PRIV-WAR Report

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PMSCs and Protection of Human Rights

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The Role of Human Rights in the Regulation of Private Military and Security Companies

General Report

Preliminary Version

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Regulating privatisation of "war": the role of the EU in assuring the compliance with international humanitarian law and human rights

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THE ROLE OF HUMAN RIGHTS IN THE REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES

GENERAL REPORT

Part I

The purpose of this general report is to provide an overview of the international instruments applicable to the protection of human rights with a view to ascertaining how relative obligations and remedial processes may have an impact on the regulation of PMSCs and on their accountability in the event of human rights violations. It includes regional and universal instruments. It examines the *modus operandi* of treaty bodies and the jurisprudence of human rights courts, with a focus on states' negative obligations to refrain from conduct that will result in human rights violations, and on positive obligations to make all reasonable efforts to ensure that private actors, including private military contractors, do not cause human rights violations.

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A. THE ROLE AND POSITION OF PMSCS UNDER INTERNATIONAL LAW[*]

1. Private military and security companies (PMSCs) usually provide specialized expertise or services of a military or police nature, either hired by governments in order to supplement regular military forces or employed by private corporations and firms. PMSCs' activity can take place both in peacetime (usually providing police and security services, typically supplied by Private Security Companies (PSCs)) and in the event of armed conflicts (including military activities – generally involving Private Military Companies (PMCs) – but not excluding security services as well). For the purposes of the present Report, no legal distinction will be made between PMCs and PSCs; as a consequence, in the few cases in which the acronyms PMCs and PSCs will be used – in place of the general acronym PMSCs – this will be done with an exclusively descriptive purpose, in order to draw attention to the fact that the particular activities referred to in those specific cases are *usually* carried out by a PMC rather than by a PSC, or *vice versa*.
2. In order to determine the legal status of PMSCs in international law – as well as the implications attached to this status in terms of applicable rules and international responsibility – it is first necessary to ascertain whether and to what extent they are suitable for inclusion within any existing legal category already regulated by international rules. In this respect, the legal category which seems *prima facie* to fit the characteristics of PMSCs is that of mercenaries, of which these companies could be seen as a modern and managerially organized

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evolution. For a sort of transitive property, a PMSC could be included within this category if and to the extent that its employees can be considered mercenaries. According to Article 47 para. 2 of the First Protocol to the 1949 Geneva Conventions on humanitarian law,[1] a mercenary

> "is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces".

3. The first preliminary observation to be raised with respect to this definition is that it is only applicable to persons operating *in the context of armed conflicts*. All PMSCs operating in peacetime are therefore not mercenaries. The supposed coincidence between PMSCs and mercenaries may thus be only hypothesized for those companies operating in the context of armed conflicts. In addition, as Protocol I of 1977 is only applicable to international armed conflicts, and no correspondent provision on mercenaries is contemplated by the Second Protocol dealing with non-international conflicts,[2] the scope of application of the said coincidence should be further restricted to the context of international wars only. Even in this context, the equalization of PMSCs and mercenaries is in principle not convincing. In fact, while the requisites listed in letters (a), (b), (c), (e) and (f) of the provision just reproduced are in principle satisfied by PMSCs, the same cannot usually be said with respect to letter (d), as in most cases States employ PMSCs which are their own nationals.[3] Further, this conclusion does not change substantially according to the 1989 United Nations *Convention against the Recruitment, Use, Financing and Training of Mercenaries* (UN Convention against Mercenarism)[4] as well as to the 1972 OAU *Convention for the Elimination of Mercenaries in Africa* (OAU Convention against mercenarism), both including the requirement *sub* letter (d) above among the requisites to be satisfied for a person to be considered a mercenary.
4. In sum, only in a residual number of cases may a PMSC be considered to fulfil the requirements for being considered a mercenary company, i.e., when it is acting in the context of an international armed conflict and it is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict. In this case – and only in this case – can a PMSC be considered an "unlawful combatant" which, pursuant to Article 47 para. 1 Protocol I 1977, "shall not have the right to be […] combatant[s] or […] prisoners of war".[5] The area of coincidence between PMSCs and mercenaries is slightly broader in the context of the situations falling within the scope of application of the UN Convention against Mercenarism, Article 1 para. 2 of which includes within the

[1] 1125 *UNTS* 3.
[2] 1125 *UNTS* 609.
[3] See the list of PMSCs and their portfolio included in "Private military company", *Wikipedia*, at <http://en.wikipedia.org/wiki/Private_military_company> (last visited on 21 February 2009).
[4] U.N. Doc. A/RES/44/34 of 4 December 1989.
[5] The same principle is also expressed by Article 3 of the OAU Convention against mercenarism.

concept of mercenary, "any person who, in [whatever] situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State […]". The 1989 Convention, therefore, subsumes within the concept of mercenaries also those PMSCs which – outside an international armed conflict – are acting for these purposes. However, the concrete impact of this provision in the real world is quite limited, as the condition that, in order to be considered mercenaries, the persons concerned are neither nationals nor residents of the State against which their acts are directed is in any case to be met; in addition, only thirty-two countries have so far ratified the UN Convention against Mercenarism.[6]

5. In the event that, as explained above, a PMSC passes the required test for being subsumed within the scope of the concept of mercenary, it – as a single entity – and its employees, in their personal capacity, are considered accountable for violations of internationally recognized human rights irrespective of whether their action takes place in peacetime or in the context of an armed conflict. In fact, PMSCs' employees do not benefit from the exemptions from responsibility for warring acts provided for lawful combatants involved in the fights under international humanitarian law. It is also to be noted that – in the same situation – all States that are parties to either the UN Convention against Mercenarism[7] or the OAU Convention against mercenarism[8] are under the international obligations not to hire PMSCs, as these two conventions expressly prohibit recruitment, use, financing or training of mercenaries.[9] In the remaining cases the necessity of ascertaining whether and to what extent human rights rules or international humanitarian law are applicable to the activities of PMSCs arises. In reality – as previously emphasized – the cases in which PMSCs do *not* satisfy the conditions for being considered mercenaries are the overwhelming majority. In general terms, therefore, PMSCs are to be considered a legal subject that is clearly distinct from mercenaries (although overlapping with them in a limited number of cases), thus deserving separate doctrinal evaluation as well as specific

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[6] See <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P> (last visited on 21 February 2009). The ratifying countries are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Honduras, Italy, Liberia, Libya, Maldives, Mali, Mauritania, Moldova, New Zealand, Peru, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Syria, Togo, Turkmenistan, Ukraine, Uruguay, Uzbekistan.

[7] See previous note.

[8] The twenty-four States parties to the OAU Convention against mercenarism are currently: Benin, Burkina Faso, Cameroon, Congo, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Mali, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia, Zimbabwe. See <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/ELIMINATION%20%20MERCENARISM%20IN%20AFRICA.pdf> (last visited on 21 February 2009).

[9] Article 1 para. 1 of the OAU Convention against mercenarism is even more detailed, as it affirms that "[t]he crime of mercenarism is committed by the individual, group or association, representatives of a State and the State itself with the aim of opposing by armed violence a process of self-determination or the territorial integrity of another State that practices any of the following acts: a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs armed forces partially or wholly consisting of persons who are not nationals of the country where they are going to act, for personal gain, material or otherwise; b) Enlists, enrols or tries to enrol in the said forces; c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces".

legal regulation. In light of this need, the purpose of this Report is to investigate the role of human rights in the specific context of PMSCs operations.[10]

6. In terms of international responsibility, the activity of PMSCs potentially concerns five different levels of responsibility, concerning respectively the PMSCs as single entities, their employees in their individual capacity, the State(s) which benefit(s) of their services (hiring State(s)), the territorial State – if different from the latter –, as well as their "home State". With respect to the profile of "direct responsibility" of PMSCs – which would be particularly useful when host States are practically unable to control their activities – the main problem rests in ascertaining whether and to what extent these companies may be considered holders of legal obligations pursuant to international law. This issue will be the object of a specific contribution included in the present research.[11]
7. As for individual responsibility, there is no reasonable doubt that PMSCs employees are to be considered responsible in their personal capacity for any act reaching the threshold of a crime against the peace and security of mankind (including, *inter alia*, torture, rape, enslavement, etc.), being therefore subjected, *inter alia*, to the application of the principle of universality of jurisdiction as well as – for the acts perpetrated in the territorial context to which it extends – to the jurisdiction of the International Criminal Court (ICC).[12]
8. With respect to the third profile of responsibility, when and to the extent that PMSCs operate in the service of a government, their activities are certainly suited to generating the responsibility of the State concerned, as they are "empowered by the […] State to exercise elements of the governmental authority".[13] For this reason, pursuant to the rule of general international law codified by Article 5 of the *Articles on Responsibility of States for Internationally Wrongful Acts* (ILC's Articles) – which were adopted in second reading by the International Law Commission in 2001 and "noted" by the U.N. General Assembly in 2002 – each action they perform is to "be considered an act of the State under international law". Even if one would not be in agreement with the characterization of PMSCs as entities exercising elements of the governmental authority, they should *at least* be considered entities acting "on the instructions of, or under the direction or control of" the State at the service of

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[10] With respect to the relationship between human rights and international humanitarian law see the contribution by F. LENZERINI and S. MACLEOD, "The Interaction of Human Rights and International Humanitarian Law Norms with Respect to PMSCs".

[11] See the contribution by S. MACLEOD and O. QUIRICO, "International Initiatives for Holding Corporations to Account and their Viability with regard to PSMCs".

[12] The problem of whether or not the employees of PMSCs may be considered as acting in an official capacity is absolutely irrelevant with respect to the competence of the ICC, as – pursuant to Article 27 of the Statute of the Court – it "shall apply equally to all persons without any distinction based on official capacity" (para. 1) and "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" (para. 2). On the issue of responsibility of PMSCs personnel see the contribution by MACLEOD and QUIRICO cited in the previous note.

[13] See International Law Commission's (ILC) Articles on "Responsibility of States for Internationally Wrongful Acts", 2001 ("noted" by the U.N. General Assembly in 2002; see Doc. A/RES/56/83 of 28 January 2002), available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> ((last visited on 21 February 2009), Article 5. See, on this subject, the contribution by C. HOPPE, "Positive Obligations of the Hiring State for Human Rights Violations Arising in Connection with the Provision of Coercive Services by a PMSC".

which they operate, which would be in any case responsible in light of the rule of customary international law embodied by Article 8 of the ILC's Articles. The fourth profile of responsibility concerns the national State governing the territory in which a PMSC operates when it is different from the hiring State; in this respect, a number of factors must be considered, which will be carefully addressed in a specific contribution pertaining to the present research.[14]

9. Finally, the responsibility of the State of origin of PMSCs may arise, particularly since in the real world such a State might be the only one that is effectively capable of controlling the activity of its own national PMSCs. Also this issue will be distinctively addressed in a specific contribution included in the present research.[15]
10. On the other hand, however, the characterization of PMSCs as *de facto* State organs or as entities operating on the instructions of, or under the direction or control of the State would exclude responsibility – of both the State and the PMSC as such – for any human rights breaches occurring during situations of emergency in which lawful derogation of human rights standards operates according to the conditions established by most relevant international treaties.[16] This exemption from responsibility is in any event excluded for breaches of human rights which are considered absolutely non-derogable, such as arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment, enslavement and application of *ex post facto* criminal laws.

B. SPECIFIC HUMAN RIGHTS POTENTIALLY AFFECTED BY PMSCS OPERATIONS*

11. PMSCs are specialized companies providing high-tech intelligence, training and support of a military character as well as surveillance and protection to strategic installations, high-ranking officials and economic plants of special importance (such as oil platforms). They often perform conflict activities, especially in particularly dangerous zones that would be hardly practicable by conventional armed forces. Their activity has increased exponentially in most recent years – especially in the context of the military operations carried out by the United States – due to their growing specialization as well as to the contextual decrease of military support by Western allies. Therefore, the activity of PMSCs usually involves recourse to armed force, through the performance of typical conflict operations. It is thus self-evident how PMSCs operations might affect the enjoyment of most human rights, the effectiveness of which is usually jeopardized in the course of armed conflicts. Not only human rights of individual character, but also collective rights are threatened by PMSCs operations. All human rights that are most in danger of being affected by PMSCs are contemplated and protected by all the relevant international instruments that will be examined in details in the following sections. In this Section, a general preliminary evaluation of these rights is being developed in order to clarify, in

[14] See the contribution by C. BAKKER, "Positive Human Rights Obligations of the Host State of PMSCs".
[15] See the contribution by F. FRANCIONI, "The Responsibility of the PMSC's Home State for Human Rights Violations Arising from the Export of Military and Security Services".
[16] Article 4 ICCPR; Article 15 ECHR; Article 27 IACHR.
* This Section has been written by Federico Lenzerini.

particular, to which extent they are suitable of being affected – in practice – by PMSCs operations.

a) Right to life

12. As emphasized by the Human Rights Committee, the right to life "is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation".[17] While it was proclaimed with respect to the 1966 *International Covenant on Civil and Political Rights* (ICCPR),[18] this principle also applies to any other international regime dealing with human rights, including customary international law. At the same time, respect for the right to life obviously constitutes an essential prerequisite for making the enjoyment of all other human rights possible.
13. Arbitrary deprivation of life is therefore prohibited under any circumstance, with no derogation possible. To ascertain the extent to which PMSCs and their employees are to be considered responsible for the breach of the right, it is therefore necessary to investigate *a contrarii* the conditions that are to be satisfied in order for such an action to be considered non-arbitrary. First, deprivation of life is in principle to be considered non-arbitrary – thus legitimate – when it is the result of the execution of capital punishment sentenced by a final judgement, rendered by a competent court, at the end of a trial in which all procedural rights of the accused have been granted, and only in those States that are not bound by any international treaty to abolish the death penalty.[19] This eventuality, however, is in principle not pertinent to PMSCs operations, as they do not usually include the performance of judiciary competences. Deprivation of life is also non-arbitrary when it is committed for reasons of self-defence, used by a person in order to prevent the loss of his/her/another's life. This situation is possible in the context of PMSCs operations. However, self-defence may only be considered legal when the principle of proportionality is respected, i.e., when the only possible means for preventing a loss of life consists in taking the life of the offender. For this reason, a breach of the right to life will occur each time that this condition is not met. A third situation in which taking of life is not arbitrary occurs in the event of armed conflict, to the extent that lethal force is used by lawful combatants as an indispensable means to achieve the goals pursued through the conflict. This is also a typical situation involved in the exercise of PMSCs operations, which, however, does not cover the (few) cases in which these companies are to be considered mercenaries, since in these instances their employees are unlawful combatants, to whom international humanitarian law is not applicable.
14. In sum, the taking of someone's life by a PMSCs employee constitutes a breach of the right to life in all circumstances except when it is justified on grounds of

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[17] See Human Rights Committe, *General Comment No. 06: The right to life (art. 6)*, 1982, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (last visited on 21 February 2009), para. 1.

[18] 999 *UNTS* 171.

[19] For example, death penalty is today prohibited by *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty*, 1983, *CETS* No. 114, which has been ratified by all members of the Council of Europe, with the only exception of Russia (see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=6/1/2009&CL=ENG>, last visited on 31 May 2009).

self-defence or when – in the event of armed conflict – such an employee may be considered a lawful combatant using lethal force in the context of a fight within the limits allowed by international humanitarian law. In practice, most cases of unlawful deprivation of life by PMSCs take place in the form of extrajudicial executions.[20]

b) Freedom from torture and cruel, inhuman or degrading treatment

15. In principle, myriad acts might be perpetrated by PMSCs which reach the threshold of cruel, inhuman or degrading treatment or even torture. When this happens, a breach of the prohibition of such treatments inevitably occurs, as the prohibition in point is not subject to derogation on any grounds, irrespective of whether it takes place in peacetime or in the event of armed conflict. The prohibition of torture and cruel, inhuman or degrading treatment or punishment corresponds in fact to a rule of *jus cogens* and no derogation to it is possible in time of emergency pursuant to relevant international instruments.[21]

c) Right to physical and mental health

16. The right to physical and mental health partially overlaps with the prohibition of torture and cruel, inhuman or degrading treatment, as these treatments inevitably jeopardize the physical and/or mental health of the victim. A distinctive right to health is in fact expressly contemplated neither by the ICCPR nor by the European Convention on Human Rights (ECHR),[22] while the American Convention on Human Rights (ACHR), at Article 5, subsumes the right to "physical, mental, and moral integrity" – together with the prohibition of torture or cruel, inhuman, or degrading punishment or treatment – within the provision concerning the "right to humane treatment", which may not be the object of any suspension or derogation even in "time of war, public danger, or other emergency that threatens the independence or security of a State Party", pursuant to Article 27 para. 2. The right to the enjoyment of the highest attainable standard of physical and mental health is instead expressly contemplated – as a social right – by Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[23] Article 5(e)(iv) of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (Racial Discrimination Convention),[24] Article 12 of the 1979 *Convention on the Elimination of All Forms of Racial Discrimination against Women* (CEDAW),[25] Article 24 of the 1989 *Convention of the Rights of the Child* (CRC),[26] as well as by Article 16 of the *African Charter on Human and Peoples' Rights* (ACHPR).[27]

17. In general terms, however, these provisions conceive of the right in question in terms of a right of access to healthcare, particularly through the national sanitary services, in order that all the sectors of the civil society (including the most vulnerable and disadvantaged groups) are ensured this access on an equitable basis. In this respect, PMSCs operations are apparently unlikely to interfere with

[20] See *infra*, particularly para. 105.
[21] See, *e.g.*, Article 4 ICCPR; Article 15 ECHR; Article 27 IACHR.
[22] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, *CETS* No. 5.
[23] 993 *UNTS* 3.
[24] U.N. G.A. res. 2106 (XX) of 21 December 1965.
[25] 660 *UNTS* 195.
[26] U.N. G.A. res. 44/25 of 20 November 1989.
[27] 21 *ILM* 58 (1982).

the realization of this right. This conclusion, however, is to be revisited in consideration of the broad meaning accorded to the right to health by the "quasi-judicial" bodies entrusted with controlling the implementation of the relevant international instruments, particularly the Committee on Economic, Social and Cultural Rights and the African Commission on Human and Peoples' Rights (hereinafter: African Commission). In its General Comment No. 14 (2000) on Article 12 ICESCR,[28] the Committee on Economic, Social and Cultural Rights considered the right to health to extend "not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health";[29] States should consequently "refrain from unlawfully polluting air, water and soil, e.g., through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g., during armed conflicts in violation of international humanitarian law".[30] Under this perspective, PMSCs operations might well interfere with the enjoyment of the right to health, as the types of interferences to the right to health listed by the Committee – or at least part of them – might certainly be committed these companies in carrying out their usual mandate. This is even clearer if one takes a look at the practice of the African Commission. In particular, in the renowned *Ogoni case*, the government of Nigeria had been involved in oil production through the State oil company in the lands of the Ogoni people – a local indigenous group – leading to environmental degradation and serious health problems for the members of the group resulting from environmental contamination in those land. As the operation of the project of oil exploitation was (peacefully) opposed by the Ogoni people, the Nigerian government ended those protests through military force, including (but not limiting to) destruction and burning of several Ogoni villages. The Commission found that, due to this behaviour, Nigeria had breached, *inter alia*, Article 16 ACHPR.[31] In this respect, it is easy to note that a decisive role in producing this violation was played by the Nigerian security forces, which in the specific case carried out operations (i.e., "protection" of State investments against possible interference or "boycott") that may be part of the usual mandate of PMSCs. Therefore, when performing activities of this kind, PMSCs might interfere with the realization and enjoyment of the right to health, even in the cases in which this right does not overlap with the prohibition of torture and cruel, inhuman or degrading treatment.

[28] See General Comment No. 14 (2000), "The right to the highest attainable standard of health" (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 of 11 August 2000.
[29] See para. 11.
[30] See para. 34.
[31] See Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 2001, 2001 *AHRLR* 60.

d) Freedom from enslavement and forced labour

18. In practice, the exercise of an element of State sovereignty by PMSCs may well result in the imposition on persons external to the company of forcible conditions of works which may reach the threshold of forced or bonded labour. This practice is prohibited by most international instruments generally dealing with human rights, as well as by two specific ILO conventions on the subject.[32] Ordinarily, subjection of a person by a PMSC to a practice amounting to forced labour is thus to be considered a violation of internationally recognized human rights. However, exceptions are possible in which the imposition of forcible conditions of work does not amount to a breach of international law, i.e., when forced labour is imposed – by the competent governmental authority (which may be represented by a PMSC when authority has been delegated by the State) – during an armed conflict or in other situations of emergency, pursuant to the relevant international instruments.[33] In any case, any authority representing a State party to the ILO Convention No. 29 (1930) that is competent to exact forced or compulsory labour must ensure that "the work to be done or the service to be rendered is of important direct interest for the community called upon to do work or render the service", is of "imminent necessity", that is impossible "to obtain voluntary labour for carrying out" the work needed as well as that "the work or service will not lay too heavy a burden" upon the population.[34]
19. The applicability of whatever exemption to the prohibition of forced labour is in any case excluded when forced labour deteriorates into conditions analogous to slavery; enslavement, servitude and other institutions and practices analogous to slavery are in fact prohibited by a provision of customary international law of peremptory character, and the possibility of any derogation to this prohibition is categorically excluded by relevant international instruments. The distinction between slavery and forced labour is however quite fuzzy, and it is virtually impossible to precisely define the exact line of demarcation between them in terms of legal categorization. Therefore, the question whether a situation of forced labour has actually deteriorated into slavery is to be resolved on a case-by-case basis, through a practical assessment aimed at establishing whether the specific situation under examination – taking into account all the factual elements by which it is characterized – is confined within the exclusive realm of forcible exploitation of the work of others or, on the contrary, reaches the threshold of the exercise of "any or all of the powers attaching to the right of ownership" over the victim, pursuant to the definition of slavery proclaimed by relevant treaties[35] and also accepted by customary international law.[36]

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[32] See *Convention No. 29 concerning Forced or Compulsory Labour* (1930) and *Convention No. 105 concerning the Abolition of Forced Labour* (1957), both available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited on 22 February 2009).

[33] See, *e.g.*, Article 2(d) of ILO Convention No. 29 (1930).

[34] See Article 9.

[35] According to Article 1 of the 1926 *Slavery Convention* (60 *LNTS* 253), "[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". This definition is confirmed by Article 7 of the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (226 *UNTS* 3), as well as by Article 7 of the 1998 *Rome Statute of the International Criminal Court* (2187 *UNTS* 90).

e) Freedom from racial discrimination and *apartheid*

20. In addition to the cases in which racial discrimination or *apartheid* are practiced *deliberately*,[37] the right to be treated without discrimination is breached each time that the majority of internationally recognized human rights are *applied in a discriminatory manner*, i.e., distinctly among different groups on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[38] In concrete terms, pursuant to Article 5 of the 1965 U.N. *International Convention on the Elimination of All Forms of Racial Discrimination*, the prohibition of racial discrimination implies that the right of everyone to equality before the law – "without distinction as to race, colour, or national or ethnic origin" – is guaranteed with respect to a huge list of rights, including: the right to security of person and protection by the State against violence or bodily harm; the right to freedom of movement and residence; the right to leave any country and to return to one's own country; the right to property; the right to freedom of thought, conscience and religion; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association; the right to housing; the right to equal participation in cultural activities; the right of access to any place or service intended for use by the general public (such as transport hotels, restaurants, cafes, theatres and parks). In this respect, each time that a PMSC gives rise to a restriction of whatever of these rights on one of the grounds listed *supra* – e.g., to the prejudice of a racial or political group hostile to the national government – a breach of the prohibition of racial discrimination occurs.

f) Right to liberty and to security of the person

21. International human rights instruments usually refer the right to the security of the person to the situations of arrest and detention, in conjunction with the right to liberty.[39] Violations of this right may well be committed by PMSCs, especially when they are entrusted with the duty of providing police services. One may reasonably assert that, when a measure of deprivation of liberty is carried out by a PMSC, its possible arbitrariness is even more likely than when it is executed by a "regular" State officer, as the presence of all the necessary guarantees in order for this measure to be lawful may hardly be granted by a private operator which – while authorized to exercise such power – is usually disconnected with the ordinary State authorities entrusted by law to ensure respect for these guarantees. So, for instance, PMSC operators may lack the necessary legal expertise in order to grant that deprivation of liberty takes place "in accordance with such procedure[s] as are established by law";[40] also, modalities of PMSCs operations may prevent that the arrested person is brought "promptly before a judge or other officer authorized by law to exercise judicial

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[36] See F. LENZERINI, "La definizione internazionale di schiavitù secondo il Tribunale per la Ex-Iugoslavia: un caso di osmosi tra consuetudine e norme convenzionali", 84 *Rivista di Diritto Internazionale*, 2001, p. 1026 ff.

[37] Racial discrimination or *apartheid* are specifically addressed by, respectively, the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (660 *UNTS* 195) and the 1973 *International Convention on the Suppression and Punishment of the Crime of* Apartheid (1015 *UNTS* 243).

[38] See Article 2 para. 1 ICCPR.

[39] See, *e.g.*, Article 9 ICCPR.

[40] See, *e.g.*, Article 9 para. 1 ICCPR.

power";[41] the same can be said with respect to the right of the arrested person that lawfulness of his/her deprivation of liberty is scrutinized by a court with the competence of "order[ing] his[/her] release if the detention is not lawful",[42] or with respect to the requirement that "[p]re-trial detention should be an exception and as short as possible".[43]

g) Right to Judicial Protection

22. Access to justice is an essential requirement in order to ensure effectiveness of all human rights. These rights may in fact be considered "effectively enjoyable" only whether and to the extent that an efficient remedy is available allowing victims to obtain redress in the event of them being breached. The key role of judicial protection in the architecture of human rights is confirmed by Article 27 para. 2 ACHR, according to which not only certain basic "primary rights" (including, *inter alia*, right to life, right to humane treatment and freedom from slavery) are to be considered absolutely non-derogable even in "time of war, public danger, or other emergency that threatens the independence or security of a State",[44] but the same applies to "the *judicial guarantees essential for the protection of such rights*"[45] as well. This position has also been shared by the Human Rights Committee in its General Comment on states of emergency, in which the Committee stressed that

> "the Covenant requires a State party […] to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation […] to provide a remedy that is effective".[46]

23. The right to judicial protection includes, *inter alia*, the right to have access to an effective remedy in favour of victims to vindicate breaches of recognized human rights as well as the right of any person imprisoned, detained or charged with a criminal offence to be informed in a language which he/she understands of the charge imputed to him/her and to be tried without delay before an impartial judge. It is evident how these requirements may be infringed by PMSCs. This might happen in the event that these companies exercise coercive functions where persons are arrested and/or detained for military or security reasons without being provided with adequate information and/or without being promptly brought before an impartial judge. At the same time, unlawful arrest and detention of a person by a PMSC – leading in itself to a violation of the right

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[41] *Ibid.*
[42] See, *e.g.*, Article 9 para. 4 ICCPR.
[43] See Human Rights Committee, General Comment No. 8, "Right to liberty and security of persons" (Article 9), 1982, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument> (last visited on 22 February 2009), para. 3.
[44] See Article 27 para. 1 ACHR.
[45] Emphasis added.
[46] See Human Rights Committee, General Comment No. 29, "States of Emergency" (Article 4), 1982, U.N. Doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 14.

to personal liberty – may also imply the "additional" breach of the right to judicial protection, when prolonged detention prevents the victim from the opportunity of having access to a remedy against his/her arbitrary arrest.

h) Freedom of expression

24. In the context of PMSC operations, violation of freedom of expression will take place in the same situations in which a breach of the right to liberty and to security of the person occurs. Unlawful arrest and/or detention of a person may in fact be determined by the will of preventing him/her from expressing his/her opinions, in the event that they are perceived by the authorities as fomenters of anti-governmental feelings. In such a context, a "multiple" human rights breach takes place, as unlawful arrest and/or detention implies that both the right to liberty and to security of the person and freedom of expression are violated.

i) Freedom of thought and religion

25. There are at least two prerogatives arising from the right to freedom of thought and religion that might be affected by PMCs. First, the right in point may be infringed by these companies to the same extent of freedom of expression, when a person (including an individual belonging to a religious minority) is arrested or detained for a religious reason; in these cases, religion-based persecution adds to unlawful arrest and/or detention. The other case takes place when a person is prevented – by means of the use of coercive powers by PMSCs – from the opportunity to exercise or manifest his/her belief individually and/or in community.[47] Relevant instruments generally allow restrictions on the freedom to manifest religion or belief, on the condition that such restrictions are prescribed by law and are necessary to protect public values like national safety, public order, public health or morals, or the rights and freedoms of others. However, as affirmed by the Human Rights Committee, "[l]imitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need for which they are predicated".[48] In addition, "[r]estrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner".[49]

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[47] According to the Human Rights Committee, "[t]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications". See General Comment No. 22, "The right to freedom of thought, conscience and religion" (Art. 18), 1993, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument > (last visited on 22 February 2009), para. 4.

[48] *Ibid.*, para. 8.

[49] *Ibid.*

j) Freedom of movement

26. In performing their usual military and police activities, PMSCs may easily interfere with the enjoyment of the right to freedom of movement. This may happen not only in the form of restrictions to the most apparent prerogative attached to the right in point, i.e., to move freely in the territory of the country. Other instances leading to a breach of the freedom of movement may happen, e.g., when a PSC performs an activity of border control, and arbitrarily prevents a person from exercising the right of leaving the country or even the inherent right of a citizen who is abroad to re-enter his/her country.
27. However, when and to the extent that PMSCs act under the State authority – thus taking the position of governmental officials – they may benefit of the exemptions of responsibility when the restrictions contemplated by the pertinent treaties with respect to the right in point are applied,[50] provided that the conditions for these restrictions to be lawful are met. In particular, any restriction must be provided by law and grounded on the necessity to protect collective values like national security, *ordre public*, public health, public morality or the right and freedoms of others.[51] In addition, restrictions "must not impair the essence of the right […] [and] conform to the principle of proportionality", in the sense that "they must be the least intrusive instrument amongst those which might achieve the desired result […] [and] proportionate to the interest to be protected".[52]

k) Freedom of association

28. PMSCs' coercive functions might well interfere with the enjoyment of the right to freedom of association, as it is usually exercised by people in a democratic society. Like freedom of movement, also the right in point is subject to restrictions, which, however, must be justified by the need to safeguard national security or public safety, public order, public health or morals or the rights and freedoms of others. In this respect, the same restrictive criteria that are necessary in order to ensure lawfulness of restrictions to freedom of movement may be considered applicable to freedom of association as well.

l) Right to private and family life

29. International jurisprudence and "para-jurisprudential" practice has recognized a broad scope of operation for the right to private and family life, which has been translated into a wide range of specific prerogatives, the respect for which is essential in order to ensure proper enjoyment of the right in point. These include,

[50] For example, according to Article 12 para. 3 ICCPR, freedom of movement "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"; a similar provision is contemplated by Article 2 para. 3 of *the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, CETS* No. 46.

[51] See, in addition the provisions cited in the previous note, Article 22 ACHR and Article 12 ACHPR.

[52] See Human Rights Committee, General Comment No. 27, "Freedom of Movement" (Article 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 of 2 November 1999, para. 13 f.

inter alia, the right not to be separated from the members of one's family,[53] the right to shelter,[54] the right of detained persons to communicate with their relatives,[55] as well as the right that living conditions in the area where the family house is located are not deteriorated by polluting emissions originating from industrial activities.[56] Given this broad range of ways in which private and family life may be breached, the right under discussion is particularly threatened by PMSCs operations, especially because they often operate in situations in which – due to war or political instability – legal guarantees are weaker than usual. So, for instance, in a number of cases characterized by frequent arbitrary arrest and detention performed by military authorities – justified by the State concerned through relying on the situation of emergency faced by the country – the African Commission has found a violation of the State obligation to protect the family[57] arising from the lack of communication between detained persons and their families. Also, in another case the Commission held that the "State's obligation to respect housing rights [resulting from the obligation to ensure family protection] requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing on his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs".[58] With respect to the right to privacy in particular, it might easily be breached by a number of activities typically carried out by PSCs. For example, according to the Human Rights Committee, "[s]urveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited";[59] also, "gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law".[60] Violation of these requirements is highly probable in the context of PSCs operations.

30. Alike other rights previously examined, the right to private and family life might be the object of restrictions, in accordance with the law, when limitations are necessary for national security, public order, for the protection of health and morals and for the protection of the rights and freedoms of others. As usually, lawfulness of these restrictions is to be evaluated according to the restrictive approach described *supra*; with particular respect to the right in point, as

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[53] See, among the innumerable relevant decisions, European Court of Human Rights, *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. No. 13178/03, judgement of 12 October 2006.

[54] See, *e.g.*, African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *cit.*, para. 60 ff.

[55] See, for instance, African Commission of Human and Peoples' Rights, *Article 19 v. The State of Eritrea*, 2007, 2007 *AHRLR* 73, para. 102.

[56] See, *e.g.*, European Court of Human Rights, *Case of Guerra and Others v. Italy*, Appl. No. 14967/89, judgement of 19 February 1998.

[57] See Article 18 ACHPR.

[58] See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *cit.*, para. 61.

[59] See Human Rights Committee, General Comment No. 16, "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation" (Article 17), 1988, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument > (last visited on 22 February 2009), para. 8.

[60] *Ibid.*, para. 10.

interference to private and family life must not be "arbitrary", "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".[61]

m) Right to property

31. The right to the use and enjoyment of one's own property may be easily breached by PMSCs' operations. This may happen, for example, when private property is seized by one of such companies for military or security reasons, or in any other case when – for whatever reason – a person is prevented by a PMSC from enjoy his/her possessions. However, restrictions of private property rights arising from PMSCs' activities may be lawful when the company concerned acts on behalf of the State and the possibility of applying these restrictions is provided by law for the general interest of the society.
32. On the other hand, the scope of the right to property is not confined to private property rights as conceived in Western legal orders. Certain forms of collective possession are also to be considered included within such a scope, although – being the right to property of individual nature – they have to be separated into a number of individual rights corresponding to the sum of persons sharing the collective prerogative in point. This applies in particular to possession of ancestral lands by indigenous peoples; in this respect, the Inter-American Court of Human Rights held that

> "[t]hrough an evolutionary interpretation of international instruments for the protection of human rights […] the right to property [is protected] in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property […] the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations".[62]

33. The nature of PMSCs' interferences with the enjoyment of this communal characterization of the right to property is evident; a typical example is given by the situations in which PSCs provide safety services – on behalf of the territorial government – in favour of foreign companies intending to economically exploit indigenous traditional lands against the will of the indigenous communities concerned.

n) Collective Rights

34. The range of collective rights that might be breached by PMSCs' operations is quite broad. There are basically two "categories" of internationally recognized "collective" rights. The first is represented by those collective prerogatives which are the necessary result of the need to enjoy certain individual rights in community with the others in order to make them effective, as in some cases their effectiveness may not be ensured without translating them into communal

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[61] *Ibid.*, para. 4.
[62] See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79, para. 148 f.

prerogatives. This happens, for example, with respect to the right of manifesting one's own religion or culture, which is made void if it cannot be exercised in common with other people sharing the same religious convictions or belonging to the same culture. This has been made clear by the Human Rights Committee, which emphasized that "many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others".[63] These principles had been previously expressed by the Committee in clearer terms with specific respect to the right of persons belonging to minorities to enjoy their culture with other members of their group, provided for by Article 27 of the Covenant. In the words of the Committee,

> "[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group".[64]

35. The second category of collective rights is composed by those prerogatives which are recognized by human rights instruments *directly* in favour of peoples. In addition to the right of self-determination of peoples, provided for by common Article 1 of the ICCPR and the ICESCR (as well as by Article 20 ACHPR), a number of peoples' rights are contemplated by the ACHPR, including the rights to existence, to economic, social and cultural development, freely to dispose of their wealth and natural resources, to peace and security, to a safe environment and to preserve and enjoy their own culture. All these rights – which apply indifferently to *national* peoples and to *minority groups* living within a State – may be breached by PMSCs' operations to a variable extent. This issue will be dealt with in more detail in the Section devoted to the ACHPR.

C. RELEVANT INTERNATIONAL HUMAN RIGHTS TREATY LAW – THE "UNIVERSAL" CONTEXT*

a) International Covenant on Civil and Political Rights

36. Article 2 para. 1 ICCPR affirms the obligation of States parties to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind". In addition, States parties are also bound to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

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[63] See General Comment No. 31[80], "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 9.

[64] See General Comment No. 23, "The Rights of Minorities" (Article 27), 1994, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> (last visited on 22 February 2009), para. 6.2.

* This Section has been written by Federico Lenzerini.

notwithstanding that the violation has been committed by persons acting in an official capacity".[65]

37. Paragraph 1 of Article 2 makes it clear that States parties are not only bound to "respect" human rights themselves, but also to "protect" individuals from human rights breaches perpetrated by non-state actors, or – to use the words of the Human Rights Committee – "to ensure [the rights granted by the Covenant] to all individuals in their territory and subject to their jurisdiction".[66] As a consequence, "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[67] This presupposes that States parties are bound to take "appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities […] [as well as] to provide effective remedies in the event of breach".[68] The latter requirement includes the obligation to provide adequate reparation in favour of victims, since "[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy […] is not discharged".[69]
38. This double-layered characterization of the obligations set up by the Covenant make it irrelevant – under the ICCPR – whether PMSCs act as private companies or as entities exercising prerogatives of State sovereignty. Irrespective of the position of PMSCs as private or public entities, the ICCPR is in fact fully applicable to human rights breaches perpetrated by such companies. In the event that they operate as private actors, violations of human rights committed by PMSCs indeed fall within the scope of operation of the obligation to "ensure" protection of individuals against non-state breaches of the rights affirmed by the Covenant; in the case that they are exercising functions delegated to them by the State, the need of ensuring compatibility of their operations with the standards set up by the ICCPR is dictated by the State obligation to respect those standards. In the second instance, the existence of the said obligation is made even clearer by paragraph 3(a) of Article 2, commending States to ensure an effective remedy in favour of victims of human rights breaches also when they are "committed by persons acting in an official capacity".
39. As for the "territorial extension" of the obligations arising from the ICCPR, the term State "jurisdiction" included in Article 2 para. 1 is to be intended as binding States parties to "respect and ensure the rights laid down in the Covenant to anyone [regardless of his/her nationality or statelessness] within the power or effective control of that State Party, even if not situated within the territory of the State Party".[70] This principle assumes special significance with respect to

[65] See Article 2 para. 3(a) ICCPR.
[66] See Human Rights Committee, General Comment No. 31[80], "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 3.
[67] *Ibid.*, para. 8.
[68] *Ibid.*
[69] *Ibid.*, para. 16.
[70] *Ibid.*, para 10.

PMSCs' operations as it also applies with respect to "those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained".[71] In light of the main purpose of the ICCPR – i.e., to ensure *effectiveness* of human rights – the term "forces" is to be intended as embracing not only the "official" forces included within the context of the national army, but also PMCs hired by the State in order to perform equivalent functions. This further implies that the rule "where public officials or State agents have committed violations of the Covenant" States parties, "may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties",[72] also applies to employees of such PMCs, who act as *de facto* State organs.

b) ICCPR Provisions Specially Relevant to PMSCs

40. The ICCPR defends all individual rights analysed in the previous Section as well as – at Article 1 – the right to self-determination of peoples. In this sub-section, however, only the provisions of the Covenant will be examined which, in addition to being especially relevant to PMSCs operations, present specific profiles additional to those already described in the previous Section.

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

41. According to the Human Rights Committee, "[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[73] It presupposes the rights of peoples to "freely determine their political status and freely pursue their economic, social and cultural development" and to "freely dispose of their natural wealth and resources". These rights may be easily breached by PMSCs in exercising their usual operations, for example through supporting a *coup d'état* by a political group which is not supported by the people; through helping such a group to preserve its political power and repelling the attacks of revolutionary forces enjoying popular support; or through performing vigilance activities at elections in a way which threatens people to the extent of preventing them from freely manifesting their voting choice. In this respect it is interesting to note that the Human Rights Committee has expressed the position according to which the right under discussion "imposes specific obligations on States parties, not only in

[71] *Ibid.*
[72] *Ibid.*, para. 18.
[73] See General Comment No. 12, "The Right to Self-Determination of Peoples" (Article 1), 1984, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument> (last visited on 22 February 2009), para. 1.

relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination";[74] this could support the idea that – in the event that a foreign PMSC is hired by a non-democratic government with the purpose of creating or preserving a situation of sovereignty contrary to the will of the local people – the national government of the PMSC concerned may be considered internationally responsible *vis-à-vis* said people to the extent that it is capable of exercising its control over such a company.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

42. One of the most recurring forms of discrimination is that based on gender, especially with regard to the enjoyment of internationally recognized human rights. With respect to this provision, the Human Rights Committee has noted that "[w]omen are particularly vulnerable in times of internal or international armed conflicts",[75] i.e., in the typical context in which PMCs' operations usually take place, when rape, abduction and other forms of gender-based violence are particularly exacerbated. However, these intolerable forms of indignity and violence are not the only breaches of Article 3 that might occur as result of PMSCs' activities. Such potential breaches – most of which are linked to other rights contemplated by the Covenant – also include, *inter alia*: trafficking in women and forced prostitution;[76] deprivation of liberty on an arbitrary or unequal basis;[77] unequal protection of the rights of women and men deprived of their liberty (particularly when they are not separated in prisons and when women are guarded by male guards);[78] differential treatment of women and men with respect to certain rights such as freedom of movement,[79] access to justice,[80] privacy,[81] freedom of thought, conscience and religion.[82]

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

43. As this provision affirms in clear letters, the right to life is *inherent* to the human being and must be protected by law, irrespective of the nature of the entity – whether public or private – taking the life of others. The scope of this provision, however, is not absolute, as its second sentence implies that deprivation of life may be considered lawful when it is not "arbitrary". Arbitrariness is first of all excluded – according to paragraph 2 of the same article – when a sentence of death is imposed, although this may be done "only for the most serious crimes in

[74] *Ibid.*, para. 6.
[75] See General Comment No. 28, "Equality of rights between men and women" (Article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 of 29 March 2000, para. 8.
[76] *Ibid.*, para. 12.
[77] *Ibid.*, para. 14.
[78] *Ibid.*, para. 15.
[79] *Ibid.*, para. 16.
[80] *Ibid.*, para. 18.
[81] *Ibid.*, para. 20.
[82] *Ibid.*, para. 21.

accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant […] [and only] pursuant to a final judgement rendered by a competent court". While this situation is not usually relevant to PMSCs operations, other possible derogations are implicit to the provision under discussion which may well arise in the context of the activity of these companies. In this respect, lawful taking of the life of others may result from the exercise of the right to self-defence (which is also *inherent* to the human being) as well as in the event that lethal force is used by lawful combatants as an indispensable means to achieve the goals pursued by an armed conflict, provided – in both cases – that certain conditions are met.[83]

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. […]

44. Article 10 places specific obligations on States that are additional to those arising from the right to liberty and security of the person. By virtue of this provision, even in the cases that arrest and/or detention carried out by a PMSC may be considered lawful *per se*, this lawfulness does not exclude that Article 10 is breached. Such a breach occurs every time that an arrested person – whether or not his/her arrest is lawful in itself – is treated without humanity,[84] is not separated from convicted persons and/or is not granted separate treatment appropriate to his/her status of unconvicted person.[85] Additionally, violation of Article 10 also occurs when accused juvenile persons are not separated from adults and are not granted prompt access to justice in order to be tried without delay. According to the Human Rights Committee, proper implementation of the provision in point requires that specific positive measures are taken by the State in favour of imprisoned persons, including "teaching, education and re-education, vocational guidance and training and […] work programmes for prisoners inside the penitentiary establishment as well as outside".[86] It is evident that, in order to make these measures possible, a number of "components" of the governmental organization of a State must be simultaneously present, while a PMSC would hardly possess such a multifaceted organization. This is the reason why, when PMSCs are authorized to arrest and/or detain individuals, it is highly likely that a breach of Article 10 occurs, unless arrested persons are immediately delivered to governmental authorities.

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[83] See *supra*, para. 13.

[84] This implies, in particular, that "[p]ersons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment"; see Human Rights Committee, General Comment No. 21, "Replaces General Comment 9 concerning Human Treatment of Persons Deprived of Liberty" (Article 10), 1992, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument > (last visited on 22 February 2009), para. 3.

[85] According to the Human Rights Committee, this is essential "in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2" of the Covenant; see *ibid.*, para. 9.

[86] *Ibid.*, para. 11.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. […]

45. This provision looks like a specification of the principle enshrined by Article 2 para. 1 ICCPR, according to which all individuals must be able to enjoy all the rights granted by the Covenant without discrimination of any kind. The need of including in the ICCPR a specific provision addressing children, however, was induced by the special peculiarities characterizing childhood, in light of which specially shaped measures – different to those that are usually sufficient for adults – are necessary in order to ensure that children properly enjoy the rights recognized by the Covenant. As emphasized by the Human Rights Committee, "[t]he right to special measures of protection belongs to every child because of his status as a minor";[87] these measures include, *inter alia*, protection from insidious forms of child labour,[88] prevention of them from being "subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs",[89] as well as prevention of the danger of abduction, sale of or traffic in children.[90] Like all other actors in the society, PMSCs must abide by the obligation of preventing children from being involved in such practices.

Article 25

Every citizen shall have the right and the opportunity […]: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; […].

46. As emphasized by the Human Rights Committee,

> "[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of [that right] […] peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs".[91]

Therefore, when a PSC carrying out vigilance activities at elections prevents national citizens from freely manifesting their voting choice, or in any way intimidates people in order to "persuade" them to support a particular political candidate, in addition to violating the collective right to self-determination breaches the individual right set up by Article 25 as well (and, possibly, the right

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[87] See See General Comment No. 17, "Rights of the Child" (Article 24), 1989, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument> (last visited on 22 February 2009), para. 4.

[88] *Ibid*.

[89] *Ibid.*, para. 3.

[90] *Ibid.*, para. 7.

[91] See General Comment No. 25, "The right to participate in public affairs, voting rights and the right of equal access to public service" (Article 25), 1996, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument> (last visited on 22 February 2009), para. 2.

to freedom of expression). This is made clear by the Human Rights Committee in affirming that a necessary requirement arising from the right in question demands that "voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process".[92]

c) International Covenant on Economic, Social and Cultural Rights

47. In light of the nature of the rights safeguarded by its provisions, the ICESCR is much less relevant to PMSCs' operations than the ICCPR. This notwithstanding, the concrete realization of a few provisions of the former might be affected by the activities usually carried out by such companies. In this respect, leaving aside Article 1 – to which, being identical to Article 1 ICCPR, the same considerations developed for the latter apply – one may rely on Article 11. According to paragraph 1 of this article, "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". This provision may be breached in a number of cases that are of interest for the present research – especially in the context of PMCs' operations – particularly on account of the fact that the right in point, as emphasized by the Committee on Economic, Social and Cultural Rights, "should not be interpreted in a narrow or restrictive sense […] [but] it should be seen as the right to live somewhere in security, peace and dignity".[93] Among the specific prerogatives into which this broad concept of the right to housing is translated, the opportunity to have "sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting […]" is included,[94] which may be easily prevented by PMSCs in carrying out their usual activities.
48. Among such activities, the possibility of forced evictions emerges. Forced evictions, which are often connected with forced relocations occurring in the context of armed conflicts, "are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law".[95] In addition, "the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions".[96] Forced evictions may easily result not only from PMCs' operations, but also from those of PSCs; this may happen, in particular, when security services are provided in order to help realize "development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing

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[92] *Ibid.*, para. 20.
[93] See General Comment No. 4, "The right to adequate housing" (Article11 (1)), 1991, available at <http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument> (last visited on 28 February 2009), para. 7.
[94] *Ibid.*, para. 8(b).
[95] *Ibid.*, para. 18.
[96] See Committee on Economic, Social and Cultural Rights, General Comment No. 7, "The right to adequate housing (Art.11.1): forced evictions", 1997, available at <http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument> (last visited on 28 February 2009), para. 4.

of land for agricultural purposes, unbridled speculation in land", etc.[97] In certain cases, forced eviction may be considered to be justified, e.g., "in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause".[98] Even in these cases, however, it "should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality".[99] In addition, in order to be lawful, forced evictions presuppose that certain guarantees are ensured in favour of affected people, which may hardly be provided by PMSCs.[100]

49. Pursuant to Article 12 para. 1 ICESCR, "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". As previously noted,[101] this right may be infringed by PMSCs in a number of circumstances. This is especially evident in light of the broad scope of the term "highest attainable standard of physical and mental health", which "embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment".[102]

50. One of the specific actions that may be carried out by PMSCs leading to breach of Article 12 para. 1 ICESCR consists in "limiting access to health services as a punitive measure, e.g., during armed conflicts in violation of international humanitarian law".[103] A special profile of responsibility arising from the violation of the right in point is connected to "development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands", in the

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[97] *Ibid.*, para. 7.
[98] *Ibid.*, para. 11.
[99] *Ibid.*, para. 14.
[100] In particular, "[a]ppropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available". See *ibid.*, para. 15 f.
[101] See *supra*, para. 16 f.
[102] See Committee on Economic, Social and Cultural Rights, General Comment No. 14, "The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)", U.N. Doc. E/C.12/2000/4 of 11 August 2000, para. 4.
[103] *Ibid.*, para. 34.

accomplishment of which PMSCs may well be involved,[104] through providing either military intelligence or security services. Another interesting point to be emphasized consists in the fact that, pursuant to the provision in question, States "have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means";[105] these "third parties" might well be PMSCs, with respect to which a profile of responsibility of their "home" State may arise. This form of responsibility might be accompanied by that of the host country, which may arise from its "failure to regulate the activities of individuals, groups or corporations [including PMSCs] so as to prevent them from violating the right to health of others".[106]

51. Although limitations to the right in point may be considered justifiable in exceptional circumstances, they "must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review".[107]

d) Convention on the Elimination of All Forms of Discrimination Against Women

52. According to Article 1 CEDAW, the term "discrimination against women" means "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". From this definition it is evident that the rationale of this Convention rests on the same philosophical basis as Article 3 ICCPR.[108] The CEDAW, however, is much more specific on the precise rights that must be granted in favour of women in order to ensure effective elimination of discrimination against them. Therefore, some additional profiles of responsibility – resulting from PMSCs' operations – may arise from the Convention under discussion in comparison with those resulting from the violation of the prerogatives that are implicit in Article 3 ICCPR. For example, pursuant to Article 11 CEDAW, a PMSC which employs nationals of the host State in order to perform certain activities must ensure access to the same employment opportunities for persons of both genders, as well as equal remuneration and equal treatment in respect of work of equal value performed by women and men. Also, by virtue of Article 15 para. 2, in the event of contractual negotiations, PMSCs must recognize in favour of women the same contractual capacity as men.

e) 1984 UN Torture Convention[109]

53. According to Article 1 para. 1 of the 1984 UN Torture Convention,

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[104] *Ibid.*, para. 27.
[105] *Ibid.*, para. 39.
[106] *Ibid.*, para. 51.
[107] *Ibid.*, para. 29.
[108] See *supra*, para. 42.
[109] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. G.A. res. 39/46 of 10 December 1984.

> "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

54. As clearly emerges from the text of this provision, the Convention may only be breached by or at the instigation of or with the consent or acquiescence of a person "acting in an official capacity", i.e., within the context of the organization of the State. In light of this, each time that the services of a PMSC are performed in favour of a government – which is aware of benefiting from these services (thus going beyond the cases in which the PMSC has been *formally* hired by the government itself) – the effects arising from the PMSC action can fall within the scope of the 1984 UN Torture Convention, to the extent that they produce any treatment reaching the threshold of torture or other cruel, inhuman or degrading treatment or punishment.
55. In addition, the Committee against Torture (CAT) has clarified the requirement that a person acting in an "official capacity" is involved, through stating that this concept also encompasses all cases in which, within a State, quasi-governmental powers are exercised by non-governmental entities that have the effective control of a territory over which "de facto, [they] exercise certain prerogatives that are comparable to those normally exercised by legitimate governments", in the absence of a central government from which protection against their action can be sought.[110] For this reason, the scope of the 1984 UN Torture Convention also covers the activities performed by PMSC hired by a non-governmental faction, which in the territory of the State exercises powers comparable to those usually exercised by legitimate governments.

f) 1989 Convention on the Rights of the Child and Its Protocols

56. The CRC is especially vulnerable to PMSCs' operations. As noted with respect to Article 24 ICCPR,[111] for the rights of the child to be effectively realized, special measures are necessary which go far beyond what is usually sufficient in order to ensure protection of adults' rights. The principle enshrined by Article 3 CRC – according to which "[i]n all actions concerning children […] the best interests of the child shall be a primary consideration" – presupposes that in each material circumstance involving a child the usual means used in order to ensure respect for human rights may not be adequate, as a specially-shaped action is required according to the special condition of the specific child involved. With respect to PMSCs' operations, this means that these companies must always act paying special attention to the necessary specific measures appropriate to ensure actual protection for the best interest of the child in all circumstances in which their activity could affect a juvenile. Also, the restrictions to the enjoyment of human rights usually applicable are to be considered – in principle – of much

[110] See *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999), available at <http://www1.umn.edu/humanrts/cat/decisions/120-1998.html> (last visited on 21 February 2009), para. 6.5.
[111] See *supra*, para. 45.

stricter application with respect to children that to adults. In addition, the CRC contemplates a number of rights of the child that are additional to those enjoyed by children by virtue of general instruments on human rights and that are to be respected by all actors having the material chance to have an effect on them, including PMSCs. These rights include: the right of the child not to be separated from his or her parents against their will;[112] the right not to be illicitly transferred or not returned abroad;[113] the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse;[114] the right to be protected from economic exploitation and from performing any work that is likely to be harmful to his/her health or physical, mental, spiritual, moral or social development;[115] the right to be protected from the illicit use of narcotic drugs and psychotropic substances as well as from being involved in the illicit production and trafficking of such substances;[116] the right to be protected from all forms of trafficking[117] as well as from all forms of sexual exploitation and sexual abuse;[118] and – of special significance for PMCs – the right of persons who have not reached the age of fifteen years to refrain from taking a direct part in hostilities.[119]

57. The CRC has been recently complemented by two optional protocols, concerning respectively the prohibition that children are involved in armed conflict[120] and of sale of children, child prostitution and child pornography.[121] While the second as well may not be extraneous to PMSCs operations, the first is pertinent to the activity usually performed by these companies, particularly PMCs. In particular, the Protocol on the involvement of children in armed conflict, calls State parties to "ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces",[122] as well as that "members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".[123] The Protocol thus raises the minimum age for a person to take a direct part in the hostilities from 15 to 18 years, and circumscribes the possibility of recruiting persons younger than 18 years old to *genuine* voluntary recruitment.[124] Of special significance for PMCs is Article 4, according to which "[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons

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[112] See Article 9. The application of this right is made even more complicated by the fact that they it be exempted when the best interest of the child requires to do so, but exemptions may not be decided on the initiative of whatever actor (including PMSCs), but strictly by "competent authorities subject to judicial review".
[113] See Article 11.
[114] See Article 19.
[115] See Article 32.
[116] See Article 33.
[117] See Article 35.
[118] See Article 34.
[119] See Article 38 para. 2.
[120] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 2000, U.N. Doc. A/RES/54/263 of 25 May 2000.
[121] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 2000, U.N. Doc. A/RES/54/263 of 25 May 2000.
[122] See Article 2.
[123] See Article 1.
[124] See Article 3.

under the age of 18 years". State parties must take all feasible measures in order to prevent such recruitment and use.

D. CUSTOMARY INTERNATIONAL LAW*

58. Treaty law is not the only international legal source that is suitable for governing PMSCs in terms of human rights protection. When gross violations of fundamental human rights are perpetrated – including, *but not limited to*, extrajudicial killings, torture and cruel, inhuman or degrading treatment, enslavement or slave trade, trafficking in persons and systematic rape of women – international responsibility of relevant actors (according to the conditions summarized *supra*)[125] also arises pursuant to customary international law on human rights and customary international criminal law (with respect to individual responsibility). In this respect, it may be useful to recall that, when rules of customary international law exist, they are binding on *all* members of the international community, including – to the extent that they may be considered internationally responsible at all, pursuant to international law – non-state actors like PMSCs.

E. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM*

59. This part of the Report focuses on the Inter-American System and on the role that human right norms and implementing procedures laid down in that system may play in regulating the activities of PMSCs. The Inter-American System consists of 1) the 1948 Declaration of the Rights and Duties of Man, 2) The 1969 American Convention on Human Rights, 3) the Organisation of American States (OAS) Charter, 4) the Inter-American Conferences on Private International Law.

a) <u>The Inter-American System: An Overview</u>

60. *The American Declaration of the Rights and Duties of Man* was adopted by Resolution XXX of the Conference of American States[126] on the basis of a text elaborated by the Inter-American Juridical Committee. The content of the Declaration anticipated what will be the catalogue of rights proclaimed a few months later by the Universal Declaration adopted by the UN General Assembly in December 1948. It is to be noted, however, that the American Declaration differs in several ways from the Universal Declaration: it proclaims not only the rights of man but also the duties of each individual "[…] as a prerequisite of the rights of all"[127]; it stresses the importance of culture as "the highest social and historical expression"[128], and highlights spiritual development as "the supreme end of human existence". But apart from these differences, the American Declaration adopts the basic catalogue of civil and political rights enshrined in the Universal Declaration, as well as the basic underlying liberal philosophy

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* This Section has been written by Federico Lenzerini.
[125] See paras. 6-10.
* This Section has been written by Francesco Francioni.
[126] Convened at Bogotà from 30 March to 2 May 1948
[127] See Preamble, 2nd sentence.
[128] *Ibid.*, 5th sentence.

according to which human rights are not derived from the fact that an individual is a national of a given state but are based on attributes of shared humanity. Besides, like the Universal Declaration, the American Declaration is a normative instrument of soft law, a standard of progressive achievement that later on will develop into a binding legal instrument, the 1969 American Convention on Human Rights.

61. *The American Convention on Human Rights*[129] codifies traditional civil and political rights along the earlier models of the 1950 European Convention and of the 1966 UN Covenant on Civil and Political Rights.[130] Like the latter instruments, the American convention is premised on the concept that human rights are protected and guaranteed by way of "state obligations" rather than by obligations of private actors. Formal evidence of this approach can be found in the title of Part 1 of the Convention, "State Obligations and Rights Protected" and, more specifically, in the title of Chapter 1 on "General Obligations", which refers to the obligation of States Parties to respect the rights and freedoms set forth in the convention and to implement such rights and freedoms in their domestic legal order to ensure their effective enjoyment to all persons "subject to their jurisdiction".[131] An opening of the Convention toward the possible development of human rights obligations of non-state actors can be found in Chapter V on Personal responsibilities where Article 32 expressly states that "Every person has responsibilities to his family, his community, and mankind". It is clear that this language opens infinite possibilities for the construction of human rights obligations at the horizontal level in the private to private relations, including obligations directly binding upon private military contractors. An original feature of the American Convention is its Article 29 para. 4, which refers to the 1948 American Declaration of the Rights and Duties of Man as a source of interpretive criteria for the rights laid down in the Convention. This is a very progressive provision in as much as it permits that the more extensive formulation of a human right offered by the Declaration, a soft law instrument, will prevail over a possibly more restrictive formulation to be found in the Convention, which has the status of a binding international instrument.
62. At the procedural level, The American Convention provides for direct access to remedies by "any person or group of persons, or any non-governmental entity legally recognized in one or more member state of the Organisation […]"[132]. This right, however is limited to the Commission and is couched in terms of "right of petition" , not of full judicial guarantees. The Commission is an organ representative of states under Article 35 [133] and its function can be characterised as fact-finding and conciliation rather than adjudication. True judicial protection in the Inter-American system is offered by the Inter-American Court of Human Rights. But access to this court is limited to the Commission and States. Besides, the jurisdiction of the American Court is not automatic and mandatory, as in the

[129] Adopted at San Jose de Costa Rica on November 22, 1969, entered into force July 15, 1975.
[130] It is to be noted, however that an additional Protocol on economic, social and cultural rights was later adopted in San Salvador on 17 November 1988, and entered into force on 28 September 1999, as well as a Protocol on the abolition of death Penalty, Asuncion 1990, which has direct relevance for PMSCs, the specific topic of this report.
[131] Article 1. It is to be noted that this article – like the corresponding article 1 of the ECHR – refers only to "jurisdiction", not to "territory" as Article 2 ICCPR does.
[132] See Article 44.
[133] "The Commission shall represent all the member countries of the Organisation of American States".

system of the ECHR after the entry into force of Protocol XI, but is contingent upon the State Party's declaration of acceptance at the time of ratification or adherence to the Convention.[134] Although this limitation of the individual right of access to justice may make the American system appear less advanced, when compared to the system of direct access to court under the ECHR the practice shows that the Commission can act as an effective agent of victims of human rights violations and that individuals and entities can see their claims effectively pursued by the Commission before the Court. Besides, victims, family members and organisations representing victims can bring arguments, requests and elements of proof in the proceedings before the Court.[135] Besides the contentious procedure, the Court performs a consultative function under Article 64. The exercise of this function by the Inter-American Court may be triggered by all member states of the OSA as well as by competent organs of the same Organisation.

63. The consultative jurisdiction of the Court is not limited to the interpretation of the Convention but extends to "[…] other treaties concerning the protection of human rights". In the practice of the Court, the consultative competence has extended to the interpretation of the American Declaration of the Rights and Duties of Man and of other relevant treaties, such as international humanitarian law. This enhances the role of the American Court and makes it a true guardian of the regional system of international human rights beyond its narrower function as guarantor of the human rights listed in the 1969 Convention.
64. *The OAS Charter* is also relevant to this Report. Although not a human right instrument but a constitutive instrument of a regional international organisation, the OSA Charter, adopted in 1948 in line with the organisational decentralisation contemplated by the UN Charter[136], exhibits a commitment to the protection of human rights in several of its constitutional provisions. Article 3 proclaims "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex". Article 17 affirms the right of every state "[…] to develop its cultural, political, and economic life freely and naturally" but at the same it requires that in "[…] this free development, the state shall respect the rights of the individual and the principles of universal morality". Of relevance to the subject matter of this report is also the Inter-American democratic Charter, adopted in 2001, which contains a specific chapter (Chapter 2) dedicated to human rights.
65. This overview of relevant legal instruments would not be complete without a brief reference to the *Inter-American Conferences on Private International Law*. These conferences aim at the codification of several areas of private international law and, although they do not produce human rights treaties *stricto sensu*, they may indirectly contribute to the protection of human rights or be relevant to the regulation of private military and security companies. An example of the first category is given by the conventions on the law applicable to family relations and on international child abduction. An example of the second category is given by *Convention on Conflicts of Law concerning Commercial*

[134] See Article 62.
[135] See Article 23 of the new rules of procedure of the Court.
[136] See Chapter VII, articles 52-54.

Companies,[137] which establishes as a principal criterion for the existence, operation and dissolution of a company the place where the company is constituted.[138] Similarly, the *Convention on Personality and Capacity of Juridical Persons in Private International Law*[139] adopts the criterion of "the place of the organisation" of the juridical person to determine the law competent to regulate the existence, operation and extinction of the legal entity.[140] These conventions are relevant to determine the law applicable to PMSCs operating in the territory of the contacting parties, as well as to establish the competent forum for the adjudication of claims against PMSCs. In addition, they may be a source of interpretative criteria to define the scope of application of specific human rights provisions by the Inter-American Court and the Commission especially in light of their inclination to interpret the American Convention in the wider context of the inter-American system and taking into account the specific mandate to extend the consultative jurisdiction of the Court to "other treaties" relevant to human rights in the American States pursuant to Article 64 of the 1969 Convention.

b) Human Rights Provisions Relevant to PMSC

66. As already indicated in the introduction to this section of the Report, the Inter-American system of human rights protection and, in particular, the 1969 Convention, do not lay down obligations binding directly upon non-state actors such as PMSCs. The human right obligations are exclusively addressed to State Parties of the relevant instruments and the private persons who are victims of human rights breaches can only invoke the responsibility of the State in whose jurisdiction the injury has occurred. This does not exclude, however that, in the event of human rights abuses committed by private entities, the responsibility of the State may be triggered on the basis of an alleged failure to prevent, protect or prosecute the private act that has caused the breach. This observation is especially relevant for the PMSCs and their operations in peacetime and in the context of armed conflicts. With this in mind we can proceed, first to the identification of the human rights provision which are directly or indirectly relevant to the activities of PMSCs and, then to the assessment of the potentiality that human rights obligations yield for holding States responsible for human rights abuses committed by PMSCs.
67. Not all human rights provisions contained in the American Convention and in the other normative instruments examined above are applicable to conduct involving PMSCs. For instance, Article 9 concerning freedom from *ex post facto* laws establish an obligation that can be fulfilled only by the state by law and by a proper organisation of the justice system. Therefore, the human right guaranteed by the principle *nullum crimen/nulla poena sine lege* cannot be put at risk by activities of private military contractors.

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[137] Adopted in Montevideo on May 8, 1979 and entered into force on June 14, 1980. AS of December 2008 this convention was ratified by Argentina, Brazil, Guatemala, , Mexico, Paraguay, Peru, Uruguay and Venezuela.

[138] See Article 2

[139] Adopted in La Paz on May 24, 1984 and entered into force on September 8, 1992. As of December 2008 four states were parties to this convention: Brazil, Guatemala, Mexico, and Nicaragua (see <http://www.oas.org/juridico/english/sigs/b-49.html>, last visited on 31 May 2009).

[140] See Article 2.

c) American Convention on Human Rights

68. In the following schematic outline we indicate the articles of the American Convention that have a direct relevance to the operation of PMSCs.

Article 1

Obligation to Respect Rights – 1. The States Parties to this Convention undertake to respect the rights and freedoms guaranteed herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition […].

69. This Article is important because it provides for an obligation of all state parties "to ensure" to all persons subject to their jurisdiction the full enjoyment of the rights guaranteed in the Convention. This entails that violations of human rights by PMSCs in the area of application of the Convention must be prevented in accordance with a standard of due diligence and, in the event they occur, they must be subject to investigation and remedial process.

Article 4

Right to Life – 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

70. Given the nature of the services provided by PMSCs, which include coercive services and the use of weapons, it is clear that this Article can have direct relevance in view of the regulation of this type of company. Also the language of the Article lends it self to a broad scope of application, including private military contractors. First, the introductory clause refers to a unconditional right of every person to have his life respected, arguably by public authorities as well as by non-governmental actors empowered with means to use force. Second, the Article refers to the obligation by the state to protect the right to life by law. This entails the positive obligation to enact appropriate legislation to ensure that life is protected against violence and to provide a system of public security where no one may be arbitrarily deprived of his/her life. As we shall see in the following section, this obligation has been implemented by the American Court in a number of cases involving atrocities committed by private actors.

Article 5

Right to Humane Treatment – […] 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. […].

71. Like the right to life, the right to be free from torture and inhumane treatment contains an unconditional obligation to the effect that "no one" shall be subjected to torture either by direct state action or by action of private actors in situations where their conduct may be attributable to the state. This obligation is further strengthened by the second clause of Article 5 para. 2, which refers to the special situation of persons deprived of their liberty and for this reason more likely to be exposed to the risk of inhuman treatment. Since detention facilities as well as interrogation services have been in actual practice often outsourced to private military contractors, this Article can serve either to provide a conduit for the direct attribution to the contracting state of abuses committed by the PMSC – to the extent that they exercise elements of governmental authority,[141] acted on

[141] See Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

the instruction of, or under the direction or control of the state - or, alternatively, to hold the same state accountable for omission of proper supervision of the services outsourced to the PMSC.

Article 6

Freedom from slavery – 1. No one shall be subjected to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. 2. No one shall be required to perform forced or compulsory labour […].

72. This provision too is formulated in absolute terms, in the sense that the prohibition of slavery, slave trade and traffic in women applies irrespective transgressor's public or private status. Thus the organisation of human-trafficking by PMSCs, as has happened in the recent history of private military contractors operating in the Balkans,[142] falls within the scope of this obligation. At the same time, Article 6 can be a source of legal obligations for a state which permits or licences the provision of private security services to business corporations operating in its territory and such services are used to implement policies of involuntary servitude or forced labour, as sometimes has happened in the field of extractive industries. In addition, the provisions of Article 6 can be interpreted so as to create an obligation for the home state of the PMSC – i.e., the state where the company is legally constituted – to adopt appropriate legislation and administrative measures so as to prohibit and sanction the engagement in slavery and slave traffic by PMSCs.

Article 7

Right to Personal Liberty – 1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto […].

73. This provision is crucial in relation to PMSCs who have been contracted by a state to perform detention and interrogation services. This is a very common scenario in light of the widespread practice developed in recent situations of armed conflict and military occupation such as Afghanistan and Iraq. Of course, in such situations, the question arises whether Article 7 as a human rights provision must yield to the international humanitarian law (IHL) as *lex specialis*.[143] But even if international humanitarian law has the effect of displacing international human rights norms, because of the exceptional situation of armed conflict and military occupation, nevertheless Article 7 may still retain a residual role to safeguard the liberty and security of people who are not participating in hostilities and are not prisoners of war. Besides, this Article may provide an overlapping protection over that which is guaranteed by IHL. As we shall see in the subsequent section, the judicial practice of the American

[142] See N. LINDSTROM, "Regional Sex Trafficking Networks and International Intervention in the Balkans", paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Canada, 17 March 2004, at <http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/4/7/p73476_index.html> (last visited on 31 May 2009), p. 11 f.

[143] See the contribution by F. LENZERINI and S. MC LEOD, "The Interaction of Human Rights and International Humanitarian Law Norms with Respect to PMSCs".

Commission and Court support a certain degree of convergence and synergy between IHL and the human rights protected in the inter-American system.

Article 8
Right to a Fair Trial – 1. Everyone has the right to a hearing […].

Article 25
Right to Judicial protection – 1. Everyone has the right to simple and prompt recourse, or any effective recourse, to a competent court or tribunal for the protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention […].

74. These articles lay down an obligation for the States Parties to the American Convention to guarantee access to justice and judicial protection to possible victims of abuses committed by PMSCs. This includes the right to seek reparation for civil damages and the right to obtain appropriate investigation and prosecution when the abuses committed by the PMSC constitute criminal offences.

Article 19
Rights of the Child – Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.

75. The most obvious application of this article concerns the protection of children against recruitment of minors in PMSCs that may be involved in hostilities. This prohibition stems from the combined interpretation of Article 19 and Article 38 of the CRC, which is in force for all the States parties to the American Convention. However, it is to be noted that for the purpose of the prohibition of recruitment of child soldiers, a "child" is defined as a person who has not attained the age of 15, rather than 18 as per the general definition of Article 1 of the CRC.

76. The Articles discussed above do not exhaust all the possible sources of human rights norms which may be at risk of violation in connection with activities of PMSCs. Other norms, such as those concerning protection of property (Article 21), freedom of movement and residence (Article 22), might well be violated in connection with services provided by private military contractors. But we have concentrated our attention on the above provisions, both because they are the most likely to be breached by the type of coercive services normally required by PMSCs, and because it is in relation to these provisions that we can find important judicial practice that we now move on to examine.

d) Judicial Practice concerning the American Convention on Human Rights

77. As pointed out at the outset of this report, the American Convention of human rights lays down a system of state obligations which are addressed to State Parties and not to private actors. Therefore in the case law of the Commission and of the Court one cannot find any indication that private military contractors as such may be held responsible for breach of the Convention as a consequence of their conduct. One must look instead at the State which has a relevant connection with the company to determine whether an injury caused by the PMSC is attributable to that state or, even in the absence of such attribution, that

state may be held accountable for its own failure to comply with the obligations undertaken by the Convention.

78. In order to assess the conditions and scope of state responsibility for the conduct of PMSCs it is useful first, to contextualise the issue within the broader perspective of the interaction between human rights and the law of armed conflict – since it is in this context that abuses of PMSCs are most likely to arise – and, second, to examine the criteria of attribution that the inter-American practice has developed in order to establish state responsibility for human rights violations perpetrated by private actors.

79. On the first point, the practice developed by the organs of the Inter-American system have given a broad interpretation to general protection clause of Article 1 para. 1 of the American Convention, so as to bring within its scope also situations of armed conflict – and particularly of non-international conflict, where services of PMSC are most likely to be performed – and to develop a mutually supportive approach to the relationship between human rights and international humanitarian law. In the *La Tablada* case involving a claim of alleged breaches of international humanitarian law by Argentina, the Commission gave a very expansive interpretation of an earlier Advisory Opinion of the American Court, which had affirmed its competence to interpret and apply "other treaties" within the meaning of Article 64 of the American Convention.[144] This meant, in the opinion of the Commission, that such "other treaties" could include the 1949 Geneva Conventions and the 1977 additional protocols.[145] Such sweeping extension of the competence was not warranted either by the clear language of Article 64, which restricts the competence of the Court to interpret "other" human rights treaties to its advisory function, nor by the equally restrictive advisory opinion rendered by the Court in 1982 on the specific issue of the applicability of "other treaties" in the Inter-American System[146]. However, in the subsequent case law the Court has rectified this overly expansive interpretation of the Convention and has held that norms of international humanitarian law may be applicable not so much as an autonomous source of legal obligations in the proceedings before the Court, but rather as a legal parameter to be taken into account *incidenter tantum* and as a criterion of interpretation of the applicable norms of the Convention. This approach is clearly expressed in the *Case of Las Palmeras v. Colombia,* involving atrocities which the Commission had found to constitute a breach of common Article 3 of the Geneva conventions.[147] When the case was referred to the Court by the Commission, the Court declined to apply Article 3 as part of the directly applicable law. Instead, it simply used Article 3 as a criterion of interpretation of the American Convention and, in particular, of the scope of the general protection clause of Article 1 para. 1. The same conclusion could have been reached by considering common Article 3 as part of customary international to be taken into consideration in the interpretation and application of the American

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[144] See, *supra*, section 2.

[145] IACHR Report No 55/97, case No 11.137, *Argentina*, OEA/Ser/L/V/II.97, Doc. 38, October 30, 19997, par. 157.

[146] Inter-American Court of Human Rights, *"Other treaties" subject tot the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982, Series A No 1.

[147] See Inter-American Court of Human Rights, Judgement of February 4, 2000, Series C No 67, paras. 32 ff.

Convention.[148] But the subsequent practice of the American Court does not appear to rely on customary international law; rather, it affirms a mutually supportive role that common Article 3 and the specific provisions of the American Convention play in defining the proper scope of application of the later. This approach is well illustrated by case of *Bàmaca Velàsquez v. Guatemala* concerning enforced disappearances and presumed extrajudicial executions.[149] The Court addressed the complaint of the victims in light of the general obligation to respect human rights laid down in Article 1, para 1 of the Convention and pointed out that this general obligation overlapped in many respects with the obligations arising under common Article 3. In the end, however, the Court found the respondent state responsible for breach of Article 1 para. 1 rather than for a direct violation of common Article 3.[150] The same approach has been followed in subsequent case law, such as in the *Case of the Miripiran Massacre*,[151] and the *Case of the Ituango Massacres*.[152]

80. This jurisprudential approach, whereby fundamental rules of IHL are taken into account in order to establish the extent of the state's obligation to respect and ensure respect for the human rights guaranteed under the American Convention, is of the utmost importance for the purpose of this report. It permits the infusion of humanitarian law into the body of applicable human rights law in situations of armed conflict. And most important, it signals the potential that the complementary use of IHL and the American Convention may yield in holding State Parties accountable for abuses committed by private military contractors in situations of armed conflict.
81. The judicial practice examined above provides a substantive legal basis to construe the scope of application of the American Convention in light of fundamental principles of IHL and in the context of armed conflict where services of private military contractors are likely to be performed. It remains to be seen what are the precise criteria of attribution developed in the case law of the Court with respect to the triggering of state responsibility for acts of non-state actors such as PMSCs.
82. In principle, attribution to the state of human rights breaches committed by private military contractors is possible whenever the respondent state has failed to comply with its obligation to prevent such abuses or to investigate and sanction them according to a criterion of due diligence and correct administration of justice. The paradigmatic case in the practice of the American Court is *Velasquez Rodriguez*,[153] which concerned enforced disappearances to a large extent attributable to criminal conduct of state officials. However, given the extent and ramifications of the practice of enforced disappearances and the "multiple violations" of the American Convention that such practice entailed –

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[148] For this view, see F. MARTIN, "Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l'Homme", 83 *International Rev. Red Cross*, 2001, 1037 ff.
[149] See Inter-American Court of Human Rights, *Bàmaca Velàsquez v Guatemala*, Merits, judgment of 25 November 2000, Series C No. 70.
[150] *Ibid.*, para. 214.
[151] See Inter-American Court of Human Rights, *Case of the "Miripiran Massacre" v. Colombia*, Merits, Reparation and Costs, judgment of 15 September 2005, Series C No. 134, paras. 167-189.
[152] See Inter-American Court of Human Rights, *Case of the Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, judgment of 1 July 2006, Series C No. 148, paras. 201-235.
[153] See Inter-American Court of Human Rights, *Case of Velasquez-Rodriguez v. Honduras*, judgment of 29 July 1988, Series C No. 4, especially para. 155.

including breach of the right to personal liberty, Article 7, and right to life, Article 4 – the Court determined that it was not decisive whether state organs had directly engaged in enforced disappearances. What was relevant was that the state (Honduras) had failed adequately to protect the victims when faced with a widespread practice of disappearances which called for reasonable measures of crime prevention and investigation and prosecution of the perpetrators. On the basis of this precedent. the responsibility of the territorial state for acts of private actors has been incorrectly referred to as "objective responsibility" under the American Convention.[154] The correct definition, instead, is state responsibility for breach of a due diligence duty to prevent or repress grave breaches of the American Convention. The only "objective" element is the standard of due diligence, which is not "*quam in suis"* or generally related to the subjective capacity of a state, but to the precise and "objective" standards of human rights protection set out in the American Convention. Clearly, allowing a widespread practice of enforced disappearances in its territory is incompatible with such standards, even if disappearances occur due to private vigilantes or militia, which were not created directly by the state but over which the state should have exercised proper supervision.

83. Such a due diligence approach, in spite of occasionally broad language echoing "objective responsibility",[155] is confirmed by the subsequent practice of the American Court where the test for establishing state responsibility for private acts is the state's "awareness of a situation of real and imminent risk for a specific individual or group of individuals, and of the existence of a the reasonable possibility of preventing or avoiding that danger".[156] Such test of "awareness" includes the situation where the state has actual knowledge of the real and imminent risk and of situation of "constructive" knowledge, i.e., where the state ought to have known of the imminent risk. In the *Pueblo Bello Massacre*[157] case concerning extra-judicial executions by armed para-military groups in Colombia, the Court held that:

> "it is true that in this case, it has not been proved that the State authorities had specific prior knowledge of the day and time of the attack on the population of Pueblo Bello and the way it would be carried out [...]".

However,

> "Colombia did not adopt sufficient prevention measures to avoid a paramilitary group of approximately 60 men from entering the municipality of Pueblo Bello at a

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[154] See C. MEDINA QUIROGA, "Las obligaciones delos Estados bajo la Convencion Americana sobre derechos humanos", in *La Corte Interamericana de Derechos Humanos: un Quarto de Siglo: 1979-2004*, San Jose, 2005.

[155] See, for instance, Inter-American Court of Human Rights, *Case of the La Rochela Massacre v. Colombia,* judgement of 11 May 2007, Series C No. 163, where the Court says: "[t]his Tribunal has established that international responsibility of states, pursuant to the provisions of the American Convention, arise from a violation of general obligations, in the nature of *erga omnes*, to respect and enforce respect for – guarantee – norms of protection and to ensure the effectiveness of the rights enshrined therein, under all circumstances and for all persons, as embodied in Articles 1(1) and 2 of the Convention".

[156] See Inter-American Court of Human Rights, *Valle Jaramillo et al. V. Colombia*, judgment of 27 November 2008, Series C No. 192, para. 78

[157] See Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v Colombia*, judgement of 31 January 2006, Series C No. 140.

time of the day when the circulation of vehicles was restricted and then leaving this zone after having detained at least 43 alleged victims in the instant case, who were subsequently assassinated or disappeared".[158]

84. This broad construction of actual or required knowledge as a constitutive element of state responsibility for acts of private actors is very relevant to the operations of PMSCs. Although such companies cannot be assimilated to the criminal para-military organisations that were involved in the serious violations of human rights examined above, the approach developed by the American Court offers several elements that can be usefully applied to a PMSC scenario. First, if a relevant factor in establishing state responsibility is the knowledge of the risk posed by armed group to innocent civilians, greater knowledge must be deemed to exist when the state *itself* contracts out to private military contractors certain coercive functions. Then, full knowledge of the nature of these functions translates by necessity into the awareness of the risk that they entail, especially if this include coercive services and use of weapons that might expose the civilian population to actual or potential danger to their life, security or liberty. Second, although the criterion for establishing state responsibility remains "due diligence", rather than objective liability, the case law of the Inter-American Court shows that the standard of due diligence is not subjective but, on the contrary, must be objectively indexed to the human rights obligations as laid down in the Convention and as interpreted in the judicial practice of the Court. Third, since in the PMSC scenario it is the hiring state that creates by contract the services from which the risk of human rights violations arises, in the event of recurring or systematic violations the Court may even presume the breach of due diligence simply on the basis of the fact of a repetition of the human right violation without any need for further inquiry into the knowledge or fault of the hiring state.

e) Inter-American Conventions on Private International Law

85. As pointed out above, the private international law component of the Inter-American System, although apparently unrelated to PMSCs, may have a certain relevance in addressing the issue of who can be held responsible for human rights violations committed by these companies. PMSCs are commercial companies and as such they may fall within the scope of application of the already mentioned *Convention on Conflicts of Law Concerning Commercial Companies* as well as the *Convention on Personality and Capacity Of Juridical Persons*.[159] Both these conventions adopt as a criterion for the choice of the applicable law the place of "organisation" of the company, i.e., the state in which the formal and substantive requirements for the constitution of the company or of the juridical person were fulfilled. This entails a close connection between the state of incorporation and the PMSC. In the event a PMSC which is incorporated and registered in a state and performs services in another state, the question arises whether in the event of serious violations of human rights committed in the latter state the victim may invoke the international responsibility of the home state of the private military contractor. To the best of our knowledge there is no instance in the practice of the Commission or the Court in which such responsibility has been affirmed or even invoked. The state

[158] *Ibid.*, paras. 135-138.
[159] See *supra*, para. 65.

responsibility for breach of human rights has always been based upon the territorial link between the facts giving rise to the breach and the respondent state. However, this is only one possible interpretation of the term "jurisdiction" adopted in Article 1 of the American Convention. A more expansive reading of the term could include the state, which because of its role in creating the company, licensing its activities, monitoring its operations, maintaining the power to dissolve the company or disqualify its employees, must be presumed to exercise some form of control even over extra-territorial operations. If this control is effective and is mandated by appropriate legislation, then one could argue that a reasonable duty to prevent injuries by PMCS exists on the basis of the test of "knowledge" of the risk and of due diligence under human rights standards. All the more, one can argue that in the event of serious violations of human rights committed by the PMSC in a third state, the home state should be responsible for making available to the victims appropriate judicial or administrative remedies and, if the breach amounts to a crime, appropriate investigation and prosecution of the alleged perpetrators.

F. THE AFRICAN HUMAN RIGHTS SYSTEM*

a) The African System: An Overview

86. The African system of human rights represents a legal system which is particularly sensible to PMSCs' activities. In factual terms, this is due to the frequency with which armed conflicts – especially of non-international character – take place in the African continent. In this respect, one author has stressed that "[p]erversely privatizing state security, undemocratic leaders have bankrolled foreign forces to subvert democracy and good governance, thus securing their own survival and undermining their peoples' right to self-determination".[160] Mercenarism has marked a long-lasting African tradition, against which African countries have ardently reacted in most recent decades, perceiving mercenaries – i.e., "white soldiers of fortune fighting black natives" – as a symbol of racism and neo-colonialism.[161] Although – as seen *supra* – in technical-legal terms PMSCs may be equated to mercenaries only in very few cases, in principle the former could actually replace the latter in performing their traditional functions.
87. The African system of human rights is rooted in the idea of *Pan-Africanism* – representing the aggregation of the historical, cultural, spiritual, artistic and philosophical legacies of African people – which promotes values that are the result of the African civilization as shaped by its struggle against slavery, racism, colonialism, and neo-colonialism.[162] Although not specifically mentioned, the idea of Pan-Africanism finds expression in the Preamble of the Charter of the Organization of African Unity (OAU – then transformed into the African Union, AU), which refers to the "aspirations of peoples for brotherhood and solidarity". Human rights were not originally included within the institutional mandate of

* This Section has been written by Federico Lenzerini.
[160] See F. VILJOEN, *International Human Rights Law in Africa*, Oxford, 2007, p. 295.
[161] See J. L. TAULBEE, "Myths, Mercenaries and Contemporary International Law", 15 *California International Law Journal*, 1985, 339, p. 342; see also VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 297 f.
[162] See VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 157 f.

the OAU, and, during its first years of existence, the Organization turned a blind eye to allegations of human rights breaches in member States in order to avoid interference into their domestic affairs. In the 1960s, however, it had the opportunity to deal with two human-rights-related issues of transnational character that had a strong political connotation, i.e., self-determination of peoples (in the sense of the struggle of African peoples against foreign colonization) as well as the problem of the management of refugees, triggered by the need for preventing the potential conflicts which could arise out of subversive activities carried out by refugee people against their countries of origin.[163] The latter issue led to the adoption in 1969 of what may be considered the first human rights regional instrument, i.e., the OAU Refugee Convention.[164]

88. The appropriate social and political background for the adoption of the ACHPR matured at the end of the 1970s, facilitated by the process of democratization of most African countries, which took place in two different stages: the period of decolonization and 1979, with democratization of Ghana and Nigeria.[165] In the same year, three infamous dictators – namely, Amin in Uganda, Nguema in Equatorial Guinea and Bokassa in the Central African Empire – were overthrown after having perpetrated massive human rights abuses in their respective countries during the 1970s;[166] this gave a huge spur to the process of codification of human rights in Africa. The ACHPR was finally adopted in 1981.
89. In the subsequent years, other African human rights instruments were adopted, including the *African Charter on the Rights and Welfare of the Child*[167] and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*[168] are of particular interest to the present Report.

b) <u>African Charter on Human and Peoples' Rights</u>

90. The ACHPR is possibly the most comprehensive human rights treaty in the world, as it encompasses within a single instrument individual rights of both civil and political and economic, social and cultural character as well as collective (*peoples'*) rights. This construction of the Charter is coherent with the African tradition, as collective prerogatives have always represented essential features of traditional African societies.[169]
91. The structure of the ACHPR is characterized by the indivisibility of the three generations of rights,[170] i.e., civil and political rights (first generation), economic and social rights (second generation), peoples' rights (third generation). All these rights are considered indivisible by the Charter, implying that both socio-

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[163] *Ibid.*, p. 164 f.
[164] See *Convention Governing the Specific Aspects of Refugee Problem in Africa*, 1969, available at <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf> (last visited on 31 May 2009).
[165] See VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 167.
[166] *Ibid.*, p. 166.
[167] Adopted in July 1990, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited on 31 May 2009).
[168] Adopted in July 2003, *ibid.*
[169] See, *inter alia*, S. H. HELLSTEN, "Human Rights in Africa: From Communitarian Values to Utilitarian Practice", 5 *Human Rights Review*, 2004, p. 61 ff.
[170] See VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 237 ff.

economic and peoples' rights are justiciable exactly to the same extent as civil and political rights.

92. In legal terms, the construction of human rights law promoted and developed by the African Commission – established by Article 30 ACHR – is particularly well-suited to PMSCs' operations. According to the Commission, "[i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime".[171] This "four-layer" categorization of human rights – which applies to the African system, particularly to the African Charter on Human and Peoples' Rights – obviously entails, at "a primary level", the obligation to *respect*, i.e., the requirement that States "refrain from interfering [directly] in the enjoyment of all fundamental rights".[172] The second layer is represented by the obligation to *protect* "against other subjects by legislation and provision of effective remedies",[173] i.e., "to take measures to protect beneficiaries of the protected rights against political, economic and social interferences".[174] This specific requirement clearly applies to activities carried out by private actors, with respect to which the State must interpose itself between potential perpetrators and victims, acting as a shield in order to prevent that the human rights of the latter are prejudiced by the action of the former. "[T]he tertiary obligation of the State" arising from human rights law is grounded on the same rationale; it consists in the requirement to *promote* "the enjoyment of all human rights […] [through] mak[ing] sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures".[175] Finally, the fourth layer is represented by the obligation to *fulfil* human rights, i.e., "to move its machinery towards the actual realisation of the rights".[176]
93. In light of this four-layer construction, it is evident that when PMSCs' operations produce the objective result of generating a breach of a protected human right, international responsibility of the territorial State (or of the State which has – or should have – control over such activities) is triggered *irrespective* of whether or not the PMSC concerned may be considered part of the State apparatus. In fact, in the event that the PMSC is actually part of the governmental machinery, the State will be held responsible for breaching the obligation to *respect* human rights, while in the opposite situation the requirement of *protecting* (and, possibly, *fulfilling*) such rights is to be considered violated. The actual application of this principle, however, is conditioned to the presence of certain requirements, which have been recently explained in details by the Commission. In particular, according to the Commission,

> "[h]uman rights standards do not contain merely limitations on state's authority or organs of state. They also impose positive obligations on states to prevent and sanction private violations of human rights. Indeed, human rights law imposes

[171] See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *cit.*, para. 44.
[172] *Ibid.*, para. 45.
[173] *Ibid.*, para. 46.
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*, para. 47.

> obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a state can generate responsibility of the state, not because of the act itself, but because of the *lack of due diligence* to prevent the violation or for *not taking the necessary steps to provide the victims with reparation*".[177]

94. Therefore, the standard of *due diligence* is

> "a way to describe the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the state".[178]

In order to determine whether the standard of due diligence has been applied correctly, a number of factors are to be taken into account. In the Commission's words, the "extent of a state's responsibility must not be determined in the abstract. Each case must be treated on its own merits depending on the specific circumstances of the case and the rights violated".[179] In this respect, relying on the International Court of Justice (ICJ),[180] the Commission attributed particular importance to the means which are "at the disposal" of the State, although it assumed that "for non-derogable human rights the positive obligations of states would go further than in other areas".[181] It is also necessary to undertake an "analysis of the feasibility of effective state action" – as "[a] finding that no reasonable diligence could have prevented the event has contributed to denials of responsibility"[182] – as well as considering the extent to which the State concerned could "have foreseen the violence and taken measures to prevent it".[183]

95. The fact of whether or not the State has effectively applied the required due diligence is to be established on a case-by-case basis.[184] In practical terms, the due diligence requirement "encompasses the obligation both to provide and enforce sufficient remedies to survivors of private violence".[185] However, usually a "single violation of human rights […] [i]ndividual cases of policy failure or sporadic incidents of non-punishment [do not establish a lack of due

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[177] See *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, 2006, 2006 *AHRLR* 128, para. 143 (footnotes omitted; emphasis added).
[178] *Ibid.*, para. 147.
[179] *Ibid.*, para. 155.
[180] See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980, *I.C.J. Reports*, 1980, p. 3, para. 87.
[181] See *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, *cit.*, para. 155.
[182] *Ibid.*, para. 156.
[183] *Ibid.*, para. 157.
[184] *Ibid.*, para. 158.
[185] *Ibid.*, para. 159. In this paragraph the Commission adds that "the existence of a legal system criminalising and providing sanctions for assault and violence would not in itself be sufficient; the government would have to perform its functions to 'effectively ensure' that such incidents of violence are actually investigated and punished. For example, actions by state employees, the police, justice, health and welfare departments, or the existence of government programmes to prevent and protect victims of violence are all concrete indications for measuring due diligence".

diligence by a state and, therefore,] would not meet the standard to warrant international action".[186] It follows that,

> "by definition, a state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights. However, unlike for direct state action, the standard for establishing state responsibility in violations committed by private actors is more relative. Responsibility must be demonstrated by establishing that the state condones a pattern of abuse through pervasive non-action. […] To avoid such complicity, states must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses".[187]

96. Therefore, where a State is able to indicate "measures that it took to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention",[188] the burden of proof of demonstrating "collusion by the state to either aid or abet the non-state actors in committing the violence […] or show[ing] that the state remained indifferent to the violence that took place" will rest upon the complainant.[189] It is in light of this approach – which, in comparison with the Commission's less recent practice, has *de facto* restricted the scope of State responsibility[190] – that the provisions of the ACHPR are to be evaluated.

c) Specific Provisions of the ACHPR Relevant to PMSCs

97. There are a number of specific provisions in the ACHPR which may be affected by PMSCs' operations. As it has been made with respect to the ICCPR, only those provisions of the Charter will be examined which, in addition to being particularly relevant to the activity of PMSCs, bear specific peculiarities additional to those characterizing the corresponding rights in the general perspective.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

98. The first substantive right defended by the Charter is contemplated at Article 4, providing for the right to life and integrity of the person.[191] For the African Commission, "[t]he right to life is the fulcrum of all other rights. It is the fountain through which other rights flow".[192] In the African context, protection of the right to life attains special significance with respect to extra-judicial

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[186] *Ibid.*, para. 158 f.
[187] *Ibid.*, para. 160.
[188] *Ibid.*, para. 161.
[189] *Ibid.*, para. 163.
[190] See *infra*, para. 106 f.
[191] According to Article 4 of the ACHPR, "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".
[192] See Communication No. 223/98, *Forum of Conscience v. Sierra Leone*, 2000, 2000 *AHRLR* 293, para. 19.

executions, which have been a scourge in a number of African countries even in very recent times, and are potentially perpetrated by PMSCs in the context of their usual operations.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

99. Article 5 of the African Charter places emphasis on the value of human dignity, embracing in one single provision the two paramount violations of such a value, i.e., slavery and torture, which in human rights instruments are usually contemplated by separate norms. The inclusion of the term "particularly" in the provision indicates that the practices subsequently enlisted do not exhaust the catalogue of the possible behaviour conducive to breaching human dignity and, *a fortiori*, falling within the scope of application of Article 5. It is worth emphasizing that in more than one occasion the African Commission has explicitly or implicitly declared that no derogation is possible from the prohibition of torture and cruel, inhuman or degrading punishment or treatment, even in situations of particular emergency for the State concerned (irrespective of the fact that this principle is not expressly affirmed by any provision of the African Charter).[193] This certainly extends to prohibition of slavery as well. In light of the broad extension of its content, Article 5 might be breached by PMSCs in innumerable ways.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

100. Article 6 is one of the provisions of the Charter characterized by a "claw-back" clause, i.e., a limitation of the protected right(s) based on the conditions set up by domestic law. Limitations should "be consistent with standards recognized in true democratic societies and international law",[194] although the circumstance that Article 6 generally refers to reasons and conditions "laid down by law" – without contemplating any objective criteria in order to assess legitimacy of relevant domestic rules – could in principle leave States basically free to decide the degree according to which this right can be the object of derogation. However, the Commission has pointed out – first with specific

[193] See *e.g.*, Communication No. 225/98, *Huri-Laws v. Nigeria*, 2000, 2000 *AHRLR* 273, para. 41 ("[t]he prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute"); *Article 19 v. The State of Eritrea*, *cit.*, para. 102 ("article 5 permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment"). For an implicit recognition of the principle in point see *Media Rights Agenda v. Nigeria*, *cit.*, para. 73 ("the Commission notes that the alleged violations took place during a prolonged military rule and that such regimes, as rightly pointed out by the government are abnormal […]. The Commission sympathises with the government of Nigeria over this awkward situation but asserts that this does not in any way diminish its obligations under the Charter").

[194] See ORLU NMEHIELLE, *The African Human Rights System*, *cit.*, p. 92.

respect to freedom of association[195] and later with reference to Article 6 and to claw-back clauses in general – that domestic law limiting the exercise of the freedoms for which claw-back clauses are contemplated by the Charter must be consistent with "fundamental rights guaranteed by the constitution or international human rights standards".[196] As a consequence, "for a State to avail itself of this plea […] such a law [must be] consistent with its obligations under the Charter",[197] and Article 6 "must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society".[198] Therefore, decrees allowing *incommunicado* detention,[199] permitting "the government to arbitrarily hold people critical of the government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law",[200] allowing for individuals to be arrested for vague reasons and upon suspicion (without proven acts),[201] or prohibiting the writ of *habeas corpus*[202] are to be considered a breach of Article 6, since these kind of legislative measures constitute arbitrary deprivation of liberty unsuitable of justification pursuant to the claw-back clause included in the text of the provision in point.

Article 9

[…] 2. Every individual shall have the right to express and disseminate his opinions within the law.

101. According to the African Commission, "freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his country".[203] It is to be noted that paragraph 2 of Article 9 is not of absolute nature, as it includes a claw-back clause allowing for restrictions to the freedom of expression which are established by law. However, the strict conditions to be met in order to make these restrictions lawful are hardly satisfied in the context of PMSCs activities. The Commission, in this respect, has made it clear that "any laws restricting freedom of expression must conform to international human rights and standards relating to freedom of expression and should not jeopardise the right itself".[204] Therefore, for a restriction to the right in point to be lawful, it is necessary that: a) it is provided for by law; b) such a law is consistent with internationally recognized standards on freedom of

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[195] See Communication No. 101/93, *Civil Liberties Organization vs. Nigeria*, 1995, available at <http://www1.umn.edu/humanrts/africa/comcases/101-93.html> (last visited on 14 March 2009).
[196] *Ibid.*, para. 16.
[197] See Communications No. 147/95 and 149/96, *Dawda Jawara v. The Gambia*, 2000, 2000 *AHLRL* 107, para. 59.
[198] See *Amnesty International and Others v. Sudan*, *cit.*, para. 59.
[199] *Ibid.*, para. 58. On the illegality of *incommunicado* detention – with respect to Article 6 – see also *Zegveld and Another v. Eritrea*, *cit.*, para. 52 ff.
[200] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, *cit.*, para. 83.
[201] See *Amnesty International and Others v. Sudan*, *cit.*, para. 59.
[202] See Communications No. 143/95 and 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, 1999, 2000 *AHRLR* 235, para. 31.
[203] See Communications No. 105/93, 128/94, 130/94 and 152/96, *Media Agenda and Others Project v. Nigeria*, 1998, 2000 *AHRLR* 200, para. 54.
[204] See *Zegveld and Another v. Eritrea*, *cit.*, para. 60 (footnotes omitted).

expression;[205] c) "if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law".[206] Even in the event that the possibility of restricting the right in point is provided for by law, and such a law is consistent with international standards on freedom of expression, it is doubtful that PMSC would offer the necessary guarantees of competence and impartiality to ensure that the above law is applied correctly. And this notwithstanding, a violation would in any case occur where the detainee is not afforded prompt access to justice. Therefore, when a violation of Article 7(1)(d) is perpetrated by a PMSC with respect to a person detained for having expressed "unlawful" opinions, a breach of Article 9 takes place as well.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. […];

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. […];

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development;

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States. […];

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

102. As emphasized earlier, peoples' rights play a special role in the context of the ACHPR. Their inclusion in the text of the Charter was promoted by two of the countries participating in the negotiations – Guinea and Madagascar – which at the time had socialist inclinations.[207] In reality, however, collective rights are deeply rooted in the African tradition, as in traditional African societies the individual and his/her rights were strongly dependent on the prerogatives

[205] This requirement is not met, for example, in the event that a person is prevented from exercising its freedom of expression when it is aimed at "advocate[ing] human rights and democracy"; see Communication No. 222/98, *Law Office of Ghazi Suleiman v. Sudan II*, 2003, 2003 *AHRLR* 144, para. 43.
[206] *Ibid.*, para. 61.
[207] See VILJOEN, *International Human Rights Law in Africa, cit.*, p. 242.

afforded to the family and to the larger community.[208] In addition, most peoples' rights among those included in the Charter – i.e., the right to self determination, the right to freely dispose of one people's own wealth and natural resources, the right to development as well as the right to international peace and security – are strictly linked to the idea of rejection of foreign domination that in Africa was strongly felt in the immediate aftermath of the decolonization process.

103. According to the established practice of the African Commission, under a "morphological" perspective the term "peoples" includes both the national people as a whole and more limited groups within a State (or even distributed within different States) sharing common characteristics distinguishing them from the rest of the population.[209] These include indigenous peoples and other groups defined by linguistic, ethnic, religious or similar distinctive characters.

d) Practice of the African Commission concerning the African Charter on Human and Peoples' Rights

104. The African Commission has addressed a wide number of cases characterized by violations of one of more rights protected by the ACHPR arising from actions that are included among those typically performed by PMSCs in the context of their usual operations. These cases provide a brilliant depiction of how easily and frequently – in the real world – PMSCs' operations might result in individual or multiple breaches of human rights, as they are protected in the context of the African system.

105. First, the African Commission has dealt with a number of communications concerning breaches of Article 4 of the ACHPR in the form of extra-judicial executions,[210] which recent decades have been very frequent in Africa.[211] These

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[208] *Ibid.*

[209] *Ibid.*, pag. 243 ff.

[210] Quoting the introductory paragraph of the United Nations *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (see *infra*, note 51), the Commission has considered extra-judicial executions as including: "(a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) death resulting from enforced 'disappearances'; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide" (see *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, *cit.*, para. 179). This is coherent with what the Commission had previously found, for example, in *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, Communications No. 137/94, 139/94, 154/96 and 161/97, 1998, 2000 *AHRLR* 212, according to which, "[g]iven that the trial which ordered the executions itself violates [the Charter], any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures […] and the Commission had hoped that a similar situation would obtain in the case of Ken Sarow-Wiwa and others. It is a matter of deep regret that this did not happen […] The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4" (see para. 103 f.). Similarly, in *Malawi African Association and Others v. Mauritania*, Communications No. 54/91, 61/91, 98/93, 164-196/97 and 210/98, 2000, 2000 *AHRLR* 149, the Commission had held that "executions that followed [a] trial [conducted in violation of the Charter] constitute a violation of article 4. Denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death, point to a shocking lack of respect for life, and constitutes a violation of article 4" (para. 120). In *Forum of*

executions constitute a clear violation of the right to life[212] and might occur in the context of the performance of PMSCs' activities, particularly when they are perpetrated in the framework of the performance of military operations[213] (which represent one of the typical mandates of PMSCs). In this respect, consistently with its general approach concerning the "obligation to protect" examined above, the Commission – relying on a number of international instruments of various kind, including Article 1 para. 1 of the 1984 UN Torture Convention[214] and the United Nations *Manual on the Effective Prevention and*

Conscience v. Sierra Leone, *cit.*, the Commission made it clear that "any violation of [the] right [to life] without due process amounts to arbitrary deprivation of life. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under article 7(1)(a) of the Charter, the Commission consequently finds their execution an arbitrary deprivation of their rights to life provided for in article 4 of the Charter. Although this process cannot bring the victims back to life, it does not exonerate the government of Sierra Leone from its obligations under the Charter" (see para. 19). With respect to the case in which casualties are the result of "excessive use of force by law-enforcement personnel", one may quote Communication No. 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, 2001, 2001 *AHRLR* 51, in which the Commission, with respect to "the deaths of citizens who were shot or tortured to death, as well as the deaths of two young students who had gone onto the streets with their colleagues to express certain demands and to support those of the secondary school and higher institution teachers", deplored "the abusive use of means of state violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. It believes that the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life" (see para. 43). Less clear is the category – among those listed by the manual – within which the killings perpetrated by the Nigerian security forces against the Ogoni people in breach of Article 4 may be subsumed (see *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *cit.*, para. 67: "[g]iven the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole"); it may be argued that they meet the requirements for being contextually included within letters (a), (d) and – possibly – (f). In general, what is especially important for the purposes of the present study is that *at least* the first five instances enlisted by the Manual may well be the result of PMSCs operations.

[211] See V. O. ORLU NMEHIELLE, *The African Human Rights System. Its Laws, Practice, and Institutions*, The Hague/London/New York, 2001, p. 87 f. This author notes that it has been reported that, with respect to the period between 1992 and 1993, the U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions found evidence of extra-judicial executions in twenty-seven African countries (*ibid.*, p. 85).

[212] See, *e.g.*, Communications No. 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v. Zaire*, 1995, 2000 *AHLRL* 74, para. 43.

[213] This is confirmed by the practice of the African Commission, although this practice referred to activities performed by "ordinary" armed forces and not by PMSCs. See, in particular, Communications No. 27/89, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Others v. Rwanda*, 1996, 2000 *AHRLR* 282, in which the Commission found that "[t]he massacre of a large number of Rwandan villagers by the Rwandan armed forces and the many reported extrajudicial executions for reasons of their membership of a particular ethnic group is a violation of article 4" (see para. 24). See also *Free Legal Assistance Group and Others v. Zaire*, *cit.*, para. 43.

[214] See *supra*, para 53.

Investigation of Extra-Legal, Arbitrary and Summary Executions[215] –has held that "extra-judicial executions and torture are caused by the state or through its agents or acquiescence".[216] For this reason, killings committed by non-state actors do not entail State liability for extrajudicial executions, on the condition that State authorities accomplish investigations on such killings, which "must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered".[217]

106. In asserting that extra-judicial killings may entail State responsibility only when perpetrated by governmental agents or with the acquiescence of the State, the Commission apparently reversed its previous position according to which, as the African Charter "specifies in Article 1 that the States Parties shall not only recognize the rights[,] duties and freedoms adopted by the Charter, but they should also 'undertake … measures to give effect to them' […], if a state neglects to ensure the rights in the African Charter, this can constitute a violation, *even if the State or its agents are not the immediate cause of the violation*".[218] On the basis of this assumption, the Commission had found that the killing of 15 people during the Chad civil war implied State responsibility for the violation of Article 4 of the Charter, irrespective of the fact that "[t]he Government claim[ed] that no violations were committed by its agents, and that it had no control over violations committed by other parties, as Chad is in a state of civil war".[219] The same finding had also been made by the Commission in 1999 with respect to Sudan, stating that,

> "[e]ven if [the thousands of executions occurring in Sudan] are not all the work of forces of the government, the government has a responsibility to protect all people residing under its jurisdiction […]. Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law".[220]

107. However, according to the most recent position emerging from the practice of the African Commission, one should conclude that, when extra-judicial executions are committed by persons operating as PMSCs' agents, State responsibility is only generated when the PMSC concerned is acting within the framework of the governmental organization or when – this company being a private entity – the State fails to carry out opportune investigations into the

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[215] See U.N. Doc. E/ST/CSDHA/.12 (1991), also available at <http://www1.umn.edu/humanrts/instree/*executioninvestigation*-91.html> (last visited on 12 March 2009).

[216] See *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, *cit.*, para. 181. See also para. 179, according to which "[t]he six circumstances of extra-judicial executions mentioned in the UN Manual [see *supra*, note 49] point to the fact that under international law, such executions can only be carried out by the state or through its agents or acquiescence".

[217] See Communications No. 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v. Sudan*, 1999, available at <http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html> (last visited on 12 March 2009), para. 51. See also *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, *cit.*, para. 181.

[218] See Communication No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, 1995, 2000 *AHRLR* 66, para. 20 (emphasis added).

[219] *Ibid.*, para. 19.

[220] See *Amnesty International and Others v. Sudan*, *cit.*, para. 50.

killings. This may not happen, in principle, when the State has "no control over violations committed by other parties".[221]

108. Apart from extra-judicial killings, breaches of the right to life may also occur during performance of military activity in armed conflicts – including those of PMCs – when they result in the violation of recognized principles of international humanitarian law. According to the Commission,

> "the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent states' armed forces were still in effective occupation of the eastern provinces of the complainant state reprehensible and also inconsistent with their obligations under part III of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I to the Geneva Conventions […] constitute flagrant violations of […] article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation of rights".[222]

109. It is to be noted that a violation of Article 4 of the African Charter may take place not only when actual loss of life occurs. As the Commission has emphasized, "[i]t would be a narrow interpretation to [the] right [to life] to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and the dignity of his person, which this article guarantees would be protected in a state of constant fear and/or threats", as, although the victim "is still alive[, he is constantly] hiding for fear of his life".[223] A situation of this kind may well occur at the hands of a PMSC.

110. Like extra-judicial killings, "forms of exploitation and degradation of man" prohibited by Article 5 of the ACHPR represent human rights breaches that can easily result from ordinary PMSCs' activities. Thanks to its wide and open-ended formulation, this provision offers the African Commission a much room for manoeuvre, as there is no need necessarily to link a violation – on the condition that it reaches the threshold of a serious offence to human dignity – to a precisely defined legal category. Thus, for example, in a case concerning massive violations of human rights which took place in Mauritania in the period 1989-1992, the Commission held that, although it could not "conclude that there is a practice of slavery based on [the] evidences before it", it deemed that Article 5 had been breached,

> "due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man; both practices condemned by the African Charter".[224]

This approach is certainly sound in light of the letter and the spirit of Article 5; therefore, it appears quite surprising that in the end the Commission felt the need

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[221] See *supra*, text corresponding to note 107.

[222] See Communication No. 227/99, *DR Congo v. Burundi, Rwanda and Uganda*, 2003, 2004 *AHRLR* 19, para. 79 f.

[223] See Communication No. 205/97, *Kazeem Aminu v. Nigeria*, 2000, available at <http://www1.umn.edu/humanrts/africa/comcases/205-97.html> (last visited on 14 March 2009), para. 18.

[224] See *Malawi African Association and Others v. Mauritania*, *cit.*, para. 135.

to specify – in its findings – that the breach of this article had occurred in the form of "cruel, inhuman and degrading treatments".[225]

111. The African Commission has developed a quite broad concept of inhuman or degrading treatment or punishment,[226] "to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental".[227] In general terms, it is intended to include "not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience".[228] For example, the Commission has found that Article 5 had been breached on account of the fact that the victims had been forced "to live as stateless persons under degrading conditions, […] depriv[ing] them of their family and […] their families of the men's support".[229] In explaining the reason for its finding, the Commission generally stated that "this constitutes a violation of the dignity of a human being";[230] however, the reference to "degrading conditions" can reasonably lead one to believe that this situation was intended by the Commission to be included within the concept of inhuman and degrading treatment as well.[231] This reading was later confirmed in other communications, in which the Commission found that the fact of "[b]eing deprived of the right to see one's family is a psychological trauma difficult to justify, and may constitute inhuman treatment".[232] Thus, the very fact of "being held *incommunicado*, with no access to legal representation or contact with their families" constitutes by itself an

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[225] A different approach was adopted by the Commission in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, *cit.*, in which it affirmed that enforced disappearances constitute a violation of Article 5, without making it explicit within which of the legal figures contemplated by this article it is to be subsumed (see para. 44).

[226] See C. HEYNS, "Civil and Political Rights in the African Charter", in *The African Charter of Human and Peoples' Rights. The System in Practice, 1986-2000* (M. EVANS and R. MURRAY eds.), Cambridge, 2002, 137, p. 150 ff.

[227] See Communication No. 224/98, *Media Rights Agenda v Nigeria*, 2000, 2000 *AHRLR* 262, para. 71. See also Communication No. 97/93, *Modise v. Botswana*, 2000, 2000 *AHRLR* 30, in which the Commission held that exposure to "personal suffering and indignity [violates] the right to freedom from cruel, inhuman or degrading treatment" (see para. 91); this principle was further specified by the Commission in Communication No. 241/2001, *Purohit and Another v. The Gambia*, 2003, 2003 *AHRLR* 96, para. 58 ("[p]ersonal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication"); this was later confirmed in Communication No. 236/2000, *Doebbler v. Sudan*, 2003, 2003 *AHRLR* 153, para. 37.

[228] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, *cit.*, para. 79.

[229] See Communication No. 212/98, *Amnesty International v. Zambia*, 1999, available at <http://www1.umn.edu/humanrts/africa/comcases/212-98.html> (last visited on 14 March 2009), para. 58. Some perplexities may be triggered by the fact that – after having emphasized at para. 58 that this behaviour "violat[ed] Article 5 of the Charter, which guarantees the right to: the respect of the dignity inherent in a human being and to the recognition of his legal status" – no reference to the breach of Article 5 is mentioned in the findings; the most likely explanation is that it is probably due to a oversight in writing the text of the Communication.

[230] *Ibid.*

[231] This inference is confirmed by a finding held by the Commission in another communication, according to which the fact of "holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned"; see *Amnesty International and Others v. Sudan*, *cit.*, para. 54.

[232] See Communication No. 151/96, *Civil Liberties Organisation v. Nigeria*, 2000, 2000 *AHRLR* 243, para. 27. See also Communication No. 222/98, *Law Office of Ghazi Suleiman v. Sudan I*, 2003, 2003 *AHRLR* 134, para. 44.

instance of inhuman and degrading treatment and, therefore, a breach of Article 5.[233]

112. Most occurrences of inhuman and degrading treatment or punishment detected by the African Commission took place to the prejudice of detained persons. Despite the fact that the Commission, in the number of cases involving detention, generally refers to "violation of Article 5" without explicitly mentioning inhuman and degrading treatment, these breaches are in fact to be subsumed within such a category. For example, in 1999, in a case concerning Nigeria, the Commission held that "[d]eprivation of light, insufficient food and lack of access to medicine or medical care […] constitute violations of article 5".[234] Also, cruel, inhuman or degrading treatment has been found in another case on detention for the victim being kept "in leg irons and handcuffs" – with "no evidence of any violent action on his part or escape attempts that would justify holding him in irons" – as well as "in cells which were airless and dirty, then denied medical attention, during the first days of his arrest".[235] In a later case, a similar finding was based on the fact that the prisoner was detained with "his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take a bath […] he was kept in solitary confinement in a cell meant for criminals".[236] The very fact of "being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma. Moreover, this deprivation of contact with the outside world and the health-threatening conditions amount to cruel, inhuman and degrading treatment".[237]

113. Through arbitrary arrest and/or detention, PMSCs – just like other entities exercising elements of governmental authority or which, are in the factual position of using equivalent powers – may produce multiple violations of human rights as enshrined in the ACHPR. The most obvious of these violations concerns the right to liberty and to security of the person which, according to Article 6 ACHPR, implies that "[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained". In the practice of the African Commission, detention has been considered illegal as result of a number of grounds, including lack of legal basis for the detention (e.g., detaining persons without charges[238] or holding an individual after expiration of sentence[239]), arbitrariness of the arrest from which detention arises,[240] the circumstance that

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[233] See Communication No. 275/2003, *Article 19 v. The State of Eritrea*, *cit.*, para. 102. See also Communication No. 250/2002, *Zegveld and Another v. Eritrea*, 2003, 2003 *AHRLR* 85, para. 55.
[234] See *Civil Liberties Organisation v. Nigeria*, *cit.*, para. 27.
[235] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, *cit.*, para. 80.
[236] See Communication No. 224/98, *Media Rights Agenda v. Nigeria*, 2000, 2000 *AHRLR* 262, para. 70.
[237] See *Huri-Laws v. Nigeria*, *cit.*, para. 40.
[238] See Communication No. 102/93, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, 1998, available at <http://www1.umn.edu/humanrts/africa/comcases/102-93.html> (last visited on 29 March 2009), para. 55; *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, *cit.*, para. 28.; *Law Office of Ghazi Suleiman v. Sudan I*, *cit.*, para. 49 f.
[239] See Communication No. 39/90, *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon*, 1997, available at <http://www1.umn.edu/humanrts/africa/comcases/39-90b.html> (last visited on 29 March 2009).
[240] See *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, *cit.*

detention is exclusively based on grounds such as ethnic origin[241] or political opinion[242] or is aimed at preventing people from exercising lawful activities,[243] as well as – more generally – the fact that detention is not followed by trial within a reasonable time,[244] due to the lack of "any opportunity for the complainant to challenge the arrest and detention before a court of law".[245]

114. In the latter instance, the right "to be tried within a reasonable time by an impartial court or tribunal", affirmed by Article 7(1)(d) of the Charter, is breached as well. In its 1992 *Resolution on the Right to Recourse and Fair Trial*, the African Commission clarified that the scope of this provision includes – *inter alia* – the right of persons who are arrested to be "informed at the time of arrest, in a language which they understand of the reason for their arrest and […] promptly of any charges against them",[246] as well as – in particular – to be "be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released".[247] The circumstances in which PMSCs usually operate, "environmental" situations of particularly critical character, ought not influence in any way the scope of applicability of the right in point. This is confirmed by the fact that – in a case in which the respondent State had claimed that the delay in bringing detainees before a judge was due to the complexity and gravity of the offences committed as well as the "precarious war situation" existing within the State – the Commission held that,

> "states parties cannot derogate from the Charter in times of war or any other emergency situation. Even if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances […] The existence of war in Eritrea cannot therefore be used to justify excessive delay in bringing the detainees to trial".[248]

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[241] See *Organisation Mondiale Contre la Torture and Others v. Rwanda*, *cit.*, para. 28.

[242] See Communication No. 103/93, *Alhassan Abubakar v. Ghana*, 1996, available at <http://www1.umn.edu/humanrts/africa/comcases/103-93.html> (last visited on 29 March 2009); Communications No. 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, 1999, 2000 *AHRLR* 227, para. 51.

[243] See *Free Legal Assistance Group and Others v. Zaire*, *cit.*, para. 42; in this case several persons were detained and held indefinitely for protesting against torture.

[244] See, *e.g.*, Communications No. 64/92, 68/92, and 78/92, *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, 1995, available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html> (last visited on 29 March 2009); *Malawi African Association and Others v. Mauritania*, *cit.*, para. 114; *Article 19 v. The State of Eritrea*, *cit.*, para. 94. See also note 137 *supra* and corresponding text.

[245] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, *cit.*, para. 83.

[246] See Res.4(XI)92, available at <http://www1.umn.edu/humanrts/africa/resolutions/rec9.html> (last visited on 1 April 2009), para. 2b.

[247] *Ibid.*, para. 2c. See also, consistently, *Zegveld and Another v. Eritrea*, *cit.*, para. 56 ("persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the state should initiate legal proceedings that should comply with fair trial standards"). It is to be noted that another provision included in the text of Article 7 is suitable of being breached in the context of detention (including detention performed by PMSCs); it is the rule provided for by paragraph 1(c), according to which the right to have one's cause heard "comprises […] the right to defence, including the right to be defended by counsel of his choice". In this respect, the African Commission has found that "[p]reventing a detainee access to his lawyer clearly violates article 7(1)(c) which provides for the 'right to defence, including the right to be defended by a counsel of his choice'" (see *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, *cit.*, para. 29).

[248] See *Article 19 v. The State of Eritrea*, *cit.*, para. 98 f.

115. In the event that arrest and/or detention is carried out for some specific reason linked to the exercise by the person(s) concerned of other specific rights defended by the ACHPR, the illegality of such arrest and/or detention also implies a breach of the latter right. This has been affirmed by the African Commission, e.g., with respect to the right to free association contemplated by Article 10 of the Charter, in cases in which persons had been sought by the police due to their political belief[249] or imprisoned for belonging to an association the criminal nature of which had not been demonstrated by the respondent State.[250] In the latter case the Commission also held that the fact of charging (and, *a fortiori*, arresting and/or detaining) individuals for holding unauthorized meetings constituted a breach of the right of free assembly provided for by Article 11, because the State concerned had been unable to show that these charges "had any foundation in the 'interest of national security, the safety, health, ethics and rights and freedoms of others', as specified in article 11".[251]

116. Other possible breaches of the ACHPR may be the result of inadequate conditions of detention. For example, in the case just mentioned, the African Commission found a violation of the right to enjoy the best attainable state of physical and mental health, contemplated by Article 16 of the Charter, due to the fact that some detainees had died "as a result of the lack of medical attention. In addition, the "general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene".[252]

117. The possible violation of Article 18(1) ACHPR – affirming the principle that the family "shall be protected by the State which shall take care of its physical health and moral" – is also related to the conditions according to which one is detained. Such a violation can be caused by *incommunicado* detention, which prevents the person concerned from contacting his/her family,[253] as well as by the lack of prompt access to a lawyer.

118. In extreme cases, when conditions of detention assume a particularly inhumane character, they may deteriorate so as to be subsumed into the concept of torture. Therefore, in the case of Mauritania, noted above, the Commission found that such a particularly awful crime was produced on account of the fact that the detainees

> "were beaten […], forced to make statements […], denied the opportunity of sleeping […], held in solitary confinement […] [In addition, they] were not fed; they were kept in chains, locked up in overpopulated cells lacking in hygiene and access to medical care […]. They were burnt and buried in sand and left to die a slow death. Electrical shocks were administered to their genital organs and they had weights tied on to them. Their heads were plunged into water to the point of provoking suffocation; pepper was smeared on their eyes and some were permanently kept in small, dark or underground cells which got very cold at night […] Both within and outside the prisons, the so-called 'jaguar' position was the form of torture utilised […] The women were raped […] Taken together or in isolation, these acts are proof of

[249] See *Kazeem Aminu v. Nigeria*, *cit.*, para. 22.
[250] See *Malawi African Association and Others v. Mauritania*, *cit.*, para. 107.
[251] *Ibid.*, para. 111.
[252] *Ibid.*, para. 122.
[253] See *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, *cit.*, para. 29; *Malawi African Association and Others v. Mauritania*, *cit.*, para. 124; *Article 19 v. The State of Eritrea*, *cit.*, para. 103.

> widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths […] equally constitutes cruel, inhuman and degrading forms of treatment prohibited by article 5 of the Charter".[254]

119. All these kinds of practices might well be performed by agents working for PMSCs recruited by governments, such as other forms of torture which might take place in the context of military or security operations.[255] With respect to torture, however, State responsibility is to be considered restricted – according to the approach recently supported by the Commission – to the same extent as extra-judicial executions. Relying on Article 1 of the 1984 UN Torture Convention,[256] the Commission has in fact held that also torture is "caused by the state or through its agents or acquiescence",[257] concluding in one case that – as "the complainant did not adduce any evidence to show that state organs were responsible or that the government or state organs connived with [private torturers] […] [and the state] demonstrated that it investigated allegations brought to its attention"[258] – no State responsibility arose. It is unclear whether this applies only to torture or extends to cruel, inhuman or degrading punishment and treatment as well. On the one hand, one could opt for the first option on account of the fact that only torture as such is mentioned by the Commission and that it represents a legal category which, although very similar, is formally distinguished from inhuman or degrading punishment and treatment. On the other hand, however, the opposite position could be supported through relying exactly on the fact that the inhuman or degrading punishment and treatment is "materially" equivalent to torture, being distinguishable on the sole basis of the *intensity* of pain provoked to the victim. Another element which could be used to support this second opinion rests in the circumstance that the 1984 UN Torture Convention – used by the Commission in order to support its position – does not provide any definition of cruel, inhuman or degrading treatment or punishment in addition to that of torture supplied by Article 1, thus seeming to imply that the main characters of the latter (including the fact that the "pain or suffering [must be] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity) also extend to the former.

120. Another practice that may be performed by PMSCs which might entail compound breaches of the ACHPR is that of forced eviction. In a number of cases, the African Commission has found such a practice as infringing various provisions of the Charter. For example, in the repeatedly cited case concerning the massive violations taking place in Mauritania from 1989 to 1992 the Commission held that "[e]victing black Mauritanians from their houses and depriving them of their Mauritanian citizenship constitutes a violation" of the right to freedom of movement and residence within the borders of the State

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[254] See *Malawi African Association and Others v. Mauritania, cit.*, para. 115 ff. The "Jaguar position" consists in tying the victim's wrists to his feet and then suspending him from a bar and keeping him upside down, sometimes over a fire. The victim is then beaten on the soles of his feet (*ibid.*, para. 20).
[255] See, *e.g.*, Communications No. 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v. Zaire, cit.*, para. 41, in which the Commission found that 15 persons had been tortured by a military unit at Kinsuka, near the Zaire River.
[256] See *supra*, para. 53.
[257] See *Zimbabwean Human Rights NGO Forum v. Zimbabwe, cit.*, para. 181.
[258] *Ibid.*, para. 183.

affirmed by Article 12(1) of the Charter, despite the efforts made by the Mauritanian government "to ensure the security of all those who returned to Mauritania after having been expelled".[259] Forced eviction may also result in the breach of Article 18(1) as well as – when it takes the form of transfer to a country different than one's own transfer of persons – of the right to return to one's country provided for by Article 12(2).[260] The same provision, together with Article 12(1), is also breached when a person is "abducted and threatened" by individuals who are believed to be working for the government (including PMSCs agents), leading the person concerned to flee the country for safety.[261]

121. Sometimes forced eviction is accompanied by seizure (or even destruction) of private property.[262] The latter practice – irrespective of whether or not is connected with the former – results in the breach of Article 14 ACHPR, except when it is justified "in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws". In a number of cases the African Commission has found that this breach was perpetrated by military or security forces in the performance of their functions.[263] Therefore, the practice of the Commission confirms that the right in point may well be encroached by PMSCs while performing their usual activities.

122. In addition to the case of Mauritania referred to in the present sub-section of this Report in relation to a number of rights, other two communications of the African Commission are specially pertinent to the topic of PMSCs' operations. The first is a renowned case decided by the Commission in 2001, concerning a number of abuses perpetrated by Nigerian military forces in the ancestral lands of the Ogoni indigenous community, with the purpose of facilitating oil exploitation in those lands by a consortium involving the National Petroleum Company and the multinational company Shell Petroleum. In order to defeat the resistance to the project by the members of the Ogoni people, who were committed to defending their traditional lands from environmental disaster, Nigerian security forces – composed of "uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons"[264] – performed a number of violent actions (including killings as well as attack, burning and destruction of Ogoni villages and homes) and created a state of terror and insecurity among the Ogoni people which finally allowed exploitation of oil reserves in their land by the oil Consortium.

123. Besides finding a breach of the general obligation to ensure to all individuals the enjoyment of "the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color,

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[259] See *Malawi African Association and Others v. Mauritania*, *cit.*, para. 126.

[260] See *DR Congo v. Burundi, Rwanda and Uganda*, *cit.*, para. 81.

[261] See Communication No. 215/98, *Rights International v. Nigeria*, 1999, available at <http://www1.umn.edu/humanrts/africa/comcases/215-98.html> (last visited on 29 March 2009), para. 30.

[262] See *e.g.*, Communication No. 159/96, *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola*, 1997, available at <http://www1.umn.edu/humanrts/africa/comcases/159-96.html> (last visited on 29 March 2009), in which the Commission found that loss of possessions by expelled people resulted in the violation of their right to property.

[263] See, *e.g.*, *Malawi African Association and Others v. Mauritania*, *cit.*, para. 128; *Huri-Laws v. Nigeria*, *cit.*, para. 52 f.

[264] See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *cit.*, para. 8.

sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status" – provided for by Article 2 of the Charter – the Commission held that other five provisions of the Charter, plus two *implied* rights, had been violated by Nigeria. First, the Commission found that a breach of Article 4 occurred, on account of the fact that,

> "[g]iven the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole".[265]

124. Second, massive environmental degradation provoked by oil exploitation in Ogoniland had resulted not only in the violation of the individual right to enjoy the best attainable state of physical and mental health contemplated by Article 16 ACHPR, but also of the right of peoples to a general satisfactory environment favourable to their development affirmed by Article 24. This right, in particular, imposes on governments clear obligations "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources", which imply that they keep "non-interventionist conduct […] for example, [through] not […] carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual".[266]

125. Third, due to the wanton destruction of Ogoni villages, property, health, and family life had been adversely affected, leading to the simultaneous violation – to the prejudice of the Ogoni people – of Articles 14 (right to property), 16 and 18(1) (right to protection of the family), as well as of the *implied* right to shelter, resulting from the combination of those three articles.[267] In addition, as the Nigerian government had "destroyed food sources through its security forces and State Oil Company; [had] allowed private oil companies to destroy food sources; and, through terror, [had] created significant obstacles to Ogoni communities trying to feed themselves",[268] the right to food – "implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22)"[269] – had also been breached.

126. Finally, the Commission found that a violation of the right of peoples freely to dispose of their wealth and natural resources contemplated by Article 21 ACHPR had also been perpetrated, because the Nigerian government had facilitated the destruction of the Ogoniland through giving "the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis".[270]

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[265] *Ibid.*, para. 67.
[266] *Ibid.*, para. 52.
[267] *Ibid.*, para. 60 ff.
[268] *Ibid.*, para. 66.
[269] *Ibid.*, para. 64.
[270] *Ibid.*, para. 58.

127. In cases like the one just described, PMSCs may play a twofold role. In fact, they could either perform directly the activities resulting in the violation of the protected rights or create the conditions for these violations to take place through providing military or security services adequate to making the action of the material perpetrators concretely possible.

128. The other case of particular significance for the present Report arises from the only inter-state communication submitted to the African Commission so far, concerning the military activities carried out by the armed forces of Burundi, Rwanda and Uganda in the territory of the Democratic Republic of Congo from August 1998 to January 1999, justified by the three respondent countries by invoking the need to safeguard their interests. Such military actions resulted in a large number of dreadful and massive human rights breaches, including massacres of civilians, killing of many patients in hospitals (including children), systematic rape and carnage of women, deliberate spreading of sexually transmitted diseases through ordering HIV positive soldiers to commit rape, mutilations, forced deportation of civilian population and looting of private property.

129. In evaluating this communication, the Commission concentrated its analysis on Article 23 ACHPR, concerning the peoples' rights to national and international peace and security. In this respect, the Commission held that the conduct of the respondent States was "inconsistent with the standard expected of them under the UN Declaration on Friendly Relations, which is implicitly affirmed by the Charters of the UN and OAU, and which the Commission is mandated by article 23 of the African Charter on Human and Peoples' Rights to uphold".[271] In addition, the Commission, having noted that "the series of violations alleged to have been committed by the armed forces of the respondent states fall within the province of humanitarian law",[272] also found that the conduct of the respondent States was also in contravention of such a body of law. It therefore concluded that "the occupation of the complainant's territory by the armed forces of the respondent forces [*sic*.]" violated article 23 of the Charter, "even in the face of their argument of being in the complainant's territory in order to safeguard their national interests […]. The Commission is of the strong belief that such interests would better be protected within the confines of the territories of the respondent states".[273]

130. In addition, the conduct of the respondent States was considered by the Commission to breach other rights of collective character among those contemplated by the ACHPR. First, "in occupying territories of the complainant state [they committed] a flagrant violation of the rights of the peoples of the Democratic Republic of Congo to their unquestionable and inalienable right to self-determination provided for by article 20 of the African Charter".[274] Second, the "illegal exploitation/looting of the natural resources of the complainant state" by the respondent countries produced a breach of Article 21 of the Charter.[275] Third, due to "the indiscriminate dumping of, and/or mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the complainant state" perpetrated by the armed forces of the

[271] See *DR Congo v. Burundi, Rwanda and Uganda*, *cit.*, para. 68.
[272] *Ibid.*, para. 69.
[273] *Ibid.*, para. 76.
[274] *Ibid.*, para. 77.
[275] *Ibid.*, para. 94.

respondent states – considered by the Commission as "barbaric [acts constituting] […] an affront on the noble virtues of the African historical tradition and values enunciated in the Preamble to the African Charter"[276] – a violation of the right to development guaranteed by Article 22 ACHPR also took place.

131. Of course, the awful crimes perpetrated by the respondent States in the territory of the Democratic Republic of Congo also resulted in the massive infringement of a huge amount of individual rights recognized by the African Charter. In addition to the previously mentioned violation of Article 4,[277] as well as to the breach of Article 5, the Commission also found that "[t]he allegation of mass transfer of persons from the eastern provinces of the complainant state to camps in Rwanda […] is inconstent [*sic*.] with article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection [as well as with] the right to freedom of movement, and the right to leave and to return to ones country guaranteed under article 12(1) and (2) of the African Charter respectively".[278] Furthermore,

> "[t]he looting, killing, mass and indiscriminate transfers of civilian population, the siege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life and state of war that took place while the forces of the respondent states were occupying and in control of the eastern provinces of the complainant state are in violation of article 14 guaranteeing the right to property, articles 16 and 17 (all of the African Charter), which provide for the rights to the best attainable state of physical and mental health and education, respectively".[279]

132. The situations examined so far do not exhaust the possible violations of the ACHPR that may be in principle perpetrated by PMSCs while performing their usual activities. In the real world, the specific actions that might be carried out by these companies are so multifaceted that it is virtually impossible to enumerate all possible concrete cases in which they could result in human rights breaches. Consistently, the African Commission has found violations of the Charter in numerous other instances occurring in the context of military and security operations, typical of PMSCs. For instance, the causing of enforced "disappearances of persons suspected or accused of plotting against the instituted authorities" determines a breach of Article 6 ACHPR.[280] Another example is provided by the case in which a PMSC contributes to the success of a military *coup d'état*; in such a case, "a grave violation [arises] of the right […] to freely choose [one people's] government as entrenched in article 20(1) of the Charter".[281]

e) 1990 Charter on the Rights and Welfare of the Child

133. It is estimated that 44% of the African population is under 15.[282] It is therefore unnecessary to explain why protection of children's rights acquires a

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[276] *Ibid.*, para. 87.
[277] See *supra*, text corresponding to note 220.
[278] *Ibid.*, para. 81.
[279] *Ibid.*, para. 88.
[280] See *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso, cit.*, para. 44.
[281] See *Dawda Jawara v. The Gambia, cit.*, para. 73.
[282] See VILJOEN, *International Human Rights Law in Africa, cit.*, p. 260.

special significance in the context of the African continent. The African Charter on the Rights and Welfare of the Child was adopted in 1990, and took nine years to reach the threshold of 15 ratifications necessary to enter into force. The reason for this reluctance by African countries to access this instrument was most likely due to its advanced text, characterized by notable improvements with respect to the CRC[283] which imply additional responsibilities for States and other relevant actors (including PMSCs). For instance, Article 21 establishes that all necessary measures must be taken in order "to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child". Article 26 is also noteworthy, as it mandates States parties to accord the highest priority to the needs of children "living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization". Last but not least, of special significance for PMCs is Article 22(2), which, through prohibiting *tout court* that "child shall take a direct part in hostilities" or will be simply recruited, is the first international instrument to exclude in any case participation of persons of less than 18 years old in armed conflicts. The subsequent paragraph of the same article adds that all feasible measures must be taken in order to ensure protection and care of children who are in situations of international war as well as of internal armed conflicts, tension and strife.

f) 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

134. Adopted in 2003, the Women Protocol to the ACHPR has entered into force in 2005. Similarly to the African Charter on the Rights and Welfare of the Child, also this instruments includes a notable set of original provisions – most of them incorporated in the Protocol thanks to the deep involvement of NGOs in its drafting process – which extends remarkably the scope of pre-existing law applicable to women.[284] Therefore, it is possible to extend to the Women Protocol – *mutatis mutandis* – the considerations just developed with respect to the Charter on the Rights and Welfare of the Child, in the sense that also this instrument increases the duties and obligations of the relevant actors (including, to the extent that international responsibility may arise from their operations, PMSCs) in comparison to its "universal" precursor, i.e., the CEDAW. Among the most original provisions including in the Women Protocol, one may cite Article 5(b), which explicitly commends States parties to eradicate "all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other [harmful] practices", Article 11(3), protecting "asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation", as well as Article 11(4), which excludes that "girls under 18 years of age [may] take a direct part in hostilities" or may be recruited as soldiers.

[283] *Ibid.*, p. 262.
[284] *Ibid.*, p. 267.

g) Countering Terrorism in Africa

135. In July 2006, Amnesty International published a Report denouncing the human rights abuses perpetrated by Algeria's military and security forces to the prejudice of persons suspected of being affiliated to *al-Qa'ida*.[285] According to this report, the human rights breaches committed by Algerian officials included torture or cruel, inhuman or degrading treatment and punishment, arbitrary arrest and/or detention, enforced disappearances and even extra-judicial execution. This is an example of a practice that is hard to think that may be limited to the country specifically considered by the said Report.

136. This subject is particularly relevant to PMSCs, in particular PSCs, as their typical commitment consists in providing security services, and these companies may be of particular utility in less developed countries which have to face terrorist groups that in many cases possess military technology much more advanced than the one available to national security forces. Conversely, PMSCs hired from developed countries may be equipped with highly sophisticated intelligence and equipment, adequate efficiently to face the said terrorist groups. However, this presupposes the existence of a real danger that, in performing their counter-terrorism operations, the relevant companies may abuse their powers to the extent of perpetrating systematic human rights abuses. This risk is increased by the fact that, not only may the territorial governments concerned turn a blind eye to these abuses, but may even be unable to control the activities of well-equipped PMSCs. When these situations come into existence, the only way to provide effective control to ensure legality of PMSCs operations rests in international instruments and institutions. In the African context, at the moment the African Commission remains the best (if not the only) institution which may fulfil this task. The matter of counter-terrorism does not escape the application of the principles developed by the Commission in the interpretation of the rights protected by the ACHPR (e.g., the absolute impossibility of derogating from the prohibition of torture or cruel, inhuman or degrading treatment or punishment[286]), as it is also confirmed by Article 22(1) of the 1999 *OAU Convention on the Prevention and Combating of Terrorism*,[287] according to which "[n]othing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights". This principle is reiterated by Article 3(1)(k) of the 2004 Protocol to the said Convention,[288] which affirms the commitment of States parties to outlawing "torture and other degrading and inhumane treatment,

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[285] See Amnesty International, "Algeria: Unrestrained Powers: Torture by Algeria's Military Security", 10 July 2006, available at <http://www.amnesty.org/en/library/info/MDE28/004/2006> (last visited on 29 March 2009). See also VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 310.

[286] See *supra*, para. 99.

[287] The full text of the Convention is available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited on 31 May 2009).

[288] See *Protocol to the OAU Convention on the Prevention and Combating of Terrorism*, 2004, available at <www.africa-union.org/root/au/Documents/Treaties/Text/The%20Protocol%20on%20Terrorism%2026July2004.pdf> (last visited on 29 March 2009).

including discriminatory and racist treatment of terrorist suspects, which are inconsistent with international law".

h) The African Economic Community (AEC)

137. AEC was established in 1991 in the context of the (then) OAU framework, with the purpose of promoting economic integration at the regional level. To date, the *Treaty Establishing the African Economic Community*,[289] entered into force in 1994, has been ratified by all AU members except Djibouti, Eritrea, Madagascar and Somalia.[290] Although the primary objective of AEC is to "promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development",[291] the requirement of ensuring "[r]ecognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" represents one of the basic principles of the Community, to which its members have solemnly undertaken to adhere.[292] Among the organs of AEC a Court of Justice is included, with the task of ensuring "adherence to law in the interpretation and application of [the] Treaty and [to] decide on disputes submitted thereto".[293] Actions, however, may in principle be only brought by a member State or by the Assembly of Heads of State and Governments, although the Assembly itself may confer on the Court the power to assume jurisdiction over any other dispute "by virtue" of the Treaty.[294] In principle, therefore, it may not be excluded *tout court* that in the future the Court could be conferred by the Assembly the competence of dealing with individual claims concerning human rights breaches, on the basis of Article 3(g) of the Treaty, although the feasibility of this prospect is in practice most unlikely, at least for the years to come. In any event, little progress has been achieved towards the realization of the purposes of the AEC Treaty so far.[295]

i) An Additional Means for Fulfilling Human Rights in Africa: Sub-regional Institutions

138. A further option available to victims of human rights breaches in certain parts of Africa – including those committed by PMSCs – rests in the possibility of making recourse to the systems of monitoring and judicial review existing in the framework of a number of African sub-regional institutions. Although these institutions – some of which have been designated as "pillars" of AEC[296] – are basically regional economic communities (RECs), most of them include human

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[289] The full text of the Treaty is available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited on 31 May 2009).

[290] See <http://www.africa-union.org/root/au/Documents/Treaties/List/Treaty%20Establishing%20the%20African%20Economic%20Community.pdf> (last visited on 31 May 2009).

[291] See Article 4, para. 1(a), of the AEC Treaty.

[292] See Article 3(g) of the AEC Treaty.

[293] See Article 18, para. 2, of the AEC Treaty.

[294] See Article 18, para. 3, of the AEC Treaty.

[295] See VILJOEN, *International Human Rights Law in Africa, cit.*, p. 171.

[296] *Ibid.*, p. 525 f.

rights within their institutional mandate, making their institutional schemes of monitoring and judicial review applicable to violations of such rights.[297]

139. For example, in the 1993 amended version of the Treaty establishing the Economic Community of East African States (ECOWAS)[298] the commitment to ensure "recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" was solemnly affirmed, being included among the fundamental principles of the Community.[299] According to the 1991 Protocol A/P1/7/91, relating to the Community Court of Justice, the ECOWAS Court has jurisdiction to "determine cases of violation of human rights that occur in any Member State".[300] However, in principle the Court had no competence to deal with individual applications. For this reason, Article 39 of the 2001 *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*[301] affirmed that the 1991 Protocol was to be reviewed in order "to give the Court the power to hear […] cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed". The Protocol relating to the ECOWAS Court was finally amended in 2005, in order to ensure access to the Court to individuals and corporate bodies in cases of violations of their human rights,[302] which may also include breaches arising from PMSCs' operations.

140. Also in the context of the Common Market for Eastern and Southern Africa (COMESA), established in 1993 in order to promote regional economic integration through trade and development,[303] a Court of Justice exists which has "jurisdiction to adjudicate upon all matters which may be referred to it" pursuant to the COMESA Treaty.[304] According to Article 6(e) of the latter, "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" are included among the fundamental principles of COMESA. Article 26 of the Treaty explicitly allows individuals to submit claims may to the Court – on the conditions that available domestic remedies have been exhausted – in view of assessing "the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty". Therefore, human rights breaches arising from PMSCs' operations are justiciable before the Court only to the extent that they imply responsibility of member States or of the Organization itself.

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[297] See, in general, *ibid.*, p. 495 ff.

[298] See <http://www.ecowas.int/> (last visited on 31 May 2009).

[299] See Article 4(g) of the Treaty, available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> (last visited on 31 May 2009).

[300] See Article 9(4) of the Protocol, quoted by VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 503.

[301] Available at <http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/12ProtDemocGood.pdf> (last visited on 31 May 2009).

[302] See VILJOEN, *International Human Rights Law in Africa*, *cit.*, p. 507.

[303] See <http://www.comesa.int/> (last visited on 31 May 2009).

[304] See Article 23 of the COMESA Treaty, available at <http://about.comesa.int/attachments/comesa_treaty_en.pdf> (last visited on 31 May 2009).

141. Similar considerations may be developed with respect to the East African Court of Justice, one of the organs of the East African Community (EAC),[305] as Article 30 of the EAC Treaty has a content which is equivalent to Article 26 of the COMESA Treaty. Article 27 of the former explicitly recognizes "human rights […] jurisdiction" in favour of the Court, on the basis of an *ad hoc* protocol to be adopted by member States pursuant to the same provision. The Court, however, has competence to deal with human-rights-related claims submitted by individuals irrespective of the adoption of such a protocol,[306] as Article 6(d) of the EAC Treaty includes "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" among the fundamental principles of the Community. In addition, according to Article 7(2), "[t]he Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights".[307] Consistently, the East African Court of Justice recently had the opportunity to deal with a case relating to certain human rights breaches which in principle could be the result of activities carried out by PMSCs. The case concerned Uganda, where, in 2004, the claimants had been charged with treason and misprision of treason and were consequently detained. In November 2006, immediately after the High Court had granted bail to fourteen of them, the Court was surrounded by armed security agents, who interfered with the preparation of bail documents and then re-arrested and took back to jail fourteen of them.[308] A few days later, a military General Court Martial condemned the claimants to prison on the basis of the same charges for which they had been granted bail by the High Court. The interference in the Court process by the security personnel was subsequently declared unconstitutional by the Constitutional Court. This notwithstanding, the claimants were not released from detention.[309] The case was therefore brought before the East African Court of Justice, which, although noting that on the basis of Article 27 of the EAC Treaty the "quick answer" to the question whether it has "jurisdiction to deal with human rights issues" should be "no it does not",[310] after having "reflect[ed] a little bit"[311] reached the opposite conclusion. Relying exactly on Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty, the Court affirmed its jurisdiction over the case[312] and, with respect to the merits, concluded that "the intervention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened the [EAC] Treaty [as] [a]biding by the court decision is the cornerstone of the independence of the judiciary which

[305] See <http://www.eac.int/> (last visited on 31 May 2009). The EAC was established in 1999.
[306] See VILJOEN, *International Human Rights Law in Africa, cit.*, p. 504.
[307] Article 8(1)(c) is also of significance, according to which Partner States shall "abstain from any measures likely to jeopardise the achievement of [the] objectives [of the Community] or the implementation of the provisions of this Treaty".
[308] See *Katabazi and Others v. Secretary-General of the East African Community and Another*, 2007, 2007 *AHRLR* 119, para. 2.
[309] *Ibid.*, para. 3 ff.
[310] *Ibid.*, para. 33.
[311] *Ibid.*, para. 35.
[312] *Ibid.*, para. 39.

is one of the principles of the observation of the rule of law".[313] In holding this, the Court – taking inspiration from the practice of the African Commission on Human and Peoples' Rights – refuted the argument of the respondent State that the measures taken by the security personnel were necessary in order to defend national security, as "[m]uch as the exclusive responsibility of the executive arm of government to ensure the security of the state must be respected and upheld, the role of the judiciary to provide a check on the exercise of the responsibility in order to protect the rule of law cannot be gainsaid".[314]

142. Finally, the Southern African Development Community (SADC),[315] established in 1983, is also worth mentioning. Similar to what has been observed with respect to the previously mentioned RECs, also the SADC Treaty includes, at Article 4(c), respect for "human rights, democracy, and the rule of law" among the basic principles of the Community.[316] Pursuant to Article 16 of the Treaty, the SADC Tribunal is intended to "ensure adherence to and the proper interpretation of the provisions of [the] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it". A specific Protocol concerning the Tribunal and its Rules of Procedure was adopted in 2000,[317] Article 14 of which states that it "shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: (a) the interpretation and application of the Treaty […]". The jurisdiction of the Tribunal in matters concerning human rights was affirmed by the Tribunal itself in a very recent case, relating to the claimed violation of the applicants' property rights over agricultural land acquired by the government of Zimbabwe.[318] The Tribunal – relying on Article 14 of the said Protocol – considered that the relevant provision of the SADC Treaty that required interpretation and application in the instant case was Article 4(c),[319] on the basis of which

> "SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal".[320]

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[313] *Ibid.*, para. 54.
[314] *Ibid.*, para. 53.
[315] See <http://www.sadc.int/> (last visited on 31 May 2009).
[316] See <http://www.sadc.int/index/browse/page/119> (last visited on 31 May 2009).
[317] See *ibid.*
[318] See *Mike Campbell (Pvt) Ltd and William Michael Campbell v. The Republic of Zimbabwe*, 2007, 2007 *AHRLR* 141.
[319] *Ibid.*, para. 5.
[320] *Ibid.*, para. 6.

F. THE ASIAN FRAMEWORK*

143. As is well known, no specific regional instruments exist in the context of the Asian continent concerning human rights protection. However, *de iure condendo*, a provision included in the *Charter of the Association of Southeast Asian Countries* (ASEAN),[321] adopted in November 2007, could be of relevance to this Report. This provision is Article 14, according to which, "[i]n conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body". Such a provision is strictly related with Article 2 para. 2(i) of the Charter, which includes "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice" among the basic principles of the Association. When the ASEAN human rights body foreseen by Article 14 will be actually established and become operative, also in the area of Southeast Asia there will be the possibility of monitoring and judicially (or quasi-judicially) reviewing respect for human rights by an international court or other similar institution, the competence of which will naturally cover human rights breaches perpetrated by PMSCs.

GENERAL REPORT

Part II

G. THE EUROPEAN SYSTEM

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144. This part of the report assesses the impact of the activities carried out by PMSCs on the enjoyment of human rights under the EU human rights regime. .It aims to provide a general overview of the issues at stake and it is without prejudice to the more specific doctrinal studies carried out within the framework of Work Package 4 of the PRIV-WAR Project.

1) The EU human rights regime

145. The EU's commitment to human rights has gradually increased over time. As is well known, the founding Treaties of the European Union contained virtually no provision very few provisions on fundamental human rights, such as the prohibition of discrimination on grounds of nationality and sex. Moreover, these provisions were included purely out of economic considerations, in view of achieving a successful operation of the common market. Although the EU has not been founded as a human rights organization,

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[321] See <http://www.aseansec.org/21069.pdf> (last visited on 31 May 2009).

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today there is no longer any doubt that human rights form an integral part of the European Community's legal order.

146. The need for protection of human rights was first significantly recognized with the entry into force of the Amsterdam Treaty, which not only brought human rights to the forefront of the EU legal system, but also acknowledged that these principles could be infringed by a Member State, and consequently laid down the procedures to be applied in such a situation, recalling that a 'serious and persistent' violation of human rights by a Member State may result in its rights under the Treaty being suspended (Article 7). The Amsterdam Treaty also formally recognized the role of the Court of Justice in protecting human rights and fundamental freedoms.

147. Moreover, since the 1990s, the EU has been more concerned about the observance of human rights also in its external policies. An especially important aspect of EU's human rights policy with respect to third-countries is the political conditionality principle (whereby respect for human rights is made a precondition for EU membership)[322]. The initiatives developed within the framework of the Common Foreign and Security Policy (CFSP) should not be neglected either. Finally, over the past decade, the EU, along with the Council of Europe and the OSCE, has also become increasingly involved in the resolution of humanitarian crisis in Europe and worldwide.

148. In the future, the EU human rights regime will be significantly impacted by the entry into force of the Treaty of Lisbon, which was signed by the Heads of State or Government of the EU Member States on 13 December 2007 and was initially supposed to enter into force on 1 January 2009, if it had not been for ratification problems that have currently postponed the Treaty's entry into force. The most important change brought about by the Treaty involves the abolishment of the European Union's three-pillar structure and the relation between the EU and the ECHR[323], which is addressed in further detail below in the context of EU Charter of Fundamental Rights.

a) The European Court of Justice

149. As is well known, the main tasks of the European Court of Justice (ECJ) involve, first, the review of the legality of Community law with respect to primary law provisions and conflicts between such provisions, and second, the supervision of EU Member State compliance with their duties under EC law. While the precise scope of all fundamental rights protected by the ECJ may not be clearly defined, nonetheless the Court has played a very significant role in the development of human rights in the EU. As will be further illustrated below, in its development of the law, the ECJ relies on the common constitutional principles and international treaties in force for the Member States, especially the ECHR and its application by the ECtHR. This is how important human rights such as human dignity, religious freedom, due process,

[322] M Nowak, 'Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU', p. 687 and E Riedel and M Will, 'Human Rights Clauses in External Agreements of the EC', p. 723, in P Alston (ed.), *The EU and Human Rights* (1999).

[323] See, generally, H-M Blanke, S Mangiameli (eds.), *Governing Europe under a Constitution* (2006).

procedural guarantees and other rights have become part of Community law.[324]

150. The importance of human rights was first recognized by the ECJ in *Stauder* (1969), where the Court underlined that fundamental human rights are "*enshrined in the general principles of Community law and protected by the Court*"[325]. A year later, *Stauder* was reinforced by *Internationale Handelsgesellschaft*, where it was commented that, "*respect for fundamental human rights forms an integral part of the general principles of law protected by the Court of Justice*"[326]. In *Nold* (1974)[327], one of the most important cases on human rights to date, the Court made it clear that when the protection of fundamental rights is at stake, inspiration may be drawn not only from the constitutional traditions common to the Member States, but also from international treaties for the protection of human rights binding on EU Member States. Finally, the *Rutili*[328] case of 1974 must also be noted, since it was in *Rutili* that the ECJ for the first time made an explicit reference to the European Convention on Human Rights (ECHR). As a matter of fact, while the ECJ's reliance on the ECHR and the case law of ECtHR is continuously increasing, some scholars have pointed out that it has not yet "proved itself to be a precursor in relation to the establishment of a high level of protection"; rather, the ECJ has merely "followed the raising of the level of protection [of human rights] which has taken place 'externally'".[329]

151. Over the past two decades, the case-law on the importance of human rights in EU's legal order has become increasingly comprehensive. In fact, in a widely discussed recent judgment in the *Viking* (2007) case, the ECJ made the following important statement: "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence […] Member States must nevertheless comply with Community law".[330] In the *Viking* case, a Finnish company wanted to reflag its vessel under the Estonian flag in order to be permitted to staff the ship with an Estonian crew which would accept considerably lower wages than its current Finnish crew. The International Transport Workers' Federation (ITF) encouraged its affiliated to

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[324] K Stern, "From the European Convention on Human Rights to the European Charter of Fundamental Rights: The prospects for the protection of human rights in Europe", in H-M Blanke, S Mangiameli (eds.), above n 323, 174

[325] Case 29/69, Erich Stauder v City of Ulm (1969) ECR 419.

[326] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel (1970) ECR 1125.

[327] Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, (1974) ECR 491.

[328] Case 36/75 Rutili v. Minister for the Interior (1975) ECR 1219.

[329] H-J Blanke, "Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg", in H-M Blanke, S Mangiameli (eds.), above n 323, 277.

[330] Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Laine Eesti [2007], paragraph 40, ECR I-000. The Court found support to this statement by noting that the concept has been employed with respect to other fields of law: "See, by analogy, in relation to social security, Case C-120/95 Decker [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 Kohll [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 Commission v France [2004] ECR I-2229, paragraph 21, and Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 29", at para. 40.

boycott the vessel and moved on to take other solidarity industrial action. The Finnish Seaman's Union (FSU) also threatened a strike. In response, Viking sought an injunction in the English High Court in order to restrain the ITF and the FSU from committing acts arguably in breach of Article 43EC. The ECJ was thus faced with the difficult task of determining the delicate balance between a company's economic rights of free movement and the trade unions' social rights.[331] The Court's conclusion was, to put it in very general terms, that the protection of economic rights prevailed over the fundamental social rights, because the restriction on the free movement right did not meet the high threshold of the proportionality test applicable in these types of circumstances. Nonetheless, the judgment is of considerable importance since the Court recalled that protection of fundamental rights fell under the scope of Community law even in situations where the primary dispute at stake has arisen in an area of law that falls outside the scope of the Community's competence.[332]

152. *Interim conclusion*

It may thus be concluded, at least *prima facie*, that the state of nationality of a PMSC whose acts may constitute a breach of fundamental principles of human rights - as enshrined in the Member State common traditions and human rights treaties applicable to them - is bound to remedy such violations, even if the operation and the major activities of the PMSC in question were to fall outside the scope of Community's competence. The issue of extra-territorial application of human rights will be further addressed below (see Section 2.2 and 2.4).

b) The European Court of Human Rights (ECtHR)

153. The European Convention of Human Rights (ECHR) is of essential importance for the current research project and this report in particular, as for decades it has been seen as the cornerstone of EU human rights' regime. In fact, the need to include specific human rights legislation within EU's *acquis* has often been dismissed as redundant precisely because of the importance and efficiency of human rights enforcement mechanism offered under the ECHR.

154. Turning to the basic premise of the underlying research questions, it shall be recalled that generally, with some rare exceptions, States have no obligation to require the PMSCs registered in their national territory to take account of human rights obligations in situations that fall outside their jurisdiction, i.e., that do not take place within the national borders of the Contracting State. As the state hosting the PMSC will usually lack both the incentive and resources for effective enforcement of human rights, PMSCs, just like other multinational corporate enterprises, may appear to be operating in a legal vacuum. As one author has put it, "international law does not directly reach the

[331] For a similar case, see Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetaref orbundet* (2007)

[332] Viking case, n 330 above: "Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices." (para. 40)

corporate actor".[333]

155. As will be demonstrated below, the ECtHR has made remarkable achievements in bridging this gap. Nonetheless, several uncertainties remain. The role of the ECHR in determining the scope of PMSC's obligations in the field of human rights is inherently linked to two complex issues: first, the scope of Contracting States duties to ensure respect for human rights, punish and prevent such violations in situations where the breach of international law occurs at the hand of a private entity; and second, the Court's jurisdictional limits. Considering that both of these significant questions will be dealt in more depth as part of a separate doctrinal research in the framework of the PRIV-WAR Project, the purpose of the current report is merely to outline the substance and the complex legal issues relating to these two concepts, i.e., the Contracting State obligations under the ECHR and the Court's (extra-territorial) jurisdiction.

156. As to the first and perhaps slightly less problematic issue of State obligations regarding protection of human rights, it may be observed that the ECtHR has often had the occasion to pronounce on the obligation of States Parties to the ECHR with regard to human rights violations committed by private parties. A more detailed analysis of the issue of attribution of private conduct to the Contracting State and its obligation to punish and prevent the occurrence of human right violations has already been conducted in the framework of the current research project.[334] At this point it may suffice to underline that the ECtHR has frequently taken a bold approach when determining the scope of the *positive* obligations of the Contracting Parties under the Convention, thus indirectly including also the sphere of private relations. From a comparative perspective, the obligation to *prevent* human rights violations is, on the other hand, more developed under the Inter-American system.[335]

157. For example, in *Osman v the United Kingdom*[336], a landmark case on State responsibility for alleged breaches of Article 2 of the ECHR (right to life), the Court was faced with the question of whether the failure of authorities to appreciate the threat posed to one private party by another private party and the consequent lack of intervention can amount to a violation of the State's positive obligation to protect the right to life. The Court responded by stating that State responsibility would only arise if: "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[337] The

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[333] Olivier de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', in Philip Alston, *Non-State Actors and Human Rights* (2005), 228.

[334] Ineta Ziemele, 'Issues of Responsibility of Private Persons or Entities for Human Rights Violations: The Case-law of International Human Rights Courts and Monitoring Bodies', EUI Working Papers, Academy of European Law, WP 2009/08, http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL_2009_08.pdf

[335] Note, however, that some scholars have praised the ECtHR with respect to the duty of prevention addressed to the State Parties: "perhaps in no other international or regional instrument for the protection of human rights has an obligation to protect been extended more fully than in the Convention, imposing on the Contracting States far-reaching duties to adopt measures to prevent violations committed by private parties", De Schutter, above n 333, 240.

[336] *Osman v. the United Kingdom* (no. 23452/94), judgment of 28 October 1998.

[337] Ibid., para. 116, emphasis added.

Court's careful approach in wording the applicable test can be explained by its desire to avoid imposing a disproportionate burden on States, noting, *inter alia*, difficulties arising from evaluating operational choices in terms of priorities and resources and concluding that clearly not every claimed risk to life can entail an obligation on behalf of the State authorities to prevent it from materializing.[338]

158. To conclude, while the fairly high threshold set out by the Court has in fact been satisfied in several cases,[339] the ECtHR has so far remained very careful when pronouncing itself on the State obligation to *prevent* the occurrence of human rights violations and hence it appears unlikely, at least *prima facie*, that a State's responsibility could be invoked on grounds that it has failed to prevent human rights violations committed by a PMSC against a private party unless the Osman criterion is, of course, satisfied. In this context, the most complex question would however involve the exercise of the Court's jurisdiction, both personal and (extra-)territorial.

159. Article 1 of the ECHR provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" (emphasis added).

The question thus arises as to whether Article 1 of the Convention places a territorial limitation on Contracting States' duty to secure the rights and freedoms set forth in the Convention. The question was thoroughly considered by the ECtHR in the case of *Bankovic*[340], which arose out of the human rights violations allegedly committed by the NATO forces as a result of the bombing of Belgrade. The applicants argued that the Court has jurisdiction to adjudicate the violation of their human rights since the illegal acts of the Respondent states have produced effect in the Federal Republic of Yugoslavia (FRY). The Court disagreed with this approach:

> "71. [...] the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.
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> 72. In line with this approach, the Court has recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.), no. 31253/96, p. 7, 9 February 2000, unpublished). [...]
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> 73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State." (emphasis added)

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[338] Ibid., see also I Ziemele, n 334 above.

[339] See, among others, *Kontrová v Slovakia* (no. 7510/04), judgment of 31 May 2007, *Yasa v.Turkey* (2 September 1998), *Mahmut Kaya v.Turkey* (19 February 1998), *Akkoc v. Turkey* (10 October 2000), *Killic v. Turkey* (28 March 2000).

[340] Bankovic et al. v. Belgium and 16 other States (App. No. 52207/99), Eur. Ct. H.R. (2001), available at 41 I.L.M. 517.

The Court found no jurisdictional link between the persons who were victims of the act complained of and the respondent States. The Court's conclusion was that Article 1 must be understood as reflecting an "essentially territorial understanding of jurisdiction",[341] since otherwise the phrase "within their jurisdiction" used in Article 1 would be rendered superfluous. In other words, the Court was not satisfied that the applicants were capable of falling within the jurisdiction of the respondent States on account of the extra-territorial act in question, which in and of itself cannot give rise to State responsibility under the Convention in the absence of any pre-existing relationship between the applicants and the Contracting State.[342]

160. While *Bankovic* has given rise to an extensive debate – and sometimes criticism - in the legal doctrine[343], it is important to underline that the jurisdictional standard applied by the Court is two-fold: territorial and personal. As a result, the Court will have jurisdiction over an agent whose illegal acts take place outside the territory of the Contracting State, as long as such an agent exercises effective control over the alleged victim. For example, in the *Issa* case[344] the Court relied on its previous case law to recall that: "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. …Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[345]

161. To conclude, while historically the Court has adhered to a rather narrow interpretation of its jurisdictional limits, the tide might be changing and the question may be settled more definitely once the (currently pending) case arising out of the last Iraq war is settled. In any case, even under the current case law, a Respondent State may be held responsible for human rights violations carried out by a PMSC, as long as a connection between the two can

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[341] Ibid., para. 59-61

[342] Ibid., para. 35-45

[343] A more in-depth analysis of the interpretation of Article 1 of the ECHR, the Bankovic case and its relationship to the Court's previous case-law on the subject matter will be carried out in the framework of D4.3, devoted to the analysis of jurisdictional issues.

Generally, for comments and criticism see, among others, E. Roxstrom et al., "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection", 23 Boston University International Law Journal (2005) 55; Olivier de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', in Philip Alston, *Non-State Actors and Human Rights* (2005), 228.

For the Court's earlier case-law on the issue of jurisdictional limits, see *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep.72 (1975) and *Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) (1992), where the Court, in determining its jurisdiction, made the following important observation: "*the term 'jurisdiction' in Article 1 is not limited to the national territory of the High contracting parties; their responsibility can be involved because of acts of their authorities that occurred outside of their territories*" (para. 91).

[344] *Issa and Others v. Turkey* (no. 31821/96), Judgment of 16 November 2004, ECHR 2004 - , para. 67.

[345] Ibid., paras 68, 71, emphasis added.

be established[346] and the PMSC is found to have had effective control of the territory where its illegal acts have been perpetrated.

c) The EU Charter of Fundamental Rights

162. It has been repeatedly pointed out that it is high time to replace Community's hesitation with respect to fundamental rights with a clear position in the matter: the EU Charter of Fundamental Rights (the Charter) has been tailored to fill this lacuna. Solemnly proclaimed during the Nice Intergovernmental Conference by the European Parliament, the Council and the Commission on 7 December 2001, the Charter not only constitutes the very essence of the European *acquis* in terms of fundamental rights, but also contains fundamental rights that apply to all people, irrespective of their nationality. While the Charter maintains a distinction between rights conferred upon EU citizens, EU residents and all other individuals in general, it entails a number of rights that apply merely to the latter category, such as dignity rights (Article 1-5)[347], rights to various freedoms,[348] as well as nine out of twelve solidarity rights under Title IV of the Charter. In addition, various equality rights contained in the Charter are also applicable to all persons, as enshrined Article 21(1), which, mainly mirroring Article 14 of the ECHR,[349] provides:

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".[350]

Providing the Community with a general anti-discrimination clause is a welcome and long-awaited development, since both the non-discrimination provisions contained in the Treaty, as well as in the secondary legislation (like, for example, in the Racial Equality Directive[351], discussed below), are always limited in their material scope of application, whereas Article 21(1) appears to abolish discrimination on the mentioned grounds in all fields of Community law.

163. While the effect of the Charter in practise may largely depend upon the ECJ,

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[346] For a more elaborate analysis on the distinction between "governmental" and "non-governemental" organizations and the attribution of their conduct to the State, see I Ziemele, n 334, at 21.

[347] Human dignity (Art.1), Right to life (Art.2), Right to the integrity of the person (Art.3), Prohibition of torture and inhuman or degrading treatment or punishment (Art.4), Prohibition of slavery and forced labour (Art.5).

[348] Right to liberty and security (Art. 6), Respect for private and family life (Art.7), Protection of personal data (Art.8), Freedom of thought, conscience and religion (Art.10), Freedom of expression and information (Art.11), Freedom of assembly and association (Article 12(1)), Freedom of arts and sciences (Art.13), Right to education (Art.14), Freedom to choose an occupation and right to engage in work (Art.15 (1) and (2)), Right to property (Art.17).

[349] Note that discrimination on grounds of national origin has been carefully left out from Charter's general non-discrimination clause.

[350] For the corresponding laws in different Member States ensuring compliance with the general non-discrimination clause of the Charter, see Hölscheidt, S., "Kommentar zu Kapitel III, Gleicheit" (p.263-318) in Meyer, J., (Hrsg.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden, 2003, p.277-281.

[351] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. (*Official Journal L 180 , 19/07/2000 P. 0022 – 0026)*

due note should also be taken of Article 51(2), which explicitly states that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution", a view supported also by the European Commission[352]. In fact, it has been argued that "the proscription of discrimination does not extend the competence of the Union, but rather restrains it".[353] Whether the ECJ will adopt a similar view when interpreting Article 21(1) of the Charter still remains to be seen. In any case, while the importance of a general non-discrimination clause in the Community legal order cannot be underestimated, it cannot escape one's attention that Article 21(1) differs greatly from the non-discrimination clauses contained in the major international human rights instruments, since the Article does not list discrimination on grounds of nationality or national origin among the prohibited grounds of discrimination. This lacuna is partially filled by Article 21(2) which states that:

> "Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, *and without prejudice to the special provisions of those T*reaties, any discrimination on grounds of nationality shall be prohibited." (emphasis added)

164. However, as becomes clear from the conditional wording of this Article and the praxis of both Community institutions and the ECJ, the provision certainly applies to EU citizens only.[354] In fact, the complex structure of the Constitution contains various, sometimes overlapping, equality clauses. For example, Article 4(2) in Part I of the Constitution also provides that in "the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited". None of this, however, constitutes a step towards enforcement of non-EU citizen rights: the question of whether the EC Treaty also bans, at least in some degree, discrimination of other persons coming under the scope of Community law, such as third country nationals, is a matter of interpreting the Treaty,[355] rather than the Charter, especially since Article 21 (2) of the Charter is an exact recital of Article 12 of the EC Treaty. Finally, the fact that the scope of principle of democratic equality,[356] enshrined in Article 44 of Part I of the Constitution, is also limited to EU citizens, further enforces this view.

165. There are nevertheless two ways of rendering the concept of fundamental rights in the European Union more effective. The first avenue leads through the progressive interpretation of the Charter by the ECJ and granting it legally binding force through adoption of the European Constitution. The second avenue, perhaps more complementary rather than alternative, could involve the EU's accession to the ECHR. As noted above, the Community's commitment to respect fundamental human rights can be found not only in Article 6(2) of

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[352] Communication from the Commission on the nature of the European Charter of Fundamental Rights, COM (2000) 644 final, 11.10.2000, point 9.

[353] Ellis, E., "Social Advantages: A New Lease of Life?", CMLRev. 40: 639-659, 2003, at 659.

[354] On the development of Article 21(2) by the members of the Convent and for a commentary, see Hölscheidt, S., "Kommentar zu Kapitel III, Gleicheit" (p.263-318) in Meyer, J., (Hrsg.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden (2003), 283, 289.

[355] Peers, S., "Immigration, Asylum and the European Union Charter of Fundamental Rights", European Journal of Migration and Law 3 (2001) 162

[356] Article I-44 (principle of democratic equality) states: "In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union's institutions".

the EU Treaty, but it has also been demonstrated by the ECJ already since its early judgements in *Stauder*, (1969), *Internationale Handelsgesellschaft* (1970), *Nold* (1974), and *Rutili* (1975).

166. As is well known, the ECJ is not bound by the ECHR judgements; in fact, it has always emphasized that the Convention and the rights contained therein serve the purpose of inspiration and should only be regarded as guidelines. The situation might change, however, with the Union's accession to the ECHR, and Article I-7(2) of the Constitution[357] provides the legal basis for such action. Article 52(3) of the Charter itself states: "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention", adding, as a matter of fact, that this "provision shall not prevent Union law providing more extensive protection". In addition, the proposed amendments to Article 6(2) TEU provide that, "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", and yet does not fail to add that "[s]uch accession shall not affect the Union's competences as defined in the Treaties".

167. The views as to how realistic as well as desirable such an accession would be differ greatly. Some opine that the legal difficulties arising from the accession have already been largely overcome, which is also demonstrated by the interconnection of the two Courts – the ECJ referring to the ECHR in its judgements, and the ECtHR – to the EU Charter, thus concluding that the accession would be nothing but "*a recognition of the unity of fundamental values in Europe in its entirety*".[358] Others are less optimistic, pointing to the necessity for significant changes in the procedural mechanisms of both the ECJ and the ECtHR.[359] What is however certain is that accession of the Union to the ECHR will have an important impact not only on the relationship between the EU and the Council of Europe, but also between the ECJ and the ECtHR, considering that in the case of accession the Convention would be applicable to the Union institutions and consequently the ECtHR would have certain competence for measures adopted by EU's institutions.[360]

168. *Interim conclusion*

It is difficult to estimate to what extent the Charter could be relevant for the victims of human rights violations committed by PMCS registered in one of the EU Member States, especially considering the non-binding nature of the Charter as such. One situation where the Charter's provisions could play a complementary role would arguably be, for example, the case where the damage suffered by an individual of a host State of the PMSC arises from discriminatory treatment in his or her employment by the PMSC. However, considering the exclusion of discrimination on the grounds of nationality and

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[357] Article I-7(2) states in a fairly imperative tone: "The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution".

[358] Dutheil de la Rochère, J., "The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty", CMLRev. 41: 345-354, 2004, at 353.

[359] Van Gerven, W., "Remedies for Infringements of Fundamental Rights", European Public Law Journal, Vol.10/2, 261-284, 2004, at 265.

[360] Richard Crowe, "The Treaty of Lisbon: A Revised Legal Framework for the Organisation and Functioning of the European Union", ERA Forum (2008) 9:163–208, p. 177, available at http://www.springerlink.com/content/0p7830l50w668026/fulltext.pdf.

national origin from the scope of the Charter, it is unlikely that the general anti-discrimination clause of Article 21 could be of much relevance for a potential victim of discrimination, as will also be demonstrated further below in the context of EU's secondary legislation of anti-discrimination.

d) The EU's anti-discrimination legislation

169. One of the Amsterdam Treaty's main achievements is the adoption of a more comprehensive non-discrimination clause, enshrined in Article 13 EC,[361] which provides the Community with a legal basis to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. While true that the European Union has been concerned with discrimination issues since its very dawn, it was not until the adoption of the Treaty of Amsterdam in 1997 that this general anti-discrimination clause was included as a basic founding principle of the Union.

170. The Commission was granted the "green light" to start taking action in the field by the European Council in Tampere (1999) after the Council had called for an instant implementation of Article 13 EC. The Commission responded by coming forth with a whole package of anti-discrimination measures less than a year after Tampere. This "package", as often referred to in literature, includes the Racial Equality Directive, a Framework Directive prohibiting discrimination in employment and occupation on grounds of religion, belief, disability, age and sexual orientation (furthermore- the Employment Directive)[362] and a Community Action Program aiming at exchange of good practice, experience and information among Member States.[363] The importance of this so-called "anti-discrimination measure package" cannot be underestimated, since the two directives adopted under Article 13 provide, for the first time, a common legal framework of minimum protection against various forms of discrimination across all member states of the European Union.

171. The Racial Equality Directive, arguably the most significant element of the "package", represents the result of European Commission's recent efforts to get more involved in the combat of racism in the European Community. Adopted by the Council of Ministers on 29 June 2000 and in force a month later on 19 July 2000, the Racial Equality Directive is the result of almost a "decade of intensive work and lobbying by non-governmental organizations",[364] as well as the European Parliament and the European Commission. The main purpose of the Racial Equality Directive is the

[361] Article 13 of the E.C. Treaty, as amended by the Amsterdam Treaty, states:
"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[362] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303 , 02/12/2000 P. 0016 – 0022).* The *Employment Directive* requires member states to make discrimination unlawful on grounds of religion or belief, disability, age or sexual orientation in the areas of employment and training.

[363] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action program to combat discrimination (2001 to 2006).*Official Journal L 303 , 02/12/2000 p. 0023 – 002*.

[364] Chopin, I. *"Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European Union and Non-Governmental Proposals"* 2 EJML (2001) 430.

enforcement of the principle of equal treatment in the Union by ensuring effective combat against discrimination on grounds of racial and ethnic origin. It is recalled in the Preamble of the Directive that elimination of discrimination on grounds of race and ethnic origin is not only in line with the Community's obligations to respect and safeguard fundamental human rights, but also that discrimination undermines the achievement of the Union's objectives, such as attainment of high level of employment, social protection, economic and social cohesion and the overall development of the European Union as an area of freedom, security and justice. The scope of the Racial Equality Directive is quite wide: it applies to both "direct" and "indirect" discrimination, as well as to both public and private sectors. The Directive aims at combating discrimination regarding access to employment, vocational training and working conditions, as well as social security, healthcare, social advantages, and education, thus covering most of the areas where racial discrimination may occur.

172. Turning to a closer analysis of the Directive, it must be noted that probably the most controversial issue surrounding the Racial Equality Directive arises from its application to individuals who do not hold EU citizenship. While the Preamble of the Racial Equality Directive states that, "the prohibition of discrimination should also apply to nationals of third countries", the respective prohibition is subject to the condition that it may not interfere with any provisions governing their entry, residence or access to employment. The Preamble also recalls that any differences of treatment based on nationality[365] are also excluded from the scope of the Racial Equality Directive (just as from the scope of the Employment Directive, the second most substantial part of the "package"[366]). Article 3(2) of the Directive expresses the views pronounced in the Preamble in even more explicit terms:

> "This Directive *does not cover difference of treatment based on nationality* and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to *any treatment* which arises from the legal status of the third-country nationals and stateless persons concerned." (emphasis added).

In practices, the distinction between discrimination on grounds of nationality and that of racial or ethnic origin may be not be easily distinguishable, as the two often overlap; in addition, the difference of treatment on grounds of nationality is often used as a cover for racial discrimination.

173. In the context of the present research, potential victims of discrimination at the hands of PMSCs would not only need to demonstrate that their

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[365] The Preamble of the Directive, Recital 13.

[366] It is interesting to note that Article 3 (2) of the Racial Equality Directive is identical to the corresponding Article 3(2) of the Employment Directive which states: "This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of third country nationals and stateless persons concerned". For an elaborate study on different treatment of discrimination and European law, with special regard to discrimination in employment, see Bell, M., Waddington, L., "Diversi eppure eguali. Riflessioni sul diverso trattamento delle discriminazioni nella normativa europea in materia di eguaglianza", Giornale di Diritto del Lavoro e di Relazioni Industriali, N.99-100, anno XXV, 2003, 3-4, pp. 373- 432.

discrimination is not merely based on their nationality, but would also need to tackle the complex question of extra-territorial application of the EU's human rights legislation. Here, two different types of situations have to be distinguished. If a territorial link can be established between the infringement of the human right in question and the EU (i.e., the scope of application of Community law), EU law is likely to provide a remedy. If, however, no such direct territorial link can be established, the victim of the human rights violations will need to resort to the so-called "effects doctrine" in order to affirm his or her rights.

174. In the context of EU law, the "effects doctrine" has been extensively applied in EU competition law, and there is no reason why this should not be the case with respect to human rights law. The "effects doctrine" is, however, not absolute, and the prevailing view in the doctrine is that the applicant needs to demonstrate that the illegal act in question has not only had a direct effect in European Union but has also been implemented in the EU.[367] The nationality of victims may also play a role, as so far the leading case-law on the subject matter has involved "victims" of European nationality.[368]

175. In conclusion, the extra-territorial application of the EU human rights regime in the absence of a territorial link is unlikely to be successful for the victim of the type of human rights violations that are likely to occur in the context of PMSC action.

2) Addressees of human rights obligations

176. Although the notion of a right – be it a human right or an entitlement of lesser gravity – is, in the final analysis, indistinguishable from the notion of a corresponding obligation, it can nevertheless be useful to address these "two sides of the coin" separately, for the content and scope of substantially the same right can differ depending on who is bound to respect it or ensure its effectiveness. In the context of EU human rights regime, it is, of course, first and foremost the Community itself which is bound by human rights obligations (a) That much is obvious from the first section of this contribution. As the EU is constructed to act primarily 'through' the public authority of Member States, the latter are also obliged to observe human rights that are a part of EU law (b.). Finally, it cannot seriously be denied that private law relationships may be affected by human rights obligations (c.).

a) Human rights obligations of the EU

177. Respect for human rights, initially a creature of case law of the Court, has now been recognised at the level of primary law, i.e., the EU's constitutive Treaties (a.1.), but history suggests that the ultimate source of human rights obligations remains 'the general principles of law' (a.2.). Recognition of this hierarchy helps explain why and in what ways the content of human rights, when they are addressed to the EU, can be altered (a.3.) or limited (a.4.).

a.1) Primary law

[367] P Torremans, 'Extraterritoriality in Human Rights', in N A Neuwahl, A Rosas (eds), *The European Union and Human Rights* (1995), 281, 293

[368] Case 36/74, Walrave v Union Cycliste Internationale (1974) ECR 1405. TO ADD

178. The basic primary law provision which establishes that the EU is bound by human rights is Article 6(2) of the EU Treaty:[369]

> "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

"Attachment" to human rights and fundamental freedoms, as well as to 'fundamental social rights', is confirmed also in the preamble to the EU Treaty.[370]

179. In addition to this, there are pillar-specific primary law provisions which oblige the EU to respect human rights. As regards the Common Foreign and Security Policy, it is Article 11(1) of the EU Treaty:

> "[t]he Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:
>
> — to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
>
> […]
>
> — to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter,
>
> […]
>
> — to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".

180. Provisions of comparable generality do not appear in the sections of primary law covering the so-called First and Third Pillar, but more specific or implicit references to human rights are numerous. For example, the EC Treaty refers to human rights or 'fundamental social rights' in the context of Community action in certain areas,[371] and implicit references can easily be derived from provisions on judicial control, an approach which merits closer inspection because it introduces the point made in section a.2..[372]

181. The provisions of the EU Treaty and EC Treaty granting the Court jurisdiction are worded in a way suggestive of rules of law over and above the EU primary law. Thus, Article 220(1) of the EC Treaty provides that "[t]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is

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[369] Note that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, once it comes into force, will amend Article 6; according to the new text, "*[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union*", and "*[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

[370] See 3rd and 4th recital.

[371] See Article 136(1) (social policy), Article 177(2) (development cooperation) and Article 181a(1) (economic, financial and technical cooperation with third countries).

[372] The multiple provisions prohibiting discrimination are not listed separately for they are but a specific expression of a fundamental right to equal treatment.

observed". As regards this wording, "[i]t is usually thought that here the word 'law' must refer to something over and above the treaty itself; if correct, this means that Article 220 […] not only entitles, but also obliges, the Court to take general principles into account".[373] Of course, such a reading is by no means inevitable; indeed, the word 'law' may logically refer to the Treaty itself or to the theoretical construct of a 'rule of recognition' or 'Grundnorm' stating that 'the law, i.e., the treaty shall be obeyed'.[374] Yet, the fact remains that much more has been read into the word 'law' as used in Article 220(1) of the EC Treaty, letting it incorporate general principles of law including human rights.

182. Other, more specific, provisions also contain language that seems or at least can be construed to imply that rules of law superior to the EC Treaty exist. Article 230(2) lays down the grounds on which the Court may review the legality of Community acts, and these grounds include an "infringement of this Treaty or of any rule of law relating to its application". It is normally considered that "[t]he phrase 'any rule of law relating to its application' covers all those rules of Community law other than those in the Treaties themselves. This includes general principles of Community law,"[375] because the phrase "must refer to something other than the Treaty itself".[376] The general principles, of course, include notably fundamental rights.[377] Assuming that this analysis is correct, Article 35(6) of the EU Treaty, when it entrusts the Court with "*jurisdiction to review the legality of framework decisions and decisions [...] on grounds of [...] infringement of this Treaty or of any rule of law relating to its application*", reinforces the supremacy of human rights over EU Third pillar action.

183. *Interim Conclusion*

Thus, as a matter of primary law, the EU is bound by human rights obligations in all its activities both generally and under each on the three pillars. This leaves no scope for a technical argument that the EU may have been designed with the intention of exempting some of its activities from rights review and, more importantly, affects how the Charter, once it has come into force, must be read.

a.2) Human rights as general principles

184. Yet, although it is clear that all forms of EU action are covered by human rights obligations, the Treaties alone do not reflect the particular 'brand' of rights that bind the EU. It will be recalled that the ECHR is explicitly referred to in Article 6(2) of the EU Treaty, but even there the mention appears simply alongside the reference to 'general principles of Community law'. Further, the history of the Court's jurisprudence and of the EU Treaty suggests that the said

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[373] Trevor C Hartley, *The Foundations of European Community Law*, 6th ed., OUP, 2007, p. 132.

[374] Cf., however, Takis Tridimas, *The General Principles of EU Law*, 2nd ed., OUP, 2006, p.: 19: "[i]n fact, this concise and seemingly innocuous provision is replete with values, and arguably the most important provision of the founding Treaties. It establishes that the Community is bound by the rule of law [...]."

[375] Paul Craig, Gráinne de Búrca, *EU Law*, 3rd ed., OUP, 2003, p. 535.

[376] Hartley 2007, p. 132.

[377] See the seminal case 4/73 Nold, [1974] ECR 491, para. 13, relating to the similarly worded Article 33(1) of the now expired Treaty establishing the European Coal and Steel Community.

Article simply reflects case-law,[378] and thus it is there that one can learn more about the meaning of the words 'general principles of Community law' and also about human rights as a specific sort of these principles.

185. The general principles are 'inspired' from the constitutional traditions of the Member States, and so are those that relate to fundamental rights:[379]

> "[r]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community".

186. In addition to the constitutional traditions, "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law",[380] and "[i]n that regard, the Court has stated that the [ECHR] has special significance".[381] Accordingly, the human rights obligations which bind the EU are chiefly an amalgamation resulting from the 'inspiration' drawn from national constitutional traditions and from the 'special significance' attached to the ECHR. Insofar as it makes sense to speak of differing – lower or higher – levels of protection of human rights, one may safely say that the product of this alchemy is neither the lowest common denominator amongst the Member States and the jurisdiction established by the ECHR, nor a maximisation of intensity with which fundamental rights apply. Rather, the Community concept of fundamental rights is generally such as would enable "the most appropriate solution on the circumstances of the case. [...] [T]he Court seeks such elements from national laws as will enable it to build a system of rules which will provide 'an appropriate, fair and viable solution' to the legal issues raised, and the judicial enquiry has been referred to as 'free-ranging'".[382] The variable nature of this 'free-ranging' enquiry is indeed demonstrated by instances in which the EU version of fundamental rights is above or below the putative reference level set by the ECHR.

a.3) 'High' standard of protection

187. An instructive example of different approaches to the protection of human rights appears in the cases concerning the control of acts of the United Nations Security Council. Both the Court and the ECtHR have recently dealt with the matter. The cases before the Court arose in the context of Security Council resolutions requiring all States to freeze the assets of the persons identified by the Security Council or its Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda network or the Taliban. A list of such persons was drawn up, yet they were not afforded any meaningful rights of defence or even told what they were supposed to have done wrong. In order

[378] Hartley 2007, p. 140.
[379] Judgment in case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125.
[380] Nold, op. cit., para. 13.
[381] Opinion 2/94, [1996] ECR I-1759, para. 33.
[382] Tridimas, p. 21, references omitted.

to implement that resolution, the Council of the European Union adopted a Common Position[383] providing that "[f]unds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee […]".[384] Because the Common Position – a foreign affairs measure which binds the EU member states – lacks direct enforceability, an EC Regulation[385] was adopted, which, of course, was directly applicable in all Member States. The Regulation provided that "[a]ll funds and other financial resources belonging to any natural or legal person, entity or body designated by the […] Sanctions Committee and listed in Annex I shall be frozen".[386] A certain Mr. Yasin Al-Qadi and an organisation called Barakaat International Foundation were included in the list of the Sanctions Committee and eventually in Annex I of the Regulation.

188. Both challenged the Regulation, insofar as it included their names, before the Court of First Instance (CFI)[387] on grounds of lack of competence and infringement of the right to property protected by Article 1 of Protocol 1 to the ECHR, the right to a fair hearing in accordance with earlier case law of the ECJ, and the right to judicial process under Article 6 ECHR and ECJ case law. The CFI delivered judgments in which it ruled that "the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law"[388] but continued to state that it was "empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible".[389] Having rather controversially reviewed the state of *jus cogens* as regards the right to property,[390] fair hearing[391] and judicial process,[392] the CFI concluded that violation thereof could not be established. As the applicants had also been unsuccessful in arguing that the EC lacked competence to adopt the contested Regulation,[393] their actions were dismissed.

189. An appeal on points of law was brought before the Court. In what is

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[383] See Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1).
[384] Art. 4.
[385] See Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).
[386] Art. 1(2).
[387] See judgments in Case T-315/01, Kadi, [2005] ECR II-3649 and Case T-306/01, Yusuf and Al Barakaat International Foundation, [2005] ECR II-3533.
[388] Kadi, para. 225; Yusuf, para. 276.
[389] Kadi, para. 226; Yusuf, para. 277.
[390] See Kadi, paras. 234-252; Yusuf, paras. 285-303.
[391] See Kadi, paras. 253-276; Yusuf, paras. 304-331.
[392] See Kadi, paras. 277-291; Yusuf, paras. 332-346.
[393] See Kadi, paras. 87-135; Yusuf, paras. 125-170.

commonly known as the *Kadi* judgment,[394] it ruled, *inter alia* that, "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system"[395] and accordingly "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".[396] The abstract reference in these passages to 'an international agreement' points to nothing less than the Charter of the United Nations. The Court refused to admit that the Charter might have a place in the hierarchy of Community law, but if it had, it would enjoy "primacy over acts of secondary Community law [yet] [t]hat primacy at the level of Community law would not […] extend to primary law, in particular to the general principles of which fundamental rights form part".[397]

190. Having thus established full applicability of the constitutional (*viz.* general) principles of the EC Treaty, the Court checked the contested Regulation against the EU version of fundamental rights, rather than *jus cogens*, as the CFI had done. Unsurprisingly, violations of the right to defence and effective judicial protection,[398] as well as property[399] were found. The Regulation was annulled insofar as it concerned the applicants.[400] The ruling was given notwithstanding the fact that the Charter of the United Nations provides for the obligatory nature of Security Council's Resolutions[401] and their prevalence over other international agreements, be they earlier or subsequent,[402] or that, as was argued by the CFI, "Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations"[403] because the EC Treaty leaves earlier international obligations unaffected[404] and requires the Member States to cooperate in maintaining international security.[405] It has been submitted that "[t]he Court's reasoning was robustly

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[394] See Joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation, judgment of 3 September 2008, nyr.
[395] Para. 282.
[396] Para. 285.
[397] Paras. 307-308.
[398] See paras. 333-353.
[399] See paras. 354-371.
[400] Although maintaining its effect for three months in order to give the Council an opportunity to remedy the breaches of fundamental rights.
[401] See Art. 25: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*"
[402] See Art. 103: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*"
[403] Kadi, para. 190; Yusuf, para. 240.
[404] See Art. 307(1): "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.*"
[405] See Art. 297: „*Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the*

dualist"[406] and that "[t]he bottom line of the judgment […] is that the UN Charter and UN SC Resolutions, just like any other international law, exist on a separate plane and cannot call into question or affect the nature, meaning or primacy of fundamental principles of EC law".[407]

191. By contrast, when confronted with a similar problem, the ECtHR adopted a deferential approach. In its *Behrami/Saramati* admissibility decision[408] the Grand Chamber had to rule on whether the ECtHR may adjudicate on the alleged human rights violations by KFOR – a security presence established by a Security Council Resolution and staffed by "Member States [of the United Nations] and relevant international institutions", "under UN auspices", with "substantial NATO participation" but under "unified command and control"[409] – and by UNMIK – an interim administration under UN auspices established by the same Resolution – in Kosovo following the forced withdrawal of Federal Republic of Yugoslavia forces and the conflict between Serbian and Albanian forces in 1999.

192. One of the applicants was Mr Behrami, who complained on his own behalf, and on behalf of his deceased son who had died whilst playing with undetonated cluster bombs which had been dropped during the bombardment by NATO in 1999. In a UNMIK investigation, it was revealed that a French KFOR officer had accepted that KFOR had been aware of the unexploded cluster bombs for months but that they were not a high priority. Mr Behrami submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated bombs which those troops knew to be present on that site.

193. The *Saramati* application involved a Kosovar national of Albanian origin who was on 24 April 2001 arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 4 June the Supreme Court allowed Mr Saramati's appeal and he was released, but on 13 July, when reporting to a police station which was located in an area where the lead nation was Germany, he was again arrested by UNMIK police officers by order of the Commander of KFOR, who at the time was a Norwegian officer. Eventually, after Mr Saramati's detention had been extended several times, the Supreme Court of Kosovo quashed the conviction, his case was sent for re-trial and his release from detention was ordered. In the meantime, on 3 October 2001, a French General had been appointed to command the KFOR. Mr Saramati complained under Article 5 of the ECHR, concerning the right to liberty and security, alone and in conjunction with Article 13, concerning the right to an effective remedy, about his extra-judicial detention by KFOR. He also complained under Article 6(1), concerning the right to a fair trial, that he did not have access to court and about a breach of the respondent States' positive obligation to guarantee the Convention rights of those residing in Kosovo.

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maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

[406] G. de Búrca, *The European Court of Justice and the International Legal Order after* Kadi, Jean Monnet Working Paper 01/09, p. 34, www.jeanmonnetprogram.org/papers/09/090101.pdf

[407] Ibid., p. 35.

[408] See decision of 2 may 2007, *Behrami and Behrami v. France*, Application No 71412/01, and *Saramati v. France, Germany and Norway*, Application No 78166/01.

[409] See Resolution 1244 of 10 June 1999.

194. The ECtHR decided not to recycle its earlier *Bosphorus* case law, which concerned the relationship between the ECHR and EU measures. There the ECtHR had, in effect, ruled that it would not review a national measure implementing an EU measure where the latter left no discretion to the Member States' authorities, as long as there is no evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.[410] Rejection of this kind of approach in the *Behrami/Saramati* case[411] was based on a strictly territorial argument:[412]

> "[i]n its judgment in [the Bosphorus] case, the Court noted that the impugned act […] had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers […]. The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities".

Somewhat more comprehensibly, the ECtHR went on to say that "[t]here exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases".[413] Indeed, the applications were found to be inadmissible because the reproached conduct was attributable not to the Respondent States but rather to the United Nations on the basis of an intensely teleological argument that to decide otherwise "would be interfere with […] effective conduct of [UN's] operations".[414]

195. Of course, one may attempt to explain the divergent approaches of the ECtHR and of the Court by saying that the former, being an international court proper, could not behave in the expansive manner of a supreme court, and that the latter simply used an opportunity to take a new step towards constitutionalising the EC. Although itself a creature of international law, it now levitates as a constitutional entity, much like traditional states do, by pulling itself up by its own bootstraps, i.e., by dismissing any need for a superior international legal order by virtue of which it might be said to exist. However, the ECtHR has also sought to assert the constitutional quality of the

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[410] See judgment of 7 July 2005, Bosphorus Airways v. Ireland, Application No 45036/98, para. 155: "*State action taken in compliance with [international] obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides […]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued […]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.*" For the position on State's obligation where it has discretion, see para. 157.

[411] Once even described as 'surprisingly formal' and 'unconvincing': see de Búrca, p. 20.

[412] *Behrami / Saramati*, para. 151.

[413] Ibid.

[414] Para. 149.

ECHR structure,[415] yet it chose not to reconsider its view of the hierarchical position of international law in the name of human rights. This indicates that the EU version of fundamental rights is probably rather more absolute. Furthermore, the daring and deferential statements by, respectively, the Court and the ECtHR, as well as the outcome of the cases, seem to go beyond what would be required if the two courts had been motivated merely by determining the best approach for positioning themselves *vis-à-vis* international law. It therefore appears that in substantial, if not procedural, terms the EU's general principles are on occasion capable of offering more protection to individuals than the ECHR.

196. Yet, for the sake of a fair account, when discussing the scope of human rights obligations addressed to the EU it should be stated that in less exceptional circumstances the Community courts do not appear to discipline the institutions more than the ECHR and ECtHR's case law would require. Despite the widely shared view that the general principles of EC law are not limited to the level of protection required by the ECHR,[416] it seems excessively difficult, not to say impossible, to find instances where the EU's acts are subjected by the Community courts to more exacting standards. An idealist interpretation of this fact would suggest that the standard of protection is already consistently high and does not call for aggressive judicial intervention. A pragmatist would suspect that, "*[t]he Court could also be accused of being influenced in its judicial decision-making by its interests as a Community institution and thereby failing in its duty of impartiality*".[417] The latter may be a harsh assessment, but it seems correct to assert that the human rights obligations binding the EU are not consistently more rigorous than those arising under the ECHR.

a.4) 'Low' standard of protection

197. Indeed, in a number of instances it could be argued that the EU falls below the standard of protection that would be required by the ECHR. Two examples will suffice to prove the point, and, in addition, in the present context it may be pertinent to note that EU's external policy also allows for human rights goals to be counterbalanced by political pragmatism. First, as regards fair trial rights,[418] the position of the Advocate General – the Court's judicial officer who delivers non-binding opinions to which the parties have no right of response – appears rather precarious. In the *Emesa Sugar* case the Court rejected a litigant's request to submit observations in response to the Opinion of the Advocate General, principally because the latter has the same status as the Judges[419] and is "*not entrusted with the defence of any particular interest in the exercise of [his] duties*".[420] However, in a subsequent case on the status

[415] See, e.g.,, judgment of 18 January 1987, Ireland v. The United Kingdom, Application No 5310/71, paras. 239 et seq..
[416] See, e.g.,, Xavier Groussot, *General Principles of Community Law*, Europa Law, 2006, p. 98.
[417] Trevor C Hartley, *Constitutional Problems of the European Union*, Hart, 1999, p. 44.
[418] For a critical discussion, not reproduced here, on whether the case law regarding *locus standi* in accordance with Article 230 of the EC Treaty is fully compatible with the right of access to court under Article 6(1) of the ECHR, see notably the Concurring Opinion of Judge Ress in the Bosphorus case, op. cit..
[419] See Order of the Court in case C-17/98, Emesa Sugar (Free Zone), [2000] ECR I-665, para. 11.
[420] Para. 12.

of the *commissaire du Gouvernement* of the French *Conseil d'État* the ECtHR implied that conformity with Article 6(1) of the ECHR required that the parties may respond, if only in writing, to the *commissaire*'s opinion even after the closure of oral proceedings.[421] No such right is afforded to litigants before the Court.[422]

198. Second, competition law is a notoriously problematic area when it comes to ensuring full compliance by the Commission with the ECHR. For example, the prohibition of double jeopardy has been interpreted by the Court as requiring not that the same competition law infringement may not be pursued by the Commission and by a Member State, but simply that in setting a fine an earlier fine must be taken into account:[423]

> "[i]n the field of Community competition law, the [non bis in idem] principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge.
>
> [T]he possibility of concurrent sanctions, one a Community sanction, the other a national one, […] is acceptable […]. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where […] the infringement was committed within the Community".

199. In view of this jurisprudence, it has been submitted that "*the case law of the ECJ concerning international* ne bis in idem *in competition cases is not fully in line with the ECHR case law on the national* ne bis in idem *by precluding the double prosecution from the* ne bis idem *principle and by accepting the accounting principle*",[424] i.e., the principle merely requiring that one penalty be taken into account when deciding on another, because under ECHR "*Article 4 of Protocol No 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice*".[425] The perfectly valid practical argument that enforcement of competition law might be unduly hampered by 'excessively strict' application of human rights rules does not invalidate the point that the fundamental rights, as recognised by the EU, may be curtailed when convenience so requires.[426]

200. In the area of development cooperation, human rights safeguards have been

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[421] See judgment of 7 June 2001, Kress v. France, Application No 39594/98, para. 76.

[422] For a more extensive commentary, making the point that "Kress *leaves the advocate general of the ECJ in a very precarious, indeed unsustainable, position*" see Tridimas, pp. 344-347; cf., however, Groussot, pp. 95-97, who argues that "*in the light of the* Kress *case, it could be asserted that the* Emesa Sugar *[order] used the right argumentation to find that the impossibility for the parties to reply to the Opinion of the AG did not amount to an infringement of the ECHR*".

[423] Judgment in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon et al., [2004] ECR II-1181, paras. 131-132.

[424] John A.E. Vervaele, *European Criminal Law and General Principles of Union Law*, College of Europe research papers in law, No 5/2005, p.16, www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf

[425] Judgment of 29 May 2001, Fischer v. Austria, Application No 37950/97, para. 29.

[426] For further examples on competition law practice that can hardly be reconciled with ECHR, see, e.g., Tridimas, pp. 342-344 and Groussot, pp. 98-99.

modelled in an explicitly political fashion. The Cotonou Agreement,[427] which partly replaced the Lomé IV bis Convention, has the objective of promoting and expediting the economic, cultural and social development of the African, Caribbean and Pacific (ACP) States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.[428] Its three complementary pillars are development cooperation, economic and trade cooperation, and the political dimension.[429] Benefits available to the ACP States include preferential trading conditions. Article 96 provides that, "[i]f […] a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law" it must commence a consultation procedure; if other 'appropriate measures' are not sufficient, "[i]t is understood that suspension would be a measure of last resort". In 2005, Article 96 was watered down somewhat by placing an increased emphasis on political dialogue prior to adoption of sanctions.

201. It has been observed that "[i]n terms of practice, these clauses have been invoked on numerous occasions, usually in response to military coups. However, with one exception, the measures taken have involved the suspension of financial aid and other cooperation but not trade benefits".[430] Thus, both the wording of the Cotonou Agreement and the practice of its application suggest that the human rights conditionality clause, the likes of which have systematically been used by the EC (EU) in cooperation agreements since 1991,[431] is essentially a mild political instrument eminently inappropriate for reinforcing the human rights obligations of PMSCs. The best that can be said for the conditionality clauses in general is that, assuming that they are constitutionally valid, they can be a "*vehicle for positive measures*", but to ensure respect for human rights and democratic principles in other territories the Community will require legislative competence under Community law to adopt appropriate measures.[432]

b) Human rights obligations of Member States

202. The starting point for a discussion on the extent to which EU fundamental rights are addressed to the Member States must be a passage from the *ERT* judgment:[433]

> "[the Court] has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall

[427] Partnership Agreement between the members of the African, Caribbean and Pacific group of States of the one part, and the European Community and its Member States of the other part [2000] OJ L317/3, amended [2005] OJ L 287/1.
[428] See Art. 1.
[429] See http://ec.europa.eu/development/geographical/cotonouintro_en.cfm
[430] Lorand Bartels, *The trade and development policy of the European Union*, [2007] 18 Eur. J. Int'l L., pp. 738-739. The one reported exception concerned the suspension of the EU's obligation not to impose any restrictions on any capital payments between residents of the Community and Zimbabwe.
[431] See Armin von Bogdandy, *The European Union as situation, executive, and promoter of the international law of cultural diversity – elements of a beautiful friendship*, [2008] 19 Eur. J. Int'l L., p. 262.
[432] Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, OUP, 2007, pp. 123 et seq.
[433] Judgment in case C-260/89, Elliniki Radiophonia Tiléorassi, [1991] ECR I-2925, para. 42.

> within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights".

203. Two important notions appear in the quoted passage. Firstly, as has been confirmed on other occasions, "where national legislation is concerned with a situation which […] does not fall within the field of application of Community law, the Court cannot […] give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the [ECHR]".[434] Put in other words, national measures that fall outside the scope of Community law are not subject to review for compliance with general principles of EC law. Secondly, it is sufficient for a national measure to be within the 'scope' of Community law, as opposed to being an implementing measure or a measure which restricts the fundamental freedoms but comes within the ambit of an express derogation provided for in the Treaty, for Community general principles to apply.[435] By and large, this describes the state of the law.

204. Yet, three important notes must be made. Firstly, the Court has been extremely creative in recognising situations as falling within the 'scope' of Community law and thus triggering rights review of national measures. For example, in the *Carpenter* case, the UK was disallowed from expelling a certain Mrs. Carpenter, a national of the Philippines, because her separation from her husband "*would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom*".[436] The situation thus having come within the scope of Community law, the Court instructed the Member State in question that expulsion would be a disproportionate intervention in Mr. Carpenter's privacy. It has been recognised that "[t]here is […] a clear and, indeed, remarkable tendency towards broad application of general principles, in particular, fundamental rights. Further, the case law has understood European citizenship as an autonomous source of rights thus bringing within the scope of application of Community law a range of situations not directly linked with free movement".[437] On one occasion, the Court even engaged in a discussion on compatibility with fundamental rights of a national measure after having ruled that it did not come within the scope of Community law,[438] though the broader significance, if any, of this judgment by a Chamber consisting of merely three judges remains unclear.

205. Secondly, the interpretation of fundamental rights protected by the Community, when addressed to the Member States, has sometimes become very extensive. For instance, in the said *Carpenter* case the Court's view of what was required for an adequate protection of family life went beyond what

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[434] Judgment in case C-299/95, Kremzow, [1997] ECR I-2629 para. 19.
[435] Although this has relatively recently been described as merely an obiter – see Hartley 2007, p. 144 – the rule on 'scope' seems to be good law.
[436] Judgment in case C-60/00, Carpenter, [2002] ECR I-6279, para. 39.
[437] Tridimas, p. 39, references omitted.
[438] See judgment in case C-71/02, Karner, [2004] ECR I-3025, paras. 44-52.

in all likelihood would have been demanded by the ECtHR.[439] In the *Mangold* case, one of the most daring of the Court's forays into human rights law of all time, the Grand Chamber referred to "various international instruments and […] the constitutional traditions common to the Member States"[440] in the abstract and found, *inter alia* that "[t]he principle of non-discrimination on grounds of age must […] be regarded as a general principle of Community law".[441] An editorial in the *Common Market Law Review* commented that the Court's reasoning would have provoked a thick red underlining if it had occurred in a student essay.[442]

206. Thirdly, in what has become known as a process of judicial de-pillarisation, the Court has understood its jurisdiction under the Third Pillar broadly, holding that individuals may invoke a framework decision adopted under Article 34(2) of the EU Treaty to create consistent interpretation of national law and that "the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law".[443] If the transposition to the Third Pillar of Community case-law on interpretation of law is meant to be complete, it follows that a Member State is bound by the EU version of fundamental rights also when acting within the scope of rules on police and judicial cooperation in criminal matters.

207. The above is relevant in the context of PMSCs because under international law they "might be considered […] as agents of the state, and in this way, the normal rules for state responsibility would apply where the firm's activity is controlled by the state".[444] However, for such attribution to be possible, apart from the content of the respective entity's powers "the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise" must be assessed.[445] Such assessment is not carried out by reference to autonomous criteria but "depends on the particular society, its history and traditions"[446] and therefore appears to be an inexact exercise. Furthermore, in most contexts where PMSCs have not been commissioned by a Member State and their activities have human rights implications, attribution to any of the Member States will be almost impossible because the exercise of governmental authority as normally understood does not entail extraterritorial maintenance of peace and security. It follows that the human rights obligations of the Member States are unlikely to be triggered by acts of locally recruited PMSCs. That, of course, may be different when, upon invitation or by orders of the UN, States maintain peace and security abroad. The ECtHR has recognised that "a State may also be held accountable for violation of the Convention rights and

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[439] See, on one hand, the Court's very generous proportionality analysis in para. 44, and, on the other hand, ECtHR's rather more exacting criteria for prohibiting expulsion in, e.g., judgment of 19 February 1996, Gül v. Switzerland, Application No 23218/94, paras. 40-43.
[440] Judgment in case C-144/04, Mangold, [2005] ECR I-9981, para. 74.
[441] Para. 75.
[442] Horizontal direct effect – A law of diminishing coherence?, [2006] 43 CMLRev 1.
[443] Judgment in case C-105/03, Pupino, [2005] ECR I-5285, para. 44.
[444] Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 2006, p. 320, references omitted.
[445] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, adopted in 2001, United Nations, 2008, commentary on Art. 5, p. 43.
[446] *Ibid*.

freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State".[447] Accordingly, *de facto* control of State agents may give raise to attribution of responsibility for acts of these agents to the respective State.

3.3. Direct and indirect *Drittwirkung*

208. Horizontal applicability of human rights provisions – often referred to by the German noun *Drittwirkung* – is a perpetually vexing and contested issue of constitutional law. The first principal objection is that if human rights provisions were applicable in relations between individuals, this "would put an end to private autonomy".[448] A second important objection is that given the legal principle status of human rights and the highly abstract nature of rules, they are eminently inappropriate for regulating the daily myriad of relationships between private parties who cannot be expected to undertake a balancing of competing principles and to cope with the open texture of fundamental rights provisions. Nevertheless, while these reasons might be very convincing grounds to reject the idea that human rights could be enforced directly by one private party against another, known as direct *Drittwirkung*, opinions differ widely as to the permissibility of indirect or *'mittelbare' Drittwirkung*, i.e., the notion that human rights could or should guide the interpretation of private law rules and/or deny enforceability to private law obligations where that would be in an alleged conflict with the State's obligation to ensure protection against abusive effects of private autonomy.

209. Direct *Drittwirkung* is not required by the ECHR which, it will be recalled, is a particularly important source of inspiration for general principles of EU law. The following passage adequately summarises the situation:[449]

> "one may conclude that Drittwirkung does not imperatively ensue from the Convention. On the other hand, nothing in the Convention prevents the States from conferring Drittwirkung upon the rights and freedoms laid down in the Convention within their national legal systems insofar as they lend themselves to it. In some states Drittwirkung of the rights and freedoms guaranteed by the Convention is already recognised, whilst in other States this Drittwirkung at least is not excluded in principle. Some have adopted the view that it may be inferred from the changing social circumstances and legal opinions that the purport of the Convention is going to be to secure a certain minimum guarantee for the individual as well as in his relations with other persons. It would seem that with regard to the spirit of the Convention a good deal may be said for this view, although in the case of such a subsequent interpretation one must ask oneself whether one does not thus assign to the Convention an effect which may be unacceptable to (a number of) Contracting States, and consequently is insufficiently supported by their implied mutual consent".

210. As to indirect Drittwirkung under the ECHR, the obligations imposed upon

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[447] Issa and Others, n. 344 above, para. 71.

[448] David P. Currie, *The Constitution of the Federal Republic of Germany*, University of Chicago Press, 1994, p. 186, quoted in: Mark Tushnet: *The issue of state action / horizontal effect in comparative constitutional law*, [2003] 1 I.Con 84.

[449] Yutaka Arai et al., *Theory and Practice of the European Convention on Human Rights*, eds. Van Dijk et al., 4th ed., Intersentia, 2006, p. 32, references omitted.

the Member States seem to be very extensive.[450]

211. Under EC law, because "[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights",[451] there can be no question of direct *Drittwirkung*. The indirect variety, by contrast, forms part and parcel of established case law. The *Schmidberger* case[452] is a particularly relevant example "which places the protection of fundamental rights on a par with the fundamental freedoms".[453] Austrian authorities had allowed an environmental group to organize a demonstration on the Brenner motorway, the main transit road between Germany and Italy, which as a result was to be closed for almost 30 hours. The applicant was a transport company, and it sought damages from Austria, claiming that the failure to prevent the motorway from being closed amounted to a restriction on the free movement of goods. The Court agreed that failure to ban the demonstration was a measure having equivalent effect to a quantitative restriction. However, it also stated that the protection of fundamental rights, amongst them freedom of expression, "is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".[454] Having analysed the scope of freedom of expression and balanced it against the free movement of goods, the Court concluded that "the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade".[455] Because freedom of expression was also described as a general principle of EC law,[456] it is clear that the Community fundamental rights can have a very intense indirect horizontal effect:[457] the exercise of freedom of speech by one private party validly precluded another private party from conducting its business.

212. *Interim conclusions*

As was reported in WP 7.1 sub b, "[t]he Court of Justice in a series of judgments has established the competence of the Commission according to which private security counts as an 'economic sector' and as such is subject to the same rules as other supply of services in the Internal Market".[458] Therefore, the EC human rights rules affect PMSCs just as any other service providers. It is often argued that "indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in

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[450] For an elaborate discussion see Ineta Ziemele, 'Issues of Responsibility of Private Persons or Entities for Human Rights Violations: The Case-law of International Human Rights Courts and Monitoring Bodies', EUI Working Papers, Academy of European Law WP 2009/08, http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL_2009_08.pdf, esp. the commentary on the *Pla and Puncernau* case.

[451] Opinion 2/94, [1996] ECR I-1759, para. 27.

[452] See judgment in case C-112/00, Schmidberger, [2003] ECR I-5659.

[453] Tridimas, p. 209.

[454] Schmidberger, para. 74.

[455] Para. 93.

[456] Para. 71.

[457] For an extreme example see Mangold, op. cit..

[458] *The Regulatory context of private military and security services at the European Union level*, not published, p. 6.

substance".[459] Put more provocatively, however horizontal effect is formulated, in the final analysis it will always be direct.[460] That may be true from a radically substantive point of view. Yet, in reality, the extent to which human rights can be invoked against a private party depends also on rules of competence, standing and interpretation. Consequently, as regards the applicability of human rights in private relations, the distinction between direct and indirect *Drittwirkung* does hold some value. It therefore seems that the law could properly be described by saying that the human rights as general principles of EC law can be applicable to private relations, albeit indirectly.

3) Judicial remedies

213. Human rights violations carried out by the PMSCs may give ground to both State responsibility as well as individual responsibility. With respect to the latter, it is questionable whether civil or criminal liability should be preferred. In fact, it has been pointed out in respect to responsibility of multinational enterprises, while civil liability is tailored to compensate the victims of the human rights violations, criminal liability may provide more efficient tools for repression if the State becomes involved in the investigatory process.[461] In any case, the invocation of the PMSC personnel's individual criminal responsibility is most likely to occur before the national courts of the State that has territorial or personal jurisdiction over them. Another option involves the invocation of responsibility of the PMSC's Home State, Contracting State or Host State[462] before the ECtHR (as long they are, of course, Contracting States to the ECHR) on grounds of violation of such a State's positive obligation to observe human rights and prevent their infringement.

214. Any claim before the ECtHR would, however, only be successful if: 1) the admissibility criteria are met (*inter alia*, exhaustion of local remedies as provided under general international law), 2) a connection between the PMSC and the Respondent State can be established, in other words, if the PMSC's conduct is attributable to the Respondent State and, 3) if the Court's jurisdictional limits can be overcome by demonstrating that either the illegal act has been committed in a Contracting State's territory, or that the Respondent has exercised effective control of such a territory.

215. As far as invocation of State responsibility before the ECJ is concerned, the matters are more complex, not least because the ECJ is not a human rights court. In addition, the matters are further complicated by the unclear *locus standi* for private parties before the ECJ when Community acts are challenged. Generally the ECJ's approach with respect to individual access to the Community courts has been restrictive: the individual is expected to resort to national courts for judicial review, and it is the national court that is entitled to ask the Court for a preliminary ruling in case of doubt as to the interpretation of Community law. In fact, a number of scholars have observed that the present system is not always sufficient for protecting an individual's

[459] *Viking* Case, n. 330 above, per AG Poiares Maduro, para.40.
[460] Robert Alexy, *A theory of Constitutional Rights* , OUP, 2002, p. 363.
[461] Olivier de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', in Philip Alston, *Non-State Actors and Human Rights* (2005), 228.
[462] The responsibility of the Home, Host and Contracting States is dealt with in three separate reports in the framework of WP4.

fundamental rights and have argued either in favour of an expansion of the ECJ's competence or its accession to the ECHR.[463] Given the current state of law the alleged shortcomings may be of little importance, because there is not much that an individual might be seeking from the Community with regard to the conduct of a PMSC, if one is to argue for a greater involvement by the EU in the regulation of such services and for solid foreign policy, one must also address the perceived lack of availability of *locus standi*.

216. Furthermore, in the context of PMSC (illegal) conduct, and in the (current) absence of any specific EU legislation in the field, action against a Member State on grounds of its PMSC's conduct, brought either by the Commission or indirectly by a private individual is unlikely. That is so in particular because of the Commission's wide discretion whether or not to pursue a Community law infringement.[464] Also, availability of remedies in national courts is subject to Member States' procedural autonomy, and, according to well-entrenched case law of the Court, Community law only requires that sanctions for its breach be equivalent to those penalising violations of national law,[465] that they be effective, i.e., dissuasive[466] and that they be proportionate.[467] It is excessively difficult to see how these rather abstract requirements might be used by a private party to successfully argue that a Member State has failed to comply with the Community human rights regime by inadequately reining in PMSCs.

217. In conclusion, there can be no doubt that fundamental rights are enforceable at Community level. At the same time, any possible EU legislation imposing an obligation on the Member States with respect to the licensing of PMSCs as well as criminalization of their illegal conduct outside the EU will need to strike a balance between human rights and economic rights. In other words, although the ECJ has acknowledged that fundamental rights may constitute justifiable grounds for imposing restrictions on the free movement provisions, any such restriction on, for example, the free movement of services, will be subjected to a narrow interpretation where the free movement provisions will constitute the main rule. Fundamental rights, however, are the exception in this respect.[468]

218. However, in light of several recent cases the possibility of enacting legislation requiring Member States better to regulate the conduct of PMSCs can by no means be excluded. In the recent *Ship-Source Pollution*[469] case, which followed the important ECJ's ruling in the *Environmental Crimes*[470] case, the Court ruled that the EC may enact first pillar legislation thereby requiring Member States to adopt measures criminalizing certain conduct where such legislation is necessary for combating crimes of a considerable

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[463] See, among others, A-M Roddik Christensen, *Judicial Accommodation of Human Rights in the European Union* (2007), at 80. For a forceful and as yet unsuccessful criticism of the current practice see Case C-50/00 P UPA v. Council [2002] ECR I-6677, per AG Jacobs, para. 33 et seq.

[464] See, e.g. Case 7/71 Commission v France [1971] ECRI-1003, para. 5 et seq.

[465] See, e.g. Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, para. 13.

[466] See, e.g. Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, para. 23.

[467] See, e.g. Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art [2003] ECR I-10155, para 62.

[468] M Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?* (2007), at 208.

[469] Case C-440/05 Commission v Council, Judgment of 23 October 2007

[470] CaseC-176/03Commission v Council [2005] ECR I-7879

gravity, in these cases – in the field of environmental law. In addition, as already mentioned above, the EU competence to adopt any necessary measures in the field would also be enhanced by the entry into force of the Lisbon Treaty, which foresees the abolishment of the current three pillar structure and will, hopefully, do away with some of the complexity related to competence delimitation.