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Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention on Human Rights: The *Colas Est SA v. France* Approach

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PROTECTION AGAINST UNWARRANTED SEARCHES AND SEIZURES OF CORPORATE PREMISES UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE *COLAS EST SA V. FRANCE* APPROACH

*Marius Emberland**

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INTRODUCTION

In this Article, I consider the judgment delivered April 16, 2002, by the European Court of Human Rights in the case of *Colas Est SA v. France*.¹ The judgment concerned the interpretation of Article 8 of the European Convention on Human Rights (ECHR), which provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²

Colas Est SA, Colas Ouest SA, and Sacer SA—the “applicants” in the jargon of the ECHR—were privately owned, but publicly held, limited liability companies (*sociétés anonymes*) operating in the road construction business in the French districts of Colmar, Mérygnac, and Boulogne-Billancourt.³ In 1985, the applicants, together with fifty-three other companies, were subject to a large-scale investigation carried out by the French Directorate General for Competition, Consumer Affairs, and Repression of Fraud *Direction Générale de la concurrence, de la consommation et de la répression des fraudes* or DGCCRF) to investigate suspicions of unlawful contract practices among large public contractors. Pursuant to the relevant legislation, known as Order No. 45-1484 of June 30, 1945, DGCCRF investigators on two occasions in 1985 conducted coordinated searches and seizures on the premises of all fifty-six companies concerned. Their purpose was to discover and secure documents related to the suspected anticompetitive activities. The

1. *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. (Apr. 16, 2002), at <http://www.echr.coe.int>. Pending publication in *Reports of Judgments and Decisions*, the judgment is available (in French only) exclusively on the Internet. The European Court of Human Rights (“the Court”) is the authoritative supranational arbiter of claims under the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 19, 213 U.N.T.S. 221, 234 [hereinafter ECHR], available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>. For commentary on the case, see John Temple Lang & Cesare Rizza, *The Ste Colas Est and Others v. France Case: European Court of Human Rights Judgment of April 16, 2002*, 23 EUR. COMPETITION L. REV. 413 (2002).

2. ECHR, *supra* note 1, art. 8 (Right to respect for private and family life).

3. *Colas Est*, App. No. 37971/97 at §§ 8–21.

searches and seizures were made without a warrant, as this was not required by the June 30, 1945 Order.⁴

In a decision of October 25, 1989, the French Competition Council found, on the basis of evidence contained in the seized documents, that the applicants had in fact been engaged in unlawful business practices, and ordered Colas Est SA, Colas Ouest SA, and Sacer SA to pay FRF 12,000,000, FRF 4,000,000, and FRF 6,000,000 in fines, respectively. The petitioners challenged the lawfulness of the searches in the Paris Court of Appeals, which, on July 4, 1994, reduced the fines of the first two applicants to FRF 5,000,000 and FRF 3,000,000, respectively, but upheld the fine of the third applicant. Further appeals proved unsuccessful. In its judgment of June 4, 1996, the highest appeals court in France, the *Cour de cassation*, rejected, among other arguments, the companies' contention that searches and seizures without a court-sanctioned warrant violated their right to protection of their "home" as understood in Article 8 of the ECHR.⁵ This final rejection of the companies' assertions of illegitimate exercise of public power constituted the trigger for the filing of an application before the European Court of Human Rights in Strasbourg in which the companies claimed that French authorities, in their handling of the case before domestic courts, had violated their obligations under the European Convention on Human Rights.⁶

In the case, the European Court of Human Rights unanimously held that the right to the protection of one's home, as enshrined in the European Convention on Human Rights, extended to the business premises of the three companies.⁷ The court also held that French authorities had violated the companies' rights under this provision in respect of the searches and seizures conducted in their offices without a court warrant. France

4. This arrangement, incidentally, is not unique among European jurisdictions. In Italy, Austria, Finland, the Netherlands, and Sweden, for instance, prior judicial authorization was not required at the time the European Commission adopted its White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM(99)101 final § 110, where this arrangement was requested as standard procedure.

5. The decisions of the three court instances involved are published in the *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes* for the respective dates of their pronouncement.

6. The (now-defunct) European Commission of Human Rights, acting as the Court's screening organ, found the original application partially admissible. See *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. (Oct. 21, 1998) (on admissibility), at <http://www.echr.coe.int> (in French only).

7. I use terms such as "corporations" and "companies" interchangeably for the sake of convenience. It should be noted, however, that neither term is clear-cut, and they are not synonyms. I refer to "corporations" and "companies" when describing business entities of the type encountered in *Colas Est*, i.e. publicly held but privately owned business entities with limited liability and a presumed overriding for-profit objective.

was ordered to pay compensation to the three companies.⁸ The court, moreover, appears to have accepted the adoption of a two-tiered scheme of protection, according to which the protection of the privacy and home of private individuals is to be interpreted with substantially greater vigor than those protections as applied to juridical persons.

I am obviously mindful of the most important practical consequence of the judgment: the ECHR now requires that public authorities regularly seek a court warrant prior to carrying out investigative measures such as searches and seizures on the premises of companies suspected of taking part in anticompetitive activities. The holding is significant for the framing of the procedural rules according to which the Council of Europe member states' competition authorities carry out their investigative measures: searches and seizures of corporate premises without court warrant may now run counter to the ECHR. The *Colas Est* holding has in this respect marked a watershed also in the framing of the fundamental rights protection of the European Union. Six months after the *Colas Est* judgment was delivered, the European Court of Justice ("ECJ"), the supranational arbiter of private complaints against public authorities implementing the laws and regulations of the European Union, held that the fundamental right to protection of private activity as a general principle of Community law now extended to encompass corporate premises and that searches and seizures on corporate premises must have prior court authorization to be legitimate under EU law.⁹ The ECJ, in reaffirming that "the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law,"¹⁰ took into consideration the developments that had occurred in ECHR case law since it established the general right to protection of private activity in 1989. It made particular mention of the judgment of the European Court of Human Rights in *Colas Est*.¹¹

This aspect of the judgment is not the prime concern here. I am instead interested in the ways in which the *Colas Est* judgment signifies doctrinal trends in the development of the law of the European Convention on Human Rights. The purpose of this Article is twofold. First, I

8. The Court was composed of judges Loucaides (president of the second section, Cyprus), Costa (France), Birsan (Romania), Jungwiert (F.R.G.), Butkevych (Ukraine), Thomassen (Netherlands), and Mularoni (San Marino).

9. Case C-94/00, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, 2002 E.C.R. I-9039 (in French only), available at <http://curia.eu.int/en/content/juris/index.htm> (in English). For commentary on the case, see Christoph Feddersen, *Anmerkung*, 1 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 22 (2003). The case is also mentioned in Section II.C below.

10. *Roquette Frères*, 2002 E.C.R. I-9039, I-9053, ¶ 27.

11. *Id.* at I-9054, ¶ 29.

have sought to make accessible the court's holding in the *Colas Est* case. The decision warrants attention as this was the first time the court in direct terms extended the scope of the right to protection of one's home in ECHR Article 8—a central privacy right under the Convention—to the business premises of juristic persons. It thereby established a possibility under the Convention's privacy provision that private activity in general, and not only the activity and interests of individual human beings, may have a legitimate need for protection against the arbitrary exercise of public power. The judgment deserves attention also because the court, in subscribing to a two-tiered mode of ECHR Article 8 protection in which the privacy interests of non-individual actors are subject to a more lenient standard of judicial review than privacy interests pertaining to individuals, seems to enter another novel area in privacy protection under the ECHR. As the judgment is available in its original French version only, and thus potentially overlooked by a non-French-speaking audience, I believe it is important in its own right to convey the essence of the *Colas Est* case.

Second, I have sought to situate the two novelties of the *Colas Est* decision in their proper doctrinal landscape. I explain how the judgment is a result of the private complaints system under the Convention, which allows for-profit entities to file claims of human rights protection of their own interests before a supranational human rights tribunal principally on the same basis as individuals. I also point to the ways in which the decision, as a landmark in the development of privacy under the Convention, can be rationalized in light of general instruments of adjudication applied by the court in Strasbourg. It has also seemed useful to place the court's decision in a comparative context. The notion of corporate privacy protection might strike observers as peculiar considering the ECHR's status as a human rights treaty. I point out, however, that the protection of corporate premises under a privacy heading is a familiar arrangement in several constitutional regimes, as is—at least to a certain extent—the adoption of a lower-tiered mode of judicial scrutiny of corporate privacy.

I wind up my examination with some prospective thoughts on the *Colas Est* decision's two doctrinal markers. I consider the decision's accommodating view of including corporate actors among those able to seek protection under ECHR Article 8 a welcome aspect of the development of ECHR law. It signifies, I assert, a legal instrument which is in transition in that it draws increasingly on its constitutional rather than its international human rights law heritage.

This Article is organized in the following way. Part I presents and assesses the parties' arguments and the court's reasoning regarding

whether ECHR Article 8 is applicable to the claim at hand. It also places in a comparative landscape the finding that Article 8 protects the business premises of companies. Part II presents and analyzes the court's suggested acknowledgment of a two-tiered protection system in ECHR Article 8 under which corporate premises enjoy less judicial protection than do the homes of individual human beings. It places this rationale, too, in ECHR and comparative perspectives. The Article concludes with the prospective views indicated above.

I. THE APPLICABILITY TEST

Two general questions arise when claims under ECHR Article 8 are brought before the court. They were also central to the court's handling of the *Colas Est* claim. The first issue, which is my concern in the present Part, is this: is Article 8, in principle, applicable to the case? This question—the applicability test—must be resolved through interpretation of Article 8(1), which sets out the rights protected and, if only implicitly by the term “everyone,” those actors entitled to protection under it. The second issue, which turns on the interpretation of ECHR Article 8(2), concerns the appropriate level of protection offered under the provision once it has been found applicable. It is considered separately in Part II below.

As I stated in the Introduction, the court found the *Colas Est* claim admissible and ECHR Article 8(1) applicable to corporate premises. Several reasons justify the court's holding of an extension of the concept of “home” to encompass (at least, in some circumstances) the business premises of companies. Some of them were mentioned explicitly by the court. Others can be justified by reference to solutions adopted in constitutional regimes closely related to the Convention. Before I consider these issues, I pause for a moment on the general right of corporate actors to rely on ECHR standards before the court, and on the ambiguity of ECHR Article 8(1) in respect of these applicants.

A. *The Right to Petition and Companies' Interests: ECHR Article 34*

The controversy surrounding the *Colas Est* decision lies not, it should be emphasized, in the ability of companies in principle to utilize the system for private complaints before the European Court of Human Rights. The right to petition the court is open to individuals and entities alike, regardless of their nature and purpose. ECHR Article 34 on Individual applications states:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.¹²

The case law of the court and the European Commission indicates that a company can be regarded both as a “person” and as a “nongovernmental organization” within the meaning of the provision.

Companies, or in exceptional circumstances, shareholders on their behalf,¹³ and other for-profit entities have made ample use of this opportunity for legal strategizing *vis-à-vis* public authorities on the level of pan-European law.¹⁴ Several hundred judgments by the court to date concern business entities’ claims for human rights protection. The number of complaints never to be considered by the court on their merits is significantly higher.¹⁵ Seen against this background, the *Colas Est* decision does not appear to constitute a controversial or remarkable incident in the development of ECHR law.

B. The Ambiguity of Article 8(1)

The controversy surrounding companies’ claims generally occurs when the court is called to consider which provisions are applicable to the corporate sphere and which are not. Significantly, most ECHR rights and freedoms have the capacity to protect the interests of companies.¹⁶

12. ECHR, *supra* note 1, art. 34.

13. The right to petition is restricted to those private actors whose interests are allegedly violated: the ECHR does not accept the commencement of *actio popularis*. This follows from the requirement in ECHR Article 34 that the “victim” itself has the right to petition. Despite the “victim” requirement inherent in ECHR Article 34, individual shareholders have also, in certain circumstances, been granted *locus standi* to file petitions claiming violations of their interests by measures taken initially against the corporate construct. As such, the corporate veil has not been regarded as impermeable in Strasbourg case law. *See, e.g.*, *Agrotexim v. Greece*, 330 Eur. Ct. H.R. (ser. A) 3, 22–26, §§ 59–72 (1995) (concerning expropriation of brewery; standing for minority shareholders).

14. The first judgment considering a complaint from a company was a freedom of expression case, *Sunday Times v. U.K.*, 30 Eur. Ct. H.R. (ser. A) (1979) (enjoining a newspaper company from publishing articles on issues pending before a court).

15. The number of company-initiated applications filed before the European Commission of Human Rights, the Court’s former screening panel, was also considerable. An early application again involved the *Sunday Times* consortium. *See Sunday Times v. U.K.*, App. No. 6538/74, 2 Eur. Comm’n H.R. Dec. & Rep. 90 (1975) (admissibility). On the structural changes in place since 1998, see Andrew Drzemczewski, *A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol No. 11*, 6 COLLECTED COURSES ACAD. EUR. L. 121 (1995-II).

16. For details and citation of cases, see, for example, Marius Emberland, *Duality and Ambiguity: The Protection of Corporations’ Interests under the European Convention on*

Companies have, for instance, successfully sought protection under due process guarantees and other rights and freedoms generally thought of as central to the rule of law such as the principle of no punishment without law.¹⁷ The protection of private property (Article 1 of the First Protocol to the ECHR) is another right clearly applicable to the corporate sphere; it is the only ECHR provision that explicitly says so.¹⁸ The freedoms of expression (ECHR Article 10) and of organization (ECHR Article 11) are similarly regarded as conventional instruments for the protection of companies' interests.¹⁹ Some ECHR provisions are equally clearly found by their very nature and purpose to be inapplicable to non-natural persons, such as companies. Consequently, there has, but for various reasons, been little principled discussion about the applicability of these provisions to the non-individual (and for-profit) sector. For instance, the prohibition of torture and other forms of serious ill-treatment (ECHR Article 3) is regarded as protecting the sphere of individual human beings only.²⁰ The prohibition against arbitrary deprivation of physical

Human Rights, 2001 NOR. INST. HUM. RTS.: HUM. RTS. REP. 1. Other studies of the corporate aspects of ECHR protection include Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 187 (Michael K. Addo ed., 1999); James Strachan, *The Human Rights Act 1998 and Commercial Law in the United Kingdom*, in COMMERCIAL LAW AND HUMAN RIGHTS 161 (Stephen Bottomley & David Kinley eds., 2002); Nicolas Bratza, *The Implications of the Human Rights Act 1998 for Commercial Practice*, 5 EUR. HUM. RTS. L. REV. 1 (2000); and Jan de Meyer, *Human Rights in a Commercial Context*, 5 HUM. RTS. L.J. 139 (1984).

17. See, e.g., *Tre Traktörer AB v. Swed.*, 159 Eur. Ct. H.R. (ser. A) (1989) (involving limited liability company and its sole shareholder relying, *inter alia*, on the procedural safeguards in ECHR articles 6 and 7 in case concerning revocation of restaurant license subsequent to unlawful tax evasion).

18. Article 1 of the First Protocol to the ECHR provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9 (1991).

19. A typical Article 10 case is *Groppera Radio AG v. Switz.*, 173 Eur. Ct. H.R. (ser. A) (1990). For Article 11 complaints, see, for example, *Stallarholmens Plåtslageri o Ventilation Handelsbolag v. Swed.*, App. No. 12733/87, 66 Eur. Comm'n H.R. Dec. & Rep. 111 (1990).

20. This is generally believed to derive from the European Commission's admissibility decision in *Verein "Kontakt-Information-Therapie" v. Aus.*, App. No. 11921/86, 57 Eur. Comm'n H.R. Dec. & Rep. 81 (1988) (admissibility), which concerned a nonprofit organization rather than a company. The view on inapplicability of Article 3 to legal entities was nevertheless phrased in general terms by the Commission.

liberty in ECHR Article 5 likewise is thought to be restricted by its very nature to protect the interests of individual human beings.²¹

Article 8, the provision under consideration in *Colas Est*, belongs to a category of ECHR provisions around which there is a great deal of uncertainty concerning the extension of scope to the corporate sphere.²² ECHR Article 8 protects four different, but overlapping, privacy rights: the rights to enjoy respect for “private life,” “family life,” “home,” and “correspondence.” These rights are traditionally aimed at protecting typically individual activity. Concepts such as “private and family life” as well as “home” surely make the reader immediately think about activities that are intrinsic to the human being. On the other hand, the provision’s text does not explicitly exclude an extension of protection of private activity to non-individual actors (and its rights are open to the enjoyment of “everyone,” itself an ambiguous term). The scope of the Article, moreover, is sufficiently complex and/or ambiguous to prevent the court from dismissing corporate claims by automatically referring to their intrinsic nature and purpose only: the protection of “correspondence” is, for instance, easily reconcilable with non-individual activity (business entities communicate or correspond as much as do individuals). The “private life” concept inherent in the provision is, besides, traditionally believed to have a broader connotation than the sometimes closely held individualized concept of “privacy” in Anglo-American legal thought.²³ Indeed, the court emphasized in *Niemietz v. Germany* that:

[I]t would be too restrictive to limit the notion [of private life] to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.²⁴

What contributes to the ambiguity of ECHR Article 8 is the scarcity of indications in other sources, such as the Convention’s preparatory

21. *Wouterse v. Neth.*, App. No. 46300/99, Eur. Ct. H.R. (Oct. 1, 2002) (on admissibility), at <http://www.echr.coe.int> is a recent example of two companies claiming protection under Article 5 guarantees. The Court did not need to consider the merits of that part of the claim.

22. In addition to Article 8, these rights include the freedom of conscience and religion in Article 9 and the prohibition against slavery and forced labor in Article 4. A recent example of a company (as well as its individual shareholders) relying, in vain, on Article 4 is *T.W. Computeranimation GmbH v. Aus.*, App. No. 53818/00, Eur. Ct. H.R. (Feb. 6, 2003) (on admissibility), at <http://www.echr.coe.int>.

23. D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 305–06 (1995).

24. *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23, 33–34, § 29 (1992).

works, and even its case law, of the status of corporate privacy under the provision.²⁵

The essential task for the court in *Colas Est*, which concerned applications from actors who were clearly not human but juristic persons, was to weigh the force of the immediate reading of the provision's text ("home") against doctrinal sources and modes which might (or might not) favor an analogous application of the provision to protect the premises of corporate persons, too. When authoritative sources are absent, the general modes of argumentation applied by the European Court of Human Rights, and the viewpoint of the individual judges about the nature and purpose not only of the ECHR but also of private corporate activity, unsurprisingly come into play. Mindful of these considerations, I believe it is conceivable that the court had a doctrinal leeway within which in principle it legitimately could have chosen either conclusion (inapplicability or applicability) as far as the *Colas Est* petition was concerned. It is against this background of ambiguity and wide judicial discretion that the *Colas Est* rationale is best analyzed.

C. The Relevance of Prior Judgments

In determining the applicability of Article 8 to the companies' claims, the court first embarked on a lengthy discussion of prior case law which had dealt with the possibility of privacy protection (under the "private life" as well as "home" headings) in the context of business activities. The court has never found it essential to draw clear distinguishing lines among the four concepts mentioned in ECHR Article 8(1). Neither has it offered exhaustive definitions of the content of the different terms. The court instead approaches Article 8 rights with considerable pragmatism and reason through a case-by-case basis. Sometimes, the court does not even consider it important under which of the four categories of privacy protection it categorizes the case at hand. The fact that *Colas Est* dealt exclusively with the court's interpretation of the concept of "home" does not, therefore, render irrelevant case law relating to the other three privacy rights. In particular, case law relating

25. An introduction to the methodology applied by the Court is found in P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 71-95 (3d ed. 1998). See also F. Matscher, *Methods of Interpretation of the Convention*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 63 (R. St. J. Macdonald et al. eds., 1993).

to “private life” is relevant, as this concept is seen as embracing the three other rights in addition to its own scope.²⁶

The court first considered, and distinguished the present case from, its former judgments in *Miailhe*, *Crémieux*, and *Funke*.²⁷ These judgments had, incidentally, also concerned investigatory measures carried out by French authorities. They did not, however, concern action against corporate premises but searches and seizures of individuals’ homes due to suspected customs offenses committed in relation to the individual applicants’ business activities. The court apparently found it germane to distinguish the present case from these judgments because the petitioners claiming protection in *Colas Est* were doing so not merely in relation to their business activities: they were themselves nonphysical (juristic) persons.²⁸ The accommodating views on applicability adopted in the *Miailhe*, *Crémieux*, and *Funke* cases were consequently of little relevance for the court as far as *Colas Est SA*, *Colas Ouest SA*, and *Sacer SA* were concerned.

Two other judgments were regarded as more relevant vehicles for the court’s subsequent reasoning. *Niemietz v. F.R.G.* dealt with the legitimacy under the Convention of police searches and seizures of a lawyer’s home office for the purpose of obtaining evidence in the criminal case against the lawyer’s client.²⁹ The court in *Niemietz* had found that the individual applicant (the lawyer) enjoyed protection of his “private life” as well as “home” against the investigative measures in question, and eventually held against the German authorities for the manner in which they had been carried out. The court in *Colas Est* also cited its judgment in *Chappell v. U.K.*, in which it found that the right to respect for one’s “home” (as well as “private life”) applied to premises that were used simultaneously as an individual’s residence and as an office for that same individual’s limited liability company.³⁰ That claim related to the intrusiveness of searches carried out by police in relation to a copyright infringement case. To claim that Mr. Chappell could not enjoy protection in his home against searches and seizures carried out in connection with his business activities apparently would have been too formalistic an interpretation of both the “private life” and “home” concepts of the

26. See, e.g., *Niemietz*, 251 Eur. Ct. H.R. (ser. A) at 33–34, §§ 27–31 (considering the individual applicant’s claim under a “private life” and “home” heading in combination without attempting to distinguish the two).

27. *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. § 37 (Apr. 16, 2002), at <http://www.echr.coe.int>. See *Miailhe v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 75 (1993); *Crémieux v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 49 (1993); *Funke v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 7 (1993).

28. *Colas Est*, App. No. 37971/97 at § 40.

29. *Niemietz*, 251 Eur. Ct. H.R. (ser. A) at 33–34, §§ 27–31.

30. *Colas Est*, App. No. 37971/97 at § 40 (citing *Chappell v. U.K.*, 152 Eur. Ct. H.R. (ser. A) 3, 12–13, 26, §§ 26(b), 63 (1989)).

provision, and the court found Article 8 applicable in that judgment without further debate.

Chappell and *Niemietz* are the two judgments of the court that lie closest to the facts in *Colas Est*. The reliance on them as starting points for the court's reasoning was a strong indication that the court would eventually find ECHR Article 8 applicable to the claims filed by *Colas Est SA* and its companion applicants. But reliance on them did not constitute a sufficient justification in the court's view.

D. *The Emphasis on Teleological Interpretation*

The court recalled that in *Niemietz* it had stated that the term "domicile," which is equivalent to the English term "home" in the French authentic version of the Convention, carried broader connotations than its English counterpart and might encompass, at least, the offices of a person exercising a liberal profession.³¹ The ECHR consists of two authentic versions, English and French authoritative texts.³² Although official translations of the treaty exist in the languages of all Council of Europe member states, only the French and English versions bind, and equally so, the court.

When, as in the present case, the court is confronted with versions of a treaty that are equally authentic but not exactly the same, the court "must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty."³³ This principle of interpretation, which derives from Article 33(4) of the Vienna Convention of the Law of Treaties,³⁴ has consistently been applied by the court. In relying on *Niemietz*, the court in *Colas Est* also subscribed to this principle of interpretation.

This mode of interpretation operates in concert with another principle consistently applied by the court, in which the court when interpreting the Convention text places emphasis on effective rather than formalistic interpretation. The principle of effective protection of ECHR rights lies at the heart of the supervisory business of the court.³⁵ It commands that the Convention is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."³⁶ The

31. *Id.* (citing *Niemietz*, 251 Eur. Ct. H.R. (ser. A) at 34, § 30).

32. The final sentence of the ECHR states: "Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic . . ." ECHR, *supra* note 1, at 256.

33. *See Wemhoff v. F.R.G.*, 7 Eur. Ct. H.R. (ser. A) at 9–10, § 8 (1968).

34. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 33, ¶ 4, 1155 U.N.T.S. 331, 340.

35. *See, e.g., HARRIS ET AL.*, *supra* note 23, at 15.

36. *Airey v. Ir.*, 32 Eur. Ct. H.R. (ser. A) at 12, § 24 (1979).

effectiveness principle “means, first of all, that the Court is inclined to look beyond appearances and formalities” and rather focus on realities.³⁷ This reliance on *effet utile* may also “lead the Court to adopt an extensive interpretation of the scope and content of the rights and freedoms of the Convention.”³⁸ In extending the scope of ECHR Article 8 and the protection of “home” to corporate premises, at least in certain circumstances, the court showed a willingness to ignore the formalism of the English term “home” in favor of the pragmatism of everyday judicial business. The principle of effective interpretation was not explicitly relied on by the court save for its reiteration of *Niemietz*’s application of the principle of teleological interpretation. It must nonetheless have had some bearing on the court’s views.

Because of the principles of effectiveness and purposeful interpretation in the Vienna Convention, the court’s approach to interpreting the concept of “home” in ECHR Article 8 shifted logically from formalistic-linguistic niceties (can a company have a “home”?) to a teleological inquiry (what is the purpose of ECHR Article 8’s protection of the “home”?). As far as ECHR Article 8 is concerned, the court has frequently stated that the essential purpose of privacy protection under the Convention is “to protect the individual against arbitrary interference by the public authorities.”³⁹ I now consider the two elements of this stated objective.

The facts presented in *Colas Est* surely meet the second limb of the objective: French investigators entered the companies’ premises without a court warrant (as this was not required by law). Yet, prior judicial authorization of intrusive activities into the private sphere by the executive is a cornerstone of the rule of law on which the legal systems of the Council of Europe build and which is central to the ECHR itself.⁴⁰ Several indicators point to the court’s emphasis on this second limb of the stated objective. The court’s willingness to extend the concept of “home” to corporate premises was influenced by the court’s eventual finding of a violation of the applicants’ privacy rights:⁴¹ the court mentioned particularly, as an argument for finding the provision applicable, the scale of the

37. VAN DIJK & VAN HOOF, *supra* note 25, at 74.

38. *Id.*

39. *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23, 34, § 31 (1992) (quoting *Marckx v. Belg.*, 31 Eur. Ct. H.R. (ser. A) at 15, § 31 (1979)).

40. The fifth recital of the ECHR Preamble makes explicit mention of the rule of law. ECHR, *supra* note 1, pmb1.

41. The combination of the inquiry into the second and first limbs of the provision, entirely conceivable from a practical adjudicatory viewpoint, also finds occasional expression in the Court’s explicit argumentation insofar as it does not by necessity consider them separately. See HARRIS ET AL., *supra* note 23, at 305 (criticizing this mode of inquiry).

investigative measures under scrutiny.⁴² The court, moreover, did not unreservedly extend the scope of ECHR Article 8 privacy protection to corporate premises: its scope was to be interpreted widely only “in certain circumstances” (“*dans certaines circonstances*”). The court did not specify the “circumstances” that actuate corporate privacy protection, but it is fair to draw the conclusion that the measures in question in the *Colas Est* case were exactly such circumstances.

What, then, about the first limb of the overall purpose of protecting rights in ECHR Article 8? *Colas Est SA* and its companion applicants were not “individuals” as the term is consistently applied by the court when referring to the objective of privacy protection. *Niemietz* and *Chappell* concerned, it is true, business premises, too, and that gives these judgments’ rationale some influence when interpreting the provision in the present context. But the contested measures in those cases were carried out on the premises of individual human beings and where those human beings also had their homes. The concern for the individuals in *Niemietz* and *Chappell* was crucial to the court’s finding of extension of “private life” and “home” to the business context in these judgments. Indeed, in *Niemietz*, the court emphasized as a reason for its generous interpretation of “private life” and “home,” the importance to the individual of “the right to establish and develop relationships with other human beings,” even in the business context.⁴³

How could the court extend the stated purpose of Article 8 to encompass the interests of the claimants in the *Colas Est* case? The three applicants in *Colas Est* were *sociétés anonymes*, publicly held limited liability companies that had no direct individual substratum except for the fact that all entities, in the last instance, are composed of human activities. A publicly held company is characterized by its non-individual nature and is distinguished from individual proprietorships, partnerships, and closely held limited liability companies. Its individual substratum is at best remote, both as far as ownership and as far as the needs of other individuals in the company’s organization are concerned. Harris, O’Boyle, and Warbrick stated significantly in 1995 that “some interferences with wholly work premises might be protected against by relying on private life but surely not as an aspect of the right to respect for one’s home.”⁴⁴ Yet, this was exactly what the court did in *Colas Est*. The court essentially widened the scope of privacy protection (as far as “home” was concerned) to be read not as protection of individual activity against

42. *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. § 42 (Apr. 16, 2002), at <http://www.echr.coe.int>.

43. *Niemietz*, 251 Eur. Ct. H.R. (ser. A) at 33, § 29.

44. HARRIS ET AL., *supra* note 23, at 318–19.

arbitrary public action, but more generally as a safeguard of private activity against such forms of intrusion. Herein lies the remarkable innovation in the court's *Colas Est* rationale as far as the applicability test is concerned. How can this move be explained?

E. *The Principle of Dynamic Interpretation and the "Snowball Effect" of ECHR Interpretation*

I see the answer to that question in the next step of the court's reasoning, the principle of dynamic (or evolutive) interpretation.⁴⁵ As the court explained, this principle assumes that the ECHR "is a living instrument, which must be interpreted in light of present-day conditions."⁴⁶ What this principle primarily entails is that the practical extent of ECHR protection is not to be limited by the intentions of the Convention's framers but, rather, is to be interpreted in light of current demands.

It is far from clear what exactly the court refers to when it refers to "present-day conditions." Does it think of present threats to the interests represented by the Convention, which presumably are greater than in 1950 when the Convention was adopted, or does it refer to a higher standard of fundamental rights awareness among its member states, which consequently entails a broader interpretation of the treaty's human rights norms? It is conceivable that the latter meaning of "present-day conditions" was subscribed to by the court. It does not, however, transpire from the judgment how the court perceived the human rights climate in France (or Europe more generally) in 2002 to be fundamentally different than in 1950 as far as the interests of private economic enterprise are concerned. Presumably, however, its underlying justification rests on the general assumption that for-profit activity enjoys greater acceptance today than it did in the aftermath of World War II. This assumption holds particularly true for France, whose private industry was significantly curtailed in the years after 1940. If the court meant to subscribe to the former reading of "present-day conditions," it presumably must have thought that free enterprise in Europe today faces a more rigorous regime of business regulation, particularly in the area of criminal investigation, than it did in 1950. The court did not, however, indicate the validity of this assumption, and it is also difficult to ascertain here.

45. On this interpretative mode, see, for example, Søren C. Prebensen, *Evolutive Interpretation of the European Convention on Human Rights*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE* 1123 (Paul Mahoney et al. eds., 2000); Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 *GERMAN Y.B. INT'L L.* 11 (1999).

46. *Colas Est*, App. No. 37971/97 at § 41. The Court cited *Cossey v. U.K.*, 184 Eur. Ct. H.R. (ser. A) (1990), as authority for the principle, although the doctrine has a longstanding Court case law pedigree.

These questions are, I suggest, at any rate, obsolete instruments for understanding the court's reliance on the principle of dynamic interpretation and thus an evolutionary rather than an originalist meaning of the Convention. The court, rather, subscribed to a fairly new meaning of the principle, or at least a meaning of it which is mainly overlooked by scholarly analyses and, in fact, the court's relevant vocabulary. The court remarked that by virtue of dynamic interpretation it held in *Comingersoll SA v. Portugal* that the scope of ECHR Article 41 (which gives an entitlement to compensation for violations of Convention rights)⁴⁷ encompassed an entitlement for nonphysical persons to receive monetary compensation for non-pecuniary damage.⁴⁸ Bearing in mind this milestone, as well as, the court said, its judgment in *Niemietz*, it considered that "time had come" to acknowledge that, in certain circumstances, the right to have one's "home" respected might include the protection of corporate premises.⁴⁹

What the court is doing here is significant. The court explicitly relied on its holding two years before in its *Comingersoll* judgment, which, on its face, is only remotely relevant for the interpretation of privacy rights in Article 8. That case also concerned the status of a non-individual publicly held limited liability company in relation to court entitlements which traditionally were thought to apply to individual human beings only. More importantly, the court in *Comingersoll* also relied heavily on the principle of dynamic interpretation as an argument for its broad reading of ECHR article 41.⁵⁰

47. Article 41 provides: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." ECHR, *supra* note 1, art. 41.

48. *Comingersoll SA v. Port.*, 2000-IV Eur. Ct. H.R. 355, 365-66, §§ 33-35. I consider the development toward full inclusion of corporate entities under ECHR Article 41 in: Marius Emberland, *Companies' Compensation for Non-Pecuniary Damage: Comingersoll SA v. Portugal Before the European Court of Human Rights and the Ambivalent Expansion of the Convention's Scope*, 2003 BRIT. Y.B. INT'L L. (forthcoming).

49. *Colas Est*, App. No. 37971/97 at § 41 (relying on *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23, 34, § 30 (1992)). In the words of the Court:

Dans le prolongement de l'interprétation dynamique de la Convention, la Cour considère qu'il est temps de reconnaître, dans certaines circonstances, que les droits garantis sous l'angle de l'Article 8 de la Convention peuvent être interprétés comme incluant pour une société, le droit au respect de son siège social, son agence ou ses locaux professionnels.

Id. In other words, considering the principle of dynamic interpretation, the Court believed it was time to acknowledge that in certain circumstances, the privacy rights guaranteed by ECHR Article 8 may be interpreted so as to include a right to protection of the business premises of company applicants.

50. *Comingersoll*, 2000-IV Eur. Ct. H.R. at 366, § 37.

But the court both in *Comingersoll* and in *Colas Est* explained the evolutionary requirement inherent in the principle of dynamic interpretation not by reference to the two alternative readings of the term “present-day conditions” mentioned above. Rather, the evolutionary aspect referred to by the court was the gradual extension of the scope of ECHR rights which it itself had undertaken in previous decisions. Put differently, when referring to the need for dynamic interpretation, the court in *Colas Est* did not, apparently, refer to a climate of heightened fundamental rights awareness in Europe as far as companies’ interests were concerned. Nor did it refer to a climate of more extensive regulation of business activity in Europe. The dynamism relied on was the internal dynamics in the court’s own case law. In short, the court’s reliance on dynamic or evolutive interpretation in *Colas Est*, as in *Comingersoll*, was essentially a subscription to the legitimacy of gradual and case-by-case extension of the Convention’s scope as a form of “snowball effect.”

Although the acceptance of a “snowball effect” mode of dynamic interpretation was restrictedly applied in the court’s emphasis on the extension of privacy protection to corporate premises “in certain circumstances” only, the *Colas Est* case signals a novel way of interpreting ECHR Article 8. As is evidenced by the *Comingersoll* judgment, this view is in line with an emerging trend of Strasbourg jurisprudence which acknowledges a gradual extension of the scope of ECHR guarantees primarily by reference to the successful outcome of previous test cases in other contexts. This is not wholly unproblematic, but it seems to be an inevitable outcome of the ways in which the court approaches “hard cases” of applicability in matters involving companies.

F. Corporate Privacy Protection: A Comparative Outlook

As I have now explained, the seemingly surprising conclusion of the *Colas Est* judgment in extending the concept of “home” to encompass corporate premises is easily understandable when the general modalities of the court’s reasoning are taken into account. Yet, the decision contains novel elements nevertheless. Thus, there is a need, I argue, to present other factors that may legitimize the court’s holding as far as the applicability test is concerned. One such cluster of factors is the solutions adopted in comparable legal regimes.

I depart from the assumption that the European Court of Human Rights, although the superior arbiter of claims arising under one particular human rights treaty, does not interpret the ECHR in a doctrinal vacuum. The law of the ECHR rests on various doctrinal traditions of municipal as well as international law character. The ECHR is alone among the international human rights law treaties on civil and political

rights in offering procedural as well as substantive human rights protection for actors other than individual human beings.⁵¹ There is, therefore, little inspiration to be drawn from comparable treaty systems for human rights protection. It is, however, conceivable that the court in *Colas Est*, without saying so explicitly, was inspired by the construction of corporate privacy as a fundamental right being developed in constitutional regimes that generally influence fundamental rights discourse. I examine three such systems here.

1. The European Union

The European Union (“EU”), the Council of Europe’s rival interstate organization in Europe, acknowledges human or fundamental rights as part and parcel of its general principles of law. These fundamental rights are binding on the organs of the EU as well as on the organs of EU member states in implementing the EU regulatory framework. The fundamental rights principles are court-made law, established by the ECJ (ECJ) and, in more recent years, its Court of First Instance. The Luxembourg courts cannot adjudicate directly on the basis of the ECHR, as the ECHR is not incorporated as EU law,⁵² although its standards are mentioned in Article 6(2) of the Treaty on European Union.⁵³ But in developing their general principles of a fundamental rights character, the Luxembourg courts draw in part on the heritage of the European Convention on Human Rights, Article 8 included.⁵⁴ Natural as well as juridical persons can initiate proceedings in the Luxembourg courts and rely on fundamental rights norms as part of their claim against the exercise of public power.⁵⁵ As the EU fundamental rights norms are regarded

51. I discuss the extent to which companies and their shareholders are protected by the ECHR’s two closest siblings on the international legal plane in: Marius Emberland, *Companies and Shareholders Before the Human Rights Committee and the Inter-American Court and Commission of Human Rights*, Jean Monnet Working Paper (forthcoming 2003), at <http://www.jeanmonnetprogram.org/papers/papers03.html>.

52. Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, 2001 E.C.R. II-729, II-753–54, ¶ 59. See also Wolfgang Peukert, *The Importance of the European Convention on Human Rights for the European Union*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE*, *supra* note 45, at 1107.

53. CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Nov. 10, 1997, art. 6, ¶ 2, O.J. (C 340) 145, 153 (1997), as amended by TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM], available at http://europa.eu.int/eur-lex/en/search/treaties_founding.html.

54. This indirect influence is structurally similar to the Luxembourg courts’ reliance on the nonbinding Charter of Fundamental Rights of the European Union, Dec. 18, 2000, pmbll., O.J. (C 364) 1, 8 (2000), available at http://www.europarl.eu.int/charter/pdf/text_en.pdf.

55. See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 230, para. 4, O.J. (C 340) 173, 272 (1997), as amended by the TREATY OF AMSTERDAM, *supra* note 53. On private parties’ ability to seize the courts, see, for

as vehicles for market integration in a much more obvious way than are the norms of the ECHR,⁵⁶ and EU norms traditionally subscribe to a belief in the importance of facilitating free and private enterprise, it comes as no surprise that companies have occasionally sought the Luxembourg courts' determination of the extent of privacy protection of corporate premises against public organs' investigatory measures comparable to those encountered in *Colas Est*.

The ECJ established in its *Hoechst AG v. Commission* holding of 1989, and two companion cases, that corporate privacy protection was considered a fundamental principle of Community law.⁵⁷ The cases concerned the carrying out by European Commission officials of searches and seizures of the offices of three publicly held limited liability companies. The companies, all involved in the polyvinyl chloride and polyethylene business, were suspected of unlawful agreements with respect to fixing of prices and delivery quotas for such products.⁵⁸ The facts of the cases were, in other words, fairly similar to those of *Colas Est*. The ECJ stated that there was a general principle of Community law that "any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and . . . provide . . . protection against arbitrary or disproportionate intervention."⁵⁹ The court

example, ALBERTINA ALBORS-LLORENS, PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES (1996); ANGELA WARD, JUDICIAL REVIEW AND THE RIGHTS OF PRIVATE PARTIES IN EC LAW (2000). More specifically, see also John D. Cooke, *Locus Standi of Private Parties Under Article 173(4)*, 6 IR. J. EUR. L. 4 (1997); Paul Craig, *Legality, Standing, and Substantive Review in Community Law*, 14 OXFORD J. LEGAL STUD. 507 (1994). However, the action subject to human rights litigation under the Charter of Fundamental Rights is markedly narrower within the EU framework than under the ECHR, as only the implementation of Community measures can be challenged. The standing requirements contained in Article 230(4) of the Treaty on European Union are also interpreted more narrowly than those contained in Article 34 of the ECHR. For a recent overview of the requirements, see H.C. Röhl, *Die anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV*, 60 HEIDELBERG J. INT'L L. 331 (2000). See also Anthony Arnall, *Private Applicants and the Action for Annulment Since Codorniu*, 38 COMMON MKT. L. REV. 7 (2001).

56. See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 102-29 (1999).

57. Joined Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859; Case 85/87, *Dow Benelux NV v. Commission*, 1989 E.C.R. 3137; Joined Cases 97-99/87, *Dow Chem. Ibérica SA v. Commission*, 1989 E.C.R. 3165.

58. For commentary on the cases, see R.K. Lauwaars, *Annotation, Joined Cases 46/87 and 227/88, Hoechst A.G. v. Commission, Judgment of 21 September 1989; Case 85/87, Dow Benelux NV v. Commission, Judgment of 17 October 1989; Joined Cases 97-99/87, Dow Chemical Ibérica S.A. et al. v. Commission, Judgment of 17 October 1989; not yet reported*, 27 COMMON MKT. L. REV. 355 (1990); Josephine Shaw, *The Common Market: Competition and Industrial Property*, 15 EUR. L. REV. 326 (1990).

59. *Hoechst*, 1989 E.C.R. at 2924, ¶ 19. The rationale was reiterated in *Dow Benelux*, 1989 E.C.R. at 3157, ¶ 30, and *Dow Chem. Ibérica*, 1989 E.C.R. at 3186, ¶ 16.

simultaneously stressed, however, that this was not the same as saying that there existed a general fundamental right concerning the inviolability of the business premises of legal persons. The court conceded that individuals had a fundamental right to inviolability of their homes, but an extension of this principle to encompass corporate premises did not necessarily follow from this conclusion. The court, in making this distinction, relied on ECHR Article 8, whose protective scope, the ECJ considered, "is concerned with the development of man's personal freedom and may not therefore be extended to business premises."⁶⁰ The longstanding prevalence of the ECJ's narrow interpretation of ECHR Article 8 is considered in more detail in Part II below. For the time being I rest assured that the EU fundamental rights regime offers considerable protection of corporate privacy, including, in principle, the protection of business premises against certain searches and seizures.

2. The United States

The analog to ECHR Article 8's protection of "home" in U.S. constitutional law is found in the Fourth Amendment to the United States Constitution. The provision provides that "the right of the people to be secure in their persons, houses, papers, and effects" shall not be violated.⁶¹

The U.S. Supreme Court has for a long time accepted that corporations are understood as belonging to the category "people" to which the Fourth Amendment refers and that their business premises are regarded as "houses" within the meaning of the same provision. In *Hale v. Henkel*, the U.S. Supreme Court was called upon to consider the extension of constitutional protection against unreasonable searches and seizures to corporate premises in a case which concerned investigative measures against suspected price fixing in the tobacco industry.⁶² The majority of the Justices considered that such a right existed. Since 1906, the principle of this holding has not been seriously contested.

What has been the subject of some controversy, however, is how the rationale is justified. In *Hale*, Justice Brown argued for the Court. "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."⁶³ The Court, in other words, relied on a particular theory

60. *Hoechst*, 1989 E.C.R. at 2924, ¶ 18. The European Court of Justice (ECJ) added that there was no ECHR case law supporting a claim for protection of corporate premises. The judgment was delivered prior to *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23 (1992).

61. U.S. CONST. amend. IV.

62. *Hale v. Henkel*, 201 U.S. 43 (1906).

63. *Id.* at 76.

which justifies juristic personhood—the aggregate theory—which sees the individual human being’s presence in the corporate structure as significant for the extension of fundamental rights to corporate persons. This is unsurprising, as the theoretical discussions of how corporate personhood could be legitimized were very much in vogue at the time.

The rationale has been explained on other grounds, as well. In a judgment delivered prior to *Hale*, the Court had stated that the Fourth Amendment as well as the Fifth Amendment forbid “the invasion of [the] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by . . . conviction of some public offence.”⁶⁴ The emphasis on a property-rights justification for the protection of privacy (and home) had been seen as an additional argument for the acknowledgment of constitutional protection against arbitrary searches and seizures of corporate premises under the Fifth Amendment.⁶⁵ More recently, the rationale of corporate premises protection under the Fifth Amendment has been explained primarily by relying on the purpose of the provision as a safeguard against arbitrary and excessive public interference with private affairs.⁶⁶ This teleological aspect bears considerable similarity to the justification offered, in part, by the European Court of Human Rights in *Colas Est*.

3. Germany

The German federal constitution’s protection of privacy offers another system comparable to that adopted by the European Court of Human Rights in *Colas Est*.⁶⁷ As translated into English, Article 13 (defining “home”) of the German *Grundgesetz* (Basic Law or Constitution) of 1949 provides:

- (1) The home is inviolable.
- (2) Searches may be ordered only by a judge or, in the event of danger resulting from any delay, by other organs legally specified, and they may be carried out only in the form prescribed by law.

64. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

65. *See, e.g.*, Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 820 (1996).

66. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311–12 (1978).

67. For accounts in English of German constitutional rights protection, see SABINE MICHALOWSKI & LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* (1999); MAIN PRINCIPLES OF THE GERMAN BASIC LAW: THE CONTRIBUTIONS OF THE FEDERAL REPUBLIC OF GERMANY TO THE FIRST WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW (Christian Starck ed., 1983).

(3) If specific facts lead to the assumption that someone has committed a very grave crime, technical means of eavesdropping in homes where that person probably stays may be ordered by court if the investigation by other means would be unproportionally obstructed or without chance of success. The measure has to be limited. The order is issued by a court of three justices. In the event of danger resulting from any delay, the order can be issued by a single judge.⁶⁸

The provision was primarily intended as a safeguard for the home of individuals, an intention which also follows clearly from the wording of the German text (“*Wohnung*”). The normative starting point for inquiries into its extension is that the provision derives its primary legitimacy from the individual’s inherent worth and his or her need for free personal development in an elementary space of autonomy.⁶⁹ The provision is in this respect similar to the majority of fundamental rights provisions in the *Grundgesetz*. Article 19(3) of the *Grundgesetz*, however, permits the extension of constitutional rights protection to juristic persons, companies included, provided that the nature of the right in question makes this extension possible.⁷⁰

68. GRUNDGESETZ [GG] [Constitution] art. 13 (F.R.G.), translated in THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (MAY 23, 1949) 23–24 (Axel Tschentscher trans., 2003) [hereinafter Tschentscher]. The Article 13 in the German text reads:

(1) Die Wohnung ist unverletzlich.

(2) Durchsuchungen dürfen nur durch den Richter, bei Gefahr im Verzuge auch durch die in den Gesetzen vorgesehenen anderen Organe angeordnet und nur in der dort vorgeschriebenen Form durchgeführt werden.

(3) Begründen bestimmte Tatsachen den Verdacht, daß jemand eine durch Gesetz einzeln bestimmte besonders schwere Straftat begangen hat, so dürfen zur Verfolgung der Tat auf Grund richterlicher Anordnung technische Mittel zur akustischen Überwachung von Wohnungen, in denen der Beschuldigte sich vermutlich aufhält, eingesetzt werden, wenn die Erforschung des Sachverhalts auf andere Weise unverhältnismäßig erschwert oder aussichtslos wäre. Die Maßnahme ist zu befristen. Die Anordnung erfolgt durch einen mit drei Richtern besetzten Spruchkörper. Bei Gefahr im Verzuge kann sie auch durch einen einzelnen Richter getroffen werden.

Id. art. 13.

69. See HERBERT BETHGE, DIE GRUNDRECHTSBERECHTIGUNG JURISTISCHER PERSONEN NACH ART. 19 ABS. 3 GRUNDGESETZ [THE ENTITLEMENT OF JURISTIC PERSONS TO FUNDAMENTAL RIGHTS UNDER ARTICLE 19] 76-77 (1985).

70. Article 19(3) provides: “Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.” GG art. 19, ¶ 3. Somewhat inaccurately translated in Tschentscher, *supra* note 66, at 27, as “Basic rights also apply to domestic corporations to the extent that the nature of such rights permits.” It is clear that companies are regarded as “juristic persons” within the meaning of GG Article 19(3). For German judgments concerning publicly held limited liability companies (*Aktiengesellschaft* or AG),

The *Bundesverfassungsgericht*, the federal constitutional court, has established that Article 13(1), governing protection of the “home,” extends so as to encompass the business premises of companies. This interpretation was originally laid down in 1971 in a case which concerned a petition from the proprietor of a closely held cleaning service against the lawfulness of standard government inspections of his company’s premises. In that decision the court held that the term “*Wohnung*” should be widely interpreted so as to include working places and business and trading premises.⁷¹ The judgment did not concern searches and seizures as those conducted in *Colas Est*. Neither did it relate to business premises of publicly held limited liability companies such as the *Colas Est* petitioners. But the constitutional court phrased its rationale in general terms, and it has been found applicable in other business entities’ complaints in subsequent decisions.⁷² There is, therefore, no doubt that Article 13(1) of the German Constitution applies to business premises in the same way that ECHR Article 8 does after *Colas Est*.⁷³

The court marshaled several arguments in justifying its stance. One significant factor was tradition: German courts had for more than one hundred years interpreted similar constitutional provisions (federal and state) as covering business premises along with individual homes, and the drafters of the 1949 Constitution knowingly wanted to include this jurisprudential heritage in the new constitution.⁷⁴ Such wide interpretation, the court argued, was also known in several foreign constitutions.⁷⁵ It was also the only interpretative solution which would be reconcilable with another constitutional interpretation, notably to include free enterprise as part and parcel of the right to individual freedom in Article 2 of the *Grundgesetz*.⁷⁶ It has also been argued, although this is not found in the decision itself, that a different solution would be discriminatory: it

see the following decisions by the Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] (F.R.G.): BVerfGE 23, 208 (223); BVerfGE 29, 260 (265–66). For judgments concerning privately held limited liability companies (*Gesellschaft mit beschränkter Haftung* or GmbH), see BVerfGE 3, 359 (363); BVerfGE 4, 7 (12); BVerfGE 10, 200 (215); BVerfGE 20, 323 (336); BVerfGE 21, 261 (278); BVerfGE 30, 292 (304, 312).

71. BVerfGE 32, 54 (68–69).

72. See BVerfGE 42, 212 (219) (concerning the extension of the provision to the premises of a limited partnership (*Kommanditgesellschaft*)); BVerfGE 76, 83 (88) (to the premises of a GmbH).

73. See, e.g., Matthias Herdegen, *Artikel 13*, in *BONNER KOMMENTAR ZUM GRUNDGESETZ* §§ 30–35, 39–40 (Rudolf Dolzer et al. eds., 1993); Theodor Maunz & Hans-Jürgen Papier, *Artikel 13*, in *GRUNDGESETZ KOMMENTAR* §§ 10–18 (Theodor Maunz & Günter Dürig eds., 1999).

74. BVerfGE 32, 54 (69–71). See also Gilbert Gornig, *Artikel 13*, in 1 *DAS BONNER GRUNDGESETZ* 1558, 1578 (Hermann von Mangoldt et al. eds., 1999).

75. BVerfGE 32, 54 (70).

76. *Id.* at 70–71.

would run counter to the prohibition against discrimination should, say, a proprietorship consisting of one individual businessman have the right to protection of his premises but not a business set up as a limited liability company.⁷⁷

II. THE APPROPRIATE LEVEL OF PROTECTION

I have so far concentrated on the court's interpretation of the requirement of applicability set out in ECHR Article 8(1). As the court found in favor of the applicant companies' contention that "home" indeed included business premises for the purpose of ECHR protection, it had to consider, as a separate issue, whether Article 8(2) was violated. The main thrust of the argument in the present Part is that the court, as a result of its flexible interpretation of Article 8(1) toward inclusion of corporate premises, had to make amends for its apparent judicial activism. To soothe the sentiments of the respondent state, or, more precisely, to consider the legitimate interests of French authorities in checking on suspected anticompetitive activity, the court had to evoke means that sufficiently signaled that its sweeping interpretation of Article 8(1) did not necessarily entail a corresponding protective mechanism in the facts of the case at hand. The court, in short, implied its adoption of a system of differentiated scrutiny under which corporate premises enjoy a lower degree of protection than do the residences of individual persons. This, too, finds resonance with solutions adopted in comparable constitutional regimes.

A. "Necessity" and the Possibility of a Double Standard

This question relates to the interpretation of Article 8(2) of the Convention. This second inquiry, which in reality concerns the choice of an appropriate level of scrutiny for the actions of national authorities, is resolved through the application of a three-part test, the framework for which is outlined in Article 8(2). For a state's interference with an interest protected under Article 8(1) to be judged legitimate under the Convention, the public interference (in *Colas Est*, the searches and seizures carried out without a court warrant) must, first, have a sufficient basis in national law. Second, it must have been exercised in the pursuit of objectives regarded as legitimate under Article 8(2). Finally, the interference must also be found "necessary in a democratic society."⁷⁸ As

77. Philip Kunig, *Artikel 13*, in 1 GRUNDGESETZ-KOMMENTAR 791, 795-96 (Ingo von Münch & Philip Kunig eds., 4th ed. 1992).

78. For details on this mode of inquiry, see, for example, HARRIS ET AL., *supra* note 23, at 283-355; VAN DIJK & VAN HOOF, *supra* note 25, at 489-540.

only the necessity requirement was of interest in *Colas Est*, the court's handling of the other two requirements is left unanalyzed here.⁷⁹

1. The Discretionary Nature of the Necessity Test: Proportionality and Margin of Appreciation

The necessity test consists further of a bundle of judicial sub-inquiries, with one important aspect being its implicit principle of proportionality. A state's interference with interests protected under Article 8(1) must be deemed a proportionate means for the fulfillment of its stated (and legitimate) objectives. This test entails a complex balancing exercise in which the court enjoys wide judicial discretion.⁸⁰ The court, moreover, has consistently held that it is primarily for national authorities themselves to determine whether their actions have fulfilled the necessity requirement and its implicit proportionality assessment. The court will only supervise the assessment of their determination when it considers it pertinent (that judgment itself depending on an assessment of all elements of the case at hand).⁸¹ This peculiar deference to national authorities, referred to as the "margin of appreciation" doctrine, is the result of the court's invention of a balancing act between national sovereignty considerations and the need for supranational supervision of ECHR norms.⁸²

I am not concerned here with the details of the necessity requirement, nor the general content of its implicit proportionality and margin of appreciation assessments. Suffice it to say that a central consideration

79. *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. §§ 32, 35, 43–44 (Apr. 16, 2002), at <http://www.echr.coe.int>.

80. Scholarly analyses of the second test are plentiful. Particularly instructive comments in English include John Joseph Cremona, *The Proportionality Principle in the Jurisprudence of the European Court of Human Rights*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG* 323 (Ulrich Beyerlin et al. eds., 1995); Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 25, at 125.

81. For detailed studies of the margin of appreciation doctrine under Article 8, see Yutaka Arai, *The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights*, 16 *NETH. Q. HUM. RTS.* 41 (1999); Clare Ovey, *The Margin of Appreciation and Article 8 of the Convention*, 19 *HUM. RTS. L.J.* 10 (1998).

82. On the margin of appreciation doctrine in general scholarly analyses, see Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 240 (1996); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 *INT'L & COMP. L.Q.* 638 (1999); R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 25, at 83; Lord Mackay of Clashfern, *The Margin of Appreciation and the Need for Balance*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE*, *supra* note 45, at 837; Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996).

for the court in its determination of the fulfillment of the necessity requirement, for which the principles of proportionality and margin of appreciation give it considerable discretion, is the extent to which public authorities have acted in ways that imply arbitrariness or intrusiveness.

The French government argued before the court that the level of protection offered to limited liability companies under Article 8's necessity standard should be lower than the level offered to individual applicants. Relying on statements in its *Niemietz* judgment,⁸³ the court considered that juristic persons should not be able to assert a right to protection for commercial premises with the same intensity as individuals could for premises utilized for the exercise of a liberal profession (as was the case in *Niemietz*).⁸⁴ In other words, public authorities, under the necessity test, should be allowed to interfere with the "home" rights of a company to a greater degree than they could with the same rights of individuals. Relying on this more lenient necessity test, the government argued that no violation existed in this case.⁸⁵

The applicants, for their part, argued that the investigative measures taken by the French authorities were disproportionate means for achieving their stated purpose. The state authorities had not, therefore, struck the right balance between ends and means when they entered the offices of the companies and seized documents without a court warrant for the sole objective of discovering an illegal contractual practice. Interestingly, the applicants did not denounce the more lenient standard for corporate privacy protections suggested by the French government. Rather, the applicants sought recourse in the alleged disproportionate nature of the state action, as viewed in light of previous judgments interpreting Article 8 in a business-related context, most notably the *Miailhe*, *Crémieux*, and *Funke* judgments.⁸⁶ The applicants argued that the requirement of necessity remained unfulfilled by the state *regardless* of the possible existence

83. *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23 (1992).

84. In the words of the judgment, the government:

souligne que si la Cour a précisé que le domicile professionnel bénéficiait de la protection énoncée par l'Article 8, il s'agissait cependant, à chaque fois, de locaux dans lesquels une personne physique exerçait son activité. S'appuyant sur l'arrêt *Niemietz*, il considère qu'en l'espèce, s'agissant des locaux professionnels des requérantes, des sociétés anonymes, l'ingérence pouvait "fort bien aller plus loin." Il soutient que si les personnes morales peuvent se voir reconnaître, au sens de la Convention, des droits similaires, à ceux reconnus aux personnes physiques, pour autant, les premières ne sauraient revendiquer un droit à la protection des locaux commerciaux avec la même intensité qu'un individu pour son domicile professionnel.

Colas Est, App. No. 37971/97 at § 30.

85. *Id.* § 34.

86. *Id.* §§ 35–37.

of a lower-tiered scheme of privacy protections for companies.⁸⁷ They maintained, further, that the more lenient scrutiny test at any rate should not be applied in their case, as the documents which had been seized by the government contained personal details about their employees, as well as ordinary commercial information.⁸⁸ Thus, the applicants also seemed to rely on an implicit requirement in Article 8 of a certain nexus between the protection of privacy generally and the activities of natural persons.

2. The Court's Evasive Stance

It seems evident that the outcome of the balancing exercise inherent in this test would depend on the acceptance by the court of a lower-tiered scheme of privacy protections for corporate premises. However, by referring to the respondent state's contention for such a doctrine (to which the companies implicitly had acceded) at the beginning of its proportionality assessment,⁸⁹ the court appears to have dodged a general conclusion on the possible existence of a double standard. The court in fact recalled that the exceptions outlined in Article 8(2) are to be narrowly interpreted,⁹⁰ and that any degree of necessity must be established in a convincing manner to be so exempted.⁹¹

Relying on statements in its judgments in *Funke*, *Crémieux*, and *Mialhe*, the court found that, in order to fall within the exceptions outlined in Article 8(2), measures of the sort taken against the three applicant corporations must be grounded in a combination of legislation and state practice which offers adequate guarantees against abuse of such measures. Due to both the nature of the original legislation and its interpretation in practice, the court found that such guarantees were lacking in the present case. The measures themselves had been rather too sweeping. Most importantly, no court warrant had been required. This removed the possibility of judicial oversight of the measures in question.⁹² The court therefore concluded that *even supposing* that the right of public authorities to interfere with protected interests was more extensive in relation to the premises of juristic, rather than natural, persons, the

87. *Id.* §§ 35–38.

88. *Id.* § 38.

89. *Id.* § 42.

90. This is a general principle of interpretation of the requirements for legitimate interferences under ECHR Article 8.

91. *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. § 47 (Apr. 16, 2002), at <http://www.echr.coe.int> (relying on *Klass v. F.R.G.*, 28 Eur. Ct. H.R. (ser. A) at 21, § 42 (1978); *Funke v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 7, 24, § 55 (1993); *Crémieux v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 49, 62, § 39 (1993); and *Mialhe v. Fr.*, 256 Eur. Ct. H.R. (ser. A) 75, 89, § 36 (1993)).

92. *Colas Est*, App. No. 37971/97 § 48.

French authorities had violated the Article 8 right of the three applicant companies.⁹³

Although the court avoided direct discussion of the two-tiered scheme of privacy protections under Article 8—it apparently did not think it a crucial question for the outcome of the case—it seems nonetheless true that the court was willing to admit a lower standard of protection for the privacy of corporate premises. How did the court come to this conclusion? This is the question to which I now turn. I start by placing it in the context of ECHR law. Thereafter, I seek to explain it by casting a glance at solutions adopted in comparable constitutional regimes.

B. *The Double Standard in the Context of ECHR Law*

One possible explanation for the adoption of a double standard is that it fits with Convention law with respect to certain other provisions as far as companies' interests are concerned. In general, ECHR case law does not appear to consider companies' claims for protection discriminatorily to the detriment of the corporate sphere. More often than not companies' interests seem to be safeguarded subject to a standard of judicial scrutiny similar to that applicable to individual human beings. Comprehensive analyses of decisions involving companies (or other business entities for that matter) undertaken for the purpose of this Article do not suggest that companies' claims generally are considered discriminatorily in this manner. Corporations enjoy, for instance, a similar level and range of protection under the due process clause in ECHR Article 6 as do individuals. Similarly, there is no evidence that companies are subject to a system of differentiated scrutiny under Article 1 of the First Protocol to the ECHR (the right to property).

The court has, however, in one other context—freedom of expression—developed a two-tiered rationale pursuant to which commercial expression (by individuals and companies alike) is scrutinized according to a more lenient standard of supranational judicial review than other forms of speech protected by ECHR article 10. In *markt intern Verlag GmbH v. Germany*, the court majority found that domestic authorities'

93. In the words of the Court itself:

Dans ces circonstances, à supposer que le droit d'ingérence puisse aller plus loin pour les locaux commerciaux d'une personne morale (voir *mutatis mutandis* arrêt Niemietz c. Allemagne . . . § 31), la Cour considère, eu égard aux modalités décrites plus haut, que les opérations litigieuses menées dans le domaine de la concurrence ne sauraient passer comme étroitement proportionnées aux buts légitimes recherchés.

Id. § 49.

margin of appreciation assessment under Article 10(2)'s necessity requirement—a requirement similar to that in Article 8(2)—was *wider* in respect of commercial expression because such activity concerned economic activity. In an area as complex as economic activity, the majority argued, public authorities should be granted a wider discretion to assess for themselves whether they were in compliance with the provision in article 10. In the words of the majority:

The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it, even those given by an independent court Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.⁹⁴

The minority in *markt intern* explicitly denounced the adoption of a lower standard of scrutiny for economic activity protected by Article 10. Their view is a powerful one, as the case was decided by a 10–9 vote with the swing vote cast by the president of the court. The minority found the reasoning of the majority “a cause for serious concern” and stated that: “[i]t is just as important to guarantee the freedom of expression in relation to the practices of a commercial undertaking as it is in relation to the conduct of [for instance] a head of government.”⁹⁵ The lower standard remains, however, the binding norm on article 10 interpretation in the economic and commercial context.⁹⁶

The *markt intern* rationale is not entirely clear as to the reasons for a lower standard of protection for commercial activity. The majority pointed to the “complex and fluctuating” nature of competition issues, an argument which could easily be interpreted as restricted only to such forms of competition regulation as were at stake in that case.⁹⁷ The ra-

94. *markt intern Verlag GmbH v. F.R.G.*, 165 Eur. Ct. H.R. (ser. A) at 19–20, § 33 (1989).

95. *Id.* at 23–24 (joint dissenting opinion).

96. *See VgT Verein gegen Tierfabriken v. Switz.*, 2001-VI Eur. Ct. H.R. 243, 264, § 69.

97. The Court, however, has generally labeled all forms of economic activity as “complex and fluctuating” and consequently susceptible of a wider national margin of appreciation. *See id.* (referring to advertising in these terms).

tionale, however, has been interpreted in retrospect as a principle under which the court admits that the regulation of economic activity is a sufficiently important aspect of public authorities' governance as to render a lower standard of scrutiny acceptable. Another possible explanation is that commercial speech lies farther away from that which is regarded as the essential purposes of free speech (the discursive process toward truth, a foundation for democracy, and the development of the individual self) than do other forms of expression (in particular, political views).⁹⁸

Although one should be cautious about analogizing from the free speech context, I believe nevertheless that both of these factors—the sovereign state's legitimate need for control over economic activity and economic activity's remoteness from the essential purpose of certain ECHR provisions—may explain the court's willingness to adopt a double standard also under ECHR Article 8. It is probably that the closer a complaint lies to the heart of the purpose of a provision, the less likely the court will subject it to scrutiny on the basis of a double standard. I stated above that the essential purpose of the protection of a "home" in ECHR Article 8 was to protect individuals from arbitrary public power and that the claim of *Colas Est SA* and its companion applicants fitted that purpose only in part. The fact that the *Colas Est* claim was deemed to lie farther away from the core of the provision than, say, individuals' claim for inviolability of their personal home may suffice as an explanation for the court's willingness to adopt a lower standard of scrutiny of such claims. It might also be, however, that the court accepts that national authorities have a legitimate need to carry out investigatory measures of business premises given the inherently economic activity occurring on them.

It must at the same time be recalled that the double standard for commercial expression in ECHR Article 10 has been criticized by commentators time and again.⁹⁹ Recent judgments even acknowledge that it is inherently difficult to distinguish between various categories of speech. In *VgT Verein gegen Tierfabriken v. Switzerland*, the court thus accepted that commercial advertising sometimes takes on political overtones and, consequently, that such expression is removed from a lower standard of scrutiny.¹⁰⁰ The adoption of a double standard on principle, therefore, is not necessarily best reconcilable with the direction in which the court's general jurisprudence might go in the future. For the time

98. Few commentators have analyzed the *markt intern* rationale extensively. These possible explanations are therefore suggested reasons only. See generally de Meyer, *supra* note 16.

99. See, e.g., HARRIS ET AL., *supra* note 23, at 402–06 (calling the rationale "remarkable").

100. *VgT Verein*, 2001-VI Eur. Ct. H.R. at 264, § 70.

being, however, the law of the Convention is not wholly unfamiliar with a system of differentiated scrutiny, as the cases of *markt intern*, *Colas Est* and *Niemietz* clearly suggest.

C. The Solutions Adopted in Comparable Legal Regimes

From a comparative viewpoint a lower standard of scrutiny for corporate premises is fairly common. This, too, may explain the court's implicit acceptance of a double standard under ECHR Article 8.

1. The European Union

As was previously mentioned, there exists a fundamental right to carry out private activity in the legal order of the European Union, as established by the ECJ in *Hoechst AG v. Commission* and its two companion cases. Is this fundamental principle interpreted in a way similar to the *Colas Est* decision's possible adoption of a lower-tiered standard of scrutiny for corporate premises?

This question remained unresolved for a long time. The ECJ said little if anything about the possibility of a lower standard of protection of corporate activity in the privacy context as a fundamental principle of EU law. The attention of the ECJ was, rather, on the extent to which the fundamental right to private activity is to be interpreted according to safeguards similar to those inherent in ECHR Article 8(2) and, more particularly, on whether the fundamental right to private activity also mandates that investigations carried out on corporate premises presuppose a court warrant. In *Hoechst*, the ECJ stated that there were no indications that ECHR Article 8 could be interpreted in a manner that supported the company claimant's assertion of protection of its premises. The narrow *Hoechst* interpretation of ECHR Article 8, which was delivered prior to the European Court of Human Rights delivered its judgment in *Niemietz*, would at least entail the possibility that no court warrant was required under EU law as long as the court in Strasbourg did not explicitly require it in its interpretation of ECHR Article 8.

The *Hoechst* rationale on a narrow, individualized reading of ECHR Article 8 was reiterated as late as 1999, when the Court of First Instance in its initial consideration of a claim similar to *Hoechst* in *Limburgse Vinyl Maatschappij NV v. Commission* did not consider it relevant for the scope of privacy protection on corporate premises that the European Court of Human Rights had seemingly tightened its judicial scrutiny of searches and seizures in the business context subsequent to *Hoechst*.¹⁰¹

101. Joined Cases T-305, 306, 307, 313, 314, 315, 316, 318, 325, 328, 329 & 335/94, *Limburgse Vinyl Maatschappij NV v. Commission*, 1999 E.C.R. II-931, II-1056, ¶ 420. The case concerned facts comparable to those of *Hoechst*. The judgment of the Court of First In-

The Court of First Instance thereby effectively dismissed the existence in EU fundamental rights law of a necessity requirement and proportionality requirement like those required under ECHR Article 8(2) as additional safeguards to the requirements provided for by the ECJ in *Hoechst* (basis in law, no arbitrariness, and no excessive measures).¹⁰²

The Luxembourg courts operate within a different structural framework than does the European Court of Human Rights. One should be careful not to ascribe the differences in their construction of ECHR Article 8 simply to a blatant clash of opinions as to its content. There was, nevertheless, general agreement among commentators that the Luxembourg and Strasbourg courts came to take different courses in the area of Article 8 interpretation in the period from the delivery of the Strasbourg court's *Niemietz* and *Chappell* judgments until very recently.¹⁰³ The Luxembourg and Strasbourg courts engage, however, in a discourse of mutual exchange and inspiration. It is not unusual for the two sets of courts to cite each other's judgments, and they by and large agree on their interpretation of the ECHR.¹⁰⁴

stance was appealed, and the ECJ holding of the case is considered below. For commentary on the case, see, for example, Rostane Mehdi, *Institutions et ordre juridique communautaire [Community Institutions and Judicial Order]*, 127 JOURNAL DU DROIT INTERNATIONAL 436, 445 (2000); Peter R. Willis, "You Have the Right To Remain Silent . . ." or Do You? *The Privilege Against Self-Incrimination Following Mannesmannröhren-Werke and Other Recent Decisions*, 22 EUR. COMPETITION L. REV. 313 (2001).

102. In its judgment of October 15, 2002, the ECJ did not find it necessary to clarify whether the *Niemietz* holding would or would not have a direct impact on the development of the *Hoechst* rationale. Joined Cases C-238, 244, 245, 247, 250, 251, 252 & 254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) v. Commission*, 2002 E.C.R. I-8375 (concerning various investigations at the premises of the companies involved) (in French only), available at <http://curia.eu.int/en/content/juris/index.htm> (in English).

103. See, e.g., Georg Ress, *Menschenrechte, europäisches Gemeinschaftsrecht und nationales Verfassungsrecht*, in STAAT UND RECHT: FESTSCHRIFT FÜR GÜNTHER WINKLER 897, 917 (Herbert Haller et al. eds., 1997); Georg Ress & Jörg Ukrow, *Neue Aspekte des Grundrechtsschutzes in der Europäischen Gemeinschaft: Anmerkungen zum Hoechst-Urteil des EuGH*, 1 EUROPÄISCHES ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 499 (1990); see also Alan Riley, *The ECHR Implications of the Investigative Provisions of the Draft Competition Regulation*, 51 INT'L & COMP. L.Q. 55 (2002).

104. See, e.g., Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE 219, 236 (Rick Lawson & Matthijs de Blois eds., 1994); Jean-Pierre Puissochet, *La Cour européenne des droits de l'homme, la Cour de justice des Communautés européennes et la protection des droits de l'homme [The European Court of Human Rights, the Court of Justice of the European Communities, and the Protection of Human Rights]*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE, *supra* note 45, at 1139; Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in THE EU AND HUMAN RIGHTS 757 (Philip Alston ed., 1999); Hans Christian Krüger & Jörg Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe: The European Convention on Human Rights and the EU Charter of Fundamental Rights*, 22 HUM. RTS. L.J. 1, 6-8 (2001); Catherine Turner, *Human Rights Protection in the European Community: Resolving Conflict*

Since the European Court of Human Rights delivered its judgment in *Colas Est*, the ECJ, too, has reconsidered its view on corporate privacy. Partly inspired by the *Colas Est* rationale, the ECJ today holds that corporate privacy in the form as that presented in *Colas Est* is part of the fundamental rights principles of European Union law. In *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, the ECJ had been asked by the French *Cour de cassation* to make a preliminary ruling on the extent to which the *Niemietz* judgment had in fact overturned or amended the *Hoechst* rationale in requiring court orders for searches and seizures also of corporate premises under Community fundamental rights law.¹⁰⁵ In its judgment of October 22, 2002, the ECJ, in reaffirming that “the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law,”¹⁰⁶ took into consideration the developments that had occurred in ECHR case law since the *Hoechst* decision, in particular the judgment in *Colas Est*.¹⁰⁷ The ECJ also concluded that there existed in theory under Community law a principle that required judicial review by national courts prior to the undertaking of searches and seizures also of corporate premises.¹⁰⁸

Significant in *Roquette Frères* was the ECJ’s confirmation of the double standard implied by the European Court of Human Rights in *Colas Est*. The ECJ wholeheartedly adopted the view that the judicial scrutiny of public authorities’ searches and seizures of corporate premises might well be less intense than the scrutiny applied to similar actions taken against the homes of individual persons. In the words of the court:

For the purposes of determining the scope of [the general principle of protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal] in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law . . . the right of interference established by Article 8(2) of the ECHR “might well be more

and *Overlap Between the European Court of Justice and the European Court of Human Rights*, 5 EUR. PUB. L. 453 (1999).

105. Case C-94/00, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, 2002 E.C.R. I-9039.

106. *Id.* at I-9053, ¶ 27.

107. *Id.* at I-9054, ¶ 29.

108. *Id.* at I-9061, ¶ 54.

far-reaching where professional or business activities or premises were involved than would otherwise be the case.”¹⁰⁹

2. The United States

It is a general tendency under the U.S. Constitution and its Bill of Rights to offer less protection to corporate entities than to individuals. The negative legacy of the notorious *Lochner* period of U.S. constitutional jurisprudence, in which the corporate world was able to effectively invalidate government regulation of free enterprise with the help of an extremely laissez-faire-oriented Supreme Court, has left constitutional jurisprudence with a “double standard” doctrine, in which economic interests are seen as less deserving of constitutional protection than non-economic interests.¹¹⁰

This is also seen in the Supreme Court’s interpretation of corporate privacy under the Fourth Amendment. Corporations do not benefit from protection on equal footing with individuals. As a starting point, it is worth recalling that the Fourth Amendment, as interpreted in *Hale v. Henkel*,¹¹¹ did not assert an inviolability of corporate premises against government activity. Rather, the Supreme Court developed a “reasonableness” standard for measuring the legitimacy of public interferences. Moreover, the Court expressly stated that the corporation may be forced to give up evidence because it was “a creature of the State” and consequently had “certain special privileges and franchises.”¹¹²

Subsequent decisions have considerably clarified the extent to which corporate premises may legitimately be subject to searches and seizures, and according to what requirements. The case law has gradually moved toward greater acceptance of a lower-tiered protection system for corporate premises. *United States v. Morton Salt Co.*¹¹³ reiterated the position that corporate rights are not coextensive with individual rights under the Fourth Amendment. So long as the investigation was lawful, the only limits the Fourth Amendment imposed were that the documents be described with sufficient particularity in the demand and the information

109. *Id.* at I-9054, ¶ 29 (citing *Colas Est SA v. Fr.*, App. No. 37971/97, Eur. Ct. H.R. § 41 (Apr. 16, 2002), at <http://www.echr.coe.int> and *Niemietz v. F.R.G.*, 251 Eur. Ct. H.R. (ser. A) 23, 34, § 31 (1992)).

110. *See, e.g.*, HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 9–29 (6th ed. 1994); GERALD GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 133–62 (5th ed. 1992). The “double standard” is often ascribed to Justice Stone’s comment in footnote 4 of his opinion in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). For details, see Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

111. 201 U.S. 43 (1906).

112. *Id.* at 74.

113. 338 U.S. 632 (1950).

sought be reasonably relevant to the inquiry.¹¹⁴ In *See v. City of Seattle*, the Court nonetheless held that the Fourth Amendment required a court warrant for searches of business property.¹¹⁵ The case involved a business owner who was convicted for refusing to permit a search of a locked commercial warehouse by the fire department as part of a routine canvass of businesses to determine their compliance with the fire code.¹¹⁶ The Court explained that a “businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”¹¹⁷

In *Katz v. United States*,¹¹⁸ the Court stated significantly that a reasonable expectation of privacy extends to persons “in a business office, in a friend’s apartment, or in a taxicab,” a statement that seemed to suggest that corporate premises were protected primarily to safeguard not economic activity but rather the individuals involved in the business concerned.¹¹⁹ It signaled a string of cases that involved businesses operating in closely regulated industries such as retail liquor sales and firearms sales which were found to lie beyond the protective scope of the court warrant requirement established in *See*.¹²⁰ Finally, in *Dow Chemical Co. v. United States*,¹²¹ the Court, in rejecting a Fourth Amendment action against the use of aerial surveillance photographs to monitor compliance with emission standards at a chemical plant, found that the industrial plant was “more comparable to an open field and as such . . . open to the view and observation of persons in aircraft lawfully in public airspace.”¹²² Despite Dow Chemical’s extensive efforts to shield its facility from outsiders, the Court permitted government surveillance by adopting for corporations a narrower definition of the space within which a business has a privacy interest than that accorded to an individual’s residence.¹²³ This has led one observer to note that:

The Court adheres to its mantra that corporations are protected by the Fourth Amendment, yet that recitation is largely irrelevant. Instead, the corporation has only an abbreviated constitutional protection compared to the individual. While the

114. *Id.* at 652.

115. 387 U.S. 541 (1967).

116. *Id.*

117. *Id.* at 543.

118. 389 U.S. 347 (1967).

119. *Id.* at 352.

120. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (both concerning what has been labeled in retrospect as “pervasively regulated businesses”).

121. 476 U.S. 227 (1986).

122. *Id.* at 239.

123. *Id.*

Court uses the phrase “reasonable expectation of privacy” in relation to the corporation, there is no realistic basis for concluding that a corporate entity has any privacy because that is a term applicable to individuals, not organizations. The Fourth Amendment protects the corporation from the government to the extent that the government may not abuse its power over the corporation, but it does not create an area protected from the scrutiny of the sovereign. Unlike the individual, there is no zone of privacy that a corporation *a priori* may lay claim to under the Fourth Amendment.¹²⁴

3. Germany

Article 13(2) and (3) of the German *Grundgesetz* set forth the requirements pursuant to which public authorities may legitimately interfere with the “home” (or business premises) of private persons. The *Bundesverfassungsgericht* has interpreted these requirements according to a double standard by which the premises of businesses must tolerate more extensive interferences from public authorities than individuals must with respect to their homes. This rationale was laid down in the 1971 judgment which established the applicability of article 13(1) to business premises.¹²⁵

The court’s rationale rests on the central premise of its willingness to include business premises in the protective scope of the provision, notably that the term “home” should always be read in light of the concept of “physical space for the private sphere” and that the essential purpose of the provision was the right of the individual to be left alone.¹²⁶ Business premises are normally farther away from this essential purpose, and this calls for the exercise of a lower standard of judicial scrutiny as far as public interference is concerned. The *Bundesverfassungsgericht* also emphasized the semipublic character of business premises: given the public’s access to these areas, the proprietors could legitimately expect less respect for private activity than had the activity concerned personal private activity.¹²⁷

The court finally argued that public authorities had a legitimate need for exercising control over business premises, for instance, as in the case before it, with respect to inspections of such premises.¹²⁸ This argument for a lower standard of judicial review of investigatory measures on

124. Henning, *supra* note 65, at 840–41.

125. BVerfGE 32, 54 (72); *see also* ALBERT BLECKMANN, STAATSRECHT II—DIE GRUNDRECHTE 1028 (4th ed. 2001); Kunig, *supra* note 76, at 798.

126. BETHGE, *supra* note 69, at 74; Kunig, *supra* note 75, at 798.

127. BVerfGE 32, 54 (75).

128. *Id.* at 74–75.

business premises is seen as an example of how the *Grundgesetz* articulates basic policy principles of balancing free enterprise and regulatory power on which the Federal Republic of Germany rests. This is referred to as the *Wirtschaftsverfassung* discourse, the debate over the character of the constitution as an economic constitution.¹²⁹ The double scrutiny standard applied by the *Bundesverfassungsgericht* under Article 13 may thus be seen as a result of particular views on the prevalence of free economic activity in a state which rests on a meticulous mélange of market economy, employees' rights, and public control.¹³⁰

4. The Court's Need to Make Amends for Its Generous Interpretation of Article 8(1)

The solutions adopted in the U.S. and German constitutions, in particular, suggest important reasons for the appropriateness of a system of differentiated scrutiny to the detriment of corporate premises in the context of privacy protection. The protection of corporate premises does not lie at the heart of privacy protection: it is therefore not particularly surprising that they enjoy a lower level of protection under Article 8 than individuals do as far as their residential premises are concerned. Company premises are, moreover, semi-public areas where the expectations of privacy are naturally lower than those of individual persons. Finally, it is important to observe the statement of the German *Bundesverfassungsgericht* that public authorities have a legitimate need for exercising control over business activity. Although not stated directly,

129. The fundamental rights aspect is just one of many discursive strands. See Winfried Veelken, *Wirtschaftsverfassung im Systemvergleich*, 55 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 463, 465–66, 472 (1991).

130. For recent contributions on the *Wirtschaftsverfassung* debate, see Peter Badura, *Grundprobleme des Wirtschaftsverfassungsrechts [Basic Problems of Economic Constitutional Law]*, 16 JURISTISCHE SCHULUNG 205 (1976); Peter Badura, *Staatsziele und Garantien der Wirtschaftsverfassung in Deutschland und Europa [State Goals and Guarantees of Economic Constitution in Germany]*, in VERFASSUNGSSTAATLICHKEIT: FESTSCHRIFT FÜR KLAUS STERN 409 (Joachim Burmeister et al. eds., 1997); ALBERT KRÖLLS, GRUNDGESETZ UND KAPITALISTISCHE MARKTWIRTSCHAFT: DIE WIRTSCHAFTSVERFASSUNG DER BUNDESREPUBLIK [THE BASIC LAW AND THE CAPITALISTIC MARKET ECONOMY: THE ECONOMIC CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY] (1994); INGO VON MÜNCH, DEUTSCHLANDS RECHTSLAGE, GRUNDRECHTSORDNUNG, WIRTSCHAFTSVERFASSUNG [GERMANY'S LEGAL POSITION, FUNDAMENTAL LEGAL ORDER, ECONOMIC CONSTITUTION] (4th ed. 1986); Fritz Ossenbühl, *Die Freiheiten des Unternehmers nach dem Grundgesetz [The Liberties of a Contractor/Entrepreneur According to the Basic Law]*, 115 ARCHIV DES ÖFFENTLICHES RECHTS I (1990); Hans-Jürgen Papier, *Grundgesetz und Wirtschaftsordnung [German Basic Law and Economic Order]*, in HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 799 (Ernst Benda et al. eds., 1994); VOLKER SCHOCKENHOFF, WIRTSCHAFTSVERFASSUNG UND GRUNDGESETZ [ECONOMIC CONSTITUTION AND THE BASIC LAW] (1986); Helge Sodan, *Vorrang der Privatheit als Prinzip der Wirtschaftsverfassung [The Priority of Privacy as a Principle of the Economic Constitution]*, 53 DIE ÖFFENTLICHE VERWALTUNG 361 (2000).

this is probably the justification for the lower level of scrutiny adopted by the ECJ in its recent *Roquette Frères* judgment. The EU fundamental rights regime operates in a framework in which public authorities are to make sure that the economic markets run smoothly. Anticompetitive practices would run counter to the basic premise of guaranteeing a free market. Unsurprisingly, then, the ECJ acknowledges a certain leeway for national authorities to interfere on the business premises of corporate applicants for the purpose of securing evidence of illicit anticompetitive activity. It is conceivable that a similar argument might have influenced the European Court of Human Rights to adopt the double standard in *Colas Est*.

It might, however, also be that the court, being virtually bound by its own methods of interpretation to adopt a generous interpretation of Article 8(1) on the level of applicability, saw its own legitimacy threatened if it did not take openly into account the needs of national authorities to legitimately control the economic activity within their jurisdiction. As the court itself gave no reasons for its subscription to a lower level of protection, such reasons remain speculations only.

SUMMARY OBSERVATIONS

In this Article, I have considered the judgment of the European Court of Human Rights in the case of *Colas Est SA v. France*. In that judgment, the court established that a publicly held company was entitled to protection of its business premises against unwarranted searches and seizures carried out by the authorities of the respondent state. This was the first time that the court explicitly extended the concept of the right to protection of “home” in Article 8 of the European Convention on Human Rights to include, at least in certain circumstances, the business premises of companies. I have explained that although the protection of business premises’ right to privacy may seem peculiar when viewing the Convention as a treaty in the international human rights tradition, the result in *Colas Est* was by no means unsurprising in light of the principles of interpretation generally applied by the court. The extension of privacy to business premises is also consonant with a longstanding constitutional tradition, as evidenced here by the construction of similar arrangements in the constitutional orders of the European Union, the United States, and Germany.

The court in *Colas Est* likewise seemingly subscribed to a two-tiered mode of privacy protection in Article 8, in which interference with the privacy of companies is not subjected to the same strict standard of scrutiny as is generally invoked when the privacy rights of individuals are at stake.

This, too, is in conformity with the court's practice and is consistent with the law of comparable constitutional regimes. The court gave no specific reasons why a double standard is acceptable as far as corporate premises are concerned. The side glance at comparable constitutional arrangements, however, gives important clues as to the rationale of a double standard, which might also have influenced the judgment of the court in *Colas Est*.

As will have become evident from the discussion in this Article, the generally accommodating response to companies' claims in the European Convention on Human Rights, as interpreted by the European Court of Human Rights, illustrates the commonalities between the Convention and constitutional legal regimes. The Convention, however, is not only a supranational constitutional instrument for the European legal order.¹³¹ It is also part of the international law of human rights, that system of international and regional treaties of international law for the protection of various forms of human rights norms emanating from the Universal Declaration of Human Rights.¹³² The Convention is singular among international human rights law treaties in its inclusive approach to corporate human rights protection.¹³³ The *Colas Est* judgment exemplifies the court's aptitude for including corporate actors even under provisions whose doctrinal background at best offers an ambiguous answer to such claims. As has been shown above, the judgment is not the only one of its kind to extend the protective scope of provisions previously thought to be reserved only to individuals to encompass

131. On the constitutionalization of international human rights law, see Jacques Robert, *Constitutional and International Protection of Human Rights: Competing or Complementary Systems?*, 15 HUM. RTS. L.J. 1, 3 (1995). On the constitutional nature of the ECHR, see, for example, Evert Albert Alkema, *The European Convention as a Constitution and Its Court as a Constitutional Court*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE, *supra* note 45, at 41; KLAUS W. WEIDMANN, DER EUROPÄISCHE GERICHTSHOF FÜR MENSCHENRECHTE AUF DEM WEG ZU EINEM EUROPÄISCHEN VERFASSUNGSGERICHTSHOF [THE EUROPEAN COURT OF JUSTICE FOR PERSONAL LIBERTIES ON THE WAY TO A EUROPEAN CONSTITUTIONAL COURT] (1985); Iain Cameron, *Protocol 11 to the European Convention on Human Rights: The European Court of Human Rights as a Constitutional Court?*, 15 Y.B. EUR. L. 219 (1995); Luzius Wildhaber, *A Constitutional Future for the European Convention on Human Rights*, 23 HUM. RTS. L.J. 161 (2002).

132. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 10, at 71, U.N. Doc. A/810 (1948). Karel Vasak pioneered the notion of an international law of human rights. See Karel Vasak, *Le droit international des droits de l'homme [The International Law of Human Rights]*, 140 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 333 (1974); see also Antônio Augusto Cançado Trindade, *The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments*, in KAREL VASAK AMICORUM LIBER: HUMAN RIGHTS AT THE DAWN OF THE TWENTY-FIRST CENTURY 521, 521–22 (Federico Mayor ed., 1999).

133. I discuss the extent to which companies and their shareholders are protected by the ECHR's two closest siblings on the international legal plane in a forthcoming article, Emberland, *supra* note 51.

corporate activity.¹³⁴ Regardless of the reservations in the judgment to the specific circumstances of the case, *Colas Est* signals the Convention's capability of transforming itself in accordance with the nature of claims brought before the court. The Convention protects not only the inalienable rights and freedoms of the individual human being qua physical person, which was arguably the main purpose of the Convention when it was adopted in the wake of the international human rights law revolution after World War II. It protects also, and increasingly, the private sphere generally against the regulatory powers of public authorities of the member states of the Council of Europe. This aspect of the Convention, its economic overtones in the company setting included, may appropriately be referred to as an inherently constitutional function. Thus understood, the *Colas Est* judgment serves as evidence of the ongoing constitutionalization of the European Convention on Human Rights.

134. See, e.g., *Comingersoll SA v. Port.*, 2000-IV Eur. Ct. H.R. 355. I consider the expansive quality of the *Comingersoll* judgment in a forthcoming publication, Emberland, *supra* note 48.