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Abstract

Both in conflict and post-conflict situations, states increasingly rely on private military and security companies (PMSCs) to perform tasks which used to be carried out by their Military. Practice shows that employees of such private companies may become involved in incidents amounting to serious violations of human rights, such as the right to life and the freedom from torture or inhuman or degrading treatment. This paper examines the positive obligations of States to investigate serious human rights violations and to prosecute those responsible for such violations, deriving from international and regional human rights instruments, as well as their interpretation by the respective courts and monitoring bodies. It then considers how these obligations may apply to states who contract PMSCs; to States on whose territory these companies operate; and to the States where they are registered. It concludes that despite the absence of judicial practice specifically addressing PMSCs, the human rights bodies increasingly accept that the positive obligations of states to investigate and prosecute serious human rights violations also apply when States have effective control over the territory of another State; but also when they exercise a lesser degree of authority or control in a third State. It argues that a proportional relationship should be recognised between the extent of such authority or control exercised in a foreign State- including through the use of PMSCS-, and the degree to which the positive human rights obligations pertain to that State.

Keywords

Law – Security – Accountability– Human Rights – Regulation – Civil-military Relations

Obligations of States to Prosecute Employees of Private Military and Security Companies for Serious Human Rights Violations

CHRISTINE BAKKER*

1. Introduction

Both in conflict and post-conflict situations, states increasingly rely on private military and security companies (PMSCs) to perform tasks which used to be carried out by their Military or by other state agents. Practice shows that employees of such private companies may become involved in incidents amounting to serious violations of human rights, such as the right to life and the freedom from torture or inhuman or degrading treatment. In situations of armed conflict, either of an international or of a non-international character, such incidents may give rise to criminal responsibility of the individual employee, and/or to state responsibility based on rules of international humanitarian law (IHL). At the same time, the International Court of Justice (ICJ) has confirmed that also in situations of armed conflict or military occupation, human rights instruments continue, to a large extent, to apply.[1] Under international human rights law, states not only have an obligation to *respect* human rights, but also to *protect* these rights and to prevent their violation. International and regional monitoring bodies have explicitly confirmed that the obligation to protect also includes the duty to investigate infringements, and to prosecute those responsible for serious human rights violations. Nevertheless, in most cases, the incidents amounting to serious human rights violations involving employees of PMSCs, have not led to adequate investigations or criminal prosecutions.[2]

This paper aims to examine to what extent and how the obligations of states to investigate and prosecute serious human rights violations also apply to acts of individual employees of PMSCs. What is the legal framework and which conclusions can be drawn from the case-law and decisions of the judicial and quasi-judicial monitoring bodies, in particular the European and Inter-American Courts of Human Rights and the United Nations Human Rights Committee? (paragraph 2). Does the obligation to investigate and prosecute have an extraterritorial scope, in other words does it persist when the tasks are performed in a third country and the violation occurred abroad? Which state is then responsible for such investigations and prosecutions: the state hiring the PMSC (contracting State) the receiving state (host State) or the state where the company is incorporated (home state) (paragraph 3)? The paper does not address the question of criminal responsibility of the PMSC as a corporation; nor the obligations of private corporations to respect human rights.[3]

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1 ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory;* ICJ, Judgment of 19 December 2005, *Armed Activities on the Territory of the Congo*.

2 The first criminal prosecutions in the United States were launched on 8 December 2009 against five former employees of Blackwater Worldwide who were indicted on voluntary manslaughter and other charges in connection with killings in Iraq in September 2007 ('Nisoor Square incident'), when 17 civilians were killed and 24 others injured.

3 See on these points in relation to multinational corporations, Francioni, F., 'Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations', in W. Benedek a. o. (eds), *Economic Globalisation and Human Rights* (2007), 245-265.

2. State's Obligations to Prosecute Serious Human Rights Violations: the Legal Framework

A. Provisions in International and Regional Human Rights Instruments

All general human rights conventions contain a general obligation to respect and to ensure the rights included in that particular instrument. This general obligation is often complemented by the obligation of the States Parties to guarantee the *right to an effective remedy* to individuals whose rights under the relevant convention have been violated. This right has been interpreted by the relevant monitoring bodies to include, on the one hand, the right to reparation and compensation for the victims of the violation or their relatives; and on the other hand, the obligation of the state to investigate the violation and if appropriate, prosecute and punish its perpetrators.[4] Therefore, the *duty to prosecute* persons accused of violating certain human rights of others, may derive either from the general obligation to respect and ensure these rights; or from the obligation to guarantee the right to an effective remedy; or both. As will be demonstrated below, the monitoring bodies of the relevant conventions have indeed based the duty –or even the *obligation* to prosecute- on a combination of these two conventional bases.

The relevant provisions of the international and regional general human rights instruments will now be examined.

1. The International Covenant on Civil and Political Rights [5]

In the International Covenant on Civil and Political Rights (ICCPR, or 'Covenant'), the general obligation to guarantee the rights of the ICCPR is included in Article 2(1), according to which each State Party 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant (…).'[6] In Article 2(3), the Covenant obliges the States Parties to ensure the existence of an effective remedy for persons whose rights or freedoms, as recognised in this Covenant, have been violated, notwithstanding that the violation has been committed by persons acting in an official capacity. States Parties are also required to ensure that the competent judicial, administrative or legislative authorities shall enforce such remedies when granted. The question to what extent these obligations also extend outside the territory of the Contracting States will be addressed in paragraph 3.

2. The Regional Human Rights Instruments: the American Declaration and Convention on Human Rights,[7] the European Convention on the Protection of Human Rights and Fundamental Freedoms,[8] and the African Charter on Human and Peoples' Rights.[9]

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4 Another procedural right, the right to a fair trial, will not be considered in this paper, even though some elements of this latter right, such as the right to be heard by an independent and impartial court, are closely linked to the right to an effective remedy.

5 International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS, 171

6 The interpretation of this provision by the Human Rights Committee, addressing the question whether the terms 'within its territory' and 'subject to its jurisdiction' must be considered in a disjunctive or in a conjunctive manner, will be addressed in paragraph 3A.

7 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) (hereafter 'American Declaration'); American Convention on Human Rights, signed on 22 November 1969, entered into force on 18 July 1978 (hereafter 'ACHR').

8 European Convention on the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, European Treaty Series, No. 5, entered into force on 3 September 1953.

9 African [Banjul] Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on Oct. 21, 1986.

Whereas the American Declaration contains a very broadly formulated commitment of the American States to protect essential human rights,[10] the general obligation to guarantee the rights of the American Convention is formulated in Article 1(1) of that Convention in terms of 'respect' and 'ensure', stating that the States Parties 'undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination (…)'. In the European Convention on Human Rights (ECHR), the general obligation to guarantee the rights laid down in that instrument (Article 1), states that the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. In the African Charter, the terms employed for the obligation of the States Parties is weaker than in the two other regional instruments, since it limits itself to 'recognizing' the rights, duties and freedoms enshrined in the Charter.[11]

As regards the right to an effective remedy, Article 25 of the American Convention states that everyone has the right to an effective recourse to a competent court or tribunal 'for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.'

The ACHR also requires the States Parties to ensure that the competent authorities shall enforce such remedies and to develop the possibilities of judicial remedy. In the European Convention on Human Rights (Article 13), the right to an effective remedy is formulated in more restricted terms, stating that every person whose rights and freedoms under the Convention are violated 'shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

It should be noted that the right to an effective remedy has a larger scope in the ACHR and –on certain points- in the African Charter, than in the ICCPR and in the ECHR. Whereas the ICCPR and the ECHR require states to guarantee an effective remedy exclusively for violations of rights enshrined in the Covenant or Convention itself, the American Convention and the African Charter also protects this right for acts that violate a person's fundamental rights 'recognised by the constitution or laws of the state concerned' (American Convention), or 'as recognised and guaranteed by conventions, laws, regulations and customs in force' (African Charter).

It follows from this overview that the main universal and regional human rights instruments all contain the general obligation of States to ensure the rights contained in each instrument, and that they also include the right to an effective remedy. It will now be considered how these provisions and the ensuing states obligations have been interpreted by the relevant monitoring bodies, showing an increasingly established recognition that the right to an effective remedy also entails the obligation of the State to investigate serious violations and to prosecute those responsible.

B. Decisions of International and Regional Monitoring Bodies

1. The Inter-American System

(a) The Inter-American Commission for Human Rights (IAComHR)

The IAComHR is empowered to hear individual complaints and may also report on general human rights situations in States Parties. It can also refer contentious cases to the Inter-American Court. Since the 1980's, the IAComHR has interpreted the right to an effective remedy in the American Convention to include the obligation of States to investigate human rights violations, and to prosecute their

[10] See American Declaration, Preamble, last paragraph.

[11] African Charter, Article Articles 1 and 2.

authors. It has repeatedly called for investigation of the facts and punishment of the responsible individuals in cases of torture or disappearances.[12] Similar formulations were applied in two cases against *Haiti* and *El Salvador*, where the Commission added that the investigation must be 'complete and impartial'[13] and that the State must 'submit the responsible persons to justice in order to establish their responsibility so that they receive the sanctions demanded by such serious actions.'[14] This interpretation was later taken up by the Inter-American Court in its first case, *Velásquez Rodríguez* of 1987 and in subsequent cases.[15]

(b) The Inter-American Court of Human Rights (IACtHR)

The IACtHR has explicitly confirmed the obligation of States to investigate all human rights violations and to prosecute and try their perpetrators. This obligation follows from the general obligation to protect and ensure the rights of the Convention, in combination with the duty to guarantee the right to an effective remedy.

Indeed, the IACtHR has systematically considered the right to an effective remedy in combination with the general obligation to protect and to ensure the exercise of the rights of the Convention (Article 1). [16] The Court has affirmed at several occasions that this general obligation also includes the obligation of the state to prevent, investigate and punish any violation of the rights enshrined in the Convention, and to provide reparation and compensation for the victims. As stated for the first time in *Velasquez Rodriguez,*[17] the state must organise its governmental apparatus in such a way that it is capable of ensuring such protection. This reasoning was further refined in subsequent cases.[18] In *Barrios Altos,* the IACtHR firmly condemned an amnesty law in Peru on the ground that this law *de facto* prohibited the access to justice, thereby denying the victims or their next of kin any form of judicial remedy. [19] Also in a series of more recent decisions**,** the Court has consistently reiterated that States Parties have an obligation to effectively investigate violations, and to identify, prosecute and punish those responsible.[20] In *Miguel Castro-Castro Prison v Peru*, the IACtHR specifically ordered the respondent State 'to effectively investigate, identify and …punish those responsible, for which it

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[12] Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress*, in Roht-Arriaza, Naomi (ed.), *Impunity and Human Rights in International Law and Practice*, (New York: OUP, 1995), pp. 24-38, at 34. See IAComHR, Resolution Nº 17/82, Case 7821 (Guatemala), March 9, 1982, Conclusion, at para. 3

[13] Inter-American Commission for Human Rights, Resolution Nº 48/82, Case 6586 (Haiti), March 9, 1982, Conclusion, at para. 3.

[14] Report Nº 26/92, Case 10.287 (El Salvador), September 24, 1992, Conclusion, at para. 5.

[15] See *infra*.

[16] Tigroudja, Hélène and Pannoussis, Ioannis, *La Cour interamericaine des droits de l'homme; Analyse de la jurisprudence consultative et contentieuse*,, (Bruxelles: Bruylant, 2003), at 270-271.

[17] IACtHR, Judgment of 29 July 1988, Ser. C, No. 4, para. 18.

[18] IACtHR, *Paniagua Morales and others v Guatemala*, Judgment of 8 March 1998, Ser. C, No. 37; IACtHR, *Suarez Rosero v Ecuador*, Ser. C, No. 35, at para. 65; IACtHR, *Villagran Morales and others v Guatemala*, Judgment of 19 November 1999, Ser. C, No. 63, at para. 225; IACtHR, *Bamaca Velasquez v Honduras*, Judgment of 25 November 2000, Ser. C, No. 70, at para. 194; IACtHR, *Durand and Ugarte v Peru*, Judgment of 16 August 2000, Ser. C. No. 68; IACtHR, *Barrios Altos (Chumbipumba Aguirre v Peru),* Judgment of 14 March 2001, Ser. C, No. 75.

[19] *Barrios Altos*, at paras 42-43.

[20] IACtHR, *Serrano Cruz sisters v El Salvador*, Judgment of 1 March, 2005; IACtHR, *Huilca Tecse v Peru*, Judgment of 3 March 2005 (ordering the respondent State to 'conduct an effective investigation in order to identify, prosecute and punish the masterminds and perpetrators of the extrajudicial execution'); IACtHR, *Moiwana v Suriname*, Judgment of 15 June 2005 (also ordering' to investigate the facts of the case and to identify, prosecute and punish those responsible'); In the same sense, see also IACtHR, *Gutierrez Soler v Colombia*, Judgment of 12 September 2005; IACtHR, *Gomez Palamino v Peru*, Judgment of 22 November 2005, and IACtHR,*La Cantuta v Peru*,Judgment of 30 November 2007.

must open the corresponding proceedings and to effectively carry out the ongoing criminal proceedings as well as new ones'.[21]

2. The European Court of Human Rights (ECtHR)

The ECtHR has also recognised the obligation of states to investigate and prosecute serious human rights violations, both as part of their duty to ensure the substantive rights of the convention (especially Articles 2 and 3), and as part of their duty to guarantee an effective remedy.

It has adopted a series of decisions concerning the right to an effective remedy, laid down in Article 13 of the ECHR. However, it is only since a few years that the ECtHR considers that this article has a significance of its own; in its early case-law the Court considered that the right to an effective remedy was only applicable as a subsidiary legal basis.[22] Nevertheless, the ECtHR has pronounced itself on many occasions on the criteria for the 'effectiveness' of the remedy required by Article 13, in particular the independence and impartiality of the national court or administrative body.[23] The Court has repeatedly stated that the nature of the rights safeguarded under Articles 2 and 3 has implications for the determination of an effective remedy under Article 13. In other words, the requirements of a remedy to be deemed effective are stricter when a more fundamental right is violated, -such as the right to life or the freedom from torture-, than for the violation of other rights. This principle has led the Court to take an important step towards the recognition of a duty to prosecute, in addition to the duty to investigate serious human rights violations. It affirmed for the first time in *Kaya v Turkey* that in the case of an arguable claim of unlawful killing by agents of the state, Article 13 entails, in addition to payment of compensation where appropriate, 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible (…).' [24] The same formulation, implying a duty to prosecute has also been upheld for torture; [25] serious ill-treatment,[26] and for the purposely destruction of a person's home and possessions by agents of the State.[27] In some cases concerning the violation of the right to life through Russian armed attacks on civilians in Chechnya, the ECtHR held that Article 13 is also violated when a criminal investigation into the attack lacked sufficient objectivity and thoroughness. [28]

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[21] IACtHR, *Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006, at para. 470 (8).

[22] This approach was applied in ECtHR, *Golder v United Kingdom*, Judgment of 21 February 1975, at para. 33; *Airey v Ireland*, Judgment of 9 October 1979, at para 35; *Brogan and others v United Kingdom*, Judgment of 29 November 1988, at para 88; *Hentrich v France*, Judgment of 22 September 1994; *Hood v United Kingdom*, Judgment of 18 February 1999, at para 71, and some others, cited by De Bruyn, Donatienne, *Le droit a un recours effectif*, in *Les droits de l'homme au seuil du troisième millennaire; Mélanges en hommage a Pierre Lambert*, Bruylant, Bruxelles, 2000, pp. 185-205, at p. 194, note 33.

[23] Some examples of older cases are *Klass and others v Germany*, Judgment of 6 September 1978, at para. 67; *Silver and others v United Kingdom*, Judgment of 25 March 1983, at para 113; *Leander v Sweden*, Judgment of 26 March 1987, at para. 77; and *Chahal v United Kingdom*, Judgment of 15 November 1996, at para 154, also cited by De Bruyn, *supra*, at p. 198, note 48.

[24] ECtHR, *Kaya v Turkey*, Judgment of 19 February 1998 (158/1996/777/978) at para. 107 (emphasis added) and *Buldan v Turkey*, Judgment of 20 April 2004 (28298/95), at para. 103.

[25] ECtHR, *Kaya v Turkey*, Judgment of 19 February 1998 (158/1996/777/978) at para. 107 (emphasis added) and *Buldan v Turkey*, Judgment of 20 April 2004 (28298/95), at para. 134.

[26] *Tekin vTurkey*, Judgment of 9 June 1998, (52/1997/836/1042), at para. 66; *Assenov and others v Bulgaria* , Judgment of 28 October 1998, Reports 1998-VIII, 3264, at para. 102; *Mikheyev v Russia***,** Judgment of 26 January 2006, *(77617/01)* , at para. 142.

[27] ECtHR, *Hasan Ilhan v Turkey*, Judgment of 9 November 2004 (22494/93), at para. 121.

[28] ECtHR, *Isayeva v Russia*, Judgment of 24 February 2004 (57950/00), at para. 229; *Isayeva, Yusupova and Bazayeva v Russia*, Judgment of 24 February 2004 (5747/00, 5748/00 and 57949/00), at para. 239; *Khashiyev and Akayeva v Russia*, Judgment of 24 February 2005 (Final Text published on 6 July 2005), at para. 185;

The Court based the duty to conduct an effective investigation on Article 13 in combination with the procedural obligation implied in the substantial provisions of, in particular, Articles 2 or 3, containing the obligation to protect the right to life and the freedom from torture, respectively.[29] On this point, the Court held that the prohibition of these Articles would be ineffective if no procedure existed for reviewing the lawfulness of lethal force by State authorities. It stated that

> (…) the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances. [30]

In the same sense, the Court decided that the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons, who disappeared in life threatening circumstances,[31] constitutes a continuing violation of Articles 2 and 5. Those findings have been upheld in the recent judgment in *Varnava and Others v. Turkey*.[32]

3. The African Commission of Human and People's Rights

The African Commission of Human and People's Rights (hereafter African Commission) reviews periodical reports from the States Parties to the African Charter, and may hear complaints presented to it by individuals or NGO's. Its decisions are not legally binding. A review of its decisions shows that the African Commission does *not* recognise a duty of States to prosecute those responsible for human rights violations, as part of the obligation to guarantee an effective remedy. The African Commission is cautious in its recommendations to States, even in cases where massive violations of the right to life and the freedom from torture have been established. [33]

4. The United Nations Human Rights Committee (HRC)

The HRC has also developed a consistent approach recognizing the obligation of states to undertake adequate investigations as well as criminal prosecutions in cases of serious human rights violations. As the monitoring body of the ICCPR, the HRC is a 'quasi-judicial body', to which communications can be addressed by private individuals signalling a violation by a state of one or more rights protected under the Covenant. The Views of the HRC are not legally binding. Nevertheless, the underlying obligations laid down in the Covenant itself do have a legally binding force, and –as has been argued convincingly-, the Views of the HRC constitute authoritative interpretations of their scope and meaning.[34] The attitude adopted by the HRC on the duty of states to provide an effective remedy

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[29] *Idem,* and ECtHR, *Adali v Turkey*, Judgment of 31 March 2005 (38187/97), at para. 233.

[30] *Kaya v Turkey*, *supra*, note 25, at para. 87 (emphasis added).

[31] Eur. Court H.R., Case *Cyprus v. Turkey* (Application No 25781/94) (judgment 10 may 2001) at para. 136.

[32] Eur. Court H.R., Case of *Varnava and Others v. Turkey* (Applications Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (Judgment of 10 January 2008). See Skoutaris, Nikolaos, *The Cyprus issue: The Four Freedoms in a (Member-) State of Siege. The Application of the Acquis Communautaire in the Areas not Under the Effective Control of the Republic of Cyprus***,** forthcoming.

[33] See the statement of the African Commission on Human and Peoples' Rights in *Organisation Mondiale Contre La Torture and Others v. Rwanda*, Comm. Nos. 27/89, 46/91, 49/91 and 99/93 (1996): *'The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of.'*

[34] Scheinin, Martin, *The Human Rights Committee's Pronouncements on the Right to an Effective Remedy- An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol*, in Nisuke, Ando, *Towards Implementing Universal Human Rights: Festschrift for the twenty-fifth Anniversary of the Human Rights Committee*,(Leiden: Nijhoff,

increasingly follows the same line of reasoning as put forward by the ECtHR. The HRC has consistently taken the position that whenever a violation of one of the substantive provisions of the Covenant is established the State Party is under an *obligation* to provide an effective remedy to the victim. This obligation is considered as a consequence of the violation itself.[35] In its subsequent Views, the HRC based this obligation on Article 2(3).[36] The Committee has gradually refined the criteria of what constitutes an effective remedy. In this regard, also the duty to prosecute those responsible for violations of the Covenant came to be recognised, for the first time in 1982. [37] In its Views addressed to Colombia in 1995, the HRC considered that the duty to criminally prosecute, try and punish those deemed responsible for human rights violations arises particularly in cases of enforced disappearances and violations of the right to life.[38] The HRC reiterated the duty to criminally prosecute those responsible for the violation of the most fundamental rights and bring them to justice in cases which occurred in Colombia[39] and Congo.[40] In these latter Views, the Committee also included the obligation of the State 'to prevent similar violations in the future'.[41]

In its General Comment 31[42] the HRC specifically states that 'A failure by a State to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.' (par. 15) Where these investigations reveal violations of certain covenant rights, States Parties must ensure that those responsible are brought to justice. 'As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.' (par 18). The Committee stresses that these obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture, summary and arbitrary killings and enforced disappearances.

In specific cases where torture or serious ill-treatment were established, the HRC 'only' held that the State had to undertake a thorough investigation, and to take measures to prevent similar violations in future.[43] This seems to constitute a difference compared to the case-law of the ECtHR and the IACtHR, which do recognise a duty to *prosecute* for these violations as well. There is no clear explanation why the same approach has so far not been extended to violations such as torture. However, the explicit recognition of an obligation to prosecute persons accused of torture in its

(Contd.)

2004), pp. 101-115, at 104-105; Nowak, Manfred, *UN Covenant on Civil and Political Rights- A Commentary*, (Kehl: Engel,1993), at 710.

35 UNHRC, Communication No. 5/1977 *(Moriana Hernandez Valentini de Bazzano et al. V Uruguay)*, Views adopted on 15 August 1979, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 1, p. 40, at para. 10.

36 For the first time in UNHRC, Communication No. 52/1979 (*Sergio Ruben Lopez Burgos v Uruguay)*, Views adopted on 29 July 1981, Selected Decisions, vol. 1, p.88, at para. 14.

37 UNCHR, Views adopted on 21 October 1982, (*Dermit Barbato v Uruguay)*,Selected Decisions of the UNHRC under the Optional Protocol, vol. II, p. 112, at p. 116, para. 11, cited by Tomuschat, Christian, *The Duty to Prosecute International Crimes Committed by Individuals*, at 323 (emphasis added). See also Views of 24 July 1984 (*Muteba v Zaire)*, *idem*, at p. 160, para. 13; Views of 4 April 1985 , *idem*, p. 176, at para. 16, both cited by Tomuschat, at 323.

38 Views of 27 October 1995 (*Nydia Bautista de Arellana v Colombia)*, Report of the Human Rights Committee, Vol. II, General Assembly Official Records, 51st session, Supp. No. 40 (A/51/40), p. 142, at para. 8.6.

39 Views of 15 April 2002, Communication No. 859/1999 (Colombia), at para. 9; and Views of 29 November 2002, Communication No. 778/1997 (Colombia), at para. 10, (these and the subsequently mentioned Views are available at http://www.unhcr.ch/tbs/doc.nsf).

40 Views of 23 July 2001, Communication No. 962/2001 (Democratic Republic of the Congo), at para. 7.

41 In its Views addressed to Colombia of 15 April 2002, the HRC held that the State is under the obligation to *try* to prevent similar violations.

42 Human Rrights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

43 See for example Views of 16 November 2005, Communication No. 1042/2001 (Tajikistan), at para. 9; and Views of 18 November 2005, Communication No. 907/2000 (Uzbekistan), at para. 8.

General Comment 31, mentioned above, indicate that the Committee does in fact adopt the same approach as the ECtHR and the IACtHR on this point as well.

* * *

As demonstrated in the preceding paragraphs, all but one of the regional and international human rights monitoring bodies have developed a consistent case-law in which the duty of states to ensure the substantial rights of the human rights instruments in combination with their obligation to guarantee the right to an effective remedy, includes the duty to investigate serious human rights violations, and to criminally prosecute those responsible for these violations. Only the African Commission on Human and Peoples' Rights has not recognized these duties. Whereas the Inter-American Commission and the Inter-American Court do not distinguish between 'serious' and 'other' human rights violations, this distinction is explicitly made by the European Court on Human Rights and the UN Human Rights Committee. The criterion of 'seriousness' refers to the rights protected by the relevant instrument; only violations of the most fundamental human rights carry the duty to investigate and to prosecute.

3. Applicability of these Obligations to Personnel of Private Military and Security Companies

When considering the applicability of the obligations to investigate serious human rights violations and to prosecute their perpetrators to the situation of private military and security companies and their individual employees, several questions arise. Firstly, do these obligations also apply when the PMCs/PSCs operate on the territory of a third state, as is most commonly the case, and to which state do these obligations then apply? These questions concern the extraterritorial scope of the human rights conventions and the question of jurisdiction. Secondly do they apply to PMC/PSC personnel in the same way as to state agents?

A. Extraterritoriality of Human Rights Obligations

The question of the extraterritorial scope of human rights instruments has been addressed on several occasions in the decisions and judgments of the competent monitoring bodies, as well as in some national courts, including the UK House of Lords[44]. These decisions have also given rise to an ongoing critical debate among scholars.[45] In order to assess how the current interpretations of the monitoring bodies can be applied to the situation of PMSCs and their employees, the principal positions taken by the ECtHR –both prior and after the *Bankovic* decision-will be considered, as well as those of the African Commission and the HRC; highlighting some common features and the main differences.

1. The European Commission for Human Rights and the European Court on Human Rights

If one thinks of the Strasbourg case-law on extraterritoriality, the *Bankoviç* decision of the ECtHR first comes to mind, as well its relatively restricted notion of the extraterritorial scope of the European

[44] UKHL, *Al-Skeini and Others v Secretary of State for Defence*, 2007

[45] See *infra*.

Convention.[46] However, two other key decisions need to be considered, which have contributed to shaping the current contours of this case-law: the pre-*Bankovic* decision in *Loizidou*,[47] and the post-*Bankovic* decision in *Issa*.[48]

In *Loizidou*, the first major ruling of the ECtHR addressing extraterritorial jurisdiction, the Court held that Turkey did have jurisdiction in Northern Cyprus by virtue of its military occupation, through which it had acquired 'effective control' over that part of the Cypriot territory. It stated that

> The concept of jurisdiction under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of contracting States can be involved by acts and omissions of their authorities which produce effects outside their territory…the responsibility of a Contracting Party could also arise when as a consequence of military action –whether lawful or unlawful- it exercises effective control of an area outside its national territory.

The Court then concluded : 'The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'[49]

The same principle was also upheld in a number of other cases on Northern Cyprus.[50]

Therefore, in situations of overall effective control (even if such control is exercised temporarily as a consequence of military action) of one state on the territory of another, the state exercising such control has the obligation to secure all the rights and freedoms of the Convention. In the Northern Cyprus cases, the Court did not need to specify the criteria of such effective control, since it concerned an overall occupation of the territory concerned. However, in a second series of pre-*Bankovic* cases, concerning human rights violations by agents of a Contracting State abroad, the ECionHR and the ECtHR have considered that the rights of the Convention also need to be ensured in certain situations which do not amount to effective control.[51] The first explicit decision in this regard was *Cyprus v. Turkey* [52] where the EComHR held that

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[46] *Bankoviç a. o. v. Belgium and 16 Other Contracting States,* ECHR (2001), Appl. No. 52207/99

[47] *Loizidou v. Turkey (prel.obj.),* EComHR (1995), Series A, vol. 310, at para. 62

[48] For a comprehensive analysis of the Strasburg case-law on extraterritoriality up to 2004, see Lawson, Rick, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, in Coomans, Fons and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), pp. 83-124; and O'Boyle, Michael, *The European Convention on Human rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'*, in the same volume, at pp. 125-139.

[49] *Loizidou, supra,* note 47, at para. 52.

[50] *Cyprus v Turkey*, ECtHR (2001), Appl. No. 25781/94, para. 77; this position was confirmed in *Demades v. Turkey*, ECtHR (2003), Appl.No. 16219/90. For a detailed analysis of this case-law, see Mantouvalou, ' Extending Judicial Control in International Law: Human Rights Treaties and Extaterritoriality', 9 *Intl Jl HR* (2005) 147, at 149-153; see also Lawson, 'The Concept of Jurisdiction in the European Convention on Human Rights', in P.J. Slot and M. Bulterman (eds), *Globalisation and Jurisdiction* (2004), 201-218. A third category of cases concern the extradition or expulsion of persons within the jurisdiction of a Contracting State to a third state where that person would risk being subjected to serious human rights violations.

[51] In particular *X v. Federal Republic of Germany*, EComHR (1965), Appl. No. 1611/62 (stating that conduct of diplomatic or consular representatives abroad affecting nationals of the sending state residing abroad may give rise to liability under the Convention); *W v. Denmark*, EComHR (1992), Appl. No. 17392/90 (affirming that authorized agents of a state bring other persons or property under the jurisdiction of that state to the extent that they exercise authority over such persons or property); *Hess v. the UK*, EComHR (1975), Appl. No. 6231/73 (confirming that a state is under certain circumstances responsible under the Conventions for the actions of its authorities outside its territory, even though this was rejected in this case)

[52] ECtHR, *Cyprus v.Turkey*,(Appl Nos. 6780/74 and 6950/75), EComHR 26 May 1975

> the authorised agents of the state, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other person or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their actions or omissions, they affect such persons or property, the responsibility of the State is engaged.[53]

Moreover, the Commission stated that it emerges from the language and the object of Article 1 and from the purpose of the Convention as a whole, that the Contracting States are bound to secure the said rights and freedoms 'to all persons *under their actual authority and responsibility*, not only when the authority is exercised within their own territory but also when it is exercised abroad.'[54] Thus, as mentioned by one commentator[55], prior to *Bankovic*, the ECtHR had already distinguished two grounds which may give rise to extraterritorial application: on the one hand 'effective control of an area', interpreted in particular as (temporary) military occupation and on the other hand, 'state agent authority', based on the acts of state agents within the territory of another State. In the Court's reasoning, 'effective control' is related to the territory where such control is exercised, and any jurisdiction arising from such control also has a territorial basis. However, jurisdiction arising from 'state agent authority' is related to the persons acting on behalf of the state. This distinction may have consequences for the actual exercise of e.g. criminal jurisdiction by the Contracting State; for example when the right to life is violated and the authorities of this State need to launch an investigation and subsequent prosecutions against the responsible persons, in compliance with its obligations under the Convention.[56]

In *Bankoviç* the ECtHR adopted a 'somewhat restrictive interpretation of the term "jurisdiction"'[57] , by limiting itself to a consideration of the 'effective control' criterion and concluded that such control was not exercised by the respondent States in the present case. The case followed a complaint on behalf of the victims of the bombing by a NATO air fighter of a TV and radio station in Belgrade in 1999, lodged against Belgium and 16 other members of NATO which are also Parties to the ECHR. In its admissibility decision, the Court decided that the applicants had not been within the jurisdiction of the states concerned, stating that the jurisdiction under the Convention is primarily territorial. Referring to its earlier decisions on extraterritoriality, the Court held that:

> In sum, 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. [58]

The Court nevertheless confirmed that extraterritorial application is not excluded, precisely by mentioning some of the exceptional cases in which extraterritorial jurisdiction by a Contracting State has been recognized. The Court states that it has accepted the exercise of such jurisdiction 'when the respondent state (…) exercises all or some of the public powers normally to be exercised by that

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53 *Idem*, at para. 136

54 Idem (emphasis added).

55 Kerem Altiparmak, *Human Rights Act: Extra-territorial Application; Al-Skeini a.o. v Secretary of State for Defence*, in 72 Journal of Criminal Law (2008), pp 27-33, at 30, citing L.J. Brooke in 69 Journal of Criminal Law (2005), pp.295-301.

56 For instance, if in the Contracting State whose agents have exercised some form of authority or control in a third State, the principle of active personality is not foreseen under its national criminal legislation for the acts involved, this might constitute a problem.

57 Mantouvalou, *supra* note 50, at 153.

58 *Bankoviç*, *supra* note 46, at para. 71.

Government.' Another key element of *Bankovic* is its territorial limitation: the Court held that the Convention is a treaty operating 'in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.' [59]

The ECtHR confirmed its primarily territorial interpretation of the Convention's jurisdictional scope in other decisions after *Bankoviç*, emphasizing that its extraterritorial application is exceptional.[60] At the same time, the Court has confirmed its prior case-law with regard to the situations in which the jurisdiction of the Contracting States does have an extraterritorial dimension. The leading post-*Bankovic* case in that regard is *Issa v Turkey* [61] The specificity of *Issa* is that it led the Court to confirm for the first time, that the jurisdiction of the European Convention may also extend to territories of third States, which are not a party to the Convention. The case concerned the violation of the right to life of Kurdish citizens during a military intervention by Turkey on the territory of Iraq. Even though the Court ultimately concluded that there was insufficient evidence that the victims had indeed been present within the territory where the Turkish military activities were taking place, the Court held that the Convention may also apply extraterritorially in a third State, either through effective control of an area or through the specific actions of its agents acting abroad.[62] The Court supported this conclusion by citing some decisions from the HRC and the IACionHR, stating that

> Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted 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.[63]

This position was reiterated in several other cases, including in *Ben El Mahi a.o. v. Denmark* and *Mansur PAD and Others v. Turkey.* [64]

It may be concluded that the case-law of the ECtHR on extraterritoriality is not entirely consistent, or at least gives rise to uncertainty as to its exact meaning. In particular, the statement in *Bankovic* emphasizing that the Convention operates in an essentially regional context and notably within the legal space of its Contracting Parties, is at odds with its later decisions adopting the broader formulation of *Issa*, confirming the possible extraterritorial application in third States.

These differences have led some national courts to interpret the European case-law, thereby adding to the lack of clarity. Indeed, the UK House of Lords in *Al-Skeini*[65] has followed the Court's restrictive reasoning in *Bankovic*, while dismissing the *Issa* position. In this case, which concerned six Iraqi citizens who were killed by British troops in Iraq, the Law Lords found that only one of the incidents - which occurred in a British-run detention facility-, fell within the scope of the Convention (and thus under the British Human Rights Act), since the UK had 'effective control' over that facility. This selective application of certain elements of the Strasbourg case-law, without a detailed consideration

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59 Idem, at para. 80

60 *E.g. Kalogeropoulou and Others v. Greece and Germany*,(App. No. 59021/00, adm. Dec.), ECtHR, 12 December 2002.

61 *Issa and Others v Turkey*, Judgment (2004), App. No. 31821/96, citing *Lopez Burgos v Uruguay*, Communication No. 52/1979, UN Doc.CCPR/C/OP/1 at 99 (1984): *Celiberti de Casariego v Uruguay*, Communication No. 56/1979, UN Doc. CCPR/C/OP at 92 (1985); IACionHR, *Coard v United States*, Case 10.951, Report No. 109/99 (1999).

62 *Issa and Others v. Turkey*, *supra*, at paras 69-71

63 *Idem*

64 *Ben el Mahi and Others v. Denmark*, ECtHR (2006), Appl.no. 5853/06 , at 9; *Mansur PAD and Others v. Turkey*, ECtHR (2007), Appl. no. 60167/00, at para. 53; *Isaak and Others v.Turkey*, ECtHR (2006) Appl.No. 44587/98, at para. 19; and prior to that in *Öcalan v. Turkey*, Judgment (2003), Appl. No. 46221/99, at para. 91; *Sánchez Ramirez v. France*, EComHR (1996), Appl. No. 28780/95.

65 *Al-Skeini and Others v Secretary of State for Defence*, *supra* note 44.

whether the other incidents in the case might fall under the second exception expressly mentioned by the Court itself, namely through the specific actions of its agents abroad, is regrettable.[66]

All these decisions specifically concern effective control by the Military or actions by other state agents. If one applies this case-law to the acts of PMCs/PSCs and their employees acting abroad, the question arises to what extent their conduct can be considered to fall within the scope of 'actual authority or control' of the contracting state, or of any other state, as will be considered below. First the case-law of other human rights monitoring bodies will be considered, which seems to point into the same direction.

2. The Inter-American System

The American Declaration of 1948 states that 'all persons are equal before the law and have the rights and duties established in this Declaration (…).' It does not contain a general provision on jurisdiction, as in the American Convention on Human Rights.[67] It should be recalled that the American Declaration also applies to OAS Member States who have not ratified the American Convention, including the United States. The Inter-American Court has not yet expressed itself on the question of extraterritoriality. [68]

The Inter-American Commission (IAComHR) has consistently held that although jurisdiction usually refers to the state's territory, 'it may, under given circumstances, refer to conduct with an extraterritorial locus where the person is present on the territory of one state, but subject to the control of another state –usually through the acts of the latter's agents abroad.' The IAComHR has cited the decisions of the European Commission on Human Rights in *inter alia*, *Cyprus v Turkey*, to support this position. [69]

A particularly noteworthy decision is *Alejandre v Cuba*, where despite similar facts as those underlying the *Bankovic* case the Inter-American Commission has reached the opposite conclusion than the European Court of Human Rights. The complaint in *Alejandre* concerned the violation of the right to life of four Cubans by Cuban military fighters who had deliberately shot down the civilian aircrafts which they were flying for the organization *Brothers to the Rescue*. The incident took place outside the territory of the Contracting States of the American Convention, in international airspace. Nevertheless, the IAComHR held that Cuba was responsible for these violations, considering that:

> The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence ratione loci, because (…) when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues.[70]

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[66] For a critical analysis of the *Al-Skeini* decision, see Abdel-Monem, Tarik a.o., *R (On the application of Al-Skeini) v. Secretary of Defence: a Look at the United Kingdom's Extraterritorial Obligations in Iraq and Beyond*, 17 Florida Journal of International Law (2005), pp 345-364 (criticizing the High Court's analysis of the Strassbourg law, arguing that by neglecting the more recent decision in *Issa*, the High Court has side-stepped the possibility that it marks a new, broader expansion of the European Convention's coverage outside the boundaries of Europe); Kerem Altiparmak, *supra*, note 55 (arguing, that a more plausible explanation is needed of the contradiction between *Bankovic* and the post-*Bankovic* case-law and criticizing that the House of Lords failed to apply the 'state agent authority doctrine' by relying so strongly on *Bankovic*).

[67] See *supra*, paragraph 1A.

[68] In one case where the question came up, it was not elaborated upon since the case was decided on the basis of lack of proof on the merits: *Fairen Garbi and solis Corrales v. Honduras*, IACtHR, 15 March 1989 (merits).

[69] The same conclusion was drawn in *Victor Saldaño v. Argentina*, IACHR report No. 38/99, 11 March 1999, also citing *Cyprus v Turkey*.

[70] *Armando Alejandre Jr. And Others v. Cuba*, IACHR Report No. 86/99, Case No. 11.589, 29 September 1999 at para. 25

Whereas the ECtHR in *Bankovic* concluded that the airstrikes by the NATO bombers did not amount to effective control and therefore the victims did not fall under the protection of the European Convention, the IAComHR concluded in *Alejandre* that it had found conclusive evidence 'that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority.'[71] Consequently, the Commission declared itself competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State. In another difference between the two decisions, the ECtHR emphasized the geographical limits of the European Convention's jurisdiction, whereas the IAComHR held that '(b)ecause individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction.'[72] The Commission also held that

> (i)n principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.

Thus, the IAComHR has consistently based its decisions on the criterion of 'authority and control' by state agents, emphasizing the acts of these agents, rather than the presence of the victim in a particular geographic place.[73]

The same considerations on extraterritoriality were reiterated in *Coard and Others v. the United States,*[74] which concerned violations of rights during the US military intervention in Grenada. Even in this situation, the Commission justified the extraterritorial application of the American Declaration –even though the US did not challenge this- , by referring to the *authority and control* of the US agents abroad, without entering into the question of effective control of the territory. Indeed, the IAComHR stresses effective control over the *person* rather than over the *territory*, another difference with the Strassbourg case-law.

It has been suggested that the differences between the ECtHR and the IAComHR are related to (1) the governing texts –the American Declaration not being legally binding and not containing any clause on jurisdiction-; (2) the functional mandate of the Inter-American Commission, allowing it to more easily adopt certain positions than a judicial body such as the European Court; and (3) the fact that Commission's juridical space extends throughout the Americas, whereas not all States in Europe are members of the Council of Europe, the legal space of the ECHR. [75] Nevertheless, the consistent approach of the Commission and its arguments provide useful elements for interpreting the jurisdictional clause of the legally binding American Convention. In practice, the principles developed by the IAComHR have very often been subsequently adopted by the IACtHR, when this Court was confronted with similar questions.

3. The Human Rights Committee

Also the Human Rights Committee (HRC) has taken a clear position on the possibility of extraterritorial applicability of the ICCPR. The Covenant states that each State Party 'undertakes to respect and to ensure *to all individuals within its territory and within its jurisdiction* the rights

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[71] *Idem,* at para. 25

[72] *Idem,* at para. 23

[73] It should be noted that even in *Issa,* the ECtHR declared the case ultimately inadmissible because of uncertainty whether the victims had actually been within the *geographic area* where the Turkish military interventions had taken place. For an elaborate analysis of the IAComHr's decisions on extraterritoriality, see Cerna, Christina, *Extraterritorial application of the Human rights Instruments of the Inter-American System*, in Coomans and Kamminga, *supra* note 49, pp. 141-174.

[74] IAComHR Report No. 109/99, Case No. 10.951, 29 September 1999

[75] Douglas Cassell, *Extraterritorial Application of Inter-American Human rights Instruments*, in Coomans, Fons and Menno Kamminga (eds), *supra* note 49, pp. 175-181, at 178-180.

recognized in the Covenant'.[76] In it's often cited General Comment No. 31, the HRC has clarified that 'a State Party must respect and ensure the rights laid down in the Covenant *to anyone within the power or effective control* of that State Party, even if not situated within the territory of that State Party.'[77] The HRC held on several occasions that:

> Article 2(1) does not imply that the State Party cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.[78]

Since its first decisions on the extraterritorial application of the Convention, the HRC affirmed that it would be 'unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[79] This principle has also been upheld by the ECtHR, including in *Issa.*

A difference compared to the Strasbourg case-law, is the interpretation of the term 'effective control'. Like the ECtHR in *Bankovic*, the HRC has used this notion as the decisive criterion for extraterritorial effect, for example in its Concluding Observations on Israel (1998). However, the HRC has not linked such control to the territory, as the ECtHR has done, but rather to 'a contextual assessment of the State's factual control in respect of facts and events that allegedly constitute a violation of a human right.'[80]

In its Concluding Observations on Israel (2003), the HRC no longer refers to the notion of 'effective control'. It stated that:

> (…) in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, *for all conduct by [Israels] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant* and fall within the ambit of state responsibility of Israel under the principles of public international law.[81]

Some scholars disagree with the HRC's interpretation of the Covenant's jurisdictional scope and some states have also expressly stated a different view of the issue.[82] In this regard, the HRC stated in its Conclusions on the USA:

> The Committee does not share the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent

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[76] ICCPR, Article 2(1) (emphasis added).

[77] HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004, at 10 (emphasis added).

[78] *Saldias de Lopez v. Uruguay*, HRC, Communication No. 52/1979, CCPR/C/13D/52/1979; *Lopez Burgos v. Uruguay*, HRC (1981), Communication No. 52/1979, CCPR/C////13/D/1979, at para. 12.3 and *Celeberti de Casariego v. Uruguay*, HRC (1981) Communication No. 56/1979, at para. 10.3.

[79] *Lopez Burgos v. Uruguay*, *supra*,note 79, at para. 12.3.

[80] Scheinin, Martin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in Coomans, Fons and Menno Kamminga, *supra* note 48, pp. 73-82, at 76-77.

[81] Concluding Observations on Israel (2003), UN Doc. CCPR/CO/78/ISR, at par 11, cited by Scheinin, *supra* note 48, at 81 (emphasis added).

[82] See Dennis, M., *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict or Military Occupation,* 99 *AJIL,* 119 at 124, 125, citing in this regard Egon Schwelb, Manfred Nowak and the Netherlands, the latter having replied to a request from the HRC to provide information about the fall of the enclave Srebrenica, that the citizens of Srebrenica did not fall within the jurisdiction of the Netherlands, referring to the text of article 2(1) and the term 'within its territory and within its jurisdiction'.

> interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State Party even when outside that state's territory.[83]

On the other hand, the ICJ has also expressed itself on the extraterritorial scope of the ICCPR in its advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, using the same wording as the above-cited conclusion of the HRC in its Concluding Observations of 2003.[84]

The HRC has not published any Decisions or Views regarding the question of extraterritorial application of the Covenant in recent years. Although this question was raised in a complaint against Canada (concerning the deportation of a Pakistani asylum seeker claiming a risk to be subjected to torture and murder when sent back to Pakistan), this complaint was declared inadmissible on the ground of lack of exhaustion of local remedies. [85]

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This overview shows that the various international and regional human rights monitoring bodies have, in general terms, reached similar conclusions with respect to the extraterritorial scope of the different human rights instruments, albeit with some nuances. Whereas they all affirm that the jurisdiction of the States Parties is primarily of a territorial nature, at the same time they recognize that some exceptions to this rule exist. In particular, in situations of 'effective control', such as military occupation of a foreign territory, the State Party exercising this effective control is bound to respect and ensure the rights of the human rights instrument to the individuals present in that territory. Moreover, the jurisdiction of a State party may also extend outside its own territory in situations where a State party or its agents exercise some lesser form of 'authority or control' (ECtHR and IAComHR). Despite the restrictive interpretation of the term 'jurisdiction' by the ECtHR in *Bankoviç*, the European Court has reiterated its recognition of such exceptions to the rule of territorial jurisdiction in its subsequent case-law.

In a nutshell, the main positions of the three monitoring bodies are:

(1) the ECtHR emphasizes 'effective control' of a territorial area in a foreign State as the main criterion for extraterritorial application of the Convention, while acts of state agents, exercising some authority or control may also constitute the basis for such an application. These two criteria are still considered as exceptional situations; the Court has underlined the essentially regional nature of the Convention and its primary application within the legal sphere of the Contracting States. At the same time; since 2004, the Court has also recognized the possibility of extraterritorial application in third States, in the same above-mentioned exceptional situations.

(2) While the IAComHR also bases its acceptance of extraterritorial application of the American Declaration (and the American Convention) on the criterion of effective control, this 'control' is not related to the territory, but rather to the acts of the state agents exercising authority or control in the foreign State. Its interpretation of such control seems to be broader than that of the ECtHR, since the

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83 UN Doc. CCPR/C/USA/3, 28 November 2005, para. 468.

84 ICJ, Advisory Opinion (2004), para. 109.

85 CCPR/C/94/D/1578/2007, 20 November 2008. Canada stated that: '*The Committee has only exceptionally given an extraterritorial application to rights guaranteed by the Covenant, thereby protecting the essentially territorial nature of the rights guaranteed therein. According to the State party, limiting the power given to a state to control who immigrates across its borders by giving extraterritorial power relating to articles of the Covenant would deny a states' sovereignty over removal of foreigners from its territory*.'

IAComHR also recognized the shooting of civilian airplanes in international airspace as falling within that scope (as opposed to the more restrictive interpretation adopted by the ECtHR in *Bankovic).*

(3) The HRC has also linked the notion of 'effective control' more to the persons/agents exercising such control than to the territory, also considering the factual situation in relation to the *violation* which occurred.

How can the obligations deriving from human rights instruments as outlined in paragraph 2, taking account of the aforementioned decisions of the human rights monitoring bodies be applied to the situation of states contracting private military and security companies to perform certain tasks on their behalf, and in particular to the situation in which employees of such companies become involved in conduct which can be characterized as a serious human rights violation? Some elements of an answer will be provided here.

B. To which state do the obligations apply: contracting state, host state or home state?

In order to clarify the legal pattern of obligations deriving from general human rights instruments, three situations can be distinguished. Firstly, the situation in which a State Party to one or more general human rights instruments contracts a PMSC for tasks to be carried out *within its own territory*. This may occur in the aftermath of a natural disaster or a terrorist attack, whereby the scale of the damage is such that the national armed forces and other state agencies are not able to effectively deal with the situation by themselves. (This occurred e.g. in the US after the Katrina disaster.)

Secondly, the situation will be considered where a State contracts a PMSC to perform tasks abroad, *within the territory of another State Party* to the human rights instruments which it has ratified such as the ICCPR, and/or one of the regional human rights conventions. Here the question of overlapping human rights regimes may arise, for example if a State Party to the ECHR sends a PMSC to a non-European State, which is a party to the ICCPR and/or the American Convention.

Thirdly, the situation will be addressed where a State Party contracts a PMSC to perform tasks *in a third state*, which has not ratified any of the human rights instruments considered in this paper.

The two latter situations which both concern activities of a PMSC outside the territory of the contracting state, may be linked to another set of possible factors which further determine the pattern of applicable rules. These are (1) the tasks of the PMSC are performed in the context of a *military occupation* or comparable situation of overall effective control either by the contracting state or by a third state or group of states; or (2) these tasks fall within the scope of *another form of authority or control* in the foreign territory, not amounting to a situation of overall effective control as in (1).

1. PMSC Contracted for Tasks within the State's Own Territory

The first situation is relatively straightforward: A State contracts a PMSC to perform tasks within its own territory, therefore the State is bound by the human rights instruments to which it is a party to provide an effective remedy for the victims or their relatives of any serious violations of these rights (e.g. violations of the right to life, right to freedom from inhumane or degrading treatment). Such an effective remedy includes both a civil remedy for compensation, but also a criminal investigation into the facts of such conduct. Indeed, the state must ensure that the competent judicial authorities will launch such investigations, and where appropriate, prosecute those persons responsible for them. Such safeguards become more important to the extent that the tasks are more related to a situation of (internal) security problems or situations which may involve violent protests or reactions from civilians to the presence or actions of the PMSC.

2. PMSC Contracted for Activities Abroad: Receiving State is a Party to at least one of the same Human Rights Instruments as the Contracting State

In the second situation, one State (the contracting State) contracts a PMSC to carry out certain tasks abroad within the territory of another State (the host State). Here a distinction should be made between the situation of military occupation (a) and a situation in which State exercises a lesser degree of authority or control (b).

(a) Military Occupation

If the contracting State exercises overall effective control on the territory of the host State, in particular if it has militarily occupied (part of) the latter State, the contracting State is legally bound to respect and ensure all the rights of the human rights instruments to which it is a party, in the same way as on its own territory. The jurisdiction of the contracting State, for the purposes of the human rights convention or covenant, then extends to the territory of the host State, or to the part which falls under the military occupation.

As for the obligation to investigate serious human rights violations and prosecute those who may be accused of such violations, the contracting State must ensure access to a court to those victims or their relatives. Moreover, it is bound to ensure that its competent judicial and prosecutorial authorities adequately and promptly investigate any incidents which may amount to serious human rights violations, which will in most cases also constitute crimes within the criminal legislation of the contracting State. If appropriate, the responsible individuals, also individual employees of the PMSC against whom the investigation has found sufficient evidence to establish responsibility for these crimes should also be prosecuted and brought before a criminal court of the contracting State.

As for the question whether the PMSC employees can be considered as *agents* of the contracting State in the sense of the human rights instruments considered in this paper, it would seem that in a situation of military occupation, this question is perhaps less relevant than in the situation of a lesser degree of control by the contracting State, as will be shown below. Indeed, in the situation of military occupation, the contracting State is considered to be in full command of all the actions of the PMSC as part of its effective control of the territory. The contracting State is thus bound to ensure the respect of human rights of all persons within the occupied territory; it may therefore be held responsible for a failure to have ensured its 'due diligence obligations' if human rights are seriously violated and it turns out that the State has not well informed the PMSC of the risks and the human rights standards; or if it fails to provide an effective remedy, including criminal investigations and possibly prosecution.[86]

In a situation of military occupation, the obligations of the host (and occupied) State to respect and to ensure human rights would seem to have been temporarily suspended, since they are *de facto* conferred upon the contracting (and occupant) State. In this regard, the ECtHR held that;

> Having effective overall control over Northern Cyprus, its (i.e. Turkey's) responsibility cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that (…) Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey. [87]

[86] The question whether the contracting State may also be held responsible for the violation of the human rights itself will not be discussed in this paper.

[87] *Cyprus v.Turkey*, *supra* note 52, at para.77

The obligation of the State exercising effective control to secure the 'entire range of substantive rights' clearly indicates that the occupied ('host') State's own obligations to ensure these rights cannot be fulfilled and that these are therefore suspended for the duration of the military occupation or other situation amounting to the level of effective control.

(b) Other Forms of Authority or Control

If the contracting State exercises a lesser degree of authority or control on the territory of the host State , the extent to which the contracting State is obligated to respect and ensure human rights seems to be not quite as high as in the case of military occupation or effective control. As indicated in the case-law of the monitoring bodies outlined in the preceding paragraph, the obligations of the contracting State are more restricted; these obligations are valid, in the words of the EComHR, when authorised agents of the state, including diplomatic or consular agents and armed forces, bring any other person or property 'within the jurisdiction' of that State, 'to the extent that they exercise authority over such persons or property. Insofar as, by their actions or omissions, they affect such persons or property, the responsibility of the State is engaged'.[88]

This formulation points to a proportional relationship, as it were, between the extent to which the state agents exercise authority over persons or property in the foreign state, and the degree to which this results in 'jurisdiction'- and thus in obligations to respect and ensure human rights- over such persons or property. So the more directly the authority or control (or 'power' in the words of the HRC) of the state agents of the contracting State affect persons –or property- in the host State, the more far-reaching are the obligations of the contracting State to respect and ensure the fundamental rights of persons in the host State.[89] As mentioned earlier in this paper, the principle that human rights obligations may apply extraterritorially, even if the level of authority exercised in a foreign State does not amount to 'effective control', was also upheld by the IAComHR in *Alejandro v. Cuba*, were the Commission stated that '(…) when agents of a state, whether military or civilian, exercise power and authority over persons outside their national territory, the state's obligation to respect human rights continues.'[90] Also the HRC's statement in its Concluding Observations on Israel, points in the same direction, affirming that the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, 'for all conduct by [Israels] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant (…)'.[91]

When applying the above mentioned reasoning of proportionality to PMSCs and their employees, one could argue that the authority or control of the contracting State over persons in the host State increases when the PMSC, operating under the direct command or instructions of an agent of the contracting State –for instance an army commander of that State who oversees the actions of the PMSC in the foreign territory-, directly influences the security of the persons concerned. If the PMSC has the task to ensure the security of a government building or a prison, it would seem that the contracting State has a high degree of control over that particular building; a fact which entails a high degree of obligations to protect human rights, to investigate any violations and to prosecute the responsible persons. This conclusion was also drawn, at least with regard to British soldiers, by the UK House of Lords in *Al-Skeini.* The HoL stated that the UK's obligations deriving from the Human Rights Act -which implements the obligations included in the European convention on Human Rights-

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88 *Cyprus v Turkey*, *supra* note 52, para.136.

89 For a similar interpretation of this case-law and an 'alternative approach' to the extraterritorial scope of jurisdiction, at least under the ECHR, see Lawson, R., ' The concept of jurisdiction in the European Convention on Human Rights', in P.J. Slot and M. Bulterman, *Globalisation and Jurisdiction* (2004), 201 at 215-218.

90 *Armando Alejandre Jr. And Others v. Cuba*, IACHR Report No. 86/99, Case No. 11.589, 29 September 1999 at para. 25

91 Concluding Observations on Israel (2003), UN Doc. CCPR/CO/78/ISR, at par 11, cited by Scheinin, *supra* note 80 , at 81 (emphasis added).

also extended to a detention centre in Iraq over which British soldiers had full authority.[92] If a PMSC exercises such authority on behalf of, and under the direct control of the military command of the contracting State, it could be argued that the same obligations of the contracting state persist. In the same sense, in a situation comparable to Abu Ghraib, whereby employees of a PMSC who are employed as prison guards, commit acts amounting to serious human rights violations, the contracting State is arguably bound to investigate the incidents and to prosecute the individual employees concerned, even though the acts were not committed by state agents.

If the host State is a party to (at least one of) the same human rights instrument(s) as the contracting State, the host State also has obligations to respect and ensure the human rights of its citizens. Whereas in a situation of effective control these obligations are temporarily suspended in favour of the occupant state, this is usually not the case in other situations in which a lesser degree of control is exercised by a foreign state (the contracting State). In such situations, the extent to which these obligations remain with the host state depends on its institutional capacities and the functioning of its judicial system, in particular, when it comes to criminal investigations and prosecutions. Here the clause from *Bankoviç* may be helpful, where the Court held that it had recognized the exercise of extraterritorial jurisdiction by a Contracting State, '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.'[93] If the host State has invited the contracting State to exercise some of the public powers normally to be exercised by its own Government, and if the contracting State employs a PMSC to implement these tasks in practice, this may result in a *de facto* temporary 'transfer' of the obligations to respect and ensure human rights insofar as these obligations are related to the public powers exercised by the contracting State. These would also include the obligations to investigate violations and to prosecute their authors.

3. PMC/PSC Contracted for Activities Abroad: Receiving State is not a Party to the same Human Rights Instruments

This situation is, for the most part, identical to the situation(s) described under (ii). The only –albeit not unimportant- difference is the following. If the host State is, for example, not a party to the ECHR whereas the contracting State is, then the protection offered by the ECHR, including its legally binding judgments, does not extend to the citizens of the host State to the extent that the authority or control exercised by the contracting State is not such that it meets the threshold for extraterritorial application of the Convention. If the host state is, however, a party to the ICCPR, a comparable normative regime applies. The situation would be different if the host state is not a party to the ICCPR either. However, given the high number of ratifications of the Covenant, this situation is almost theoretical.[94]

In the situations discussed above, the obligations to investigate violations of human rights and to prosecute those responsible for such violations, pertain either to the contracting state of the PMSC, or to the host state receiving the private contractors. It has been argued, in line with the case-law of the monitoring bodies, that the extent to which the obligations of due diligence (including the duty to investigate and prosecute) pertain to contracting state, is proportional to the extent to which that state exercises authority or control in the territory of the receiving state. This can only be decided on a case-by-case basis, considering all the relevant factors. Important elements are the nature of the control exercised through the activities of the PMSC (military activity; security tasks), and the chain of command (does the PMSC act under the direct instructions of a state agent of the contracting state, or

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92 House of Lords, *supra*, note 45.

93 *Bankoviç, supra* note 46.

94 The ICCPR is ratified by the large majority of states, including Afghanistan, Iraq and the USA.

does it have far-reaching discretionary powers, enabling it to act without the exact knowledge or control of the contracting state or even under the instructions of the host state or another state present in the territory?).

According to this analysis, the obligations to investigate serious human rights violations and to prosecute apply, in the first place to the contracting state. However, such obligations may also exist for the state where the PMSC is registered or where it has its headquarters, if this is a different state than the contracting state. Generally, the link between the 'state of incorporation or registration' and human rights violations in the host state is less direct, since the state of registration is not always informed of the exact contractual conditions agreed between the contracting state and the PMSC; and it is usually not directly involved in the instructions to the PMSC on how to respect human rights during its operation. However, if a specific licence regime exists, obliging the PMSC to fulfil stringent conditions in the performance of its tasks and in the training of its personnel, then the link between the state of registration and possible human rights violations clearly exists, with consequences for its positive human rights obligations as well.

4. Conclusion

This paper aims to examine how the due diligence obligations of states under general human rights law, deriving from the duty to ensure and protect human rights, may apply to the situation where employees of PMSCs commit acts amounting to serious human rights violations. Its particular focus is how the obligations of states to investigate such human rights violations and where appropriate to prosecute those responsible for such violations, as established by the regional human rights courts and monitoring bodies, apply to states who contract such companies or who receive them on their territory. The analysis clearly shows a consistent trend in the case-law of the monitoring bodies accepting both the duty of states to investigate and prosecute serious human rights violations, and the possibility that these obligations extend to a foreign territory.

Based on this case-law, it is argued that the extraterritorial application of these obligations depends on the extent to which the contracting State exercises authority or control in the host State. In a situation of military occupation or a comparable situation of 'overall effective control', these obligations are more stringent than where only partial or shared control or authority is exercised by the contracting State. The same obligations also apply to the host State, to the extent that there has been no voluntary or forced 'transfer' of the public and governmental powers to a foreign state. More importantly, if the host State does not have a sufficiently functioning government apparatus and judicial system which are able to implement these obligations- as is often the case-, the human rights obligations cannot be put into practice. The paper presents some thoughts on how the obligations to investigate and to prosecute apply in different situations, and to which State they pertain. However, many questions remain unanswered, some of which will certainly be further examined in the context of the PRIV-WAR Project.