17</sup> to submit complaints to the Inter-American Commission (I-ACionHR) (but not to the Inter-American Court (I-ACtHR), to which only States and the Commission may appeal).<sup>18</sup> That private legal persons do have standing does not mean, however, that the American Convention provides protection for such entities. In fact, it follows from the treaty text that it does not. The American Convention only ensures the human rights of persons, which according to Article 1 § 2 ACHR means 'every human being'.<sup>19</sup> A legal person may consequently only complain to the Commission concerning concrete violations – and thus not through an *actio popularis*<sup>20</sup> – of human rights of natural persons or a group of them. It is thus not possible to lay a complaint of human rights violations against private or, for that matter, public legal entities.<sup>21</sup>

<sup>12</sup> ECtHR, Judgment of 28 July 2009, *Lee Davies v. Belgium*, Appl. 18704/05, par. 55-56.

<sup>13</sup> See ECtHR, Judgment of 1 February 2001, *Ayuntamiento de M v. Spain*, Appl. 15090/89; ECtHR, Judgment of 23 November 1999, *The Municipal Section of Antilly v. France*, Appl. 45129/98; ECionHR, Decision of 31 May 1974, *16 Austrian Communes v. Austria*, Appl. 5767/72, under I. In inter-State cases, however, the State of course does have standing; see Art. 33 ECHR.

<sup>14</sup> See ECtHR, Judgment of 9 December 1994, *The Holy Monasteries v. Greece*, Appl. 13092/87, par. 14-15 and 48-49 (on churches' right to property, Art. 1 First Protocol).

<sup>15</sup> ECtHR, Judgment of 13 December 2007, *Islamic Republic of Iran Shipping Lines v. Turkey*, Appl. 40998/98, par. 80; ECtHR, Judgment of 7 December 2006, *Österreichischer Rundfunk v. Austria*, Appl. 35841/02, par. 46-54.

<sup>16</sup> This was the case in ECtHR, Decision of 27 January 2009, *State Holding Company Luganksvugillya v. Ukraine*, Appl. 23938/05.

<sup>17</sup> I-ACionHR, Report of 11 March 1999, *Mevopal, S.A. v. Argentina*, Report 39/99, par. 12.

<sup>18</sup> Art. 61 § 1 ACHR.

<sup>19</sup> I-ACtHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 22-29; I-ACtHR, Judgment of 28 January 2009, *Perozo v. Venezuela*, par. 74 and 399.

<sup>20</sup> I-ACionHR, Report of 22 October 2003, *Metropolitan Nature Reserve v. Panama*, Report 88/03, par. 29-30.

<sup>21</sup> Nevertheless, see Lindblom 2005, p. 182-183, in which it is rightly asserted that several provisions in the ACHR (such as Arts. 13, 15 and 16, respectively on the right on expression, assembly, and association) →

They are not rights-holders and therefore cannot acquire victim status.<sup>22</sup> As a result, companies and suchlike have no protection against criminal investigations, prosecutions and trials under the American Convention. The Inter-American Commission explains the grounds for the exclusion by emphasizing that legal persons are legal fictions and lack real material existence, while the essential rights of man are based upon ‘attributes of the human personality’ and the need to create conditions that will enable all persons to achieve ‘the ideal of free men enjoying freedom from fear and want’.<sup>23</sup>

A fourth approach emerges from the African Charter. Under Article 55 AfChHPR the African Commission on Human and Peoples’ Rights (AfCionHR) does consider complaints submitted by (idealistic or other<sup>24</sup>) nongovernmental organizations on behalf of (groups of) individual victims. The African Charter indeed offers very broad standing, in that a plaintiff need not even know or have any relationship with the victim.<sup>25</sup> Even a complaint that is solely in the public interest (an *actio popularis*) might be admissible. Consequently, plaintiffs do not need victim status in order for their complaint to be admissible.<sup>26</sup> Still, the question is whether private legal persons do also have standing under the African Charter if they want to complain on their own behalf. Some cases do point out that they do, at least to some extent.

In the case of *Article 19 v. The State of Eritrea* the African Commission found that banning several private newspapers constituted a violation of the right to freedom of expression under Article 9 AfChHPR.<sup>27</sup> Unfortunately, it is not made entirely clear who the Commission regards as the victim of the violation: is it the newspaper organization itself, the journalists employed by it, the readers, or democratic society? So the question remains whether the Commission would also have found a violation if the newspaper had complained on its own behalf. The case nevertheless makes it clear that the private newspaper organizations themselves could have complained of the ban, if not on their own then on behalf of others.<sup>28</sup> In the case of *Civil Liberties Organization v. Nigeria (101/93)* a complaint was brought in favour of the Nigerian Bar Association.<sup>29</sup> In its decision the African Commission holds that the Nigerian Legal Practitioners’ Decree interferes with the free association of the Nigerian Bar Association and thereby constitutes a breach of Article 10 AfChHPR. The association is thus regarded as the victim of the violation, which implies that it is a rights-holder. Also of interest here is the case of *Constitutional Rights Project and Others v.*

indirectly afford protection to non-governmental organizations, while the wording of this provisions does not necessarily exclude their application to legal persons.

<sup>22</sup> Meanwhile, the Inter-American Court has ordered provisional measures to protect the perimeter of the head offices of a broadcasting organization; see I-ACtHR, Order of the then President of the Inter-American Court of Human Rights of 3 August 2004, *Perozo v. Venezuela*.

<sup>23</sup> I-ACionHR, Report of 27 September 1999, *Bendeck-Cohdinsa v. Honduras*, Report 106/99, par. 17; I-ACionHR, Report of 11 March 1999, *Mevopal, S.A. v. Argentina*, Report 39/99, par. 17.

<sup>24</sup> Cf. AfCionHPR, Decision of 23 October to 6 November 2000, *Union Nationale des Syndicats Autonomes du Sénégal v. Sénégal*, Comm. 226/99 (2000).

<sup>25</sup> Evans & Murray 2008, p. 102-105.

<sup>26</sup> See, e.g., AfCionHPR, Decision of 16-30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on admissibility.

<sup>27</sup> AfCionHPR, Decision of 16-30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on the merits.

<sup>28</sup> See also AfCionHPR, Decision of 15 November 1999, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. 140/94, 141/94, 145/95 (1999), par. 37; AfCionHPR, Decision of 31 October 1998, *Media Rights Agenda and Others v. Nigeria*, Comm. 105/93, 128/94, 130/94 and 152/96 (1998), par. 1, 2, 4 and 57, 71, 75, 77; AfCionHPR, Decision of 31 October 1998, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Comm. 102/93 (1998).

<sup>29</sup> AfCionHPR, Decision of 1995, *Civil Liberties Organization v. Nigeria*, Comm. 101/93 (1995), par. 37.

*Nigeria*, in which the sealing up of the premises of newspaper organizations was found to violate the right to property in Article 14 AfChHPR, without it becoming clear whether the rights of the corporations, the owners or both were violated,<sup>30</sup> although, again, it seems the newspapers could have complained of the violations.<sup>31</sup> And in the case of *Civil Liberties Organization v. Nigeria (129/94)* the Commission came to conclude that the Nigerian Political Parties (Dissolution) Decree 1993, which severely limited the Article 7 AfChHPR right to have one's cause heard, amounted to an attack on the jurisdiction of the courts. The Commission consequently found a violation of this provision. The implication of all of this is that not only the political parties, which are or correspond to private legal entities, are recognized as victims of the violation of the right to access to court, but also the judiciary. This is interesting since the judiciary of course is not a private but a public body. That, however, does not mean per se that public legal persons in general may derive protection from the African Charter, for the African Commission also bases its decision on Article 26 AfChHPR.<sup>32</sup> This provision sets down the obligation of states to protect the courts.

These cases as well as many others show that the African Commission considers complaints and finds violations without assessing who the victims of the human rights violation are or might be. In fact, the African Commission usually refrains from precise legal reasoning. Because of that it avails itself of the possibility to leave the victim question aside all together. Moreover, in the interests of the advancement of human rights the AfCionHPR tries to refrain as much as possible from raising procedural barriers against complaints.<sup>33</sup> The Charter thereby entails an open system of protection. Meanwhile it is clear from all cases in which the Commission found a violation that natural persons were seriously affected by that breach. That case law therefore leaves the strong impression that private legal persons are at least admissible in complains on their own behalf when a public human rights interest is involved, or when the violation obviously also affects individuals in or behind the corporation or other legal person. The African Commission thus does not consider the protection of fundamental rights of legal persons to be a Charter objective on its own; it merely seems to provide that protection as instrumental for the protection of human beings. This nevertheless leaves legal persons the possibility to acquire human rights protection when they are the object of criminal investigations or proceedings. It remains uncertain, however, when this criterion might be fulfilled. Could, for example, undue delay in a criminal trial against a large corporation result in the finding of a violation of Article 7 § 1 (d) AfChHPR? For the time being it is thus not feasible to establish the exact extent to which private legal persons may find protection under the African Charter. Of all international human rights systems, the

<sup>30</sup> AfCionHPR, Decision of 15 November 1999, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. 140/94, 141/94, 145/95 (1999), par. 54.

<sup>31</sup> Cf. also AfCionHPR, Decision of 2-11 October 1995, *Free Legal Assistance Group and Others v. Zaire*, Comm. 25/89, 47/90, 56/91, 100/93 (1995), par. 2 and 46 (the press), par. 3 and 45 (church property Jehovah's Witnesses), and par. 4 and 48 (universities and schools).

<sup>32</sup> See, however, AfCionHPR, Decision of 15-29 May 2003, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Comm. 157/96 (2003), par. 63: complaint admissible, although it appeared 'that the authors of the communication were in all respects representing the interests of the military regime of Burundi'. The question that was raised was whether this communication should not rather be considered as a communication from a state, but eventually it was regarded as an individual complaint.

<sup>33</sup> Cf. AfCionHPR, Decision of 15-29 May 2003, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Comm. 157/96 (2003), par. 63.

African system just possibly entails the broadest application of human rights to private and even public legal persons, as well as the stakeholders in or behind them.<sup>34</sup>

### 3. Indirect Protection of Legal Persons through the Human Rights of Individuals?

While the fundamental rights guarantees, notably in the International Covenant and the American Convention, do not concern legal persons at all, the European Convention and the African Charter do not apply all rights to such entities. It is therefore of particular importance whether these entities may find human rights protection through stakeholders in or behind them. In other words, is it possible for individual owners, shareholders, employees and other natural persons concerned to invoke the protection of human rights when the violation is in fact against the non-governmental organization in which they have an interest? As regards the ICCPR, ECHR and ACHR, the answer is that the possibilities are rather limited, but they are not the same under the three human rights treaties.<sup>35</sup>

Since the ICCPR, ECHR, ACHR and AfChHPR do grant rights to natural persons, obviously as such it is not impossible for individual stakeholders in a corporation or other legal person to find protection under the human rights guarantees in these treaties. We have just seen that there may indeed be few obstacles to individuals in this respect under the African Charter. As for the other treaties applies that stakeholders can obtain victim status, at least when, in that individual capacity, they are affected directly and personally in their human rights by the State's actions or omissions against the legal person.<sup>36</sup> The Committee and the Inter-American Commission in particular do not lightly accept that this criterion is met. In order to make their position and that of the other supervisory bodies clear, it is important to distinguish between two concepts by which violations of rights of legal persons may be protected via the human rights that apply to natural individuals. Both these concepts manifest themselves in international human rights case law, in which the nature of these fundamentally different approaches is nevertheless often confused.

#### 3.1. Two Concepts

The first concept is that of identification or lifting the corporate veil. Identification means that the rights of the legal person and those of the stakeholders are approached as being one and the same. An act or omission by the State then thus causes a human rights violation that regards the organization and the individual jointly. The 'corporate veil' – *i.e.* the principle that separates the rights and duties of the legal person from those of the stakeholders because they belong to two distinct entities – is then thus lifted. A result of this might be that the exhaustion of domestic remedies (which is an admissibility requirement for individual complaints under all four human rights treaties) by one of them works for both of them.<sup>37</sup>

<sup>34</sup> Cf. AfCionHPR, Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa (2001), under E: 'States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination'.

<sup>35</sup> For a detailed inventory and analyses, see Emberland 2004, p. 264-275 (ICCPR, ACHR); Emberland 2006, p. 65-109 (ECHR).

<sup>36</sup> HRC, View of 26 July 1994, *Singer v. Canada*, Comm. 455/1991, par. 11.2; I-ACionHR, Report of 14 June 2001, *Tomás Enrique Carvallo Quintana v. Argentina*, Report 67/01, par. 54; ECtHR, Decision of 5 October 2006, *Pokis v. Latvia*, Appl. 528/02, under A.

<sup>37</sup> See Art. 5 § 2(b) Optional Protocol to the ICCPR; Art. 35 § 1 ECHR; Art. 46 § 1(a) ACHR, and Art. 56 § 5 AfChHPR.

The second concept recognizes that an action or omission by the state against a legal person may also constitute a human rights violation of its own against interested natural parties. In this approach, then, the infringement against the corporation (or suchlike entity) and the violation against the individual are formally distinguished instead of being seen as one. The individual then claims and obtains protection of rights of his or her own rather than of the legal person, but the juridical entity might benefit indirectly from that. Under this concept the exhaustion of local remedies by either the legal person or individual, in principle, would not have as a consequence the fulfilment of the exhaustion requirement for both of them.

### **3.2. *Concept I: Identification or Lifting of the Corporate Veil***

Contrary to what some of the literature suggests, the Human Rights Committee and the Inter-American Court and Commission have so far never unambiguously acknowledged the possibility of identification.<sup>38</sup> What they actually did on a few occasions is apply the second concept. Solely the European Court truly allows for piercing of the corporate veil, and then only in exceptional circumstances. In constant case law the ECtHR considers this approach particularly feasible ‘where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.’<sup>39</sup> Although the European Court suggests that identification may also be practicable in other situations, its jurisprudence does not provide any examples in which the rights of the legal person were actually regarded as also belonging to the natural person. It therefore seems that, other than in this situation, the interests of a legal person cannot be protected through its stakeholders by lifting the corporate veil, nor will natural persons be able to protect their human rights in that way. They might, however, stand a chance with the other concept.

### **3.3. *Concept II: A Measure against the Legal Person directly affects Human Rights of a Stakeholder***

In the case of *Singer v. Canada*, the Human Rights Committee found a violation of the plaintiff’s right to freedom of expression because the printing company of which he was the main shareholder was summoned by the Quebec authorities to replace commercial advertisements in English with French ones. The Committee explains that particularly the right of freedom of expression is by its nature ‘inalienably linked to the person’. The company and individual shareholder are thus not identified, the Committee instead considers that the contested advertisement provisions have personally affected the plaintiff himself.<sup>40</sup> This is

<sup>38</sup> See Emberland 2004, p. 267-269 (ICCPR, ACHR), and Emberland 2006, p. 99-104 (ECHR), in which virtual applications by the supervisory bodies of the second concept (i.e., the infringement of a legal person’s rights by a State’s measure is formally distinguished from the violation of rights of the individual under the self-same measure) are in my view undeservedly qualified as identification. The point seems to be that whenever a legal person and an individual are practically conceived as one, this as such certainly does not mean they are also formally identified and that the corporate veil will be lifted.

<sup>39</sup> ECtHR, Judgment of 24 October 1995, *Agrotexim v. Greece*, Appl. 14807/89, par. 66. See also ECtHR, Decision of 14 October 2008, *Ketko v. Ukraine*, Appl. 31223/03; ECtHR, Decision of 9 September 2004, *Capital Bank AD v. Bulgaria*, Appl. 49429/99, par. 1; ECtHR, Decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria*, Appl. 50357/99, par. 1.

<sup>40</sup> HRC, View of 26 July 1994, *Singer v. Canada*, Comm. 455/1991, par. 11.2. For a similar case, see HRC, View of 25 July 2005, *Hoffman and Simpson v. Canada*, Comm. 1220/2003, in which the Committee circumvented a confirmation of its View in *Singer*. The Committee did suggest, however, that that the

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important jurisprudence for it signifies that in exceptional circumstances legal persons may find indirect protection against infringements on their ICCPR rights through the rights of individuals. The specific nature of the right to freedom of expression and the fact that the plaintiff was a 90-percent shareholder appear to be crucial in this case. With that the case of *Singer* is fairly exceptional. The mere fact that an individual is owner or sole or major shareholder of a legal person is generally insufficient for the Human Rights Committee to accept that infringements of rights of the legal person also personally affected the individual in his or her rights.<sup>41</sup> Moreover, it is relevant here that the International Covenant does not entail a right to property.<sup>42</sup> Consequently, it is hardly possible, if at all, for individuals to find protection against actions or omissions by the state that directly infringe the rights inherent in owning stocks or shares.

Much wider than the Committee, the European Court recognizes that measures relating to a company in certain cases may be regarded as directly affecting the rights of an individual stakeholder of the legal person. The individual will then be able to acquire the protection of his human rights.

First, this might be possible when the natural person is the sole owner or shareholder of the company, or in effect is carrying out his or her business through the company.<sup>43</sup> That the infringement against the company also personally affected the individual seems acceptable, especially when it would be artificial to draw distinctions between the legal person and its owner.<sup>44</sup> Acts or omissions in criminal investigations or proceedings that cause an infringement of the rights of the legal person might, under these conditions, thus also constitute a distinguishable violation on its own against the natural person to whom the organization belongs. Meanwhile, employees, executive directors and majority shareholders as a rule cannot claim to be a victim of infringements of any rights of the legal person.<sup>45</sup> Exceptions are conceivable, however. In case the legal person is a media organization and its right to freedom of expression (Article 10 ECHR) is violated because of criminal broadcasting or publishing restrictions, not only the sole shareholder but also employee

plaintiffs in this case could have met the requirement on the exhaustion of domestic remedies through their corporation. That does indeed imply identification, but it is far from certain that the Committee actually meant to imply such.

<sup>41</sup> HRC, View of 31 March 1994, *S.M. v. Barbados*, Comm. 502/1992, par. 6.2 (access to court); HRC, View of 7 April 1999, *Lamagna v. Australia*, Comm. 737/1997, par. 6.2 (access to information); I-ACionHR, Report of 9 March 2005, *José Luis Forzanni Ballardo v. Peru*, Report 40/05, par. 34-39 (fair trial, property, effective remedy); I-ACionHR, Report of 27 September 1999, *Bendeck-Cohdinsa v. Honduras*, Report 106/99, par. 17-30 (fair trial, property, effective remedy). Nevertheless, in a General Comment the Committee states that the ICCPR does not prevent 'individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights'. HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, par. 9.

<sup>42</sup> See HRC, View of 14 October 1996, *G.C. & O.B. v. Russian Federation*, Comm. 637/1995, par. 6.2.

<sup>43</sup> ECtHR, Judgment of 11 October 2007, *Glas Nadezhda EOOD & Anatoliy Elenkov v. Bulgaria*, Appl. 14134/02, par. 40; ECtHR, Judgment of 26 October 2000, *G.J. v. Luxembourg*, Appl. 21156/93, par. 24. This may also apply if two brothers are the sole co-owners of a family business; see ECtHR, Judgment of 15 November 2007, *Khamidov v. Russia*, Appl. 72118/01, par. 123-126.

<sup>44</sup> Cf. ECtHR, Judgment of 29 November 1991, *Pine Valley Developments Ltd v. Ireland*, Appl. 12742/87, par. 42.

<sup>45</sup> ECtHR, Decision of 14 October 2008, *Ketko v. Ukraine*, Appl. 31223/03 (property); ECtHR, Decision of 14 February 2006, *Bayramov v. Azerbaijan*, Appl. 23055/03 (fair trial, property); ECtHR, Judgment of 17 June 2008, *Meltex Ltd & Mesrop Movsesyan v. Armenia*, Appl. 32283/04, par. 66 (freedom of expression).

journalists who are directly effected may themselves enjoy the protection of the European Convention.<sup>46</sup>

Second, the European Convention offers human rights protection to an individual when measures against the company have a direct bearing on the rights inherent in owning stocks or shares.<sup>47</sup> Cancellation of shares or the obligation to exchange them at a disadvantageous rate will qualify as such, although measures that severely influence the interest of the company will not, nor would they if they seriously affect the interests of large shareholders, employees or other interested parties. Not even if the company goes into liquidation<sup>48</sup> or is placed in receivership<sup>49</sup> will they be able to obtain the protection of the European Convention on their own behalf. So that will not be possible, either, when the rights of the company are violated in a criminal investigation or criminal proceedings.

As for the American Convention, the case of *Cantos v. Argentina* is most relevant. In that case the Inter-American Court holds that an individual in specific circumstances may resort to the inter-American supervisory system to enforce 'his fundamental rights' – apparently instead of those of the legal person. This even applies when they are encompassed in a legal entity.<sup>50</sup> In this case the legal person was indirectly – *i.e.* through the sole owner of the company – protected in the fair trial rights of access to court (see Article 8 ACHR) and of effective remedy (Article 25 ACHR).<sup>51</sup> Interestingly, the natural individual in this case was the sole owner of a business group that comprised eight companies and employed over 700 persons. The I-ACtHR's approach here is most in line with the case law of the European Court in that human rights protection is offered to an individual stakeholder who is the owner of the company. An important difference, though, is that the ECHR cases involve rather small companies that are in fact used as vehicles through which the owners operate, while the *Cantos* corporation was a very large entity that must have operated by itself. However, it must be pointed out that the authorities very much personalized their dispute with the *Cantos* company by systematically persecuting and harassing *Cantos* himself.<sup>52</sup> One cannot therefore conclude that the owners of large-scale companies in general will find broader protection under the American Convention than under the European one. On the contrary: the Inter-American Commission is still very reluctant to grant the protection of the American Convention to interested individuals in or behind a legal person, even when they are the sole owners or shareholders.<sup>53</sup> Ultimately, therefore, the case law of the Inter-American Court and

<sup>46</sup> Cf. ECtHR, Judgment of 28 March 1990, *Groppera Radio AG v. Switzerland*, Appl. 10890/84, par 46-51.

<sup>47</sup> ECtHR, Decision of 7 November 2002, *Olczak v. Poland*, Appl. 30417/96, par. 57-62.

<sup>48</sup> ECtHR, Decision of 5 October 2006, *Pokis v. Latvia*, Appl. 528/02, under A.

<sup>49</sup> ECtHR, Judgment of 31 July 2008, *Družstevní Záložna Pria v. the Czech Republic*, Appl. 72034/01, par. 99-101.

<sup>50</sup> I-ACtHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 29; see also par. 30, in which the Court notes that submissions to all relevant national avenues of administrative and legal recourse in the case were done directly by Mr. Cantos in his own name and in the name of his companies (which means that he personally used the national remedies), and in which it speaks of 'the alleged violation of the rights of Mr. Cantos'. See also I-ACionHR, Report of 14 June 2001, *Tomás Enrique Carvallo Quintana v. Argentina*, Report 67/01, par. 54, 56 and 61; I-ACionHR, Report of 16 October 1997, *Tabacalera Boqueron S.A. v. Paraguay*, Report 47/97, par. 27 and 32; I-ACionHR, Report of 22 February 1991, *105 shareholders of the Banco de Lima v. Peru*, Report 10/91, par. 3-4.

<sup>51</sup> I-ACtHR, Judgment of 28 November 2002, *Cantos v. Argentina*, par. 65.

<sup>52</sup> See I-ACtHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 2.

<sup>53</sup> I-ACionHR, Report of 9 March 2005, *José Luis Forzanni Ballardo v. Peru*, Report 40/05, par. 35-37. Cf. I-ACionHR, Report of 14 June 2001, *Tomás Enrique Carvallo Quintana v. Argentina*, Report 67/01, par. 54; I-ACionHR, Report of 27 September 1999, *Bernard Merens and Family v. Argentina*, Report 103/99, par. 14-19.

Commission taken as a whole seems to be closer to that of the Human Rights Committee than that of the European Court. Meanwhile, there is one clear exception: just like the European Convention and contrary to the International Covenant, the American Convention offers owners of stocks or shares human rights protection when measures against the company directly infringe their ownership rights.<sup>54</sup> It is not clear, though, whether the American and European systems provide this protection to the same extent.

### **3.4. *Evaluation and Critique***

Again, the four international human rights systems under discussion here display four different approaches. Where the International Covenant already completely denies legal persons standing and direct protection, it also offers individuals at the most very limited protection against measures directed at legal entities of which they are stakeholders. Usually, therefore, legal persons will not be able to profit from human rights protection under the Covenant, even indirectly. At first sight the not-entirely-clear approach under the African Charter appears to be the most opposed to this: whenever a human rights violation against a legal person obviously also affects individuals in or behind that entity, the African Commission intends to guarantee their protection first and foremost. So it seems that at least private legal persons may find both direct and indirect protection of their rights under the Charter. However, the protection of legal persons as such may not be regarded as an objective within the African system. Moreover, the contents of the AfChHPR are not entirely well suited to the protection of legal persons, most certainly not in criminal cases. For example, a right to privacy is absent (which is of major importance during the criminal investigation stages), while the right to a fair trial is rather limited in scope and otherwise not very well developed, either. More limited still than the African mechanism is the American system, for the latter merely offers indirect protection to legal persons, and that only to a rather limited extent. So from the perspective of the interest of private legal persons, the European system will normally be the most adequate. Not only are private legal persons expressly recognized by it as entities that as such deserve direct human rights protection, that protection is indeed offered in practice, as is discussed further below (see section 4). In addition, legal persons may enjoy indirect protection through their stakeholders when there appears to be an insufficient possibility of direct protection.

In my view, though, the adequacy of the systems should not be assessed from the perspective of the protection of legal persons, or at least not principally so. After all, these systems have not been developed, certainly not predominantly, with a view to such protection. Considering the object and purpose of the international human rights treaties, more obvious criteria are whether the approaches adequately contribute to the protection of the fundamental rights of natural individuals, guaranteeing and safeguarding the democratic state and the rule of law, and an efficient application of the supervisory mechanisms that attach to these human rights treaties. Interestingly, also under these criteria the approach by the European Court appears to be the most adequate and balanced of all.

Although an organization is much more and also something different than the sum of the individual persons who are part of it, state measures against the organization may certainly have fundamental consequences for the lives and wellbeing of these individuals. Affording protection to legal persons at the level of fundamental rights may therefore easily have as a

<sup>54</sup> I-ACtHR, Judgment of 6 February 2001, *Ivcher Bronstein v. Peru*, par. 117-131; I-ACtHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 29.

consequence the collateral protection of individuals in their human rights. The protection of individuals' human rights would also profit from the avoidance of rather formalistic approaches such as those taken by the Human Rights Committee and the Inter-American Commission. Much more broadly than they do now, these bodies should review whether a state action or omission that formally only affects the legal person, infringes the human rights of an interested individual indirectly but substantially. This is called for above all if, as particularly the European Court and furthermore the Inter-American Court intend, a natural person is in effect conducting his or her affairs through the legal entity.<sup>55</sup> This is thus not a plea for application of the first concept, *i.e.* lifting the corporate veil. Instead it is argued that the Human Rights Committee and Inter-American Commission should in principle broaden the application of the second concept. This would certainly not force them to start recognizing legal persons as beneficiaries of the ICCPR and ACHR, while at the same time it would enhance the possibilities to protect the human rights of individuals. Such an approach is much less necessary for the European Court, since it offers fundamental rights protection to legal entities and, moreover, already implements the second concept on a broader scale. The same seems to apply to the African Commission.

Direct, or at least indirect protection of the fundamental rights of legal persons also seems to be favourable from the point of guaranteeing and safeguarding the democratic state and the rule of law. Human rights treaties are a reflection of the values that are held to be the most important for society and these treaties aim first of all to limit and control the power of the state through those values. Only a state that in principle proceeds in accordance with human rights standards may qualify as a democratic state based on the rule of law. So it is of primary importance that, for instance, the state respects privacy, applies the principle of legality (*nullum crimen, nulla poena sine lege*) and offers fair trials, while much less relevant in this respect is against whom exactly the state then acts (natural person or legal entity).

Meanwhile the supervisory bodies need not only secure that the international human rights monitoring systems are implemented practically and effectively, they also have to ensure that the systems work efficiently. The protection of human rights will of course be harmed if the system is unnecessarily overburdened. It is therefore understandable that the European Court limits the possibilities for natural individuals to complain about fundamental rights violations that formally have been committed against legal persons. Since the Court can offer protection to legal persons it would be rather inefficient if the Court in the same case would have to deal with all interested parties, too. This argument does not apply to the ICCPR and ACHR, for these treaties are not applicable to legal persons. Were the Human Rights Committee and the Inter-American Commission to provide adequate protection to individuals through the second concept this would therefore not rank as insufficient. Consequently, there seems to be no obstacle in this regard for the HRC and I-ACionHR to apply the second concept more broadly than the European Court does. Considering the foregoing arguments, this would indeed be appropriate, in my view. Finally a word about the African Commission: its very broad acceptance of complaints is at present still very useful in order to enhance the protection of human rights in Africa. However, an increased caseload might eventually force the Commission to limit its open approach.

<sup>55</sup> See, *e.g.*, ECtHR, Judgment of 26 October 2000, *G.J. v. Luxembourg*, Appl. 21156/93, par. 24; I-ACtHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 25.

#### 4. A Catalogue of Human Rights relevant to Legal Persons in Criminal Proceedings

Even if private legal persons may be recipients of human rights – as is the case at least under the European system – many of these rights are not relevant to them. Although, for example, the prohibition or dissolution of a specific company could, figuratively, be seen as killing that legal entity, it would be grotesque to regard this as an infringement of the right to life or of the prohibition of the death penalty. The same seems to hold for application to legal persons of the prohibitions of torture and of slavery, the right to marry and to equality between spouses.

For some rights, however, it is less obvious whether it is appropriate to apply them to legal entities. That might for instance be the case as regards the right to freedom of movement or perhaps even the right to liberty. The economic right of freedom of establishment – which is, for instance, one of the five major freedoms of EU law and is granted thereby to both natural and legal persons<sup>56</sup> – shows that this right could be regarded relevant to companies and other organizations. This could even hold in criminal cases, for example if a company is convicted because it has settled somewhere without the necessary permits or if a criminal judgment prohibits a company from conducting its business in a certain area. At the same time, however, it is clear that natural individuals and legal persons are so different in nature that the idea of free movement and liberty cannot mean the same for both of them. It is therefore also – and in my view, more – justifiable that the right to freedom of movement and the right to liberty should refer to a human value that is not relevant to organizations. The European Court seems to adopt this approach in the sense that it reserves the right to liberty in Article 5 ECHR to ‘persons who have been arrested or detained’.<sup>57</sup>

Still, various rights may easily have significance for private legal persons that are the object of criminal law procedure. That applies, for example, to the right to a fair trial, the right to privacy, the principle of legality (*nullum crimen, nulla poena sine lege*), the freedoms of expression, religion and association, the right to an effective remedy, the right to property, the right to compensation for wrongful conviction, and the right not to be tried or punished twice (*ne bis in idem*). Indeed, numerous of these rights accrue to legal persons, but not necessarily under the same conditions as they apply to human beings. Since the ICCPR and ACHR do not apply to legal persons at all, while there is hardly any case law under the African Charter regarding such entities, what follows will be about the jurisprudence of the European Court and, infrequently, of the former European Commission of Human Rights (ECionHR). Although their jurisprudence in criminal cases is the first point of attention here, Judgments and Decisions in civil and administrative cases will be part of the assessment too, because Convention cases that concern legal persons and criminal justice are fairly scarce. When considering non-criminal cases it is important to realize that the ECHR in such cases often poses less strict requirements and leaves the national authorities greater latitude than in the criminal sphere.<sup>58</sup> Consequently, when a fundamental right applies to legal persons under civil or administrative law, they are usually *a fortiori* protected by that right in criminal cases. Meanwhile, the limited number of European Court (and former Commission) Judgments and Decisions concerning legal persons and criminal law leaves the impression that criminal prosecution of legal persons is not a large-scale phenomenon in Europe, or is at least not problematic from a human rights point of view.

<sup>56</sup> Court of Justice European Union, Judgment of 17 June 1997, *Sodemare SA, Anni Azzurri Holding SpA & Anni Azzurri Rezzato Srl v. Regione Lombardia*, Case C-70/95, par. 26.

<sup>57</sup> ECtHR, Decision of 1 October 2002, *Wouterse, Marpa Zeeland B.V. & Metal Welding Service B.V. v. the Netherlands*, Appl. 46300/99.

<sup>58</sup> Cf. ECtHR, Judgment of 27 March 2008, *LB Interfinanz A.G. v. Croatia*, Appl. 29549/04, par. 32, with further references.

#### 4.1. *The Right to a Fair Trial*

Companies and other private legal persons charged with a criminal offence are subject to the protection of the right to a fair trial in Article 6 ECHR.<sup>59</sup> The extensive case law of the European Court does not seem to include a single case in which the ECtHR rejected a legal person's fair trial complaint because the claimant was a company or other private juridical entity.<sup>60</sup> What is more, when assessing a criminal case against the fair trial requirements, the Court does not at all appear to take into consideration whether the claimant is an individual or a legal person. In, for instance, the case of *Fortum Oil and Gas Oy versus Finland* the Court assumes that Article 6 applies to criminally charged legal persons in the same way as it does to charged individuals.<sup>61</sup> Interestingly, Fortum Oil and Gas Oy is a multinational company specializing, *inter alia*, in the wholesale of petrochemical products. So the fair trial requirement might equally apply to natural persons, one-person private organizations and multinational corporations.<sup>62</sup> From the European Convention's case law it is indeed clear that legal persons enjoy wide protection against the criminal justice system under the right to a fair trial.

The case law on Article 6 § 1 ECHR affords legal persons at least the following fundamental rights. Legal persons have a right of access to court in criminal cases.<sup>63/64</sup> As part of this right and of the right to a fair hearing, juristic entities moreover have a right to protection against state intervention as regards the outcome of court proceedings.<sup>65</sup> When they are involved in a trial, an impartial and independent tribunal must conduct that trial.<sup>66</sup> Besides, the prohibition of undue delay – *i.e.*, the principle that the time between the criminal charge and the final determination of the case should be reasonable – seems to apply equally to individuals and legal persons.<sup>67</sup> In case of interpretation by domestic courts of national

<sup>59</sup> ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 37 (criminal/fiscal); ECtHR, Decision of 21 June 2005, *Sträg Datatjänster AB v. Sweden*, Appl. 50664/99 (criminal/fiscal). Cf. ECtHR, Judgment of 16 July 2009, *Baroul Partner-A v. Moldova*, Appl. 39815/07, par. 36-42 (civil).

<sup>60</sup> Cf. ECtHR, Decision of 26 May 2009, *Plåt Rör Och Svets Service I Norden AB v. Sweden*, Appl. 12637/05, par. 37-47 (criminal/fiscal); ECtHR, Decision 28 February 2006, *MAC-STRO S.R.L. v. Moldova*, Appl. 35779/03 (criminal/customs); ECtHR, Decision of 23 March 2000, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v. Greece*, Appl. 36706/97 (criminal/administrative/customs).

<sup>61</sup> ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 2 (de facto criminal). See also ECtHR, Decision of 25 January 2000, *Aannemersbedrijf Gebroeders Van Leeuwen B.V. v. the Netherlands*, Appl. 32602/96, par. 1, 2 (civil/criminal).

<sup>62</sup> Cf. ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 45 (criminal/fiscal).

<sup>63</sup> ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 37, 50 (criminal/fiscal). See also ECtHR, Decision of 17 June 2008, *Synnelius & Edsbergs Taxi AB v. Sweden*, Appl. 44298/02, par. 1 (criminal/fiscal); ECtHR, Decision 28 February 2006, *MAC-STRO S.R.L. v. Moldova*, Appl. 35779/03 (criminal/customs). Cf. ECtHR, Judgment of 15 July 2006, *Zlinsat, spol. s r.o. v. Bulgaria*, Appl. 57785/00, par. 58-63, 70-85 (civil).

<sup>64</sup> As for the right to access to court under the American Convention, legal persons may be indirectly protected in this right; see *supra* Section 3 (under: Concept II).

<sup>65</sup> ECtHR, Judgment of 23 October 1997, *The National & Provincial Building Society, the Leeds Permanent Building Society & the Yorkshire Building Society v. the United Kingdom*, Appl. 21319/93, par. 99, 105-113 (civil/administrative), and in the same case ECionHR, Report of 25 June 1996, par. 85-86, 103, 106.

<sup>66</sup> Cf. ECionHR, Decision of 22 February 1995, *M.B. & T.M.S. AB v. Sweden*, Appl. 21831/93 (civil).

<sup>67</sup> ECtHR, Judgment of 24 September 1997, *Garyfallou AEBE v. Greece*, Appl. 18996/91, par. 36-44 (criminal). See furthermore ECtHR, Decision 28 February 2006, *MAC-STRO S.R.L. v. Moldova*, Appl. 35779/03 (criminal/customs); ECtHR, Decision of 15 September 1997, *Mantel & Mantel Holland Beheer B.V. v. the Netherlands*, Appl. 22531/93, which is a confirmation of ECionHR, Report of 9 April 1997,

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(procedural) law, that interpretation must be compatible with the fair trial principle of legal certainty, and that is not different when legal persons are involved.<sup>68</sup> Domestic courts should furthermore adequately state the reasons on which they base the decisions in regard to the legal persons.<sup>69</sup> The principle of the presumption of innocence in Article 6 § 2 ECHR is also applicable to legal persons.<sup>70</sup>

Fair trial rights are furthermore guaranteed by Article 6 § 3 ECHR. On the basis of that provision companies and other legal entities have the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them.<sup>71</sup> No less important is that legal persons too must have adequate time and facilities for the preparation of their defence, and they have a right to disclosure of evidence.<sup>72</sup> Legal persons also have the right to defend themselves, naturally through legal assistance of their own choosing.<sup>73</sup> They probably even have the right, if they have not sufficient means to pay for legal assistance, to be given it free when so required by the interests of justice. The European Court does not seem to adhere to the idea that companies are always financially in the position to pay legal assistance on their own. At least in a different context (that of having to pay a court fee) the argument that a commercial entity should, unless it has been declared insolvent, have sufficient means to pay is rejected by the European Court as being hypothetical.<sup>74</sup> The case law on Article 6 § 3 ECHR furthermore holds that legal persons have the right to hear witnesses and experts in criminal cases.<sup>75</sup>

Another fair trial right that deserves some attention here is the right to freedom from self-incrimination, which is grounded in Article 6 §§ 1 and 2 ECHR. The right aims primarily to protect the defendant against having to give evidence that has no existence outside of his or her will. So the right first of all involves the right to remain silent. Additionally it offers a warrant against improper compulsion, including situations where the authorities try to obtain evidence that exists independently of the will of the defendant, such as documents. This means that obtaining documents from a suspect legal (or natural) person by using powers under compulsory criminal procedural law will normally not be in violation of the right against self-incrimination. As regards natural persons, this might however be different in case

*Mantel & Mantel Holland Beheer B.V. v. the Netherlands*, Appl. 22531/93 (criminal). Cf. ECtHR, Judgment of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Appl. 40825/98, par. 106-117 (civil); ECtHR, Judgment of 19 December 2006, *Klemeco Nord AB v. Sweden*, Appl. 73841/01, par. 29-34 (civil).

<sup>68</sup> ECtHR, Judgment of 16 July 2009, *Baroul Partner-A v. Moldova*, Appl. 39815/07, par. 36-42 (civil); ECtHR, Judgment of 18 March 2008, *Dacia S.R.L. v. Moldova*, Appl. 3052/04, par. 72-79 (civil).

<sup>69</sup> ECtHR, Judgment of 19 December 2006, *Klemeco Nord AB v. Sweden*, Appl. 73841/01, par. 39 (civil).

<sup>70</sup> ECtHR, Decision of 17 June 2008, *Synnelius & Edsbergs Taxi AB v. Sweden*, Appl. 44298/02, par. 1 (criminal); ECtHR, Decision of 23 March 2000, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v. Greece*, Appl. 36706/97, par. 4 (criminal/administrative); ECtHR, Report of 9 September 1998, *Zegwaard & Zegwaard B.V. v. the Netherlands*, Appl. 26493/95, par. 34-51.

<sup>71</sup> ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 1, 2 (de facto criminal).

<sup>72</sup> ECtHR, Decision of 23 March 2000, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v. Greece*, Appl. 36706/97, par. 10 and 6 respectively (criminal/administrative); ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 1, 2 (de facto criminal).

<sup>73</sup> ECtHR, Decision of 25 January 2000, *Aannemersbedrijf Gebroeders Van Leeuwen B.V. v. the Netherlands*, Appl. 32602/96 (civil/criminal).

<sup>74</sup> ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 49 (criminal/fiscal); ECtHR, Judgment of 10 January 2006, *Teltronic-CATV v. Poland*, Appl. 48140/99, par. 34, 57 (civil).

<sup>75</sup> ECtHR, Decision of 23 March 2000, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v. Greece*, Appl. 36706/97, par. 5 (criminal/administrative).

of ‘improper compulsion’, such as a threat or imposition of a criminal sanction, in order to compel the individual to produce documents or other material evidence, or to make a statement.<sup>76</sup> Does the right against self-incrimination protect legal persons in a similar fashion? Naturally, a legal person cannot actually hand over documents etcetera or speak for itself; it can only do that through natural persons, such as directors, board members or employees. The question thus is whether it is acceptable to the European Court if the authorities compel such individuals to produce documents or offer witness statements against the company. As far as I have been able to verify the ECtHR has not yet had to deal with this question. However, as the Court applies all fair trial rights to individuals and legal persons, and, moreover, since it does this equally to both of them, it will most probably also apply the right to freedom from self-incrimination equally to natural and legal persons to the extent possible. This would first mean that the authorities have to respect the legal person’s right to remain silent, which would imply that they have to respect that the natural representatives and employees have the right to remain silent as regards confidential corporate information. Second, it would involve that the state may not use any ‘improper compulsion’ against the legal person or its representatives and employees in order to have them procure documents or other material evidence.

Meanwhile, all the fair trial rights discussed above do not pertain only to a trial in first instance. Where appeal procedures are available, States are required to ensure that physical and legal persons within their jurisdictions continue to enjoy the same fundamental guarantees under Article 6 before the appellate courts as they do before the courts of first instance.<sup>77</sup> Article 2 of the Seventh Protocol ECHR is also relevant in this regard (at least for those states that have ratified it). This provision guarantees to both natural and legal persons the right to review of a criminal conviction or sentence by a higher tribunal.<sup>78</sup> Finally, two other applicable provisions need mentioning. These are, first, Article 13 ECHR, under which everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority, including when they are legal persons in criminal cases.<sup>79/80</sup> Second, Article 4 of the Seventh Protocol ECHR guarantees that the principle of *ne bis in idem* (i.e., the freedom from double jeopardy), applies to legal persons too.<sup>81</sup>

A fair trial right not mentioned above, but which is nevertheless part of Article 6 § 3 ECHR, is the right to have the free assistance of an interpreter if the defendant cannot understand or speak the language used in court. A company or other legal person should in my view not be able to successfully claim this right if it can send someone (i.e. a director or

<sup>76</sup> ECtHR, Judgment of 23 February 1993, *Funke v. France*, Appl. 10828/84, par. 44; ECtHR, Judgment of 29 November 1996, *Saunders v. the United Kingdom*, Appl. 19187/91, par. 70-76; ECtHR, Judgment of 21 April 2009, *Marttinen v. Finland*, Appl. 19235/03, par. 67-76.

<sup>77</sup> ECtHR, Judgment of 20 December 2007, *Paykar Yev HaghTanak Ltd v. Armenia*, Appl. 21638/03, par. 45 (criminal/fiscal).

<sup>78</sup> ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 2 (de facto criminal).

<sup>79</sup> ECtHR, Judgment of 28 June 2007, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Appl. 62540/00, par. 95-103 (criminal/administrative). Cf. ECtHR, Judgment of 27 September 2005, *Amat-G Ltd and Mebaghishvili v. Georgia*, Appl. 2507/03, par. 42, 51-54 (civil); ECtHR, Judgment of 27 September 2005, *Iza Ltd and Makrakhidze v. Georgia*, Appl. 28537/02, par. 36, 46-49 (civil).

<sup>80</sup> Under the American Convention, legal persons may be indirectly protected in the right or an effective remedy; see *supra* Section 3 (under: Concept II).

<sup>81</sup> ECtHR, Decision of 23 March 2000, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v. Greece*, Appl. 36706/97, par. 4 (criminal/administrative).

board member) who can effectively represent the company in the trial and understands and speaks the language used. The possibilities available may depend on the domestic procedural provisions that establish by whom a legal person may be represented in a criminal trial. A similar approach might be desirable as to the right to be informed promptly of the nature and cause of the accusation, in so far as this must be done in a language that the defendant understands.

Another right that, in my view, merits a different approach as between individuals and legal persons is the right to a criminal trial within a reasonable time, which has already been mentioned above. This right is in essence not about the fairness of procedures. It serves primarily to protect against unnecessary delays which might jeopardize the effectiveness and credibility of the criminal justice system, and is furthermore designed, particularly in criminal cases, to avoid a situation where a person charged should remain too long in a state of uncertainty about his fate.<sup>82</sup> The first ground mentioned in regard to criminal trials is of quite equal importance as between individuals and legal persons, but that does not seem to be the case with the second ground. A long criminal trial will easily be very stressful for an individual defendant, while a legal person or its stakeholders (who are not themselves defendants in the trial) are much less affected, or at least differently.<sup>83</sup> This of course probably applies more to large corporations and organizations than to small companies, for instance, through which an individual carries out his or her business. It nevertheless makes clear that the European Court's approach to applying the right to trial within reasonable time in exactly the same way to individuals, small personal legal entities and large-scale legal persons, is not necessary. Such an undifferentiated approach is formalistic too, for it does not – even in the abstract – take the consequences of trial delays into consideration. Given that human rights aim to provide protection at a fundamental level, it would even seem to be undesirable.

Finally, it is relevant to note that under European case law the responsibility to achieve a fair trial not only falls to the authorities; the defence to some extent is also expected to actively guard, invoke and apply its fundamental rights. It seems reasonable to me to grant more such additional responsibility to corporations and other professional private legal organizations in proportion to their professionalism and scale.

#### **4.2. *Privacy and Protection of the Home and Correspondence***

In criminal justice, the authorities' respect for private life, family life, home and correspondence is particularly relevant during the investigation stages. Article 8 ECHR offers protection of these four interests. Therewith it is an important guarantee against unlawful or unnecessary searches, secret surveillance, telephone tapping, examination or seizure of written correspondence and other documents or electronic data, the interception of e-mail, monitoring internet usage, etcetera, as well as the application of such powers without serving a legitimate aim. The protection under Article 8 ECHR also concerns companies and other private legal persons, albeit not in respect of all the interests covered, and also less extensively and on a lower level than individuals are protected under this provision.

Whereas the notion of 'family life' is without relevance to legal persons, the European Court recognizes that the 'private life' guarantees have significance for them, at least indirectly. The ECtHR holds that the notion of private life does not exclude activities of a

<sup>82</sup> ECtHR, Judgment of 24 October 1989, *H. v. France*, Appl. 10073/82, par. 58, respectively ECtHR, Judgment of 10 November 1969, *Stögmüller v. Austria*, Appl. 1602/62, par. 5.

<sup>83</sup> Cf. ECtHR, Grand Chamber Judgment of 6 April 2000, *Comingersoll v. Portugal*, Appl. 35382/97, par. 35-36 (civil).

professional or business nature.<sup>84</sup> So, for instance, tapping an individual's business calls or the calls he or she makes from business premises, as well as searches that are directed solely against a natural person's business activities, fall within the scope of the right to privacy.<sup>85</sup> That does not, however, mean that legal persons themselves are granted the right to privacy; it is the natural person who is protected here. While the Court leaves it open to doubt whether a juristic person can have a private life within the meaning of Article 8 ECHR, so far it has expressly circumvented decisions on this matter.<sup>86</sup> Meanwhile, this makes it clear that legal persons and individuals are not equated.

A different stance is taken on the notions of 'home' and 'correspondence', which do apply to legal entities. In the case of *Niemietz v. Germany*, which involves the search of a lawyer's office, the European Court holds that the right to respect for one's home extends to a professional person's office, while correspondence of a professional nature also falls within the scope of Article 8.<sup>87</sup> This, however, still only involves the protection of the individual and not directly of the legal person. But in the case of *Colas Est v. France*, which concerns search and seizure of documents at the premises of the head and branch offices of three public limited companies, the Court extends the right to respect for one's home to the legal entity itself.<sup>88</sup> In later cases it did the same for the right to respect for one's correspondence.<sup>89</sup> So large-scale private organizations also have a certain right to respect for their home (offices, branches and other business premises) and for their correspondence (letters, documents, electronic data, telephone communication, e-mail, etcetera) under the European Convention.

The scope of the protection of business activities, meanwhile, is more limited than the protection of non-commercial and non-business matters, especially as far as the right to respect for one's home is concerned. The ECtHR, in principle, does not consider a farm specializing in pig production and housing several hundred pigs as a 'home', nor even as business premises, unless perhaps if the farm were to be regarded as a company's head office or branch.<sup>90</sup> The same may apply for instance to plots of land.<sup>91</sup> Moreover, premises that are only apparently the home of a legal commercial or business organization, while in fact these constitute a cover for the conduct of criminal activities, fall outside the notion of 'home' in Article 8 ECHR.<sup>92</sup> This approach is, at least in my view, problematic. Only after the application of criminal investigative powers will it usually be possible to ascertain whether an investigated organization is perfectly legitimate, is a legitimate organization that has

<sup>84</sup> ECtHR, Judgment of 16 November 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 29 (criminal).

<sup>85</sup> *Idem*, par. 29.

<sup>86</sup> See, e.g., ECtHR, Judgment of 28 June 2007, *Association for European Integration and Human Rights & Ekimdzhiiev v. Bulgaria*, Appl. 62540/00, par. 60 (criminal/administrative); ECtHR, Judgment of 16 October 2007, *Wieser & Bicos Beteiligungen GmbH v. Austria*, Appl. 74336/01, par. 45 (criminal).

<sup>87</sup> ECtHR, Judgment of 16 November 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 30 (criminal).

<sup>88</sup> ECtHR, Judgment of 16 April 2002, *Société Colas Est v. France*, Appl. 37971/97, par. 41-42 (criminal). Confirmed in, e.g., ECtHR, Judgment of 28 April 2005, *Buck v. Germany*, Appl. 41604/98, par. 31 (criminal); ECtHR, Decision of 11 October 2005, *Kent Pharmaceuticals Limited v. the United Kingdom*, Appl. 9355/03, par. 1 (criminal); ECtHR, Judgment of 15 November 2007, *Khamidov v. Russia*, Appl. 72118/01, par. 131 (administrative/civil).

<sup>89</sup> ECtHR, Judgment of 16 October 2007, *Wieser & Bicos Beteiligungen GmbH v. Austria*, Appl. 74336/01, par. 45 (criminal), and furthermore: ECtHR, Judgment of 28 June 2007, *Association for European Integration and Human Rights & Ekimdzhiiev v. Bulgaria*, Appl. 62540/00, par. 60-62 (criminal/administrative); ECtHR, Judgment of 1 July 2008, *Liberty v. the United Kingdom*, Appl. 58243/00, par. 55-57 (criminal/administrative).

<sup>90</sup> ECtHR, Decision of 6 September 2005, *Leveau & Fillon v. France*, Appl. 63512/00.

<sup>91</sup> Cf. ECtHR, Judgment of 15 November 2007, *Khamidov v. Russia*, Appl. 72118/01, par. 131 (administrative/civil; complainant is an individual).

<sup>92</sup> ECtHR, Judgment of 28 July 2009, *Lee Davies v. Belgium*, Appl. 18704/05, par. 55-56.

offended, or is a criminal organization really. Whatever it may be is irrelevant to the rule of law, though, which requires that the authorities comply with fundamental rights requirements when applying criminal investigative powers. The Court's approach *de facto* means that usage of such powers in violation of Article 8 ECHR (*i.e.*, because the application is unlawful, unnecessary or does not serve a legitimate aim) might afterwards suddenly be acceptable. Namely, when it is then – and only then – ascertained that the organization is in fact a criminal organization whose offices thus fall outside the scope of this provision. Reasoning of this kind opens up the possibility to circumvent human rights norms all together when criminal legal persons – or for that matter, criminal individuals – are subject of criminal justice.

Finally, the level of protection of the 'home' might be lower for juristic entities than for individuals. It seems that the authorities under Article 8 § 2 ECHR have a broader margin of appreciation in limiting the right to respect for the home of such entities than when the home of a natural person is involved.<sup>93</sup> The European case law does not suggest, though, that the same is true for the right to respect for one's correspondence.<sup>94</sup> The reason for this difference in approach is not made clear and is difficult to grasp.

### 4.3. Principle of Legality

Article 7 ECHR embodies the criminal law principle of legality: *nullum crimen, nulla poena sine lege*. The principle entails a prohibition of analogous interpretation in substantive criminal law, and implies that an offence and the sanctions provided for it must be clearly defined in the law. This also means that criminal law must be accessible and foreseeable. Article 7 applies unabridged to companies and other private legal persons.<sup>95</sup> As regards the requirement of foreseeability, constant European case law nevertheless entails a standard that has its strongest effects on legal persons. The standard declares that the notion of foreseeability also depends to a considerable degree on the number and status of those whom the law addresses. In this connection it is relevant that a law may still be foreseeable even if the person concerned has to take appropriate legal advice to inform him or her about the law's meaning. Considering that legal persons conducting a business activity are used to having to proceed with a great degree of caution when pursuing their occupation, the Court holds that particularly such legal persons – *a fortiori* if they are large-scale or multinational companies – can be expected to take special care in assessing whether or not a certain activity entails an offence. This might thus mean that they have to supply themselves with legal assistance.<sup>96</sup>

<sup>93</sup> See ECtHR, Judgment of 16 November 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 31 (criminal), and with more reservation, ECtHR, Judgment of 16 April 2002, *Société Colas Est v. France*, Appl. 37971/97, par. 49 (criminal). See also ECtHR, Judgment of 28 April 2005, *Buck v. Germany*, Appl. 41604/98, par. 34-52, a (criminal) case in which the Court considers the intrusion on the private residential premises to be of a more serious nature than a similar intrusion on the business premises.

<sup>94</sup> ECtHR, Judgment of 16 October 2007, *Wieser & Bicos Beteiligungen GmbH v. Austria*, Appl. 74336/01, par. 45 (and 53-68) (criminal): 'the Court sees no reason to distinguish between the first applicant, who is a natural person, and the second applicant, which is a legal person, as regards the notion of "correspondence"'.

<sup>95</sup> ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 3 (*de facto* a criminal). Cf. ECtHR, Judgment of 30 March 2004, *Radio France and Others v. France*, Appl. 53984/00, par. 17-20 (criminal/administrative).

<sup>96</sup> ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 3 (*de facto* a criminal).

#### 4.4. Right to Freedom of Expression

Private legal persons have for a long time had a right to freedom of expression under Article 10 ECHR.<sup>97/98</sup> First, the right is important here in connection with substantive criminal law. The right restricts the possibilities for the authorities to criminalize certain expressions of legal persons such as companies, newspapers, political parties, and activist organizations.<sup>99</sup> Second, the freedom of expression of legal persons may protect them against the application of criminal investigative powers. So in the case of *Vereniging Weekblad "Bluf!" versus the Netherlands* the Court found a violation of Article 10 ECHR because the seizure and subsequent withdrawal from circulation of an issue of the association's magazine "Bluf!" (in which a confidential report by the internal security service was disclosed) was not necessary in a democratic society.<sup>100</sup> The European Court has furthermore recognized that Article 10 ECHR, for instance, protects media organizations from having to cooperate with the authorities in criminal investigations. So they may not be forced to handover journalistic materials (notes, photographs, film, documents) or to disclose journalists' sources, unless it is justified by an overriding requirement in the public interest, for instance as regards the prevention of crime.<sup>101</sup>

The rights of private legal persons under Article 10 ECHR concern both commercial and non-commercial expression, although the protection of the latter is much wider.<sup>102</sup> Advertisements and commercials are forms of commercial expression, while examples of non-commercial expression are political speech and debate, artistic expression, and journalistic and scientific publications. The European Court's standard to assess the legitimacy of infringements on the freedom of expression is much lower for commercial speech than the normally applicable standard. Not only do states have much wider latitude in deciding whether it is necessary to perpetuate the infringement in case of commercial speech than that which they normally have under Article 10 ECHR: what is more, the Court then only formally assesses whether the state has applied a test of proportionality, instead of itself materially reviewing whether the infringement of the freedom of commercial speech was indeed proportionate.<sup>103</sup> On the other hand, as far as journalist, political or other general interest speech is concerned, the states' latitude is rather limited, while the Court assesses

<sup>97</sup> See ECtHR, Judgment of 26 April 1979, *Sunday Times v. the United Kingdom*, Appl. 6538/74, par. 44-68. See furthermore, e.g., ECtHR, Judgment of 2 November 2006, *Kobenter and Standard Verlags GmbH v. Austria*, Appl. 60899/00, par. 22-33 (criminal law related). See also ECtHR, Grand Chamber Judgment of 30 June 2009, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, Appl. 32772/02, par. 78-98 (administrative); ECtHR, Judgment of 29 March 2005, *Ukrainian Media Group v. Ukraine*, Appl. 72713/01, par. 38-70 (civil).

<sup>98</sup> As has been explained, in very specific circumstances legal persons may be indirectly protected in their right to freedom of expression under the ICCPR; see *supra* Section 3 (under: Concept II).

<sup>99</sup> Cf., e.g., ECtHR, Judgment of 2 November 2006, *Kobenter and Standard Verlags GmbH v. Austria*, Appl. 60899/00, par. 22-33 (criminal law related). Cf. ECtHR, Judgment of 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, Appl. 14234/88, par. 58, 59.

<sup>100</sup> ECtHR, Judgment of 9 February 1995, *Vereniging Weekblad "Bluf!" v. the Netherlands*, Appl. 16616/90, par. 25-46 (criminal).

<sup>101</sup> See, e.g., ECtHR, Decision of 8 December 2005, *Nordisk Film & TV A/S v. Denmark*, Appl. 40485/02 (journalistic sources; criminal); ECtHR, Judgment of 31 March 2009, *Sanoma Uitgevers B.V. v. the Netherlands*, Appl. 38224/03, par. 57 (journalistic materials; criminal).

<sup>102</sup> See, e.g., ECtHR, Judgment of 22 May 2008, *Alithia Publishing Company Ltd & Constantinides v. Cyprus*, Appl. 17550/03, par. 62.

<sup>103</sup> See ECtHR, Judgment of 20 November 1989, *Markt intern Verlag GmbH & Beermann v. Germany*, Appl. 10572/83, par. 33, 36-37 (commercial speech), which has been confirmed in, e.g., ECtHR, Judgment of 11 December 2008, *TV Vest As & Rogaland Pensjonistparti v. Norway*, Appl. 21132/05, par. 64.

whether the infringement on such speech is necessary more closely than in case of ordinary expression.<sup>104</sup>

As for non-commercial speech which is of general interest, the Court moreover acknowledges the vital role the press and other media organizations (being a ‘public watchdog’) as well as political parties play in a democratic and pluralist society.<sup>105</sup> So it seems that the Court regards the press’s and political parties’ right to freedom of such expression as of even greater fundamental importance than such general interest speech from an ordinary citizen. The reason is not that the Court regards human rights protection of legal persons as of more importance than that of individuals. It just seems that the value of the media and political organizations for democratic society, and thus for the individuals as a collective, is afforded greater significance than the value of a single person’s speech. Ultimately, of course, the protection of these organizations entirely serves the right to freedom of expression of each individual. Not only are the media and political parties an important vehicle for individuals to express themselves, such organizations are also indispensable for the individual’s possibilities to receive information, which is also a part of the right to freedom of expression.

#### **4.5. Right to Freedom of Religion and Belief**

Initially the former European Commission held that a company, being a legal and not a natural person, is incapable of having or exercising the right to freedom of religion mentioned in Article 9 ECHR.<sup>106</sup> This view has never been shared by the European Court, which holds the protection of legal persons’ right to freedom of religion instrumental to the protection of individuals: ‘Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable’.<sup>107</sup> Legal persons with religious or philosophical objects are therefore protected under this provision in their own capacity. Additionally, a Church or an ecclesiastical body as such may exercise on behalf of its adherents the rights guaranteed by Article 9 ECHR.<sup>108</sup> In relation to freedom of religion, too, a special and important position of private legal entities is recognized by the Court: ‘Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords’.<sup>109</sup> All of this is also relevant in relation to criminal justice. As far as substantive criminal law is concerned, the right may protect legal persons against criminalization that violates freedom of religion. This may for instance occur if

<sup>104</sup> See, for instance, ECtHR, Judgment of 22 May 2008, *Alithia Publishing Company Ltd & Constantinides v. Cyprus*, Appl. 17550/03, par. 62 (journalism), and ECtHR, Judgment of 29 March 2005, *Ukrainian Media Group v. Ukraine*, Appl. 72713/01, par. 68 (journalism). More elaborately, see Emberland 2006, p. 164-167.

<sup>105</sup> See, e.g., ECtHR, Judgment of 14 February 2006, *Christian Democratic People’s Party v. Moldova*, Appl. 28793/02, par. 62-66.

<sup>106</sup> ECionHR, Decision of 17 December 1968, *Church of X v. the United Kingdom*, Appl. 3798/68, par. I. For the volte-face, see ECionHR, Decision of 5 May 1979, *X. & Church of Scientology v. Sweden*, Appl. 7805/77, par. 2.

<sup>107</sup> See, e.g., ECtHR, Judgment of 22 January 2009, *Holy Synod Bulgarian Orthodox Church v. Bulgaria*, Appl. 412/03, par. 103; ECtHR, Grand Chamber Judgment of 27 June 2000, *Cha’are Shalom Ve Tsedek v. France*, Appl. 27417/95, par. 72 (administrative).

<sup>108</sup> ECtHR, Judgment of 6 November 2008, *Leela Förderkreis E.V. v. Germany*, Appl. 58911/00, par. 79.

<sup>109</sup> See, e.g., ECtHR, Judgment of 22 January 2009, *Holy Synod Bulgarian Orthodox Church v. Bulgaria*, Appl. 412/03, par. 103 (administrative); ECtHR, Judgment of 31 July 2008, *Religions-gemeinschaft der Zeugen Jehovas v. Austria*, Appl. 40825/98, par. 61 (administrative).

criminal law were to regulate the leadership of religious communities,<sup>110</sup> were to prohibit religious communities from operating a place of worship,<sup>111</sup> or were to limit religious expression or manifestation. As regards criminal procedure, the application of criminal investigative powers against religious organizations could violate the right to freedom of religion. It is conceivable, for example, that a certain search and seizure in a church would not only breach the right to respect for the home (see above) but also freedom of religion, under particular circumstances.

#### **4.6. *Rights to Freedom of Association and Freedom of Assembly***

Private legal persons are furthermore beneficiaries under the European Convention of the rights to freedom of association<sup>112</sup> and freedom of peaceful assembly<sup>113</sup> in Article 11 ECHR. Although these rights in principle are applicable to all non-governmental organizations, under reference to the hallmarks of a ‘democratic society’ the European case law again offers the widest protection through these provisions to entities such as political parties, religious organizations and trades unions.<sup>114</sup> The regulation of legal persons exercising freedom of association or assembly may be supported by and enforced through criminal law, but only in so far as this is lawful, necessary and serves a legitimate aim set down in Article 11 § 2 ECHR.

#### **4.7. *The Right to stand for Election***

Article 3 of the First Protocol to the European Convention states that the states parties ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Based on this provision the European Court recognizes the right to vote and the right stand for election. The right to vote is confined to physical persons only, and that was initially also the case for the right to stand for election. However, in 2007 the Court came to accept that, when the authorities in violation of Article 3 of the First Protocol restrict individual candidates’ right to stand for election, the relevant party, as a corporate entity, could also claim to be a victim of the violation independently of its candidates.<sup>115</sup> This right now thus applies to political parties, but not to legal persons in general. The rationale for applying this right to legal persons may again be found in further strengthening the protection of democratic and pluralist society. States do nevertheless enjoy a wide margin of appreciation in regulating elections. If criminal law were to restrict the possibilities for a

<sup>110</sup> Cf. ECtHR, Judgment of 14 December 1999, *Serif v. Greece*, Appl. 38178/97, par. 33-54 (criminal).

<sup>111</sup> Cf. ECtHR, Judgment of 26 September 1996, *Manoussakis v. Greece*, Appl. 18748/91, par. 44-53 (criminal).

<sup>112</sup> See, for example, ECtHR, Grand Chamber Judgment of 30 January 1998, *United Communist Party of Turkey v. Turkey*, Appl. 19392/92, par. 24-34 (administrative law); ECtHR, Judgment of 14 February 2006, *Christian Democratic People’s Party v. Moldova*, Appl. 28793/02, par. 62-78 (administrative); ECtHR, Decision of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Appl. 40825/98, par. 61-63 (administrative).

<sup>113</sup> See ECtHR, Decision of 10 October 1979, *Rassemblement Jurassien & Unite Jurassienne v. Switzerland*, Appl. 8191/78, par. 1-4 (administrative), and ECtHR, Judgment of 14 February 2006, *Christian Democratic People’s Party v. Moldova*, Appl. 28793/02, par. 62-78 (administrative).

<sup>114</sup> See, e.g., ECtHR, Grand Chamber Judgment of 30 January 1998, *United Communist Party of Turkey v. Turkey*, Appl. 19392/92, par. 24-25 (administrative law).

<sup>115</sup> ECtHR, Judgment 11 January 2007, *Russian Conservative Party of Entrepreneurs v. Russia*, Appl. 55066/00, par. 53-67 (administrative). See also ECtHR, Judgment of 8 July 2008, *Georgian Labour Party v. Georgia*, Appl. 9103/04, par. 72-74 (administrative).

political party to stand for election, this might constitute a violation of Article 3 of the First Protocol.

#### **4.8. Right to Property**

A provision in the First Protocol that is of more relevance to criminal law is the right to property in Article 1. It is moreover the only right in the European Convention and protocols thereto the formulation of which expressly holds that every natural and legal person is entitled to it. So it protects companies and all other private legal entities against state interference with their possessions through both substantive criminal law and criminal law procedure, unless the interference is lawful, necessary and serves a legitimate aim. The right might for instance serve as an impediment for imposing excessively disproportionate fines, confiscations or forfeiture in criminal trials.<sup>116</sup> And as for criminal procedure, the right, *e.g.*, requires sufficient procedural guarantees against seizure by the police or prosecuting authorities and a reasonable opportunity to challenge such seizures.<sup>117</sup>

#### **4.9. Right to Freedom of Discrimination**

Private legal persons enjoy this right, which is guaranteed by Article 14 ECHR and by the Twelfth Protocol ECHR.<sup>118</sup> So discrimination against an organization on the basis of the nature of that entity, its stakeholders or the people it represents or whose interests it promotes may be in violation of these provisions. It is important to note that the right to non-discrimination does not prohibit all differences in treatment in the exercise of the rights and freedoms.<sup>119</sup> But in so far as this right protects against discriminating criminal law prohibitions or sentences, or discriminating application of criminal procedure, legal persons can probably derive the same level of protection from these provisions as natural individuals. A lack of relevant case law, however, means it is not possible to draw more unequivocal conclusions.

#### **4.10. Right to redress for Fundamental Rights Violations**

On the basis of Article 41 ECHR the European Court may ‘afford just satisfaction to the injured party’ of a human rights violation. Under this provision legal persons have for a long time been awarded financial compensation for pecuniary damage.<sup>120</sup> In 1999 the European

<sup>116</sup> See ECtHR, Judgment of 9 July 2009, *Moon v. France*, Appl. 39973/03 (criminal/customs). Cf. ECtHR, Judgment of 23 July 2009, *Bowler International Unit v. France*, Appl. 1946/06 (administrative); ECtHR, Judgment of 24 October 1986, *AGOSI v. the United Kingdom*, Appl. 9118/80, par. 47-62 (administrative/criminal), and in the same case ECionHR, Report of 11 October 1984, par. 75, 80-93; and furthermore ECtHR, 16 September 2004, *OOO Torgovyi Dom “Politeks” v. Russia*, Appl. 72145/01 (administrative).

<sup>117</sup> ECtHR, Judgment of 9 October 2008, *Forminster Enterprises Limited v. the Czech Republic*, Appl. 38238/04, par. 63-78 (criminal).

<sup>118</sup> Cf. ECtHR, Decision of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Appl. 40825/98, par. 88 and 99 (administrative); ECionHR, Report of 25 June 1996, *The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom*, Appl. 21319/93, par. 85-86 (civil/administrative).

<sup>119</sup> ECtHR, Judgment of 9 December 1994, *The Holy Monasteries v. Greece*, Appl. 13092/87, par. 92; ECtHR, Judgment of 18 February 2009, *Andrejeva v. Latvia*, Appl. 55707/00, par. 81.

<sup>120</sup> See, *e.g.*, EHRM, Judgment of 6 November 1980, *Sunday Times v. the United Kingdom*, Appl. 6538/74, par. 13; ECtHR, Judgment of 22 May 1990, *Autronic AG v. Switzerland*, Appl. 12726/87, par. 65; ECtHR, Judgment of 9 December 1994, *The Holy Monasteries v. Greece*, Appl. 13092/87, par. 95-104.

Court for the first time also acknowledged a private legal person's right, *i.e.* a political party, to financial compensation for non-pecuniary damage on account of the frustration its members and founders had suffered as a result of a violation of the right to freedom of association (Article 11 ECHR).<sup>121</sup> Although the compensation is awarded to the entity, the grounds for it lie in the damage to the individuals it represents. However, shortly thereafter the Court expressly recognized a company's right under Article 41 ECHR to financial compensation for non-pecuniary damage it sustained as a result of a violation, in this case of the reasonable time requirement of Article 6 § 1 ECHR.<sup>122</sup> Since then legal persons have also been granted financial compensation for non-pecuniary damage that resulted from violations of, for instance, the right to freedom of religion and the prohibition of discrimination,<sup>123</sup> the right to property and the fair trial right to enforcement of final judgments,<sup>124</sup> and the right to access to court in criminal cases.<sup>125</sup> To understand the European Court's approach, it is important to take into consideration that the ECtHR primarily starts from the international law principle that a violation imposes on the state a legal obligation to make reparation for its consequences and that this obligation secures the effectiveness of the Convention's rights.<sup>126</sup> The question whether the violation caused damage to a human being is thus of secondary importance. This does not mean, though, that the Court is indifferent to whether it deals with a legal persons or an individual. It will view the circumstances of the case and assess how the legal person was actually harmed, which will in principle be different from how a natural individual would have been harmed if he or she were affected by the violation committed by the state.

## 5. Human Rights Obligations to hold Public and Private Legal Persons criminally liable

The human rights systems that are under discussion here not only offer protection – to individuals, and some to legal persons too – against the application of criminal law by the state. The supervisory bodies that monitor these treaties all also hold that certain human rights imply positive obligations on the state to apply criminal law when that human right has been violated. So the question arises whether these positive obligations also entail duties of the state to criminalize, criminally investigate, prosecute, criminally try, and punish legal persons that are responsible for breaching the human rights entailed in these treaties. In other words, does international human rights law require states to provide for the possibility of corporate liability in their criminal law systems?

<sup>121</sup> ECtHR, Grand Chamber Judgment of 8 December 1999, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Appl. 23885/94, par. 57.

<sup>122</sup> ECtHR, Grand Chamber Judgment of 6 April 2000, *Comingersoll v. Portugal*, Appl. 35382/97, par. 27-37 (civil). See recently, *e.g.*, ECtHR, Judgment of 6 October 2009, *Deservire S.R.L. v. Moldova*, Appl. 17328/04, par. 62. The question on whether a commercial company may allege that it has sustained non-pecuniary damage through anxiety was already raised, but not answered in ECtHR, Grand Chamber Judgment of 28 July 1999, *Immobiliare Saffi v. Italy*, Appl. 22774/93, par. 79 (administrative).

<sup>123</sup> ECtHR, Decision of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Appl. 40825/98, par. 129 (civil).

<sup>124</sup> ECtHR, Judgment of 12 February 2008, *Oferta Plus S.R.L. v. Moldova*, Appl. 14385/04, par. 72-76 (civil).

<sup>125</sup> ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 56 (criminal/fiscal).

<sup>126</sup> ECtHR, Grand Chamber Judgment of 6 April 2000, *Comingersoll v. Portugal*, Appl. 35382/97, par. 29 and 35 (civil).

In this respect it is important to note first that not a single provision in the ICCPR, the ECHR, the ACHR, or the AfChHPR does explicitly formulate positive obligations on states to apply criminal substantive law to legal persons or to use the criminal justice system against them. In fact, there is hardly a provision in these treaties that propounds an express obligation to utilize criminal law if the human right entailed in that provision is violated.<sup>127</sup> Other than that, some provisions in these treaties – particularly in the ICCPR and ACHR – contain the more generally formulated obligations that certain conduct shall be ‘prohibited by law’ or, even vaguer, that the human right shall be ‘protected by law’.<sup>128</sup> These provisions thus do not specify that criminal law should be employed to this end. Nevertheless, based on such formulations, as well as on many other provisions, the supervisory bodies of these treaties have come up with quite an extensive set of positive obligations to apply criminal law. Naturally, these obligations mostly attach to civil and political rights. They are after all the rights that are principally protected in the ICCPR, ECHR and ACHR; only the African Charter also contains a substantial number of economic, social and cultural rights.

In a General Comment, the Human Rights Committee emphasizes that the state has the obligation to protect individuals, not just against violations by state agents, but also against acts committed by ‘private persons or entities’ that breach human rights in so far as they are amenable to application between private persons or entities.<sup>129</sup> This may involve the need to investigate or punish such private persons or entities. By way of illustration the Committee points out that states have to ensure that private persons or entities do not discriminate or inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. Interestingly, as regards, for instance, torture and inhuman treatment (including rape and female genital mutilation), killing and enforced disappearance, the Committee holds that adequate protection may entail positive obligations to criminalize such violations and to criminally investigate, prosecute, convict and adequately punish those responsible.<sup>130</sup> The phrase ‘those responsible’ will at least be meant to refer to natural persons, including any directors, managers or employees of legal persons. The Committee does not however state in so many words that this also applies when the responsible party is a company or other legal entity. Yet, considering that states have to protect individuals against legal entities, while adequate protection may require the application of criminal law, it seems that states are also

<sup>127</sup> The exception is Art. 13 § 5 ACHR where it maintains that propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitements to lawless violence or to similar action on discriminatory grounds ‘shall be considered as offenses punishable by law’.

<sup>128</sup> Prohibitions by law are required for slavery and the slave trade (Art. 8 ICCPR; Arts. 6 and 21 ACHR; Art. 5 AfChHPR), propaganda for war (Art. 20 ICCPR), national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Art. 20 ICCPR), discrimination (Art. 26 ICCPR), and torture, cruel, inhuman or degrading punishment and treatment (Art. 5 AfChHPR). Protection by law is primarily demanded for the individual’s life (Art. 6 ICCPR; Art. 2 ECHR; Art. 4 ACHR), privacy, correspondence, honour, and reputation (Art. 17 ICCPR; Art. 11 ACHR), family (Arts. 17 and 23 ICCPR; Arts. 11 and 17 ACHR; Art. 18 AfChHPR), children (Arts. 23 and 24 ICCPR; Art. 19 ACHR; Art. 18 AfChHPR), and women and different forms of equality (Arts. 23 and 26 ICCPR; Arts. 17 and 24 ACHR; Arts. 3 and 18 AfChHPR).

<sup>129</sup> HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, par. 8.

<sup>130</sup> See also, e.g., HRC, General Comment No. 6, The right to life, 30 March 1982, par. 3; HRC, View of 29 March 1982, *Bleier v. Uruguay*, Comm. 30/1978, para 11-15; HRC, View of 13 November 1995, *Bautista v. Colombia*, Comm. 563/1993, para 8.6, 10; HRC, View of 29 July 1997, *Arhuaco v. Colombia*, Comm. 612/1995, par 8.2; and furthermore HRC, Concluding Observations, *Senegal*, CCPR A/53/40 vol. I (1998), par. 61; HRC, Concluding Observations, *Libyan Arab Jamahiriya*, CCPR A/54/40 vol. I (1999), par. 130; HRC, Concluding Observations, *Suriname*, CCPR A/59/40 vol. I (2004), par. 69 (11-12).

obligated to apply criminal law against such private entities when these are responsible for such human rights violations. Meanwhile, the Human Rights Committee neither finds nor implies any obligations to apply criminal justice against public legal persons that are responsible for human rights violations.

By now, the concept of positive obligations as regards criminal law seems most developed in the case law of the European Court. In order to protect the right to life the ECtHR holds that the state has a primary duty to put in place effective criminal-law provisions to deter the commission of offences against the person, and to criminally investigate breaches of the right, and prosecute, convict and punish perpetrators.<sup>131</sup> These obligations are furthermore relevant as regards (certain) violations of, for example, the prohibition of torture and ill-treatment (including rape and domestic violence), prohibition of slavery, the right to privacy, and the freedoms of expression, religion and assembly.<sup>132</sup> It is clear from the case law that these positive obligations not only apply if the perpetrator is a state official or a private individual (of course including possible directors, managers and employees of legal entities), but also when a state body is responsible for the violation.<sup>133</sup>

The Court here thus seems to require that states provide for the possibility of criminal liability of public legal persons being responsible for a violation of, *inter alia*, the right to life. This conclusion finds further support in the case of *Oneryildiz v. Turkey*, in which the Court rules: ‘Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, [...], the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2’.<sup>134</sup> It is not absolutely certain that the phrase ‘those responsible’ means to refer to state ‘bodies’ too, but such a reading of the sentence would be the most obvious one. Further confirmation may be found in the case of *Rowley v. the United Kingdom*, which concerns the death of a boy in a residential care home due to negligence of this public corporation.<sup>135</sup> The mother complains about a failure to prosecute for corporate manslaughter. The ECtHR rejects this complaint, because it was of the view that application of criminal law is not required in case of medical negligence. The fact that the prosecution would concern a public legal entity was on the other hand not at all considered to be relevant by the Court. All of this merits the conclusion that the ECHR probably requires that states can hold public legal persons criminally liable in case they commit certain human rights violations. However, the obligations are still framed in such a general fashion that it is not

<sup>131</sup> ECtHR, Grand Chamber Judgment of 28 October 1998, *Osman v. the United Kingdom*, Appl. 23452/94, par. 115.

<sup>132</sup> See for example ECtHR, Judgment of 12 April 2007, *Ivan Vasilev v. Bulgaria*, Appl. 48130/99, par. 58 (ill-treatment by police); ECtHR, Judgment of 4 December 2003, *M.C. v. Bulgaria*, Appl. 39272/98, par. 148-153, 185-186 (rape by private individuals); ECtHR, Judgment of 26 July 2005, *Siliadin v. France*, Appl. 73316/01, par. 89 en 143-144 (slavery by private individuals); ECtHR, Judgment of 3 May 2007, *Gldani Congregation of Jehovah’s Witnesses v. Georgia*, par. 133-135 (private violence against religious community).

<sup>133</sup> See, e.g., ECtHR, Judgment of 4 May 2001, *McKerr v. the United Kingdom*, Appl. 28883/95, par. 111; ECtHR, Judgment of 14 March 2002, *Paul & Audrey Edwards v. the United Kingdom*, Appl. 46477/99, par. 69; ECtHR, Grand Chamber Judgment of 8 April 2004, *Tahsin Acar v. Turkey*, Appl. 26307/95, par. 221 and 223; ECtHR, Decision of 10 May 2005, *Hackett v. the United Kingdom*, Appl. 34698/04, par. 1; ECtHR, Judgment of 20 December 2007, *Nikolova & Velichkova/Bulgarije*, Appl. 7888/03, par. 57.

<sup>134</sup> ECtHR, Grand Chamber Judgment of 30 November 2004, *Oneryildiz v. Turkije*, Appl. 48939/99, par. 93; see this paragraph also in relation to par. 91-92. See also ECtHR, Judgment of 24 March 2009, *Mojsiejew v. Poland*, Appl. 11818/02, par. 53(c), in which the Courts point at the need ‘in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility’.

<sup>135</sup> ECtHR, Decision of 22 Februari 2005, *Rowley v. the United Kingdom*, Appl. 31914/03, par. 1.

clear whether they are relevant to either central governmental bodies, or municipalities and other lower public offices, or both.

From the criminal liability of public entities, it seems only a small step also to require such liability for private legal persons. Although the Court may not yet have expressly confirmed this, the European case law does at least strongly suggest that application of criminal law against private entities may indeed be obligated in certain situations. Not only has the Court on several occasions stated that these positive obligations apply in any context: ‘whether public or not’.<sup>136</sup> More important is that the Court, when framing positive obligations in relation to criminal law, pays little attention in principle to the nature of the individual or entity responsible for a human rights violation. Instead it takes a pragmatic approach and reasons from the obligations of the state and the idea that the protection of human rights must be effective and that violations should be deterred and repressed. Seen from this perspective it seems implausible that the Court is not going to demand criminal liability of private legal persons when this emerges as being vital to the protection of human rights.

The obligation of states to criminally investigate, prosecute and punish those responsible for human rights violations, and thus to criminalize such breaches, is from its first Judgment acknowledged under the American Convention by the Inter-American Court.<sup>137</sup> The obligations have been stressed in relation to, for instance, the right of life, the right to liberty, the prohibition of torture and ill-treatment, the right to a fair trial, and freedom of expression. In respect of the prohibition of forced disappearance of persons, the Court even holds that these duties ‘have attained the status of *jus cogens*’.<sup>138</sup> Though apart from that, these duties ultimately may be relevant in respect of all human rights in the ACHR, since in its formulations the Court places no limits on the obligations to particular human rights, as the European Court does, but attaches them to ‘the rights protected by the American Convention’ in general.<sup>139</sup> The Inter-American Court states that ‘Criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused’.<sup>140</sup> It is evident from the case law that the duty to criminalize human rights violations as well as the obligation to investigate, prosecute, try, convict, and punish the perpetrators apply in respect of violations by natural state agents or private individuals (obviously including possible directors, managers and employees of legal entities).<sup>141</sup> There is, however, no indication that the Court also means to imply a state’s obligation to provide for corporate criminal liability. Although in some cases the Court speaks of ‘the authors of the violations’ and ‘those responsible for violations’ to which criminal law should be applied, which terms

<sup>136</sup> ECtHR, Grand Chamber Judgment of 30 November 2004, *Oneryildiz v. Turkije*, Appl. 48939/99, par. 71; ECtHR, Decision of 2 December 2008, *Milan Furdík v. Slovakia*, Appl. 42994/05, par. 1.

<sup>137</sup> See I-ACtHR, Judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, par. 166, 169, 174-176; and furthermore for example I-ACtHR, Order of 27 January 2009, *Bámaca Velásquez v. Guatemala*, par. 15-16, 23, 26, 31; I-ACtHR, Judgment of 20 November 2007, *García-Prieto v. El Salvador*, par. 99-104; I-ACtHR, Judgment of 26 November 2008, *Tiu Tojín v. Guatemala*, par. 68-73.

<sup>138</sup> I-ACtHR, Order of 27 January 2009, *Bámaca Velásquez v. Guatemala*, par. 26; I-ACtHR, Judgment of 22 September 2006, *Goiburú v. Paraguay*, par. 84.

<sup>139</sup> With further references, see *e.g.*, I-ACtHR, Judgment of 6 February 2001, *Ivcher Bronstein v. Peru*, par. 186.

<sup>140</sup> I-ACtHR, Judgment of 28 January 2009, *Perozo v. Venezuela*, par. 300.

<sup>141</sup> See, *e.g.*, I-ACtHR, Judgment of 28 January 2009, *Perozo v. Venezuela*, par. 64, 118-120, 141; I-ACtHR, Order of 27 January 2009, *Bámaca Velásquez v. Guatemala*, par. 28; I-ACtHR, Order of 4 September 2004, *Matter of “Globovisión” Television Station v. Venezuela*, par. 11 and 22.

could as such be taken to refer to legal entities,<sup>142</sup> in other instances it uses phrases as ‘the people responsible’, ‘individuals’ and ‘private persons or groups’ when formulating the general framework on positive obligations.<sup>143</sup> The Inter-American supervisory bodies do nonetheless very much emphasize the need for effective deterrence and repression of human rights violations. It is therefore reasonably conceivable that the Court or Commission will start formulating positive obligations to apply criminal law against private and maybe even public legal persons if a specific case merits their doing so.

Finally, the African Commission has affirmed that ‘some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance’.<sup>144</sup> In addition to that the Commission acknowledges positive obligations on states to exercise due diligence to prevent harmful acts of others, to impose sanctions on private violations of human rights and to take the necessary steps to provide the victims with reparation.<sup>145</sup> Under this obligation states must also investigate, prosecute, and punish acts that impair any of the rights recognized under international human rights law.<sup>146</sup> The scope of these positive obligations may depend on the kind of human right involved. The Commission assumes that they will go further for non-derogable human rights than for other rights. Meanwhile it is entirely clear that the duties as such are first of all relevant if the perpetrators are state officials.<sup>147</sup> Nevertheless, also in case of so-called ‘non-state actors’, which term refers to individuals, organizations, institutions and other bodies acting outside the State and its organs, the state may be obligated to offer protection against human rights violations through application of criminal law and criminal procedure.<sup>148</sup> However, in its most important decision on this issue the Commission seems to follow a much narrower approach than (particularly) the European and Inter-American Courts, for it largely only accepts the obligations in so far as there is collusion by the State to either aid or abet the non-state actors in committing the violations.<sup>149</sup> So *de facto* the rather imprecise case law of the African Commission hardly requires per se that states hold private juristic entities criminally liable for human rights violations. Lastly, as for public legal persons, the Commission in no way appears to indicate that states have to provide for criminal liability of such authorities in their systems.

<sup>142</sup> See for instance I-ACtHR, Order of 31 May 2001, *Cesti-Hurtado v. Peru*, par. 60, 63.

<sup>143</sup> See for example I-ACtHR, Judgment of 28 January 2009, *Perozo v. Venezuela*, par. 118; I-ACtHR, Order of 27 January 2009, *Luis Uzcátegui v. Venezuela*, par. 30; I-ACtHR, Judgment of 26 November 2008, *Tiu Tojín v. Guatemala*, par. 69; I-ACtHR, Judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, par. 173, 176, 181.

<sup>144</sup> AfCionHPR, Report of 11-25 May 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, par. 136.

<sup>145</sup> *Idem*, par. 143.

<sup>146</sup> *Idem*, par. 146, 153, 160; see also par. 204-215.

<sup>147</sup> See furthermore AfCionHPR, Decision of 16-30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on admissibility; AfCionHPR, Report of 11 May 2000, *Malawi African Association and Others v. Mauritania*, Comm. 54/91, par. 134; AfCionHPR, Report of 1-15 November 1999, *Amnesty International and Others v. Sudan*, Comm. 48/90, par. 50, 51, 56; AfCionHPR, Report of 2-11 October 1995, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Comm. 74/92, par. 20-25. See also AfCionHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, principle F(4)(b), N(e); AfCionHPR, *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*, 2002, principle 16.

<sup>148</sup> See AfCionHPR, Report of 11-25 May 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, par. 136 in relation to par. 142-160.

<sup>149</sup> *Idem*, par. 162-164, 187 (however, for a somewhat broader approach, see par. 188-215). Deservedly critical of this (but not principally in relation to criminal law) is Amao 2008, p. 769-770.

Criminal liability of public and private legal persons can be an important means to securing human rights.<sup>150</sup> It adds importantly to the development of international human rights obligations for multinational corporations.<sup>151</sup> This, however, does not seem to be the principle reason why international human rights supervisory bodies require the possibility of criminal liability of legal persons. As far as these indeed do require such liability – almost certainly the HRC, probably the ECtHR, possibly the I-ACtHR, and marginally the AfCionHPR – they will do so with a view to deterrence, which is after all the general rationale of the positive obligations on states to utilize criminal law to protect human rights. Although some of these bodies may differentiate between public entities and private legal persons, they might not want to categorize further between, for instance, multinational corporations and small organizations. Since in principle every human right can be violated by or under the responsibility of any sort of legal entity, a general approach requiring criminal liability for such entities, might be most effective in securing human rights. Furthermore, the international human rights supervisory bodies that may require the possibility of criminal liability of legal persons do not put forward or even imply a specific theory by which such liability should be constructed. This leaves states at complete liberty to implement a model of corporate criminal liability of their own choice.<sup>152</sup>

The states are not left such liberty in respect of the obligation to affect criminal liability through adequate investigation, prosecution, trial, conviction and punishment. So, if a criminal investigations points out that a legal person committed a human rights violation, the prosecuting agencies will in principle have no discretion in deciding whether they want to prosecute the entity or not (that is when the positive obligation to prosecute applies to that violation). Since the obligation rests on the occurrence of a violation of a human right, it is without significance whether the violation was to the benefit of the legal entity. Such a factor, furthermore, most probably may not serve as an obstacle to a conviction for the violation. It seems to be different for such circumstances as whether the violation resulted from a defect in the organization of the entity, a lack of supervision of employees or systemic disorganization. Such factors, as well as national requirements on the culpability of the legal person, may be taken into consideration when assessing whether the legal person may be convicted or what sanction will be adequate. That is, as long as such factors are not abused to unacceptably shelter the entity from criminal liability. As for the sanction to be imposed on the entity, the authorities have a wider margin of appreciation. None of the supervisory bodies prescribes certain sanctioning principles, nor do they require particular sanctions. However, for example, the European Court – which has the most advanced case law in this regard – demands appropriate sanctions, and will intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.<sup>153</sup>

## **6. Conclusion: to full Recognition of Legal Persons under Human Rights Law**

The International Covenant, European Convention, American Convention, and African Charter each represent a different regime in respect of how human rights relate to the application of criminal law against non-natural persons. The ICCPR does not recognize legal persons as beneficiaries of human rights, whereas it only offers such entities very restricted, indirect protection through individual stakeholders, but it does require that private legal

<sup>150</sup> Cf. Ratner 2002, p. 464-465; Engle 2003, p. 311-313; Slye 2008, p. 959-963.

<sup>151</sup> See, for example, Kinley & Chambers 2006, p. 447-497.

<sup>152</sup> On the variety of models, see *e.g.*, Pieth 2007, p. 177-182.

<sup>153</sup> ECtHR, Judgment of 20 December 2002, *Nikolova & Velichkova v. Bulgaria*, Appl. 7888/03, par. 57, 60, 62.

persons can be held criminally responsible for certain human rights violations. On balance the by far the widest recognition of legal persons as relevant entities for human rights law follows from the ECHR. This does grant legal persons a wide range of human rights; additionally it offers a fair rate of indirect protection through natural owners and sometimes shareholders; and it requires that public legal persons can be held criminally responsible for certain human rights violations, while the same in all probability applies to private entities. The ACHR entails a regime that may basically be similar to that of the ICCPR, but which differs significantly in detail and clarity. The status of legal persons is least clear under the African Charter. Through its open system it seems to be able both directly and indirectly to protect juristic entities, but it appear to require only that such entities can be held criminally liable for human rights breaches if the state has in some way colluded in that violation.

How should these differences be judged? It seems that human rights protection for legal persons may serve at least three interests. First it serves the non-natural entity itself. Although this may be a serious factual advantage, fundamentally it is hardly relevant, since international human rights law does not aim to protect entities as such. This, however, does not settle the matter at all; the point is that a human rights violation against a legal person can cause considerable inconvenience, uncertainty and other difficulties for directors, owners, shareholders, employees, members or those who are represented by it. This in fact entails the second interest: human rights protection of juristic entities may seriously advance the protection and wellbeing of natural individuals. Of course, one could argue that this not only applies to private legal persons but also to public entities. Ultimately, this cannot be decisive, though. International human rights protection of governmental bodies and other public legal persons would weaken the system, for it is exactly the authorities' power that the human rights system aims to limit and control. Moreover, securing the human rights of private legal persons affords much more progress to the third interest, *i.e.* maintaining the rule of law and democratic society, than protection of public entities will. For that interest it is first relevant that the rule of law aims to safeguard against arbitrary governance. It requires that the authorities act and decide within the law. The rule applies regardless of whom the state deals with outside its own organization: individuals, groups or non-governmental organizations. Since human rights are the most fundamental principles of the democratic state of justice (the *Rechtsstaat*), it truly serves the rule of law to obligate states to comply with human rights when they subject legal persons to criminal justice. Another aspect of the third interest is that legal persons contribute significantly to the democratic state of justice. This applies rather directly, for instance, to the media, political, and non-profit organizations, but possibly also to companies, since history shows that economic prosperity is an important condition for the development of human rights protection.

The practical approach of the European Court, which recognizes legal persons both as possible victims and as possible perpetrators of human rights violations, serves the several interests rather well. This cannot be said of the ICCPR and ACHR. The rationale of these latter systems in their refusal of protection to legal persons is that human rights derive from the inherent dignity of the human person and that legal persons are legal fictions and lack real material existence. At a profoundly fundamental level this might be a sufficient reason to justify the approach of these systems, but it shows an utter disregard for the important benefits of protection of private legal persons for individual stakeholders and society. I am therefore of the opinion that legal persons should be offered protection under each human right that can reasonably well be applied to them. Such protection does not have to involve completely equating individuals and juristic entities. The case law of the European Court illustrates that it

is very well possible to adjust the protection system to the different nature of each entity, and to focus on the interests that individuals and society have in legal persons (see particularly section 4). In fact there are several rights, as has been pointed out, which require a somewhat different application to entities than to individuals. It seems that the European Court may want to pay a bit more attention to these differences than it does now.

Meanwhile there might be more compelling reasons to bear the specific nature of legal persons in mind when offering them human rights protection. This especially applies in relation to developing countries, where powerful multinational companies could abuse human rights protection to make it even harder for local authorities to submit such entities to the law or where such companies may even be able to interfere with a state's democratic or fundamental legal structures. In such situations it is desirable to offer authorities a wide margin of appreciation in deciding that infringements of the entity's human rights are necessary to the maintenance of law and order and the protection of individuals than when an individual would have been involved. Ultimately, it may even be indispensable in such situations to withhold human rights from the legal person. This would be possible through the application of the international law principle that prevents totalitarian regimes, groups or individuals from invoking human rights protection for activities that result in the destruction or unacceptable restriction of human rights.<sup>154</sup>

Recognition of legal persons within the human rights protection system seems moreover to be essential, in the sense that it is a reality that such entities are responsible for many human rights violations. So once it is found to be necessary to strengthen the protection of human rights by obliging states to apply criminal law against the perpetrators of certain human rights violations, it seems hard to argue that such positive obligations do not have to apply when these perpetrators are private legal entities. In this respect all the international human rights systems discussed here could do with some improvement. None of the systems is sufficiently clear about whether the duty of states to provide for the possibility in domestic law of criminal liability concerns either public or private non-natural entities, or both. Furthermore, it would seem useful if they were to give a general definition of legal persons to which the positive obligations are relevant. As far as the obligations concern both public and private entities, it could be useful to specify the obligations in respect of each of them, because they may not have to be the same in every case. For example, it seems that positive obligations in regard to the former could and should be more lenient than in regard to the latter. When a public body commits a human rights violation, that violation could result in the body's international liability through the state, for the state is responsible for all of its organs. Consequently, international human rights law has possibilities at its disposal for controlling public entities rather than private ones. It might therefore be much less necessary to require the application of criminal law against public legal persons than against private entities. Apart from that, states are still very reluctant to provide for criminal liability of public entities. This, in my view at least, signifies that such liability should not be required from states that oppose such liability, while they actively employ alternative means that are also sufficiently effective to prevent public bodies from violating human rights. In addition, it would help states to know more specifically which sort of criminal punishments may be adequate for legal entities that seriously violate human rights. Criminal law will only be able to prevent the violation of human rights if it is clear to states and legal persons what kind of abuses and under which conditions will have to entail criminal liability according to the supervisory bodies.

<sup>154</sup> This principle is enshrined in Art. 5 ICCPR, Art. 17 ECHR, Art. 29 ECHR; see for the African system Art. 27 AfChHPR, which does not as such entail this principle, but provides duties for private parties that may be relevant and useful here.

Nevertheless, it is obvious that international human rights law offers compelling reasons for states that do not recognize criminal liability of legal persons to amend their criminal law systems. This may even become an additional cause of the phenomenon that legal persons are increasingly coming to be recognized as subjects of criminal law and criminal procedure. That, in turn, is an extra ground for offering them human rights protection against the power of the state within the criminal justice system.

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Cite as: P.H.P.H.M.C. van Kempen, *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR*, vol. 14.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2010), <<http://www.ejcl.org/143/art143-20.pdf>>.