Obligations under the European Convention on Human Rights by the European Court of Human Rights (Oxford: Hart Publishing, 2004)). Although the notion of positive obligations, used in a broader meaning to refer to the obligation of the State to take certain measures in order to ensure that the rights stipulated in the European Convention on Human Rights are not violated, pre-dated these cases, the first judgments in which the European Court of Human Rights affirmed that the ECHR may require positive measures to be taken, even in the sphere of relations between individuals, were in the cases of *Young, James and Webster* v. *the United Kingdom* and of *X and Y* v. *Netherlands*:

European Court of Human Rights (plenary), *Young, James and Webster* v. *the United Kingdom*, judgment of 13 August 1981, Series A, No. 44:

12. Mr Young, Mr James and Mr Webster are former employees of the British Railways Board ('British Rail'). In 1975, a 'closed shop' agreement was concluded between British Rail and three trade unions, providing that thenceforth membership of one of those unions was a condition of employment. The applicants failed to satisfy this condition and were dismissed in 1976. They alleged that the treatment to which they had been subjected gave rise to violations of Articles 9 [freedom of religion and belief], 10 [freedom of expression], 11 [freedom of association] and 13 [effective remedy] of the Convention.

13. In essence, a closed shop is an undertaking or workplace in which, as a result of an agreement or arrangement between one or more trade unions and one or more employers or employers' associations, employees of a certain class are in practice required to be or become members of a specified union. The employer is not under any legal obligation to consult or obtain the consent of individual employees directly before such an agreement or arrangement is put into effect. Closed shop agreements and arrangements vary considerably in both their form and their content; one distinction that is often drawn is that between the 'pre-entry' shop (the employee must join the union before engaged) and the 'post-entry' shop (he must join within a reasonable time after being engaged), the latter being more common.

In the United Kingdom, the institution of the closed shop is of very long standing. In recent years, closed shop arrangements have become more formalised and the number of employees covered thereby has increased (3.75 million in the 1960's and 5 million in 1980, approximately). Recent surveys suggest that in many cases the obligation to join a specified union does not extend to existing non-union employees ...

29. In 1970, British Rail had concluded a closed shop agreement with the National Union of Railwaymen ('NUR'), the Transport Salaried Staffs' Association ('TSSA') and the Associated Society of Locomotive Engineers and Firemen ('ASLEF'), but, with the enactment of the Industrial Relations Act 1971 [which introduced specific provisions making the operation of the majority of closed shops unlawful, and treating as unfair dismissal the dismissal of employees exercising their right not to be a member of a trade union], it was not put into effect.

The matter was, however, revived in July 1975 when British Rail concluded a further agreement with the same unions [following the repeal of the Industrial Relations Act 1971 by the Trade Union and Labour Relations Act 1974, which removed both the prohibition on closed shops and the employee's right not to belong to a union, although it maintained the protection against unfair dismissal if the employee genuinely objected (i) on grounds of religious belief to being a member of any union whatsoever; or (ii) on any reasonable

grounds to being a member of a particular union]. It was provided that as from 1 August 1975 membership of one of those unions was to be a condition of employment for certain categories of staff – including the applicants – and that the terms of the agreement were 'incorporated in and form[ed] part of' each contract of employment. Like other staff of British Rail, Mr Young, Mr James and Mr Webster had, it appears, been supplied when engaged with a written statement containing a provision to the effect that they were subject to such terms and conditions of employment as might from time to time be settled for employees of their category under the machinery of negotiation established between their employer and any trade union or other organisation.

The membership requirement did not apply to 'an existing employee who genuinely objects on grounds of religious belief to being a member of any Trade Union whatsoever or on any reasonable grounds to being a member of a particular Trade Union'. The agreement also set out the procedure for applying for exemption on these grounds and provided for applications to be heard by representatives of the employer and the unions.

30. In July/August 1975, notices were posted at the premises of British Rail, including those where the applicants were then working, drawing the attention of staff to the agreement with the unions and the change in conditions of employment.

A further notice of September 1975 stated that it had been agreed that the exemption on religious grounds would be available only where a denomination specifically proscribed its members from joining unions. The notice added that 'confining exemption only to religious grounds depends upon the passing through Parliament of the Trade Union and Labour Relations (Amendment) Bill' and that staff would be advised further on this point ... The Amendment Act came into force on 25 March 1976.

On the same date, a further agreement between British Rail and the railway unions came into effect. It was in identical terms to the July 1975 agreement, except that the words 'or on any reasonable grounds to being a member of a particular Trade Union' (see paragraph 29 above) were omitted.

31. The applicants and the representative of the Trades Union Congress informed the Court that NUR, TSSA and ASLEF were the only unions actually operating in 1975 in those sectors of the railway industry in which Mr Young, Mr James and Mr Webster worked. According to the Government, other unions did have members in, although they were not recruiting amongst, the relevant grades.

It appears that, prior to the conclusion of the 1975 closed shop agreement, between 6,000 and 8,000 British Rail employees, out of a total staff of 250,000, were not already members of one of the specified unions. In the final event, 54 individuals were dismissed for refusal to comply with the membership requirement.

[Preliminary: responsibility of the respondent State]

48. Mr Young, Mr James and Mr Webster alleged that [the enforcement of TULRA and the Amendment Act, allowing their dismissal from employment when they objected on reasonable grounds to joining a trade union, interfered with their freedom of thought, conscience, expression and association with others. They further complained that no adequate remedies had been available to them.]. Before the substance of the matter is examined, it must be considered whether responsibility can be attributed to the respondent State, the United Kingdom.

The Government conceded that, should the Court find that the termination of the applicants' contracts of employment constituted a relevant interference with their rights under Article 11 and that that interference could properly be regarded as a direct consequence of TULRA and the Amendment Act, the responsibility of the respondent State would be engaged by virtue of the enactment of that legislation ...

49. Under Article 1 of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.

[The alleged violation of Article 11 ECHR]

54. As a consequence of the agreement concluded in 1975 (see paragraph 29 above), the applicants were faced with the dilemma either of joining NUR (in the case of Mr James) or TSSA or NUR (in the cases of Mr Young and Mr Webster) or of losing jobs for which union membership had not been a requirement when they were first engaged and which two of them had held for several years. Each applicant regarded the membership condition introduced by that agreement as an interference with the freedom of association to which he considered that he was entitled; in addition, Mr Young and Mr Webster had objections to trade union policies and activities coupled, in the case of Mr Young, with objections to the political affiliations of the specified unions ... As a result of their refusal to yield to what they considered to be unjustified pressure, they received notices terminating their employment. Under the legislation in force at the time ..., their dismissal was 'fair' and, hence, could not found a claim for compensation, let alone reinstatement or re-engagement.

55. The situation facing the applicants clearly runs counter to the concept of freedom of association in its negative sense.

Assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.

In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants.

[The Court concludes that Article 11 ECHR has been violated, since in the view of the Court 'the detriment suffered by Mr Young, Mr James and Mr Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and cannot be regarded as proportionate to the aims being pursued', the interference with the rights of the applicants under Article 11 ECHR was disproportionate.]

European Court of Human Rights, *X and Y* v. *Netherlands*, judgment of 26 March 1985, Series A, No. 91;

[The applicants are Mr X and his daughter, Y. The daughter, born in 1961, is mentally handicapped. She has been living since 1970 in a privately run home for mentally handicapped children. In December 1977, on the day after her sixteenth birthday, Y was sexually abused in the institution by Mr B., the son-in-law of the directress of the institution where Y was staying. When Mr X went to the local police station to file a complaint against the author of the abuse, and to ask for criminal proceedings to be instituted, he was told that since Mr X considered his daughter unable to sign the complaint because of her mental condition, he could do so himself. However, it later appeared that the offence for which there might have been sufficient evidence to justify the launch of a prosecution (acts of indecency committed against a person by abuse of authority: Art. 248 *ter*), required that the victim file a complaint him/herself: under Article 64 para. 1, the legal representative may lodge the complaint on behalf of the victim only if the latter is under the age of sixteen or is placed under guardianship (curateele); this latter institution exists only for persons who have reached the age of majority, namely twenty-one (Art. 378, Book I, of the Civil Code). The applicants argue before the Court that the impossibility of having criminal proceedings instituted against Mr B violated Article 8 of the Convention, which guarantees the right to respect for private life.]

22. There was no dispute as to the applicability of Article 8: the facts underlying the application to the Commission concern a matter of 'private life', a concept which covers the physical and moral integrity of the person, including his or her sexual life.

23. The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the *Airey* judgment of 9 October 1979, Series A No. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

[Necessity for criminal law provisions]

24. The applicants argued that, for a young girl like Miss Y, the requisite degree of protection against the wrongdoing in question would have been provided only by means of the criminal law. In the Government's view, the Convention left it to each State to decide upon the means to be utilised and did not prevent it from opting for civil-law provisions.

The Court ... observes that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring 'respect for private life', and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.

25. The Government cited the difficulty encountered by the legislature in laying down criminal-law provisions calculated to afford the best possible protection of the physical integrity of the mentally handicapped: to go too far in this direction might lead to unacceptable paternalism and occasion an inadmissible interference by the State with the individual's right to respect for his or her sexual life.

The Government stated that under Article 1401 of the Civil Code, taken together with Article 1407, it would have been possible to bring before or file with the Netherlands courts, on behalf of Miss Y: an action for damages against Mr B, for pecuniary or non-pecuniary damage; an application for an injunction against Mr B, to prevent repetition of the offence; a similar action or application against the directress of the children's home.

The applicants considered that these civil-law remedies were unsuitable. They submitted that, amongst other things, the absence of any criminal investigation made it harder to furnish evidence on the four matters that had to be established under Article 1401, namely a wrongful act, fault, damage and a causal link between the act and the damage. Furthermore, such proceedings were lengthy and involved difficulties of an emotional nature for the victim, since he or she had to play an active part therein ...

27. The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

Moreover, as was pointed out by the Commission, this is in fact an area in which the Netherlands has generally opted for a system of protection based on the criminal law. The only gap, so far as the Commission and the Court have been made aware, is as regards persons in the situation of Miss Y; in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen.

[Compatibility of the Netherlands legislation with Article 8]

28. According to the Government, it was the exceptional nature of the facts of the case which disclosed the gap in the law and it could not be said that there had been any failure on the part of the legislature ...

According to the applicants, on the other hand, the current Criminal Code offered insufficient protection ...

29. ... Article 248 *ter* requires a complaint by the actual victim before criminal proceedings can be instituted against someone who has contravened this provision. [In] the case in question criminal proceedings could not be instituted on the basis of Article 248 *ter* ...

30. Thus, [the provisions of the Dutch Criminal Code were insufficient to provide] Miss Y with practical and effective protection. It must therefore be concluded, taking account of the nature of the wrongdoing in question, that she was the victim of a violation of Article 8 of the Convention.

The Inter-American Court of Human Rights has developed an extensive interpretation of the obligations of States under the American Convention on Human Rights (ACHR), establishing a typology that distinguishes the obligation to *respect* the rights and freedoms recognized by the Convention, from that of *ensuring* the exercise of all rights. Both obligations are enshrined in Article 1(1) ACHR, which reads: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color,

sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.' Article 2 ACHR provides that: 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.' However, the obligation to ensure the exercise of all rights may go far beyond the obligation to adopt the kind of measures, of a legal or regulatory nature, established by this latter provision.

This was first clearly established in the *Velasquez-Rodriguez* case. The case involved the forced disappearance of Manfredo Velasquez, a Honduran student, in 1981, during a period in which such practices were systematic. The Court concluded that the disappearance had been carried out by military personnel or by persons connected to and tolerated by the military; it thereby found a violation of Articles 7 (personal liberty), 5 (personal integrity) and 4 (right to life). The Court then decided *motu propio* to examine whether the acts also involved a violation of Article 1(1) of the ACHR:

Inter-American Court of Human Rights, case of *Velásquez-Rodríguez* v. *Honduras* (merits), judgment of 29 July 1988, Series C No. 4:

164. Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

165. The first obligation assumed by the States Parties under Article 1(1) is 'to respect the rights and freedoms' recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State ...

166. The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

167. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

168. The obligation of the States is, thus, much more direct than that contained in Article 2.

169. According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of

those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

171. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligation under the treaty, the system of protection provided for in the Convention would be illusory.

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention ...

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

The 'positive obligations' of States under the American Convention have been interpreted broadly, and include such duties as:

- '[to] ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities' and to 'safeguard the prevailing role of the family in protection of the child; [the State] must also provide assistance to the family by public authorities, by adopting measures that promote family unity' (IACtHR, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC–17/02 of 28 August 2002, Series A No. 17 at paras. 87–8);
- '[to exercise] due diligence ... to avoid operations [by paramilitary groups against civilian populations] in a zone that had been declared an emergency zone, subject to military operations' (IACtHR, case of the *Pueblo Bello Massacre* v. *Colombia*, merits, reparations and costs, judgment of 31 January 2006, Series C No. 140 at para. 139);
- '[to] undertake as guarantor, to protect and ensure the right to life, [by] generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. [The] State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk' (IACtHR, case of the *Yakye Axa Indigenous Community* v. *Paraguay*, merits, reparations and costs, judgment of 17 June 2005, Series C, No. 125, para. 162; see also case of the *Sawhoyamaxa Indigenous Community* v. *Paraguay*, merits, reparations and costs, judgment of 29 March 2006, Series C No. 146, para. 153);
- 'to provide [the individual with publicly-held information], so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case' (IACtHR, case of *Claude-Reyes et al.* v. *Chile*, merits, reparations and costs, judgment of 19 September 2006, Series C, No. 151, para 77).

The following Advisory Opinion is also representative of the approach of the Inter-American Court:

Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC–18/03 of 17 September 2003, requested by the Union of Mexican States:

[Mexico requested, in substance, whether an American State could establish in its labour legislation a differential treatment between legal residents or citizens on the one hand, undocumented migrant workers, on the other hand, in the enjoyment of their labour rights.]

146. [The] obligation to respect and ensure human rights, which normally has effects on the relations between the State and the individuals subject to its jurisdiction, also has effects on relations between individuals. As regards this Advisory Opinion, the said effects of the obligation to respect human rights in relations between individuals is defined in the context of the private employment relationship, under which the employer must respect the human rights of his workers.

147. The obligation to respect and guarantee the human rights of third parties is also based on the fact that it is the State that determines the laws that regulate the relations between individuals and, thus, private law; hence, it must also ensure that human rights are respected in

these private relationships between third parties; to the contrary, the State may be responsible for the violation of those rights.

148. The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

149. This State obligation arises from legislation that protects workers – legislation based on the unequal relationship between both parties – which therefore protects the workers as the more vulnerable party. In this way, States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct *de jure* discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level.

150. On many occasions migrant workers must resort to State mechanisms for the protection of their rights. Thus, for example, workers in private companies have recourse to the Judiciary to claim the payment of wages, compensation, etc. Also, these workers often use State health services or contribute to the State pension system. In all these cases, the State is involved in the relationship between individuals as a guarantor of fundamental rights, because it is required to provide a specific service.

151. In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person.

152. The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination.

153. In summary, employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.

154. Furthermore, there are cases in which it is the State that violates the human rights of the workers directly. For example, when it denies the right to a pension to a migrant worker who has made the necessary contributions and fulfilled all the conditions that were legally required of workers, or when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees.

The distinction between situations where the acts of private parties are directly imputable to the State and situations where they merely highlight a failure of the State to discharge its obligation to protect may break down in certain situations. Consider for instance:

European Court of Human Rights (2nd sect.), *M.M.* v. *Netherlands* (Appl. No. 39339/98), judgment of 8 April 2003:

[The applicant, a criminal defence lawyer, was alleged by the criminal defendant for whom he was acting as a legal counsel to have made sexual advances towards his wife, Mrs S. The police therefore suggested that Mrs S. connect a tape recorder to her telephone in order to allow her to tape incoming conversations with the applicant. Mrs S. recorded three conversations with the applicant, which were transcribed by the police. These transcripts were added to the case-file on the investigation against the applicant, and following press releases about the investigation against the applicant, other women came forward complaining that they too had been abused. M.M. was finally convicted for sexual assault, although the courts did not rely on the recorded telephone conversations as evidence. The applicant alleged that the recording of his telephone conversations with Mrs S. constituted a violation of Article 8 of the Convention.]

36. The question before the Court is whether the 'interference' with the applicant's Article 8 rights – to wit, the recording of telephone conversations which he had with Mrs S. with a view to their use as prosecution evidence against the applicant – is imputable to a 'public authority' or not.

37. It is not in dispute that it was the police who made the suggestion to the Mrs S. to record telephone conversations with the applicant. With the prior permission of the public prosecutor, police officers connected a tape recorder to Mrs S.'s telephone. They suggested that she steer her conversations with the applicant towards the latter's sexual approaches. They instructed Mrs S. in the operation of the tape recorder. They came to her home and collected the recordings. It was left to Mrs S. to entrap the applicant into making statements amounting to admissions of guilt and to activate the tape recorder.

38. It is recalled that in the case of *A.* v. *France* (judgment of 23 November 1993, Series A No. 277–B), a certain private citizen of his own motion reported a conspiracy to commit murder to a police superintendent. He volunteered to call the applicant A., a participant in the conspiracy, and suggested the recording of the telephone conversation in question. The police superintendent '... made a crucial contribution to executing the scheme by making available for a short time his office, his telephone and his tape recorder. Admittedly, he did not inform his superiors of his actions and he had not sought the prior authorisation of an investigating judge, but he was acting in the performance of his duties as a high-ranking police officer. It follows that the public authorities were involved to such an extent that the State's responsibility under the Convention was engaged.' (*loc. cit.*, p. 48, §36)

39. The same considerations apply here. Acting as they did, with the permission of the public prosecutor, the police 'made a crucial contribution to the execution of the scheme', as well as being responsible for its inception. The public prosecutor and the police all acted in the performance of their official duties. The responsibility of the respondent State is therefore engaged.

40. In the present case, which like the *A.* v. *France* case is characterised by the police setting up a private individual to collect evidence in a criminal case, the Court is not persuaded by the Government's argument that it was ultimately Mrs S. who was in control of events. To accept such an argument would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents.

41. It is not necessary to consider the Government's suggestion that Mrs S. would have been fully entitled to record telephone calls from the applicant without the involvement of public authority and use the recordings as she wished, the issue in this case being precisely the involvement of public authority.

42. There has accordingly been an 'interference by a public authority' with the applicant's right to respect for his 'correspondence'.

43. Such an interference will violate Article 8 of the Convention unless it is 'in accordance with the law', pursues one of the 'legitimate aims' set out in the second paragraph of that Article, and can be considered 'necessary in a democratic society' in pursuit of that aim.

[Applying these principles, the Court finds that, under the Dutch law applicable at the material time, the tapping or interception of telecommunications presupposed, first, a preliminary judicial investigation, and second, an order given by an investigating judge (Articles 125f and 125g §1 of the Code of Criminal Procedure, see para. 22 above). Since neither of these condition was met, the interference with the right to respect for private life, which is imputable to the State, was not 'in accordance with the law'; therefore Article 8 ECHR is violated.]

Box 4.1. **The issue of human rights and transnational corporations**

The discussion above has contrasted two means through which the protection of human rights in the context of private (inter-individual) relationships could be improved. This could be achieved, it has been implied, either by imputing to the State the violations committed by non-State actors; or by extending the scope of the State's obligation to protect. Both options are premised on the idea that international human rights are binding upon the State, which is therefore the primary duty-bearer; and indeed, the existing mechanisms in international human rights law are addressed to the State, and are not directly controlling on private actors. However, a third option could be explored, which would consist in strengthening the ability of international law to address directly the human rights violations committed by non-State actors (P. Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston (ed.), *Non-State Actors and Human Rights*, Series of the Collected Courses of the Academy of European Law (Oxford University Press, 2005), p. 3 (arguing that we should not be held hostage to a classical understanding of international law as limited to inter-State relations); and O. De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006), pp. 1–40). National institutions, including national courts, routinely apply international human rights norms directly to the acts of private parties: there should be no obstacle in principle to allow this to develop at the international level, if necessary, in order to overcome the inability or the unwillingness of States to control non-State actors adequately. Indeed, this may be particularly relevant in the context of economic globalization, because of the threat this process may represent to the regulatory capacity of States.

The recent debate about the human rights responsibilities of transnational corporations provides a good illustration of this more structural question. A growing body of doctrine is willing, for well understandable reasons, to consider transnational corporations as subjects of international law – altough this is neither a necessary, nor a sufficient condition for accountability mechanisms to develop at international level in order to improve the compliance of transnational corporations with the requirements of human rights (see in particular D. Kokkiniiatridou and P. de Waart, 'Foreign Investments in Developing Countries – Legal Personality of Multinationals in International Law', *Netherlands Yearbook of International Law*, 14 (1983), 87; P. Malanczuk, 'Multinational Enterprises and Treaty-Making – a Contribution to the Discussion on Non-State Actors and the "Subjects" of International Law' in V. Gowland-Debaas (ed.), *Multilateral Treaty-Making. The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, Proceedings of the American Society of International Law/ Graduate Institute of International Studies, Forum Geneva, May 16, 1998 (Leiden: Martinus Nijhoff, 2000, p. 35); J. Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal* (1983), 748, esp. at 774–6).

The insistence on an improved control of the activities of transnational corporations initially formed part of the vindication of a 'new international economic order' in the early 1970s, which the recently decolonized States pushed forward during that period (see the resolution adopted by the General Assembly of the United Nations on 1 May 1974, calling for a New International Economic Order (UN Doc. A/Res/3201 (S–VI)); and followed upon, in particular, by GA Resolution 3281(XXIX) of 15 January 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), the Charter of Economic Rights and Duties of States). The context then was relatively favourable to an improved regulation of the activities of transnational corporations: while developed States feared that certain abuses by transnational corporations, or their interference with local political processes, might lead to hostile reactions by developing States, and possibly to the imposition of restrictions on the rights of foreign investors, the 'Group of 77' non-aligned (developing) countries insisted on their permanent sovereignty over natural resources and on the need to improve the supervision of the activities of transnational corporations. On the basis of a report prepared at the request of the Economic and Social Council, a draft Code of Conduct on Transnational Corporations (TNCs) was even prepared until 1992 within the UN Commission on Transnational Corporations (see E/1990/94, 12 June 1990). The Draft Code failed to be adopted, however, because of major disagreements between industrialized and developing countries, in particular, on the reference to international law and on the inclusion in the Code of standards of treatment for TNCs: while the industrialized countries were in favor of a Code protecting TNCs from discriminatory treatment of other behaviour of host States which would be in violation of certain minimum standards, the developing States primarily sought to ensure that TNCs would be better regulated, and in particular would be prohibited from interfering either with political independence of the investment-receiving States or with their nationally defined economic objectives (for comments, see W. Spröte, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations', *German Yearbook of International Law*, 33 (1990) 331; P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: the Role of UNCTAD', in M. T. Kamminga and S. Zia-Zarifi (eds.),

Liability of Multinational Corporations under International Law (The Hague: Kluwer Law International, 2000), pp. 97–117; N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Antwerp-Oxford-New York: Hart-Intersentia, 2002), at pp. 119–24).

It is also during the 1970s that the Organization for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises. These Guidelines were revised on a number of occasions since their initial adoption on 21 June 1976. In 2000, the supervisory mechanism was revitalized and a general obligation on multinational enterprises to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments' was stipulated. Almost simultaneously, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Organization at its 204th session (November 1977), and revised at the 279th session (November 2000)). The aim of the Tripartite Declaration of Principles is to 'encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order' (para. 2). Yet, although of high moral significance because of its adoption by consensus by the ILO Governing Body at which governments, employers and workers are represented, the Tripartite Declaration remains, like the OECD Guidelines, a non-binding instrument. Both these instruments impose on States certain obligations of a procedural nature: in particular, States must set up national contact points under the OECD Guidelines in order to promote the Guidelines and to receive 'specific instances', or complaints by interested parties in cases of non-compliance by companies; they must report on a quadriennal basis under the ILO Tripartite Declaration on the implementation of the principles listed therein. However, both the ILO Tripartite Declaration and the OECD Guidelines instruments are explicitly presented as non-binding instruments, with respect to the multinational enterprises whose practices they ultimately seek to address, and their effectiveness in bringing about change in the conduct of companies is questionable.

The debate on how to improve the human rights accountability of transnational corporations was relaunched as concerns grew, in the late 1990s, about the impacts of unbridled economic globalization on values such as the environment, human rights, and the rights of workers. At the 1999 Davos World Economic Forum, the UN Secretary-General, K. Annan proposed a Global Compact based on shared values in the areas of human rights, labour, and the environment, and to which anti-corruption has been added in 2004. The ten principles to which participants in the Global Compact adhere are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. The process is voluntary. It is based on the idea that good practices should be rewarded by being publicized, and that they should be shared in order to promote a mutual learning among businesses. The companies acceding to the Global Compact are to 'embrace, support and enact, within their sphere of influence', the ten (initially nine) principles on which

it is based, and they are to report annually on the initiatives they have taken to make those principles part of their operations.

Developments occurred also within the UN Commission on Human Rights. On 14 August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 a set of 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' (E/CN.4/Sub.2/2003/12/Rev.2 (2003)). The 'Norms' proposed by the Sub-Commission on Human Rights essentially present themselves as a restatement of the human rights obligations imposed on companies under international law. They are based on the idea that 'even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and therefore 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments' (Preamble, third and fourth Recitals; see, on this initiative, D. Weissbrodt and M. Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', *American Journal of International Law*, 97 (2003), 901).

Although the initiative of the UN Sub-Commission on Human Rights was received with suspicion, and sometimes overt hostility, both by the business community and by a number of governments, it did serve to put the issue on the agenda of the UN Commission on Human Rights. In April 2005, the Commission on Human Rights requested that the UN Secretary-General appoint a Special Representative to identify ways through which the accountability of transnational corporations for human rights violations may be improved. The Special Representative of the Secretary-General, John Ruggie, set aside the 'Norms' of the Sub-Commission, on the basis that they mistakenly equated the human rights responsibilities of companies with those of the State and thus 'would turn transnational corporations into more benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest – which to my mind is by far the most effective guarantor of human rights' (Statement of the Special Representative of the Secretary-General on the issue of business and human rights to the Human Rights Council, 25 September 2006). Then, following almost three years of consultations and studies, he proposed a framework resting on the 'differentiated but complementary responsibilities' of the States and corporations. The framework comprises 'three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies' (J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/5, 7 April 2008, para. 9). Hence, while restating that human rights are primarily for the State to protect as required under international human rights law,

the framework does not exclude that private companies may have human rights responsibilities: although companies essentially should comply with a 'do no harm' principle, this also entails certain positive duties: 'To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts' (para. 56).

2 MEASURING THE SCOPE OF THE OBLIGATION TO PROTECT

2.1 The principle

The scope of the obligation to protect will vary according to the circumstances. As the cases presented in this section will illustrate, the criterion is ultimately one of 'reasonableness': what matters is whether it is reasonable to expect from the State that it take certain measures, that might prevent the violation of the rights of the individual from occurring. For analytical purposes, it is useful to see the solutions adopted by human rights courts or bodies as located along a spectrum. At one end of the spectrum, the State may be imposed actively to protect the exercise by an individual of his/her freedom, or the enjoyment of his/her right, by defining as a civil tort or as a criminal offence the attempt to interfere with such rights and freedoms, or by otherwise imposing on private actors far-reaching obligations to ensure that the right-holder may effectively exercise his/her right. At the other end of the spectrum however, the State is allowed to remain passive: however much the individual faces opposition in the exercise of his/her freedom, or however much he/she is unable to enjoy his/her right because of other private initiatives, the State may allow these private freedoms to collide with each other.

Even at this latter end, however, the State may not remain entirely passive. At a minimum, it must protect the right-holder from physical assault in the exercise of the freedom or in the enjoyment of the right: as has been remarked by Matthew H. Kramer, 'in almost every situation outside the Hobbesian state of nature, conduct in accordance with a liberty will receive at least a modicum of protection', particularly through the role of the State in guaranteeing the physical security of the person (M. H. Kramer, N. E. Simmonds and H. Steiner, *A Debate Over Rights. Philosophical Enquiries* (Oxford University Press, 1998, reprinted 2000), pp. 11–12). In the case of *Özgür Gündem* v. *Turkey*, for instance, one of the reasons for the finding of a violation of Article 10 ECHR was that the Turkish authorities had done too little to protect a newspaper holding views allegedly supportive of the Kurdish Workers' Party (PKK) against the threats of violent action addressed to them. Although of course the opinions defended by this newspaper may be contradicted and challenged by others – clashing, in that sense, with the freedom of expression of the journalists – there is an elementary duty on the State not to remain passive in the face of attempts to silence the newspaper by violent means:

European Court of Human Rights (4th sect.), *Ozgür Gundem* v. *Turkey* (Appl. No. 23144/93) judgment of 16 March 2000:

[The Court found that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper *Özgür Gündem* and journalists, distributors and other persons associated with it. Despite the fact that the concerns of the newspaper and its fears that it was the victim of a concerted campaign tolerated, if not approved, by State officials, were brought to the attention of the authorities, no measures were taken to investigate this allegation. Nor did the authorities, for the main part, respond by any protective measures.]

42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the *Gaskin* v. *United Kingdom* judgment of 7 July 1989, Series A No. 160, pp. 17–20, §§42–49) and Article 11 (see the *Plattform 'Ärzte für das Leben'* v. *Austria* judgment of 21 June 1988, Series A No. 139, p. 12, §32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (see, for example, the *McCann and others* v. *United Kingdom* judgment of 27 September 1995, Series A No. 324, p. 49, §161) and Article 3 (see the *Assenov and others* v. *Bulgaria* judgment of 28 October 1998, *Reports* 1998–VIII, p. 3290, §102), while a positive obligation to take steps to protect life may also exist under Article 2 (see the *Osman* v. *United Kingdom* judgment of 28 October 1998, *Reports* 1998–VIII, pp. 3159–61, §§115–17).

43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *mutatis mutandis*, the *X and Y* v. *Netherlands* judgment of 26 March 1985, Series A No. 91, p. 11, §23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the *Rees* v. *United Kingdom* judgment of 17 October 1986, Series A No. 106, p. 15, §37, and the *Osman* v. *United Kingdom* judgment cited above, pp. 3159–60, §116).

44. In the present case, the authorities were aware that Özgür Gündem, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the Istanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations ordered by individual public prosecutors into specific incidents. It is not convinced

by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities.

45. The Court has noted the Government's submissions concerning its strongly held conviction that Özgür Gündem and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.

46. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

The opposition between 'privileges' and 'rights' put forward in the analytical jurisprudence of W. N. Hohfeld usefully captures the contrast between the two extreme situations which have been distinguished above: either the right/freedom of the individual is no more than a 'privilege', to which there corresponds for others no obligation enforceable before courts (the others simply have a 'no-right', i.e. they cannot seek from courts that they prohibit the exercise by the right-holder of his right/freedom); or the right/freedom of the individual leads to impose on others obligations that courts may enforce (the correlative of the 'right' of the individual, in this case, is the 'obligation' imposed on the duty-bearer) (see W. N. Hohfeld in W. W. Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press, 1964, reprinted Greenwood Press, 1978).

It is important however to recognize that, even where the right/freedom of the individual is a true 'right' – protected by courts by imposing on others certain correlative obligations – there is a wide range of possibilities as to which obligations precisely correspond to the right/freedom concerned. Indeed, not only is the scope of the obligation to protect variable across the range of rights, the techniques according to which the State discharges its obligation to protect may also vary widely. In principle, international human rights instruments only prescribe the result to be achieved, leaving it to the State to choose the means through which to provide this protection. States must choose, in particular, how the relationship between the domestic legal order and international law shall influence the means of protecting human rights in private relationships (for a fuller discussion, see chapter 8). Thus, States may choose to empower their courts to apply directly human rights recognized in international treaties in force *vis-à-vis* the State to the cases presented to them, including cases opposing private parties. This option is sometimes referred to as 'direct third-party applicability' of human rights, by reference to the theory of '*unmittelbare Drittwirkung*' originally developed in Germany to justify the reliance, especially in labour disputes, of the fundamental rights of the German Basic Law (see H. C. Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts* (Tübingen: Mohr Siebeck, 1952), vol. I, p. 53 *et seq.*; W. Leisner, *Grundrechte und Privatrecht* (Munich-Berlin: Ch Beck'sche Verlagsbuchhandlung, 1960), 414 pp.; and, for an examination of how the German courts have applied this approach, K. M. Lewan,

'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany', *International and Comparative Law Quarterly*, 17 (1968), 571).

What makes this first option sometimes difficult to implement is that the regime applicable to the 'vertical' relationship between the individual and the State may not be transposable, *mutatis mutandis*, to the 'horizontal' relationship between private individuals. This appears clearly from any attempt to refer to the classical conditions imposed on the State when it interferes with human rights, in order to rely on those conditions in disputes between private parties (for a discussion of these conditions, see chapter 3, section 3). Consider first the condition of legitimacy which imposes on the State that it should always justify the restrictive measures it adopts by reference to a legitimate objective. It is of course the duty of the State to act in the public interest; in contrast, individuals pursue a variety of aims, and it would violate an elementary principle of moral pluralism to impose on all individuals that they only act in accordance to some predefined notion of what serves the common good. Hence, the condition according to which restrictions to the rights of the individual may only be justified if they are based on the pursuit of a legitimate aim is of little use in relationships between private parties, except perhaps in certain contexts such as in employment or, more broadly, market relationships, where the roles of each individual (and thus the conditions they may force the other party to accept in their mutual relationships) are defined by the nature of the transaction between them. Consider, second, the condition of legality: again with certain exceptions, such as rules internal to the undertaking set by the employer, or regulations addressed by unions or other associations towards their members, it would not seem realistic to expect that the conditions under which restrictions may be imposed to the rights of the individual as a result of private initiatives be clarified to the same degree as when such restrictions stem from publicly adopted rules. Rather, what may be expected is that the State regulate with a sufficient degree of precision the conditions under which the rights of the individual are protected, and the remedies available to the right-holder when his/her rights have been affected. But this is a requirement imposed on the State: it is not one which can be imposed, as such, on non-State actors, even where they are directly responsible for the interference with the rights of the individual. As to the condition of necessity or proportionality – the third condition imposed on the State seeking to justify an interference with a human right – it may be extended to the acts of private parties through the use of concepts such as abuse of rights or fault in civil liability regimes. However, particularly when a private actor infringes upon the human right of another by exercising a basic freedom – for instance, when freedom of expression impacts on the right to respect for private life, or when the freedom of association exercised by the union in adopting its internal regulations affects the 'negative' freedom of association of its members – it cannot be expected from a private actor, X that it only adopts a conduct that brings about a minimal impairment to the right of other private actors with whom X interacts. The implication is not necessarily that human rights, as they appear stipulated in international treaties as obligations imposed on the State, cannot be relied upon by domestic courts in order to impose obligations on private parties.

But in applying these rights to private relationships, courts may have to be inventive, and the criteria developed by international monitoring bodies may not always provide them with well-suited answers. The direct application of constitutional human rights clauses in private relationships creates similar difficulties: as noted by Aharon Barak, the President of the Supreme Court of Israel (although writing here in his non-judicial capacity), 'where constitutional provisions do not contain limitations clauses regarding the restriction of one person's right arising from the right of another, the obvious result is that judges will have to create judicial limitation clauses. Thus, judges will acquire enormous constitutional power without any concomitant constitutional guidance' (A. Barak, 'Constitutional Human Rights and Private Law' in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001), p. 13 at p. 17)

Of course, there are other options available to States than the direct application of internationally recognized human rights to inter-individual relationships. A second possibility has already been alluded to. It is for courts to interpret notions of domestic law (such as the notions of 'fault' or 'negligence' in civil liability cases, 'good faith' in contracts, 'abuse of rights' or 'public policy') in order to ensure that these notions embody the requirements of international human rights. This is a technique sometimes referred to as '*mittelbare Drittwirkung*', in order to contrast it with the previous one (see, e.g. A. Barak, 'Constitutional Human Rights and Private Law' in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001), p. 13 at pp. 21–4; S. Gardbaum, 'The "Horizontal Effect" of Constitutional Rights', *Michigan Law Review*, 102 (2003), 401 *et seq.*). The 1958 *Lüth* decision of the German Federal Constitutional Court provides the classic illustration: in this case, the Constitutional Court took into account Lüth's freedom of expression in order to find that the boycott he had initiated against a film produced by a former collaborator with the Nazis should not be treated as the kind of intentionally caused damage that may give rise to an obligation to compensate, under section 826 of the German Civil Code (BGB) (7 BverfGE (1958)). In practice, there is a continuum between the two first options: because internationally recognized human rights per necessity have to rely on tools of national law in order to be applied by domestic courts – such as, minimally, those regulating evidence, statutory limitations or other procedural issues – the direct application of international human rights is always in at least some respect 'mediated' through domestic law when it is invoked in the framework of private law relationships. Nevertheless, there are cases of more or less 'direct', or 'unmediated', application of international human rights law to private disputes, in which domestic courts essentially base their reasoning on international law, sometimes even setting aside the rules of domestic law that would create obstacles to the full implementation of international human rights: it is then that these courts face the difficulties discussed above when referring to the first of our three options.

Finally, a third possibility is for States to decide to implement their obligations to protect under international human rights instruments by adopting domestic legislation, for instance, by defining the violation of certain human rights as a criminal offence

or as giving rise to a specific form of extra-contractual liability. Only in exceptional cases will international law go beyond imposing obligations of result, and identify obligations of conduct imposed on States – i.e. the means through which the protection should be achieved, rather than simply the level of protection to be ensured. For instance, certain interferences with human rights may be of such a serious character that they require sanctions of a criminal nature, rather than only civil remedies:

European Court of Human Rights (GC), *Vo* v. *France* (Appl. No. 53924/00), judgment of 8 July 2004:

[On 27 November 1991, the applicant, Mrs Thi-Nho Vo, who is of Vietnamese origin, attended Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy. On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a contraceptive coil removed at the same hospital. When Dr G., who was to remove the coil, called out the name 'Mrs Vo' in the waiting room, it was the applicant who answered. After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file, he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid. As a result, the pregnancy had to be terminated on health grounds on 5 December 1991. Ms Vo had lost her unborn child as a result of medical negligence. The applicant and her partner subsequently lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. However, the action failed, since the French courts were unwilling to interpret the provisions of the Criminal Code on unintentional homicide as extending to cover fatal injury to an unborn child. The applicant complained of the lack of protection of the unborn child under French criminal law and argued that the State had failed to discharge its obligations under Article 2 of the Convention. She further submitted that the remedy available in the administrative courts was ineffective as it was incapable of securing judicial acknowledgment of the homicide of her child as such. Lastly, the applicant asserted that she had had a choice between instituting criminal and administrative proceedings and that, while her recourse to the criminal courts had, unforeseeably, proved unsuccessful, the possibility of applying to the administrative courts had in the meantime become statute barred.]

74. The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.

1. Existing case law

75. Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected 'in general, from the moment of conception', Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define 'everyone' ('*toute personne*') whose 'life' is protected by the Convention. The Court has yet to determine the issue of the 'beginning' of 'everyone's right to life' within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 §1 in the interests of protecting the mother's life and health because 'if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus' (see *X* v. *United Kingdom*, [Appl. No. 8416/79, Commission decision of 13 May 1980, Decisions and Reports (D.R.) 19, 244] at p. 253).

76. Having initially refused to examine *in abstracto* the compatibility of abortion laws with Article 2 of the Convention (see *X* v. *Norway*, No. 867/60, Commission decision of 29 May 1961, Collection of Decisions, vol. 6, p. 34, and *X* v. *Austria*, No. 7045/75, Commission decision of 10 December 1976, DR 7, p. 87), the Commission acknowledged in *Brüggemann and Scheuten* [Appl. No. 6959/75, Commission's report of 12 July 1977, D.R. 10, p. 100] that women complaining under Article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion: '... pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus' (*ibid.*, p. 116, §59). However, the Commission did not find it 'necessary to decide, in this context, whether the unborn child is to be considered as "life" in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 §2 could justify an interference "for the protection of others"' (*ibid.*, p. 116, §60). It expressed the opinion that there had been no violation of Article 8 of the Convention because 'not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother' (*ibid.*, pp. 116–17, §61), while emphasising: 'There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution' (*ibid.*, pp. 117–18, §64).

77. In *X* v. *United Kingdom* (cited above), the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the 'victim' of a violation of the right to life, it considered that the term 'everyone' in several Articles of the Convention could not apply prenatally, but observed that 'such application in a rare case – e.g. under Article 6, paragraph 1 – cannot be excluded' (p. 249, §7; for such an application in connection with access to a court, see *Reeve* v. *United Kingdom*, No. 24844/94, Commission decision of 30 November 1994, DR 79–A, p. 146). The Commission added that the general usage of the term 'everyone' ('*toute personne*') and the context in which it was used in Article 2 of the Convention did not include the unborn. As to the term 'life' and, in particular, the beginning of life, the Commission noted a 'divergence of thinking on the question of where life begins' and added: 'While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes "viable", or upon live birth' (*X* v. *United Kingdom*, p. 250, §12).

The Commission went on to examine whether Article 2 was 'to be interpreted: as not covering the foetus at all; as recognising a "right to life" of the foetus with certain implied limitations; or as recognising an absolute "right to life" of the foetus' (*ibid.* p. 251, §17). Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother's life, which was indissociable from that of the unborn child: 'The "life" of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman' (*ibid.*, p. 252, §19). The Commission adopted that solution, noting that by 1950 practically all the Contracting Parties had 'permitted abortion when necessary to save the life of the mother' and that in the meantime the national law on termination of pregnancy had 'shown a tendency towards further liberalisation' (*ibid.*, p. 252, §20).

78. In *H.* v. *Norway* [Appl. No. 17004/90, Commission decision of 19 May 1992, D.R. 73, 155], concerning an abortion carried out on non-medical grounds against the father's wishes, the Commission added that Article 2 required the State not only to refrain from taking a person's life intentionally but also to take appropriate steps to safeguard life (p. 167). It considered that it did not have to decide 'whether the foetus may enjoy a certain protection under Article 2, first sentence', but did not exclude the possibility that 'in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life' (*ibid.*). It further noted that in such a delicate area the Contracting States had to have a certain discretion, and concluded that the mother's decision, taken in accordance with Norwegian legislation, had not exceeded that discretion (p. 168).

79. The Court has only rarely had occasion to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman* [judgment of 29 October 1992, Series A No. 246–A: see chapter 3, section 3.3.], the Irish Government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 of the Convention, to pursue the 'legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect' (pp. 27–28, §63), since the Court did not consider it relevant to determine 'whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2' (p. 28, §66). Recently, in circumstances similar to those in *H.* v. *Norway* (cited above), where a woman had decided to terminate her pregnancy against the father's wishes, the Court held that it was not required to determine 'whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted [in the case law relating to the positive obligation to protect life]', and continued: 'Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, ... in the instant case ... [the] pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978' – a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso* v. *Italy* [Appl. No. 50490/99, E.C.H.R. 2002–VII]).

80. It follows from this recapitulation of the case law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that 'Article 8 §1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother' (see *Brüggemann and Scheuten*, cited above, pp. 116–17, §61) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

2. Approach in the instant case

81. The special nature of the instant case raises a new issue. The Court is faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article. This requires a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect 'everyone's right to life'.

82. As is apparent from the above recapitulation of the case law, the interpretation of Article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the State has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics in Science and New Technologies at the European Commission appositely puts it: 'the ... Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research ... It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code.'

It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions' (see *Tyrer* v. *United Kingdom*, judgment of 25 April 1978, Series A No. 26, pp. 15–16, §31, and subsequent case law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate ... and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life ...

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ('*personne*' in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The Court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the doctor concerned for the loss of her child *in utero* and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. The Court does not share that view, for the following reasons.

88. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and others* v. *United Kingdom*, judgment of 27 September 1995, Series A No. 324, pp. 45–46, §147), requires the State not only to refrain from the 'intentional' taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *L.C.B.* v. *United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998–III, p. 1403, §36).

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell* v. *United Kingdom* (dec.), No. 45305/99, ECHR 2000–V, and *Calvelli and Ciglio* ([GC], No. 32967/96, §51, ECHR 2002–I), §49).

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez* v. *France* [GC], No. 47287/99, §70, ECHR 2004–I), the Court has stated on a number of occasions that an effective judicial system, as required

by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, 'the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged' (see *Calvelli and Ciglio* [judgment of 17 January 2002], §51; *Lazzarini and Ghiacci* v. *Italy* (dec.), No. 53749/00, 7 November 2002; and *Mastromatteo* v. *Italy* [GC], No. 37703/97, §90, ECHR 2002–VIII).

91. In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury – which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part – she had the possibility of bringing an action for damages against the authorities on account of the doctor's alleged negligence (see *Kress* v. *France* [GC], No. 39594/98, §§14 et seq., ECHR 2001–VI). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell*, cited above) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital ...

92. The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the Court's view. In this connection, it refers to its case law to the effect that the 'right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre* v. *Spain*, judgment of 19 December 1997, *Reports* 1997–VIII, p. 2955, §33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the Court has held in personal injury cases, 'serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time' (see *Stubbings and others* v. *United Kingdom*, judgment of 22 October 1996, *Reports* 1996–IV, pp. 1502–03, §51).

93. In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts ...

94. In conclusion, the Court considers that in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

95. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention.

[Although the Court held by fourteen votes to three that there had been no violation of Article 2 of the Convention, two separate opinions and two dissenting opinions were filed by, in total, ten members of the Court. Among them was the dissenting opinion of Judge Ress:]

Dissenting opinion of Judge Ress:

France's positive obligation to protect unborn children against unintentional homicide, that is to say against negligent acts that could cause a child's death, can only be discharged if French law has effective procedures in place to prevent the recurrence of such acts. On this point, I am unable to agree with the opinion expressed by the majority that an action in damages in the administrative courts (on account of the hospital doctor's alleged negligence) afforded the unborn child adequate and effective protection against medical negligence. As Judge Rozakis, joined by Judges Bonello and Strážnická, pointed out in his partly dissenting opinion in *Calvelli and Ciglio* v. *Italy* ([GC], No. 32967/96, E.C.H.R. 2002–I), an action in pecuniary and even non-pecuniary damages will not in all circumstances be capable of protecting against the unintentional taking of life, especially in a case such as the present one in which a mother lost her child as a result of a doctor's negligence. Even though I accepted the outcome in *Calvelli and Ciglio*, which was based on the fact that the applicants had agreed to compensation under a friendly settlement, criminal proceedings were commenced in that case (although they were not continued because prosecution of the offence became time-barred).

It is not retribution that makes protection by the criminal law desirable, but deterrence. In general, it is through the criminal law that society most clearly and strictly conveys messages to its members and identifies values that are most in need of protection. Life, which is one of the values, if not the main value, protected by the Convention (see *Streletz, Kessler and Krenz* v. *Germany* [GC], Nos. 34044/96, 35532/97 and 44801/98, §§92–94, ECHR 2001–II, and *McCann and others* v. *United Kingdom*, judgment of 27 September 1995, Series A No. 324, pp. 45–46, §147), will in principle require the protection of the criminal law if it is to be adequately safeguarded and defended. Financial liability to pay compensation is only a secondary form of protection. In addition, hospitals and doctors are usually insured against such risks, so that the 'pressure' on them is reduced.

One might consider that imposing a disciplinary penalty on a doctor could be regarded as equivalent to imposing a criminal penalty in certain circumstances. Disciplinary measures were viewed as an alternative means of discouraging negligence in *Calvelli and Ciglio* (cited above, §51). However, it is equally clear that, as unpleasant as the consequences may be professionally, a disciplinary penalty does not amount to general condemnation (*Unwerturteil*). Disciplinary penalties depend on conditions that are entirely specific to the profession concerned (the bodies being self-regulating) and in general do not afford the deterrence necessary to protect such an important value as life. Nevertheless, the question has to be asked whether in the present case a disciplinary penalty for such a serious error could have provided sufficient deterrence. Here, though, is where the problem lies, as the authorities at no stage brought disciplinary proceedings against the doctor. For an error as serious as that committed by Dr G., such disciplinary proceedings accompanied by an adequate measure could at least have sent an appropriate signal to the medical profession to prevent the recurrence of such tragic events. I do not think it necessary to say that France requires criminal legislation. However, it does need to take strict disciplinary action in order to meet its obligation to afford effective protection of the life of the unborn child. In my opinion, therefore, there was no effective protection.

Among the factors that may influence the choice of the State as to how to implement its obligation to protect, is the nature of the obligation imposed on private parties as a correlative of the right recognized to the individual. An especially important distinction will be between 'negative' obligations, which merely impose on others that they abstain from interfering with the right/freedom of the right-holder; and 'positive' obligations, that require from others that they take certain steps towards supporting the exercise of the right/freedom by the individual right-holder. While 'negative' obligations can in principle be imposed *erga omnes* (for instance, any person illegally intercepting the communications of others may be civilly liable to the victim), 'positive' obligations require the duty-bearer to be identified. However, even where positive obligations are concerned, courts may rely directly on the provisions of human rights treaties in order to ensure adequate protection of the rights they enunciate:

European Court of Human Rights (2nd sect.), *Verein gegen Tierfabriken (VgT)* v. *Switzerland* (Appl. No. 24699/94), judgment of 28 June 2001:

[Verein gegen Tierfabriken (VgT) is a Swiss association for the protection of animals. As a reaction to various meat industry television commercials, VgT prepared a television commercial, which it sought to have broadcasted on Swiss Radio and Television Company programmes. However, the Commercial Television Company (now Publisuisse) responsible for television advertising, informed VgT that it would not broadcast the commercial in view of its 'clear political character'. This refusal was challenged and failed. The Swiss Courts found that the prohibition of political advertising laid down in section 18(5) of the Federal Radio and Television Act, on which the position of the Commercial Television Company was based, served various purposes, including to 'prevent financially powerful groups from obtaining a competitive political advantage. In the interest of the democratic process it is designed to protect the formation of public opinion from undue commercial influence and to bring about a certain equality of opportunity among the different forces of society'.]

[On the imputability to the respondent State]

44. It is not in dispute between the parties that the Commercial Television Company is a company established under Swiss private law. The issue arises, therefore, whether the company's refusal to broadcast the applicant association's commercial fell within the respondent State's jurisdiction. In this respect, the Court notes in particular the Government's submission according to which the Commercial Television Company, when deciding whether or not to acquire advertising, was acting as a private party enjoying contractual freedom.

45. Under Article 1 of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'. As the Court stated in *Marckx* v. *Belgium* (judgment of 13 June 1979, Series A No. 31, pp. 14–15, §31; see also *Young, James and Webster* v. *United Kingdom*, judgment of 13 August 1981, Series A No. 44, p. 20, §49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, 'there may be positive obligations inherent' in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.

46. The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.

47. Suffice it to state that in the instant case the Commercial Television Company and later the Federal Court in its decision of 20 August 1997, when examining the applicant association's request to broadcast the commercial at issue, both relied on section 18 of the Swiss Federal Radio and Television Act, which prohibits 'political advertising'. Domestic law, as interpreted in the last resort by the Federal Court, therefore made lawful the treatment of which the applicant association complained (see Marckx and Young, James and Webster, cited above). In effect, political speech by the applicant association was prohibited. In the circumstances of the case, the Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis.

48. The responsibility of the respondent State having been established, the refusal to broadcast the applicant association's commercial amounted to an 'interference by public authority' in the exercise of the rights guaranteed by Article 10.

[Whether the interference was 'prescribed by law', motivated a 'legitimate aim' set out in Art. 10 para. 2 ECHR, and 'necessary in a democratic society' to achieve that aim]

[Having found that the interference was sufficiently foreseeable and that it pursued the objective of 'the protection of the rights of others' within the meaning of Article 10 para. 2 ECHR, the Court then examines whether the interference is 'necessary' for the fulfilment of that aim.]

72. The Court will consequently examine carefully whether the measure in issue was proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity among the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors; and to support the press.

73. It is true that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (see *Informationsverein Lentia and others* v. *Austria (No. 1)*, judgment of 24 November 1993, Series A No. 276, p. 16, §38).

74. In the present case, the contested measure, namely the prohibition of political advertising as provided in section 18(5) of the Federal Radio and Television Act, was applied only to radio and television broadcasts, and not to other media such as the press. The Federal Court explained

in this respect in its judgment of 20 August 1997 that television had a stronger effect on the public on account of its dissemination and immediacy. In the Court's opinion, however, while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature.

75. Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion or at endangering equality of opportunity among the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of 'political advertising' may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be 'relevant' and 'sufficient' in respect of the particular interference with the rights under Article 10. In the present case, the Federal Court, in its judgment of 20 August 1997, discussed at length the general reasons which justified a prohibition of 'political advertising'. In the Court's opinion, however, the domestic authorities have not demonstrated in a 'relevant and sufficient' manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case.

76. The domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue may have appeared provocative or even disagreeable.

77. In so far as the Government pointed out that there were various other possibilities to broadcast the information at issue, the Court observes that the applicant association, aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland. The Commercial Television Company was the sole instance responsible for the broadcasting of commercials within these national programmes. Private regional television channels and foreign television stations cannot be received throughout Switzerland.

78. The Government have also submitted that admitting the applicant association's claim would be to accept a 'right to broadcast' which in turn would substantially interfere with the rights of the Commercial Television Company to communicate information. Reference was further made to the danger of untimely interruptions in television programmes by means of commercials. The Court recalls that its judgment is essentially declaratory. Its task is to determine whether the Contracting States have achieved the result called for by the Convention. Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilise in order to perform its obligations under the Convention (see *De Cubber* v. *Belgium*, judgment of 26 October 1984, Series A No. 86, p. 20, §35).

79. In the light of the foregoing, the measure in issue cannot be considered as 'necessary in a democratic society'. Consequently, there has been a violation of Article 10 of the Convention.

2.2 An obligation of means

The positive obligation to protect the exercise of rights is not absolute. It constitutes, in terms borrowed from the civil law, an obligation of means, rather than an obligation of result. In the case of *Plattform 'Ärzte für das Leben'*, an association of doctors who were campaigning against abortion and were seeking to bring about reform of the Austrian legislation on the matter held two demonstrations in 1980 and 1982 which were disrupted by counter-demonstrators despite the presence of a large police contingent. They complained that the Austrian authorities had violated the freedom of assembly guaranteed in Article 11 of the European Convention on Human Rights by having failed to take practical steps to ensure that its demonstrations passed off without any trouble. The question before the European Court of Human Rights was whether this was an 'arguable' complaint justifying the applicability of Article 13 of the Convention, which guarantees the right to an effective remedy to all persons who are victims of violations of Convention rights. It concluded that the Austrian authorities did not fail to take reasonable and appropriate measures which could be expected from them:

European Court of Human Rights, *Plattform 'Ärzte für das Leben'* v. *Austria* (Appl. No. 10126/82), judgment of 21 June 1988:

31. The Court does not have to develop a general theory of the positive obligations which may flow from the Convention, but before ruling on the arguability of the applicant association's claim it has to give an interpretation of Article 11.

32. A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, *mutatis mutandis*, the *X and Y* v. *Netherlands* judgment of 26 March 1985, Series A No. 91, p. 11, §23 [see above in this section]).

33. Concurring with the Government and the Commission, the Court finds that Austrian law is concerned to protect demonstrations by such positive action. For example, Articles 284 and 285 of the Criminal Code make it an offence for any person to disperse, prevent or disrupt a meeting that has not been prohibited, and sections 6, 13 and 14(2) of the Assembly Act, which empower the authorities in certain cases to prohibit, bring to an end or disperse by force an assembly, also apply to counter-demonstrations ...

34. While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see, *mutatis mutandis*, the

Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A No. 94, pp. 33–34, §67, and the *Rees* judgment of 17 October 1986, Series A No. 106, pp. 14–15, §§35–37). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.

2.3 The limits of the obligation to protect

The obligation to protect is clearly not unlimited. It must be understood as an obligation imposed on the State to take all reasonable measures that might have prevented the event from occurring. The mere fact that the event which should have been prevented did occur therefore is not evidence, *per se*, that the State has not discharged its obligation to protect: only if it is demonstrated, *in addition*, that there were certain supplementary measures which the State could have taken but failed to take, although this would not have imposed a disproportionate burden, will the State be considered to be in violation of its obligations. This is illustrated, for instance, by the disjunction between paragraphs 89 and 92, respectively, in the case of *E. and others* v. *United Kingdom* presented below: whereas, in paragraph 89, the European Court of Human Rights notes that the kind of abuse the applicants have been subjected to during their childhood 'falls within the scope of Article 3 of the Convention [European Convention on Human Rights] as inhuman and degrading treatment', in paragraph 92, it notes that 'the question therefore arises whether the [local authority concerned, in particular its social department] was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse'. The prejudice to the victim is therefore a necessary, but still an insufficient condition, for a finding of violation by the State of its obligation to protect. For such a finding to be justified, a failure of the State must have contributed to the prejudice being caused.

However, this definition of the scope of the obligation to protect remains excessively vague. It raises in turn two questions, one of procedure, and the other of substance. The procedural question is that of the burden of proof. By definition, when the State is accused of having failed to prevent a particular violation from occuring, it remains a matter of speculation whether or not the intervention by the State would have been effective in ensuring that the violation will not take place. The nature of the evidence which victims must put forward has occasionally been the subject of controversy, as the following two cases illustrate:

European Court of Human Rights (2nd sect.), *E. and others* v. *United Kingdom* (Appl. No. 33218/96), judgment of 26 November 2002:

[The four applicants, E., H., L. and T., born between 1960 and 1965, are the sons and daughters of a woman who cohabited with W.H. after the death of their father in 1965. The family were known to the social services of Dumfries and Galloway Regional Council (designated in the

judgment as 'the local authority'). They were principally concerned from 1970 onwards with the mother's severe financial difficulties. In 1977, W.H. was arrested by the police and charged with indecently assaulting two of the applicants. He entered a guilty plea to those charges. The pleas were accepted by the prosecution and the case proceeded on the basis that W.H. had committed one act of indecency against E. between 20 October 1972 and 31 August 1976, and two acts of indecency against L. between 1 January 1975 and 7 January 1977. W.H., however, was not detained pending sentence. Instead, he returned to live at the applicants' home. He was then sentenced to two years' probation, and the understanding was that he was not permitted to live in the family home due to the nature of the offences. Only in 1988 did the applicants report a history of sexual abuse by W.H. in the family. In 1992, the four applicants brought proceedings against the local authority seeking damages on the basis that the local authority had failed to carry out its statutory duties, in particular, that W.H. had breached his probation order by residing at the family home and that the social services had, or ought to have, known this and had failed to report the breach to the court or to take the children into care. They agreed, however, to the dismissal of their action, in the light of the case law of the House of Lords in *X. and others* v. *Bedfordshire County Council* [1995] 3 All E.R. 353. Three of the applicants received compensation from the Criminal Injuries Compensation Board.]

88. Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *A.* v. *United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998–VI, p. 2699, §22). These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (*mutatis mutandis*, *Osman* v. *United Kingdom*, judgment of 28 October 1998, *Reports* 1998–VIII, §116). Thus a failure, over four and a half years, to protect children from serious neglect and abuse of which the local authority were aware disclosed a breach of Article 3 of the Convention in the case of *Z. and others v. United Kingdom* ([GC] No. 29392/95, ECHR 2001–V, §§74–75).

89. The Court recalls that the four applicants allege that they suffered sexual and physical abuse from W.H. over a long period of time. There is no doubt that the treatment described ... falls within the scope of Article 3 of the Convention as inhuman and degrading treatment ...

92. The question therefore arises whether the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.

93. The parties appear agreed that it is the period after January 1977 which is in issue ... The parties do disagree whether the authorities should have been aware of the abuse that continued thereafter.

94. The Court recalls that until T. made disclosures of sexual abuse to her social worker in 1988 there is no indication that any of the children in the house made any complaint about W.H.'s ongoing assaults after January 1977. The Government take the view that there was

nothing to alert the social workers that he continued to be a risk and that in the light of knowledge and practice at the time the fact that he had been found in the family home after the conviction in January 1977 would not have been regarded as any significant cause for alarm or have provided sufficient ground for action against him.

95. However, the Court notes that the Government accept that even if it was not a formal condition of his probation it would have been understood that W.H. was no longer permitted to reside in the applicant's home. [The Court lists a number of factors which seem to converge to illustrate the dangerous character of W.H., who had been charged with a series of serious sexual offences against two children of the family indicating a background of repetitive offending.]

96. The Court is satisfied from these elements that the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from W.H. and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children ...

97. Yet the social services failed to take steps which would have enabled them to discover the exact extent of the problem and, potentially, to prevent further abuse taking place. The Government have accepted that after the initial disclosures the social services should have worked with both E. and L. who had shown significant distress at the situation at home which could have led to further understanding of family dynamics; and, most importantly, that the social services should have referred L. to the Reporter of the Children's Hearing, which could have led to a supervision requirement over one or more of the children who had been living with a known and convicted offender.

98. In addition, the Government have accepted that more should have been done to investigate the possible breach by W.H. of the probation order, that there was a consistent failure to place the full and relevant details of the family situation before the Sheriff's Court or Children's Hearing when the applicant children were the subject of a specific examination in the context of offending and truancy ... and that there was no effective co-operation or exchange of information between the school authorities which were attempting to deal with a persistent truancy problem and the social services who had access to the information about the wider family situation and history. It is also not apparent that E.'s disclosures at the hospital in December 1976 were passed to the social services or that, if they were, they led to any response.

99. The Court recalls that the Government argued that notwithstanding any acknowledged shortcomings it has not been shown that matters would have turned out any differently, in other words, that fuller co-operation and communication between the authorities under the duty to protect the applicants and closer monitoring and supervision of the family would not necessarily have either uncovered the abuse or prevented it. The test under Article 3 however does not require it to be shown that 'but for' the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.

100. The Court is satisfied that the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.

European Court of Human Rights (2nd sect.), *Younger* v. *United Kingdom* (Appl. No. 57420/00), decision (inadmissibility) of 7 January 2003:

[The applicant's son, Stuart Gipp, was found hanging from his shoelaces which were attached to the bolt hole of his open cell hatch while he was in custody at Lion Yard Magistrates' Court, Cambridge, on 9 February 1999. He died in hospital at 9.55 a.m. on the following day, aged twenty. He had been arrested on 8 February 1999. Although he had confided in his solicitor that he was a heroin user and was just beginning to experience withdrawal symptoms, he had decided not to call the police surgeon at that time.]

[The] Court concludes that there is no evidence of anything about Stuart Gipp's actions or behaviour that ought to have put the authorities on notice that he was at a real and immediate risk of suicide either at the times at which he requested a doctor or when he revealed that he was a drug user.

The applicant submits, however, that, had the authorities acted with reasonable care – in particular by ensuring that Stuart Gipp was seen by a doctor and/or by the community psychiatric nurse, who was on duty at the court that morning – there is a real possibility that they would have been made aware of Stuart Gipp's vulnerability to the risk of suicide. The Court finds this assertion to be too speculative. While the Court does not regard it as appropriate to apply a 'real possibility' test, which it finds puts the threshold far too low for the purposes of determining whether there has been a violation of Article 2, the Court would reach the same conclusion even on the basis of such a test. It cannot conclude on the available evidence that there was even a real possibility that, had Stuart Gipp been seen by a medical professional at a time prior to his bail application at about 2.50 p.m., the authorities would have become aware that he was at a real and immediate risk of suicide, nor that the calling of a doctor would have made any difference to the tragic outcome of the case. The Court notes that, from 2.50 p.m. onwards, a doctor would have been unavailable, even if called, as SCO [Senior Custody Officer] Davis had been trying to get one to attend another detainee since that time without success at the time at which she spoke to Mr Milsom at 3.50 p.m.

While the Court regards it as most unfortunate that Stuart Gipp was not seen by a medical practitioner in the circumstances of the case, it would be pure speculation to conclude that the summoning of a medical professional would have had the outcome for which the applicant contends.

The substantive question raised by the definition offered above of the obligation to protect is, of course, what 'reasonable' measures should consist in, and which limits attach to the scope of this obligation. A useful departure point is the judgment the European Court of Human Rights delivered in the case of *Osman*:

European Court of Human Rights (GC), *Osman* v. *United Kingdom* (Appl. No. 23452/94), judgment of 28 October 1998, paras. 115–22:

[The applicants are respectively the widow and the son of Mr Ali Osman who was shot dead by Mr Paul Paget-Lewis on 7 March 1988. The second applicant, Ahmet Osman, was a former pupil of Paul Paget-Lewis at Homerton House School. He was wounded in the shooting incident which

led to the death of his father. The applicants complain about the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that Paul Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family.

The background was as follows. In 1986, it appeared that Paul Paget-Lewis had developed an attachment to his pupil, Ahmet Osman. He subsequently harassed a friend of Ahmet Osman, Leslie Green, about whom he spread rumours, and whom he warned against disrupting what he called his 'special relationship' with Ahmet Osman. In March 1987, information concerning Paget-Lewis' conduct towards Ahmet Osman was passed on to the police. Although the police officer contacted did not keep any record of the meetings, and did not make any report concerning the nature and extent of the information that was communicated to him, the Government stressed that all concerned were satisfied that there was no sexual element to Paget-Lewis' attachment to Ahmet and the matter could be dealt with internally by the school. A series of incidents followed. On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman, leading to fears that he might attempt to abscond with Ahmet Osman to another country. In May 1987, a brick was thrown through a window of the applicants' house. The police were informed and a police officer was sent to the house and completed a crime report. On two occasions in June 1987 the tyres of Ali Osman's car were deliberately burst. Both incidents were reported to the police, but no police records relating to the offences can be found. In June 1987, following the request of the head of the school and a medical examination concluding that he should remain away from Homerton House and be designated temporarily unfit to work, Paget-Lewis informed the school that he would be taking medical leave for the remainder of the school term. He then left Homerton House and did not return again. The incidents of vandalism against the Osman family continued during the following months. In an interview with the police following those incidents, however, Paget-Lewis denied any involvement in the acts of vandalism and criminal damage. No evidence was found implicating him in those incidents. Yet, in December 1987, after threatening statements made by Paget-Lewis before the Inner London Education Authority (ILEA), the police sought to arrest him on suspicion of criminal damage. After this failed, in early January 1988, the police commenced the procedure of laying an information before the Magistrates' Court with a view to prosecuting Paget-Lewis for driving without due care and attention, and Paget-Lewis' name was put on the Police National Computer as being wanted in relation to a collision incident and on suspicion of having committed offences of criminal damage. Between January and March 1988 Paget-Lewis travelled around England hiring cars in his adopted name of Osman and was involved in a number of accidents. He spent time at his home address during this period and continued to receive mail there. Finally, on 7 March 1988 Paget-Lewis shot and killed Ali Osman and seriously wounded Ahmet. He then drove to the home of the principal of Homerton House School where he shot and wounded him and killed his son.

On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time. The applicants filed proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. This action failed: on 7 October 1992 the Court of Appeal held that in light of previous authorities no action could lie against the police in negligence in the investigation and suppression of crime on the grounds

that public policy required an immunity from suit (*Osman and another* v. *Ferguson and another* [1993] 4 All E.R 344); the House of Lords refused leave to appeal from that judgment. Following this decision, the applicants filed an application relying on Articles 2, 6, 8 and 13 ECHR. They complained that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure. By seventeen votes to three, the European Court of Human Rights found that neither Article 2 ECHR nor Article 8 ECHR had been violated. It held unanimously that Article 6 para. 1 ECHR had been violated, and that no separate issue was raised under Article 13 ECHR. As regards the alleged failure of the UK authorities to protect the rights to life of Ali and Ahmet Osman, the Court reasoned as follows:]

115. The Court notes that the first sentence of Article 2 §1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B.* v. *United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998–III, p. 1403, §36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 [right to liberty and to security] and 8 [right to respect for private and family life, home and correspondance] of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life ... Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical

and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned *McCann and others* judgment, p. 45, §146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case ...

117. The Court observes, like the Commission, that the concerns of the school about Paget-Lewis' disturbing attachment to Ahmet Osman can be reasonably considered to have been communicated to the police over the course of the five meetings which took place between 3 March and 4 May 1987 ..., having regard to the fact that Mr Prince's decision to call in the police in the first place was motivated by the allegations which Mrs Green had made against Paget-Lewis and the school's follow-up to those allegations. It may for the same reason be reasonably accepted that the police were informed of all relevant connected matters which had come to light by 4 May 1987 including the graffiti incident, the theft of the school files and Paget-Lewis' change of name.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The Court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable ...

118. The applicants have attached particular weight to Paget-Lewis' mental condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House ... It is most improbable that the decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

119. In assessing the level of knowledge which can be imputed to the police at the relevant time, the Court has also had close regard to the series of acts of vandalism against the Osmans' home and property between May and November 1987 ... It observes firstly that none of these incidents could be described as life-threatening and secondly that there was no evidence pointing to the involvement of Paget-Lewis. This was also the view of Detective Sergeant Boardman in his report on the case in mid-December 1987 having interviewed the Green and Osman families, visited the school and taken stock of the file ... The completeness of Detective Sergeant Boardman's report and the assessment he made in the knowledge of all the allegations made against Paget-Lewis would suggest that even if it were to be assumed that the applicants are correct in their assertions that the police did not keep records of the reported incidents of vandalism and of their meetings with the school and ILEA officials, this failing could not be said to have prevented them from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court notes in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage ...

120. The Court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions ... However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. The applicants rely in particular on Paget-Lewis' threat to 'do a sort of Hungerford' [tragic event in 1987 in which a gunman killed sixteen people before killing himself in Hungerford, United Kingdom] which they allege he uttered at the meeting with ILEA officers on 15 December 1987 ... The Government have disputed that these words were said on that occasion, but even taking them at their most favourable to the applicants' case, it would appear more likely that they were uttered with respect to Mr Perkins whom he regarded as principally to blame for being forced to leave his teaching post at Homerton House. Furthermore, the fact that Paget-Lewis is reported to have intimated to the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible deed ... could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family. The Court must also attach weight in this respect to the fact that, even if Paget-Lewis had deliberately rammed the vehicle as alleged, that act of hostility was in all probability directed at Leslie Green, the passenger in the vehicle. Nor have the applicants adduced any further arguments which would enhance the weight to be given to Paget-Lewis' claim that he had told PC Adams that he was in danger of doing something criminally insane ... In any event, as with his other cryptic threats, this statement could not reasonably be construed as a threat against the lives of the Osman family.

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have

produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. As noted earlier (see paragraph 116 above), the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

In a situation such as that presented to the European Court of Human Rights in the *Osman* case, essentially three factors limit the scope of the obligation to protect. These are: (a) first, what the Court refers to as the 'unpredictability of human conduct', which is one way to describe the degree of risk inevitable in a free society – only in a totalitarian society, it has sometimes been remarked, would the risk of human rights violations be entirely eliminated by State control (see B. Dickson, 'The Horizontal Application of Human Rights Law' in A. Hegarty and S. Leonard (eds.), *Human Rights. An Agenda for the 21st Century* (London: Cavendish Publishing Ltd, 1999), p. 59 *et seq.*). Indeed, the partly dissenting opinion appended to the *Osman* judgment was based on the conviction of three members of the Court – Judge De Meyer, joined by Judges Lopes Rocha and Casadevall – that the majority exaggerated the unpredictable character of the flow of events having led to the murder of Mr Osman: in the view of Judge De Meyer, '[the police] should have taken Mr Paget-Lewis into custody before it was too late in order to have him cared for properly. Instead they let things go until he killed two persons and wounded two others. Mr Paget-Lewis himself asked the police arresting him why they did not stop him before he acted as he did and reminded them that he had given all the warning signs. He was right.' The other factors referred to by the Court in *Osman* as limiting the scope of the obligation to protect are: (b) the budgetary constraints facing States, which face competing claims on limited resources; and (c) the obligation for States to respect other, conflicting human rights.

But the full range of factors that may limit the scope of the State's obligation to protect is in fact wider than the statement of the European Court of Human Rights in *Osman* would seem to suggest. Depending on the particular circumstances of each case, other candidates may be, in particular: (d) respect for the contractual freedom of parties, one of which has agreed to a restriction to his/her right in exchange of another advantage, whether pecuniary or not, to which he or she attaches greater value; or (e) the autonomy of the individual who chose to waive his/her right, by means other than by the conclusion of a contract. Nor is this list meant to be exhaustive. A factor such as (f) respect for the intention expressed, unilaterally, in legal acts such as wills, may also play a role. In the case of *Pla and Puncernau* v. *Andorra*, certain members of the European Court of Human Rights expressed their uneasiness at re-examining the

interpretation given by the domestic courts to a discriminatory clause inserted into a testamentary will in order to ensure an interpretation compliant with the Convention:

European Court of Human Rights (4th sect.), *Pla and Puncernau* v. *Andorra* (Appl. No. 69498/01), judgment of 13 July 2004:

[In 1939, Carolina Pujol Oller, Francesc Pla Guash's widow, made a will before a notary, one clause of which settled her estate on her son, Francesc-Xavier, as life tenant with the remainder to a son or grandson of a lawful and canonical marriage. Should those conditions not be met, the testatrix stipulated that her estate had to pass to the children and grandchildren of the remaindermen under the settlement. In 1949 Carolina Pujol Oller died. The beneficiary under the will, Francesc-Xavier Pla Pujol, contracted canonical marriage to Roser Puncernau Pedro. The couple adopted two children. In 1996, when Francesc-Xavier Pla Pujol died, it was found that he had left the assets he had inherited under his mother's will to his wife for life, with the remainder to his adopted son, Antoni. However, two great-grandchildren of Carolina Pujol Oller challenged this. In their view, Antoni Pla Puncernau could not inherit under the will made by the testatrix in 1939, since he was an adopted child. These great-grandchildren brought civil proceedings in the *Tribunal des Batlles*, which dismissed their action. However, the High Court of Justice set the judgment aside on appeal and granted the appellants' claim, and the appeal (*empara*) against that judgment was dismissed by the Constitutional Court. The applicants before the Court are Antoni Pla Puncernau, the first adoptive child of Francesc-Xavier Pla Pujol, and his mother, Roser Puncernau Pedro. They complained that, in determining inheritance rights, the High Court of Justice and the Constitutional Court had breached the applicants' right to respect for their private and family life by unjustifiably discriminating against the first applicant on the ground of his filiation. They submitted that this had resulted in a violation of Article 14 of the Convention taken in conjunction with Article 8.]

53. The Court notes that the Andorran courts gave two different interpretations: the first, given by the *Tribunal des Battles*, was favourable to the applicants and the second, given by the High Court of Justice, went against them. Both are based on factual and legal elements that were duly evaluated in the light of the particular circumstances of the case ...

56. The Court does not consider it appropriate or even necessary to analyse the legal theory behind the principles on which the domestic courts, and in particular the High Court of Justice of Andorra, based their decision to apply one legal system rather than another, be it Roman law, canon law, Catalan law or Spanish law. That is a sphere which, by definition, falls within the competence of the domestic courts.

57. The Court considers that, contrary to the Government's affirmations, no question relating to the testatrix's free will is in issue in the present case. Only the interpretation of the testamentary disposition falls to be considered. The Court's task is therefore confined to determining whether, in the circumstances of the case, the first applicant was a victim of discrimination contrary to Article 14 of the Convention.

58. In the present case, the Court observes that the legitimate and canonical nature of the marriage contracted by the first applicant's father is indisputable. The sole remaining question is therefore whether the notion of 'son' in Carolina Pujol Oller's will extended only, as the High Court of Justice maintained, to biological sons. The Court cannot agree with that conclusion of the Andorran appellate court. There is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The Court understands that she could have done so but, as she did not, the only possible and logical conclusion is that this was not her intention.

The High Court of Justice's interpretation of the testamentary disposition, which consisted in inferring a negative intention on the part of the testatrix and concluding that since she did not expressly state that she was not excluding adopted sons this meant that she did intend to exclude them, appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it (*quum in verbis nulla ambiguitas est, non debet admitti voluntatis queastio*).

59. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (see *Larkos* v. *Cyprus* [GC], No. 29515/95, §§30–31, ECHR 1999–I).

60. In the present case, the High Court of Justice's interpretation of the testamentary disposition in question had the effect of depriving the first applicant of his right to inherit under his grandmother's estate and benefiting his cousin's daughters in this regard ...

Since the testamentary disposition, as worded by Carolina Pujol Oller, made no distinction between biological and adopted children it was not necessary to interpret it in that way. Such an interpretation therefore amounts to the judicial deprivation of an adopted child's inheritance rights.

61. The Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (see, *inter alia*, *Fretté* v. *France*, No. 36515/97, §34, ECHR 2002–I). In the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the first applicant.

62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is attached today in the member States of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights ... Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of fifty-seven years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and

legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that 'the testator cannot be presumed to have meant what he did not say' and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case law.

63. Having regard to the foregoing, the Court considers that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

Partly dissenting opinion of Judge Sir Nicolas Bratza:

2. As is noted in the judgment, the present case is of an entirely different character from those previously examined by the Court involving allegations of discriminatory treatment in the field of succession and inheritance. In each of the earlier cases, it was the domestic legislation itself which gave rise to the difference of treatment of which complaint was made under the Convention, distinguishing as it did between the rights of succession of legitimate and illegitimate children (see *Marckx* v. *Belgium*, judgment of 13 June 1979, Series A No. 31, p. 24, §54; *Vermeire* v. *Belgium*, judgment of 29 November 1991, Series A No. 214–C, p. 83, §28; and *Inze* v. *Austria*, judgment of 28 October 1987, Series A No. 126, p. 18, §40) or between children born of an adulterous relationship and other children, whether legitimate or not (see *Mazurek* v. *France*, No. 34406/97, §43, ECHR 2000–II). In the present case, no such complaint is made or could be made against Andorra, discrimination on grounds of birth being expressly prohibited by both the Andorran Constitution and the special law on adoption.

3. It is also important to observe that, although the applicants complain of the decisions of the High Court of Justice and the Constitutional Court of Andorra, it is not asserted that the decisions directly interfered with the applicants' Article 8 rights or subjected the first applicant to discriminatory treatment in the enjoyment of his family life by creating distinctions between the biological and adopted members of his family. As appears from the terms of its judgment, in upholding the appeals of the Serra Areny sisters and finding that, as an adopted child of the life tenant under the will of Carolina Pujol Oller, the first applicant was excluded from inheriting under the will, the High Court of Justice of Andorra sought to give effect to the intention of the testatrix herself in the exercise of her right to dispose of her property on her death. The circumstances of the present case are in this respect quite different from those which have frequently been examined by the Court, ... in which it was the decisions of the domestic courts themselves which had restricted, penalised or otherwise interfered with the exercise of the Convention right in question and which required to be justified.

4. The fact that, under the Convention, the legislative or judicial organs of the State are precluded from discriminating between individuals (by, for instance, creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights) does not mean that private individuals are similarly precluded from discriminating by drawing such distinctions when disposing of their property. It must in principle be open to a testator, in the exercise of his or her right of property, to choose to whom to leave the property and, by the terms of the will, to differentiate between potential heirs, by (*inter alia*) distinguishing between biological and adoptive children and grandchildren. As pointed out in the opinion of Judge Garlicki [see below], the testator's right of choice finds protection under the Convention, namely in Article 8 and in Article 1 of Protocol No. 1. The State must in principle give effect, through its judicial organs, to such private testamentary disposition and cannot be held

to be in breach of its Convention obligations (including its obligations under Article 14) by doing so, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. This remains true even if there may appear to be no objective and reasonable justification for the distinction made by a testator.

5. In my view, the distinction which was held by the domestic courts to have been intended by the testatrix in the present case between biological and adopted grandchildren cannot be said to be repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights and freedoms. Nor do I understand the majority of the Chamber of the Court to suggest to the contrary. It is true that in paragraph 46 of the judgment it is said that an issue of interference with private and family life under the Convention could arise if the national court's assessment of the facts or domestic law were 'blatantly inconsistent with the fundamental principles of the Convention' and in paragraph 59 such inconsistency is found to have existed in the national courts' assessment in the present case. However, I do not read this finding as suggesting that the upholding by a national court of a will which distinguishes between biological and adopted children is of itself to be seen as incompatible with Convention principles. The majority's finding is, as I understand it, based rather on the ground that the High Court's interpretation of the will in the present case and its assessment of the intention of the testatrix were clearly wrong and that accordingly it was that court's decision that, as an adopted grandchild, the first applicant was excluded from inheriting the estate which itself gave rise to a violation of Article 14.

6. The central question thus raised is whether the manner in which the domestic courts interpreted the will of the testatrix or applied the principles of domestic law was such as to permit such a finding. The majority of the Chamber have reiterated in paragraph 46 of the judgment the principles established by the Court's jurisprudence concerning the interpretation and application of domestic law: it is in the first place for the national authorities, and in particular the national courts, to construe and apply domestic law. I would agree with the majority that this principle applies *a fortiori* when the national courts are concerned with resolving disputes between private individuals or interpreting a private testamentary disposition, such courts being better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute and the competing rights and interests involved.

This being so, an issue would in my view only arise under the Convention if the Court were satisfied that the interpretation of the will or of the relevant principles of domestic law by the national courts was, to use the terms of the judgment, 'manifestly unreasonable or arbitrary'.

7. Thus far, I am in agreement with the majority's approach. Where I strongly disagree is as to the majority's application of these principles when examining the judgments of the national courts. Far from assessing the judgments according to these strict standards, the majority have to my mind substituted their own view of the proper interpretation of the will for that of the High Court of Justice of Andorra, preferring the construction placed on the will by the *Tribunal des Batlles*. While I can readily accept that one might prefer both the reasoning and the result reached by the first-instance court, I cannot accept that the decision of the appeal court may be characterised as either arbitrary or manifestly unreasonable ...

15. For these reasons, regrettable as the result of the High Court's judgment may seem, I am unable to find that the decision gave rise to a violation of the applicants' rights under Article 14 of the Convention taken in conjunction with Article 8.

Dissenting opinion of Judge Garlicki:

It is with regret that I have to disagree with the majority.

This case relates to two important principles which determine the scope of the Court's jurisdiction: the principle of subsidiarity and the principle of State action.

In respect of the former, I fully subscribe to the arguments developed by Judge Sir Nicolas Bratza that the interpretation of the will or of the relevant principles of domestic law by the national courts cannot be regarded as arbitrary or manifestly erroneous or unreasonable.

In respect of the latter, it should be noted that the case did not involve any direct interference by the national courts with the applicants' Article 8 rights. The courts were confronted with a will which contained a clause discriminating against adopted children *vis-à-vis* biological children. The courts first determined the correct interpretation of the will and, in accordance with that interpretation, gave effect to it. Thus, the real question before our Court is to what extent the Convention enjoys a 'horizontal' effect, that is, an effect prohibiting private parties from taking action which interferes with the rights and liberties of other private parties. Consequently, to what extent is the State under an obligation either to prohibit or to refuse to give effect to such private action?

It seems clear that the authors of the Convention did not intend this instrument to possess a 'third-party effect' (see A. Drzemczewski: 'The European Human Rights Convention and Relations between Private Parties', *Netherlands International Law Review* 1979, No. 2, p. 168). However, under our case law it is obvious that there may be certain positive obligations of the State to adopt measures designed to secure respect for Convention rights, even in the sphere of the relations of individuals between themselves (see *X and Y* v. *Netherlands*, judgment of 26 March 1985, Series A No. 91, p. 11, §23). Such 'indirect third-party effect' has been addressed by the Court in many different areas, such as the right to life (State obligation to carry out an effective investigation in a case of a murder committed by private persons – see, for example, *Menson* v. *United Kingdom*, (dec.), No. 47916/99, ECHR 2003–V), freedom of expression (*Appleby* v. *United Kingdom*, No. 44306/98, ECHR 2003–VI, in which the Court indicated that the State may be obliged to adopt 'positive measures of protection, even in the sphere of relations between individuals', §39), freedom of association (*Young, James and Webster* v. *United Kingdom,* judgment of 13 August 1981, Series A No. 44, representing the first ruling of this kind), freedom of assembly (*Plattform 'Ärzte für das Leben'* v. *Austria*, judgment of 21 June 1988, Series A No. 139) and, above all, the protection of private life (see, for example, *Ignaccolo-Zenide* v. *Romania*, No. 31679/96, ECHR 2000–I, in particular §113).

Nevertheless, it seems equally obvious that the level of protection against a private action cannot be the same as the level of protection against State action. The very fact that, under the Convention, the State may be prohibited from taking certain action (such as introducing inheritance distinctions between children – see *Marckx* v. *Belgium*, judgment of 13 June 1979, Series A No. 31; *Vermeire* v. *Belgium*, judgment of 29 November 1991, Series A No. 214–C; and *Mazurek* v. *France*, No. 34406/97, ECHR 2000–II) does not mean that private persons are similarly precluded from taking such action. In other words, what is prohibited for the State need not necessarily also be prohibited for individuals. Of course, in many areas such prohibition may appear necessary and well-founded. However, it should not be forgotten that every prohibition of private action (or any refusal to judicially enforce such action), while protecting the rights of some persons, unavoidably restricts the rights of other persons. This is particularly visible in regard to 'purely' private-law relations, such as inheritance. The whole idea of a will is to depart

from the general system of inheritance, that is, to discriminate between potential heirs. But at the same time, the testator must retain a degree of freedom to dispose of his/her property and this freedom is protected by both Article 8 of the Convention and Article 1 of Protocol No. 1. Thus, in my opinion, the rule should be that the State must give effect to private testamentary dispositions, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. As in respect of all exceptional circumstances, however, their presence must be clearly demonstrated and cannot be assumed.

No exceptional circumstances of the above-mentioned kind existed in the present case. The testatrix had taken a decision, which was perhaps unjust, but cannot, even by present-day standards, be regarded as repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights. Thus, the State was under a duty to respect and give effect to her will and was neither allowed nor expected to substitute its own inheritance criteria for what had been decided in the will. Accordingly, the State cannot be held to be in breach of the Convention by giving effect to this will.

2.4 Human rights in contractual relationships and the question of waiver of rights

While all the limiting factors listed above (in the preceding section 2.3.) may potentially restrict the scope of obligation to protect, a fundamental distinction may have to be made between the situations where the right or freedom of the individual is interfered with *in the absence of any choice* of the right-holder – as was the case in the cases of *X and Y* v. *Netherlands* or *Osman* v. *United Kingdom* – and the situations where the right-holder has *chosen* – whether by agreeing to the terms of a contract or otherwise – to submit to a restriction of his/her rights. The latter set of situations may in turn be sub-divided in two categories: while all these situations raise the question whether the right-holder should be allowed to waive his/her human right (or whether, instead, the obligation to protect of the State extends to an obligation to protect the right-holder against him/herself), only where contractual relationships are concerned does the question arise whether private compulsion should be distinguished from compulsion exercised by the State (or should be treated, instead, as equivalent).

The table on the next page offers a simplified typology of the arguments concerning the limits of the obligation to protect of the State.

Section 2.5. discusses how respect for other, competing human rights, may impose limits to the scope of the obligation of the State to protect – an issue which appears, in this typology, in the far right-hand column, as argument (v). This section reviews arguments (iii) and (iv) (in the lower part of this simplified typology), which are exchanged about the weight to be given to the choice expressed by the individual right-holder, whether he/she has agreed by contract to a limitation of his/her right (for instance in the context of employment), or whether he/she chooses, unilaterally, to waive his/her right (a situation for which the cases of voluntary euthanasia or assisted suicide provide useful illustrations).

Situation		Limits of the obligation to protect		
No choice of the individual right-holder		(i) Budgetary constraints (ii) Unpredictability of human conduct in free societies		(v) Respect for other human rights
Choice of the individual right-holder	In contractual relationships	(iii) Deference to the will expressed by the parties to the contract	(iv) Autonomy of the individual waiving his/her right	
	Through unilateral decisions			

Little needs to be said here about the deference which the State should have for contractual agreements that bring about a restriction to the rights of the individual (argument (iii)). Indeed, there seems to exist a general agreement on two basic propositions. First, the kind of compulsion on the right-holder that a private actor may exercise in contractual relationships differs from that which the State may exercise: as noted by Heilbroner, 'there is a qualitative difference between the power of an institution to wield the knout, to brand, mutilate, deport, chain, imprison, or execute those who defy its will, and the power of an institution to withdraw its support, no matter how life-giving that support may be. Even if we imagined that all capital was directed by a single capitalist, the sentence of starvation that could be passed by his refusal to sell his commodities or to buy labor power differs from the sentence of the king who casts his opponents into a dungeon to starve, because the capitalist has no legal right to forbid his victims from moving elsewhere, or from appealing to the state or other authorities against himself' (R. L. Heilbroner, *The Nature and Logic of Capitalism* (New York and London: W.W. Norton & Co., 1985), at pp. 39–40). Second, however, private compulsion may exercise an equally powerful constraint on the free will of the individual right-holder. In situations where the right-holder is in need and where he/she faces few alternatives (or none at all, as in situations of monopoly or monopsony), in particular, the possibility for the private actor with whom the right-holder interacts to withhold certain goods or services (such as food, life-saving medical treatment, or a waged employment) may in fact lead to a form of coercion equivalent to that at the disposal of the State. In addition, even in situations where 'coercion' is not present and where the right-holder seems to have consented 'freely' to certain restrictions, the State would be justified in seeking to remove certain obstacles to the individual making fully rational choices, for instance because of phenomena of addiction or myopia (i.e. the individual placing his short-term desires above his long-term interests).

Since the rise of large-scale private organizations in the early twentieth century, it is understood that the individual is not necessarily more 'free' (whether or not to submit to certain conditions which another actor seeks to impose on him) in interindividual

(or 'horizontal') relationships, particularly in the sphere of the market, than he is in the ('vertical') relationships with the State (see, in particular, R. L. Hale, 'Force and the State: a Comparison of Political and Economic Compulsion', *Columbia Law Review*, 35 (1935), 149; R. L. Hale, 'Our Equivocal Constitutional Guarantees', *Columbia Law Review*, 39 (1939), 563). It is therefore fitting that human rights courts have generally considered with suspicion the argument that the State should be allowed not to intervene in private contractual relationships, out of respect for the 'free will' embodied in such contracts. On the contrary, they have generally adopted the view that, while the consent of the individual may be *necessary* to justify certain restrictions to his/her rights, such a consent, as expressed in contractual clauses, should never be considered, as such, a *sufficient* justification. It is significant for instance that, in two cases concerning restrictions to the right to respect for private life of employees, the European Court of Human Rights did not satisfy itself with the consideration that the employees concerned must be presumed to have consented to such restrictions as a condition for their employment, but instead examined whether the said restrictions were justified as 'necessary, in a democratic society' (as required under para. 2 of Art. 8 ECHR) to the achievement of the legitimate aims put forward – in the cases concerned, public safety on a vessel or on a nuclear plant (see Eur. Ct. H.R. (1st sect.), decision of 7 November 2002, *Madsen* v. *Denmark*, Appl. No. 58341/00 (inadmissibility); and Eur. Ct. H.R. (4th sect.), decision of 9 March 2004, *Wretlund* v. *Sweden*, Appl. No. 46210/99 (inadmissibility)). Consider also the following example:

European Court of Human Rights (2nd sect.), *Wilson, National Union of Journalists and others v. United Kingdom* (Appl. Nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002:

[The applicants are employees and unions to which they belong. The individual applicants were invited by their employers to sign a personal contract and lose union rights, or accept a lower pay rise. They allege that the law of the United Kingdom, by allowing the employer to de-recognize trade unions, fails to ensure their rights to protect their interests through trade union membership and to freedom of expression, contrary to Articles 11 and 10 of the Convention. In addition, the individual applicants complain that UK law permitted discrimination by employers against trade union members, contrary to Article 14 of the Convention taken in conjunction with Articles 10 and 11.]

41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applicants complain – principally, the employers' de-recognition of the unions for collective-bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions – did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see *Gustafsson* v. *Sweden*, judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996–II, pp. 652–53, §45).

42. The Court reiterates that Article 11 §1 presents trade union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police* v. *Belgium*, judgment of 27 October 1975, Series A No. 19, pp. 17–18, §38, and *Swedish Engine Drivers' Union* v. *Sweden*, judgment of 6 February 1976, Series A No. 20, pp. 14–15, §39). The words 'for the protection of his interests' in Article 11 §1 are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard (see *National Union of Belgian Police*, cited above, p. 18, §§39–40, and *Swedish Engine Drivers' Union*, cited above, pp. 15–16, §§40–41). Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard (see *National Union of Belgian Police*, cited above, pp. 17–18, §§38–39, and *Swedish Engine Drivers' Union*, cited above, pp. 14–15, §§39–40).

43. The Court notes that, at the time of the events complained of by the applicants, United Kingdom law provided for a wholly voluntary system of collective bargaining, with no legal obligation on employers to recognise trade unions for the purposes of collective bargaining. There was, therefore, no remedy in law by which the applicants could prevent the employers in the present case from de-recognising the unions and refusing to renew the collective-bargaining agreements ...

44. However, the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured (see *Swedish Engine Drivers' Union*, cited above, pp. 14–15, §39; *Gustafsson*, cited above, pp. 652–53, §45; and *Schettini and Others* v. *Italy* (dec.), No. 29529/95, 9 November 2000).

45. The Court observes that there were other measures available to the applicant trade unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action 'in contemplation or furtherance of a trade dispute'. The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests (see *Schmidt and Dahlström* v. *Sweden*, judgment of 6 February 1976, Series A No. 21, p. 16, §36 ...). Against this background, the Court does not consider that the absence, under United Kingdom law, of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of Article 11 of the Convention.

46. The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the

employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.

47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords' judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association ... It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.

The more fundamental question which should be raised, and which argument (iv) in the typology presented earlier in this section obliges us to address, is whether there are situations in which the State is under an obligation to respect the autonomy of the individual right-holder, when he/she deliberately chooses not to be protected by the State and, instead, denounces such a protection as paternalistic (for a discussion of this issue, see O. De Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights', *Northern Ireland Legal Quarterly*, 51, No. 3 (2000), 481–508). What makes this question a difficult one conceptually is that essentially the same argument (that the individual should be allowed not to be encumbered by the protection provided by the State) is invoked alternatively by the individual right-holder and by the State, depending on the circumstances. The individual right-holder may seek to invoke, against the paternalistic pretense of the State, a right to

sacrifice her rights against an advantage to which she attaches greater value, for instance a well-paid employment. She may also consider that waiving her right is part of her individual freedom, that the State ought to respect: by seeking to restrict that freedom, she may add, the State is in fact imposing on all the members of society its own conception of the 'good life', in violation of the requirement of moral pluralism. This is, indeed, the core of the anti-paternalistic argument. As to the State, it may justify its failure to protect the enjoyment of a human right by the freedom exercised by the individual right-holder, and it may be tempted to invoke the existence of a right of the individual not to have imposed an unwanted paternalism as a reason for the public authorities to remain passive in the face of certain risks facing the invididual. Both these arguments invoke the idea that the individual should be free to make certain choices, even though they may not be in her best interests. But in the first situation, the individual right-holder will be denouncing the State for wanting to protect too much; in the second situation, the State will be seeking to justify why it has been protecting so little.

In order to see how these arguments relate to one another, we need to examine more carefully how the legal system can address this tension between the autonomy of the individual and the State's obligation to protect. Focusing on the role of waiver as a limit to the State obligation to protect, three positions can be envisaged. (a) A first possibility is that the State is under an obligation to respect the right of the individual not to be protected. This will be the case where a right to 'autonomy' or 'self-determination' is recognized, imposing an obstacle to the adoption by the State of certain measures of protection. (b) A second possibility is that the State is free to restrict the possibility for the individual to waive his rights: while there is no right to 'autonomy' or 'self-determination' as in the first case, nor is the State under an obligation to extend its protection to the individual who chooses, voluntarily, to sacrifice his right, or to accept certain limitations. (c) Finally, a third possibility is that the State has an obligation to protect the individual from waiving his rights. The State is then duty bound to prohibit the possibility of waiver, and to oppose any choice of the individual which would result in him sacrificing his rights. While the existence of an individual's right to 'autonomy' or 'self-determination' per necessity implies that the State will be prohibited from imposing its protection (since the individual would be allowed to invoke her 'autonomy' against what she would see as a form of paternalism), it does not follow from the absence of such a right to 'autonomy' that the State's obligation to protect must necessarily extend to situations where the individual makes the choice to sacrifice his right: this is only one possibility, the other being that the State may choose whether or not to provide such protection. This range of possibilities is presented in the table on the next page.

Unsurprisingly, where the appropriate solution should be located will depend on the specific circumstances of each case, under each human rights instrument concerned. International human rights law remains short of recognizing an individual's general right to sacrifice their human rights, as part of a free-standing 'right to autonomy' or to 'self-determination'. It may be said in this regard that human rights do not generally follow