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HUMAN RIGHTS VIOLATIONS BY PRIVATE PERSONS AND ENTITIES:
THE CASE-LAW OF INTERNATIONAL HUMAN RIGHTS COURTS AND
MONITORING BODIES

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Abstract

The article sums up the state of international human rights law as concerns the issue of responsibility for human rights violations allegedly carried out by private persons and entities. It employs four main legal concepts: imputability of private actions to a State, positive obligations of States, duties of private persons and entities, and 'horizontal' effect of human rights. The attempt is made to see how these concepts appear in the case-law of international monitoring bodies and regional courts. The article also attempts to indicate pending questions as concerns the responsibility of private persons and entities for human rights violations and to introduce possible approaches that an international or regional judicial or legislative process could undertake to remedy the gaps, in particular in the narrower context of private military companies. One of the obvious conclusions that emerges from the study is that international actors have preferred the development of the scope of positive obligations that States ought to undertake within various human rights treaties. It is through these obligations that international human rights standards have come to circumscribe private actions. The scope of positive obligations for States typically involve the following measures: adoption of appropriate legislation, provision of judicial remedies and compensation where appropriate. It can be said that the existing legal framework contains most if not all the necessary elements to hold such legal entities as private military or security contractors accountable for human rights violations. The question lies more with the courage to use them to ensure respect for human rights.

Keywords

Fundamental/human rights – European Convention – Council of Europe – Law

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INETA ZIEMELE*

1. Introduction

Traditionally, international human rights law has developed with a view of providing rights for individuals and groups and imposing obligations on States. It is true, however, that human rights law has since its early days included a warning for the individuals and entities against abuse of the rights guaranteed under international law. Article 29 of the Universal Declaration of Human Rights (UDHR) sets forth the idea that “everyone has duties to the community”. International law foresees that individuals and entities not only have rights under international law but also duties. The ways in which private persons and entities are attributed duties and held responsible are by far not as straight forward or finely tuned as their enjoyment of human rights under international law.

This article begins with a survey as to how certain obligations to respect human rights applicable to private persons and entities have emerged in international law. It is to be noted that the article does not deal with these questions under international criminal law; the research stays within the limits of international human rights law. It is true that ultimately these are States that incur responsibility in international law if they do not ensure respect for human rights by private persons and entities. The scope of this responsibility will be determined by looking at the case-law of international human rights bodies.

Since the current research is carried out within the framework of a specific project on private military or security contractors (hereafter – PM/SCs), and international law, the relevance of the study on obligations to respect human rights by private persons and entities and relevant issues of responsibility for human rights violations has to be clarified. Private military or security companies, as the words indicate, are private law governed entities. As distinct from other private persons and entities, such companies are entrusted to carry out, often in conflict or post-conflict setting, a variety of particularly sensitive tasks.¹ Even though these may be private companies, their activities touch upon the rights of individuals in important ways wherever they operate. It is therefore that questions about the effects of human rights law in relations between private persons and entities or about obligations that derive from human rights law and are imputable to States in this respect or even directly to private persons is important for a better understanding of the legal frame within which such companies operate.

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¹ E.g. Working Papers in this series by Mirko Sossai, ‘Status of PMSC Personnel in the Laws of War: The Question of Direct Participation in Hostilities’ and Simon Chesterman, “‘We Can’t Spy ... If We Can’t Buy!’: The Privatization of Intelligence and the Limits of Outsourcing “Inherently Governmental Functions”’. For reports on the problems as concerns the practices of the PMCs and their accountability, see the website of an NGO ‘Human Rights First’ at http://humanrightsfirst.org/us_law/pmc/index.asp

The second purpose of this inquiry is to indicate pending questions as concerns violations of human rights by private persons and entities and to underline the possible approaches that an international or regional judicial or legislative process could adapt to remedy the situation, in particular in the narrower context of private military companies.

For the above mentioned purposes I will look at the practices of the UN treaty-monitoring bodies and special procedures and the Inter-American and European human rights courts. Before that I should clarify the term ‘private persons and entities’ as used in the article. It refers to private individuals, groups of individuals and legal entities which do not constitute a public authority of a State. As such, they enjoy human rights. Their actions may engage State responsibility directly if they acted upon the orders of public authorities or exercised a public function in some specific circumstances.² Furthermore, actions of private persons and entities may lead to State responsibility even if these actions took place within strictly private relations. Through the application of the notion of positive obligations, as developed by human rights monitoring bodies and courts, the expansion of the obligations to respect human rights has taken place both with respect to States and beyond. It is submitted that classical approaches to imputability and the notion of positive obligations are both relevant for the discussion on how to regulate PM/SCs.

Furthermore, the UDHR refers to the duties of everyone with respect to the community. In the context of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) the question has been posed as to whether these treaties may have a so-called ‘horizontal’ effect at the national level. Often it is referred to as the concept of *Drittwirkung* as used in German constitutional law.³ The question of whether there are duties or obligations that derive from international human rights law and apply to private persons and entities is yet another analysis that can be made for the purposes of establishing ways and means of holding private entities responsible for human rights violations.

Based on the examples of case-law presented below, the article will sum up the state of human rights law as concerns the issue of responsibility for human rights violations by private persons and entities in international law with reference the four legal concepts identified above, i.e., imputability of private actions to a State, positive obligations of States, duties of private persons and entities, and ‘horizontal’ effect of human rights. In examining the case-law, the attempt will be made to see how these legal concepts are applied by the international monitoring bodies and regional courts.

2. Human Rights Obligations of Private Persons and Entities giving rise to State Responsibility

It was pointed out in the introduction that human rights law remains essentially the area of law where States, as primary subjects of international law, have rights and obligations. It is therefore a natural and logical development that human rights law aims at strengthening the obligations of the States as concerns the behavior of private persons and entities. The overview below will look at developments within the framework in which States have the obligation to ensure an appropriate behaviour on the part of private parties and entities with respect to other private parties.

² Article 5 of the International Law Commission Draft Articles on State Responsibility stipulates that the conduct of a non-state entity “empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

³ This is a question that has attracted considerable attention in scholarly writings. Among others, see Patrick de Fontbressin, “L’effet horizontal de la Convention Européenne des Droits de L’Homme et l’avenir du droit des obligations », *Liber Amicorum Marc-André Eissen*, Bruxelles : Bruylant et Paris : LGDJ, 1995, pp. 157 -164.

A. The United Nations

1. The Human Rights Committee

The Human Rights Committee (HRC) has developed jurisprudence which indicates that there are obligations to guarantee the enjoyment of human rights set forth in the ICCPR for everyone within a State's jurisdiction whereby States have to ensure certain conduct from both public and private parties.

The *Delgado Paéz v. Colombia* case concerned a teacher who received death threats and was subject to physical attacks by private parties and ultimately fled the country after unknown killers murdered another teacher. The Committee began by asserting that the ICCPR entails a State's duty to ensure everyone within its jurisdiction with the right to personal security. Moreover, this right applies not only to persons who are arrested or detained. The Committee held:

It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.⁴

Therefore the Committee held that Colombia breached Article 9(1) by failing to ensure the applicant with effective protection.

A duty to curb discrimination in the private sphere emerges from Articles 2(1) and 26. In the *Franz Nahlik v. Austria* case, the applicant claimed that Austria violated retirees' rights to equality before the law and to equal protection of the law without any discrimination. The State party in its submissions claimed the case inadmissible due to the fact that "the author challenges a regulation in a collective agreement over which the State party has no influence". The State party also explained that the collective agreements in question "are contracts based on private law and exclusively within the discretion of the contracting parties". The Committee held that "under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment".⁵

Concluding Observations also illustrate the HRC's view that States Parties should take steps to regulate and adjudicate acts by private and public employers. Concluding Observations often call for sanctions against employers for discriminatory practices, and criminal penalties for practices such as slave labor, child labor and trafficking.⁶ The States should not only legislate against discriminatory and harmful practices such as requiring sterilization certificates, but should also sanction employers.⁷

Article 27 places an obligation on States to protect the existence and exercise of the individual's minority rights against their denial by non-state actors within the State. In the *Hopu Besert v France* case, the Committee considered the private construction of a hotel complex on government owned

⁴ Communication No. 195/1985, U.N.Doc. CCPR/C/39/D/1985 (1990).

⁵ Communication No. 608/1995, U.N.Doc. CCPR/C/57/D/608/1995 (1996).

⁶ Concluding Observations on Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005, § 11; Concluding Observations on Benin, UN Doc. CCPR/CO/82/BEN, 1 December 2004, § 24; Concluding Observations on Uganda, UN Doc. CCPR/CO/80/UGA, 4 May 2004, § 20.

⁷ Concluding Observations on Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005, § 11.

land to be a violation of the two ethnic Polynesian applicants' human rights, since the hotel was to be constructed on a traditional burial ground. Confronted with a French reservation in respect of Article 27, the Committee held that France had failed to effectively protect the applicants' family and private life in accordance with Articles 17 and 23.⁸

General Comment No. 31 of the Human Rights Committee adopted in 2004 summarizes the Committee's position on the nature of obligations set forth by the Covenant. It states:

The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. ...Article 2 requires that States parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. ...The article 2, paragraph 1, *obligations are binding on States and do not, as such, have direct horizontal effect* (italics added – IZ) as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However *the positive obligations on States Parties to ensure 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. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States parties' permitting or failing 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. States are reminded of the interrelationship between positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhumane or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.⁹

In other words, the HRC reiterates an approach which by now has become a classic, although it was not obvious at the time international human rights law began its evolution and the human rights discourse was one of negative obligations. We see that the HRC, like the other human rights mechanisms, insist on the primary responsibility of States to ensure the appropriate legal framework within which human rights are respected between private persons and entities. The notion of positive obligations has been a particularly important tool as concerns the 'extension' of human rights obligations into spheres that until recently have been kept away from State interference at least as far as their responsibility for these acts in international law was concerned. With this development comes the importance of drawing a right balance between the measures that a State has to take in order to protect human rights, as they may apply between private parties, on the one hand, and a space to be left to individual freedoms and privacy under the classical notion of a negative obligation to abstain from an interference, on the other hand. Although, as the European Court of Human Rights has noted, the distinction between positive and negative obligations often is difficult to maintain.¹⁰ Indeed, the protection of that personal space may require that particular steps are taken by the State. Finally and

⁸ Jan Arno Hessbruegge, "Human Rights Violations Arising from the Conduct of Non-State Actors" *Buffalo Human Rights Law Review*, vol. 11, 2005, p. 21, available on Westlaw database.

⁹ UN Doc. CCPR/C/21/Rev.1/Add.13: General Comment No.31 "Nature of the General Legal Obligation Imposed on States parties to the Covenant", 26 May 2004, § 8.

¹⁰ In the *Evans v. the United Kingdom* case the Court stated, inter alia: "The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar". See *Evans v. the United Kingdom* (no. 6339/05), [GC] judgment of 10 April 2007, § 75.

depending on the field, given that States are obliged to adopt legislation which transgresses into certain private relations, one could even consider that in this sense a treaty has a horizontal effect in relations between private persons and entities. In this respect, areas of freedom of expression and domestic violence come to mind.

The Human Rights Committee has also had the opportunity to address the issue of private military contractors and the responsibility of States in their regard. For example, the Committee recommends imposition of criminal penalties in relation to violations of Article 7 against private contractors acting on behalf of the State:

The State party should ensure that any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant; the State party should also ensure that the current interrogation techniques or any revised techniques are binding on all agencies of the United States Government and any others acting on its behalf; *the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure* and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques; the State party should ensure that the right to reparation of the victims of such practices is respected; and it should inform the Committee of any revisions of the interrogation techniques approved by the Army Field Manual.¹¹

In the Concluding Observations on the Report of the United States, the HRC suggested that detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations run by agents of the United States government, whether part of the military or privately contracted, are within the State's jurisdiction and therefore subject to its obligations under the Covenant. According to the HRC "the State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations."¹² The HRC has further recommended that a State Party trains "contract employees" working in detention facilities "about their respective obligations and responsibilities in line with articles 7 and 10 of the Covenant" to prevent recurrence of violations.¹³

As to the Committee's position on jurisdiction, it is interesting to note that the Committee refers to detention facilities run by US agents either in public service or on the basis of a contract. It appears that the HRC presumes that in such a situation the jurisdictional link with the US is sufficient for it to incur responsibility also for acts taking place within otherwise a foreign territory. It can indeed be accepted that that is the case for as long as the US government provides these facilities and agents with military, economic, financial and political support.¹⁴

At the roots of the problem is the fact that a modern State often lacks the resources necessary to carry out all the tasks, and that this leads the State to entrust some of these tasks to private entities. Apart from situations involving armed conflict, there are also processes of privatization of State functions which have raised questions as concerns obligations for the protection of human rights. The HRC has expressed concern about the lack of monitoring mechanisms for private prisons, and the failure to hold accountable private contractors suspected of torture or cruel, inhuman or degrading treatment at

¹¹ Concluding Observations on the United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, § 13. Emphasis added.

¹² Ibid., §§ 14, 15 and 18.

¹³ Ibid, § 14.

¹⁴ For the principle, see *Ilascu and Others v. Moldova and Russia* (no. 48787/99), judgment of 8 July 2004, § 392.

detention and interrogation centers.¹⁵ For instance, in the Concluding Observations on the Report of New Zealand while welcoming the information that the State party has decided that all prisons will be publicly managed after the expiry of the contract in July 2005 and that the contractors are expected to respect the United Nations Minimum Standards for the Treatment of Prisoners, the Committee nevertheless remained concerned about whether the practice of privatization, in an area where the State is responsible for protecting the rights of persons whom it has deprived of liberty, effectively meets the obligations of the State party under the Covenant and its own accountability for any violations.¹⁶

The dilemma facing human rights monitoring bodies is two-fold. It is outside their competence to tell the States the way in which they should carry out State functions or model their economic systems. Every now and then the monitoring bodies come to the conclusion that the choices made by the States may not be ideal for the protection of human rights. It is therefore that a monitoring body may have the following choices. Either they comment on the need to make adjustments in the system or they emphasize positive obligations of States to ensure rights of individuals. In any event, where a State outsources its functions it should provide for sufficient safeguards for the protection of human rights.

2. Other Monitoring Bodies

Other human rights monitoring instances within the United Nations have adopted approaches similar to those of the HRC. The most recent general comment of the Committee on Economic, Social and Cultural Rights (CESCR) on the right to work, for example, recognizes that various private actors “have responsibilities regarding the realization of the right to work” and that private enterprises - national and multinational - “have a particular role to play in job creation, hiring policies and non-discriminatory access to work”.¹⁷ But then, in the same comment, the Committee reiterates the traditional view that such enterprises are “not bound” by the Covenant. In the context of economic and social rights, it has been argued that within the framework of the International Labour Organization (ILO) a stronger argument could be made for direct corporate responsibilities under the core conventions. Their subject matter addresses all types of employers, including corporations; corporations generally acknowledge greater responsibility for their employees than for other stakeholders; and the ILO’s supervisory mechanism and complaints procedure specify roles for employer organizations and trade unions. But even here the legal responsibilities of corporations under the ILO conventions remain indirect.

Article 2.1(d) of the International Convention on Elimination of Racial Discrimination (ICERD) requires each State party to prohibit racial discrimination by “any persons, group or organizations”. Article 5(b) obligates States parties to provide equal protection against violence and bodily harm, whether inflicted by governmental officials or by individuals, groups, or institutions. Besides, the treaty includes reference to particular sectors, implying that the State must regulate and adjudicate the acts of business enterprises in those sectors. Article 5(f) requires States parties to undertake to prohibit and eliminate racial discrimination in the right of access to places or services intended for use by the general public, including transport, hotels, restaurants, cafes and theatres. This is the Convention which imposes very clear obligations on States with respect to the regulation of relations between individuals and entities.

¹⁵ Concluding Observations on the USA, *supra* note 11, §§ 13 and 14; Concluding Observations on New Zealand, UN Doc. CCPR/CO/75/NZL, 7 August 2002, § 13.

¹⁶ Concluding Observations on New Zealand, UN Doc. CCPR/CO/75/NZL, 7 August 2002, § 13.

¹⁷ CESCR, General Comment No. 18, § 52. For similar remarks see CESCR, general comments No. 14, § 42 and No 12, § 20. See also CRC, General Comment No. 5, § 56. It says that the State duty to respect “extends in practice” to non-State organizations.

It can be noted that, for example, the United States entered into a reservation upon the ratification of the ICERD as concerns the scope of obligations to prohibit discrimination excluding its responsibility for acts of private individuals, groups or organizations. The Committee on Elimination of Racial Discrimination (CERD) in 2008 repeated its invitation to the State party to withdraw the reservation on the scope of the obligations under Article 2.¹⁸ Clearly limiting both the scope of the obligations and the reach of the Committee in its exercise of the monitoring function over US compliance with the Convention goes against the very purpose of the Convention, especially in view of its strong language as concerns the obligations to regulate the relations between private persons and entities.

The Committee traditionally looks closely at the statistics of criminal justice systems of States parties as concerns prosecution of crimes linked to racist or ethnic motivations. It also tries to find out whether there is legislation outlawing private organizations that incite racial or ethnic hatred.

In the Concluding Observations on the State report of Nigeria, the Committee expressed its concern about assaults, use of excessive force, summary executions and other abuses against members of local communities by law enforcement officers as well as by security personnel employed by petroleum corporations. The CERD urged the State Party to conduct full and impartial investigations of cases of alleged human rights violations by law enforcement officials and by private security personnel, institute proceedings against perpetrators and provide adequate redress to victims and/or their families.¹⁹ The Committee has been concerned about those States in which foreign companies are given permission for the exploitation of lands without prior environmental assessments and taking due regard to the rights of local communities.²⁰

A number of principles derive from the work of the CERD. Already the wording of the Convention indicates that the States have fairly precise obligations that concern the regulatory framework to be adopted with respect to private businesses so as to avoid and punish acts of racial discrimination. The States should also be more assertive in the exercise of their balancing function between various interests whereby the interests of local populations and general interests should not suffer from big business projects. Such projects should not lead to violations of individual human rights and when that happens there should be a system of investigation and adjudication in place. Furthermore, in its Concluding Observations on Suriname, the CERD recommended that the State should also require “large business ventures” to contribute to the promotion of human rights. The Committee, concerned over the lack of health and education facilities and utilities available to indigenous peoples, recommended to Suriname “the inclusion in agreements with large business ventures - in consultation with the peoples concerned - of language specifying how those ventures will contribute to the promotion of human rights in areas such as education.”²¹

The International Convention on the Elimination of All Forms of Discrimination against Women requires States to take all appropriate measures to eliminate discrimination against women by any “enterprise” (Article 2(e)). In the area of equality between men and women we see particularly important developments as concerns the obligations imposed on private persons and entities. General Recommendation No. 19 adds that: “the discrimination under the Convention is not restricted to action by or on behalf of Governments”.²² The Committee on Elimination of Discrimination against Women (CEDAW) requires the adoption of positive measures or taking of affirmative action to improve the situation of women in the labour market²³ and in the spheres of family life and privacy. The Committee has admitted that the Convention requires State’s interference, when necessary, in the most

¹⁸ Concluding Observations on the United States of America, CERD/C/USA/CO/6, 8 May 2008, § 11.

¹⁹ Concluding Observations on Nigeria, CERD/C/NGA/CO/18 (2005), § 19.

²⁰ Concluding Observations on Guayana, CERD/C/GUY/CO/14 (2006), § 19.

²¹ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), § 19.

²² General recommendation no. 19 „Violence against women”, CERD, 11th session, 1992.

²³ See. e.g., UN Doc. CEDAW/C/LUX/CO/5, 8 April 2008, § 24.

delicate spheres of women's life. The Committee has clearly stated that the "State cannot absolve itself from responsibilities imposed by the Convention, by, for instance, passing those to non-governmental organizations and international donors. While the co-operation with the private sector is important, only the State possesses the necessary capacity and resources to protect and fulfill women's rights under the Convention".²⁴ The approach of the CEDAW is clearly in favour of imposing more obligations on States and demanding more responsibility from them for problems that women continue to face in various settings.

The UN Special Representative on Business and Human Rights in his analysis has come to the conclusion that the UN human rights treaty bodies most frequently have expressed concern about State failure to protect against private party abuse in relation to the right to non-discrimination, indigenous peoples' rights, and labour and health-related rights. In view of the mentioned above jurisprudence and recommendations of the treaty-monitoring bodies and the work of other special procedures of the UN, the obvious conclusion emerges that the list of fields and issues in which the States have positive obligations to regulate and intervene with private relations has grown considerably over the last decades. The scope of such obligations for States would typically involve the following measures: adoption of appropriate legislation, provision of judicial remedies and compensation where appropriate. However, as the work in the field of human rights and business shows, notably the Global Compact initiative of the UN, there is a growing dialogue between State and non-State actors such as businesses with an aim to achieve better compliance of non-State actors with some fundamental principles, including human rights. It is true that the Global Compact asks that businesses not to be complicit in human rights abuses and requires them not to accept such violations by, for example, security forces,²⁵ but it is not very specific as to the enforcement of responsibility for such violations. In this respect Theo van Boven had clarified, while the emphasis is on the responsibility of States, "[t]his approach should, however, in no way be considered as detracting from a victim's right, in appropriate cases, to bring civil action against non-state entities".²⁶

As concerns the enforcement of these obligations with respect to companies working abroad, the Committee on Economic and Social Rights (CESR) in its General Comment No. 15 indicated that States should take steps to prevent their own citizens and companies from violating rights in other countries. About violations of most fundamental rights, such as the right to life and the prohibition of torture, the HRC and the CERD have observed that States incur responsibility for the acts of private military or security companies contracted to carry out either public or government sponsored private projects abroad. Holding companies accountable in such circumstances will depend on the legislation of both the host country and the country of incorporation. However, if States are to carry out the recommendations of the UN mechanisms, it appears that they have to put in place mechanisms of criminal and civil law character to hold the companies accountable and that victims should have effective remedies available to bring claims for violations of their human rights against private persons and entities in domestic courts.

B. The Inter-American Human Rights Protection System.

Both the Inter-American Court of Human Rights and the Commission have pronounced on the obligations of the States parties to the American Convention on Human Rights with regard to human rights violations committed by private parties. It is to be noted that the Court has developed a very

²⁴ Concluding Observations to the report submitted by Albania, CEDAW, A/58/38 Part I (2003), § 80.

²⁵ On Principle 2 of Global Compact see <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>

²⁶ See Theo van Boven, "The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", in G. Alfredsson & P. Macalister-Smith (eds.), *The Living Law of Nations*, N.P.Engel, Publisher, 1996, p.353

strong *obligation to prevent* human rights violations which includes the obligation as concerns acts of private parties.

In its “Report on Human Rights Situation in the Republic of Guatemala” the inter-American Commission on Human Rights stated that “the governments must prevent and suppress acts of violence, even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise”.²⁷

Furthermore, the inter-American system has developed a rather far-reaching concept of *imputability* of responsibility to a State for acts or omissions of private parties. Admittedly, the distinction between State agents and private parties is often a complex one and in the context of Americas the realities may add to this complexity. This seems to explain both the need for the development of the obligation to prevent human right abuses and the wide approach to imputability taken by the Court and the Commission.

In the *Riofrio Massacre* case, when determining the international responsibility of the State with regard to human rights violations committed by paramilitary groups, the Inter-American Commission on Human Rights clearly stated that “in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officer, the members of the paramilitary groups act as agents of the State.”²⁸ The Commission was not satisfied by the mere fact that those groups were already outlawed by the State itself.²⁹ It took into account the evidence that agents of the State helped to coordinate, carry out and cover up the massacre and therefore concluded that “the State is liable for the violations of the American Convention resulting from acts of commission or omission by its own agents and private individuals involved in the execution of victims.”³⁰

The Inter-American Court seems to follow the same approach. The case-law of the Court shows that direct attribution of acts committed by private parties is not a decisive element in establishing the international responsibility of a State. It remains, however, a first test to be carried out. This is combined with the obligation to take all necessary measures to prevent human rights violations and once they occur to respond adequately.

In the *Yanonami v. Brasil* case, the Commission held that Brazil had breached the rights to health and life of indigenous persons, since it failed to prevent settlers from moving in large numbers to the Brazilian Amazon reserve and thereby bringing disease, violence, and destruction to the Yanomami.³¹

In the *Blake* case, the Inter-American Court of Human Rights found that a paramilitary group (a so-called “Civilian Self-Defense Patrol”) which had “an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision” was a *de facto* agent of Guatemala and that the actions perpetrated by the member of this group should therefore be imputable to the State.³²

In the *Maritza Urrutia v. Guatemala* case, during a public hearing the State asserted that there was no direct evidence to show that agents of the State were responsible for the violations committed against the victim.³³ However, the Court indicated that, in order to establish that there has been a violation of

²⁷ Cited in Andrew Clapham, “Human Rights Obligations of Non-State Actors”, in *Collected Courses of the Academy of European Law*, XV/1, 2006, p. 424.

²⁸ Report No. 62/01, Case 11.654, *Riofrio Massacre*, Colombia, 6 April 2001, § 51.

²⁹ See also *19 Merchants v. Colombia*, judgment of 5 July 2004, §§ 118-123.

³⁰ Report No. 62/01, Case 11.654, *Riofrio Massacre*, Colombia, 6 April 2001, § 52.

³¹ Resolution No 12/85, Case 7615, 5 March 1985 <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>

³² *Blake v. Guatemala*, judgment of 24 January 1998, §§ 68-78.

³³ *Maritza Urrutia v. Guatemala*, judgment of 27 November 2003, § 41.

the rights embodied in the Convention, it is not necessary to determine, as it is under domestic criminal law, the guilt of the authors or their intention, nor is it necessary to identify individually the agents who are attributed with the violations.³⁴ One passage is worth of particular mention here since it expressly stipulates that certain provisions of the American Convention, namely, Paragraphs 4, 5 and 6 of Article 7 “establish *obligations of a positive nature* that impose specific requirements on both State agents and *third parties* who *act with the tolerance* and agreement of the former and who are responsible for carrying out detentions.”³⁵

In the *Velasquez-Rodriguez v. Honduras* case, the Inter-American Court noted that: “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”³⁶ According to the Court, due diligence entails a legal duty not only to prevent human rights violations but also to properly investigate, prosecute and punish those responsible for the acts as well as to ensure the victim adequate compensation.³⁷ The same approach was adopted by the Court in the *Godínez-Cruz v. Honduras* case concerning facts similar to those assessed by the Court in the *Velasquez-Rodriguez v. Honduras* case.³⁸

The Inter-American Court also set out specific requirements for adequate investigation, stating that “it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”³⁹

It is interesting to note that a State’s failure to seriously investigate human rights violations committed by a private party has been seen by the Court as complicity of the State in the commission of the violations which therefore results in international responsibility of the State.⁴⁰

The obligation of a State to investigate and punish when human rights violations are committed allegedly also by private parties was addressed by the Inter-American Court in subsequent cases on forced disappearances. In *Morales et al v. Guatemala* for instance, the Court was concerned with arbitrary arrests or kidnappings of the victims and several murders “committed by armed individuals wearing military or police dress and others wearing civilian clothes”. The Court specifies that State tolerance of such acts is a sufficient nexus for the attribution of responsibility. “It is not necessary to determine the perpetrators’ culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities

³⁴ Ibid. See also: “*Street Children*” case (*Villagrán Morales et al.*), judgment of 19 November 1999, § 75; and *The “White Van” case* (*Paniagua Morales et al.*), judgment of 8 March 1998, para. 91.

³⁵ *Maritza Urrutia v. Guatemala*, judgment of 27 November 2003, § 71. See also: *Juan Humberto Sánchez, v. Honduras*, judgment of 7 June 2003, § 81.

³⁶ *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, § 174.

³⁷ “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”. *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, § 174; *Godínez-Cruz v. Honduras*, judgment of 20 January 1989, § 184.

³⁸ *Godínez-Cruz v. Honduras*, judgment of 20 January 1989, §§ 182-183.

³⁹ *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, § 177; *Godínez-Cruz v. Honduras*, judgment of 20 January 1989, § 188.

⁴⁰ “Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the States responsible on the international plane.” See *Velásquez Rodríguez*, § 177; *Godínez-Cruz*, § 188.

supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations."⁴¹ Although fairly exhaustive investigation of the acts had been carried out by the Guatemalan police, the state judiciary failed to take diligent and effective measures to prosecute and, where appropriate, punish those responsible for the acts.

In an advisory opinion on the Rights of Migrant Workers, the Court stated that the principle of non-discrimination, which in the Court's view may be considered as a peremptory norm under general international law, gives rise to effects with regard to third parties, including individuals. In its opinion the Court *inter alia* pronounced the duty to ensure that violations of the Convention are considered as illegal acts under national law.⁴² Furthermore, the Inter-American Court has spelled out the duty to provide appropriate legislation. For instance, in *Velasquez-Rodriguez v. Honduras* the Court highlighted that duty to prevent includes the obligation to ensure that human rights violations are recognized as illegal acts under domestic legislation.⁴³

The case of the *Maygna (Sumo) Awas Tingni Community v. Nicaragua* concerned the rights to property of indigenous peoples under the American Convention. In this case, the Court developed the jurisprudence earlier established by the Commission when dealing with the rights of indigenous peoples.⁴⁴ The Court noted that the State failed to effectively delimit and demarcate the territory to which the Awas Tingni Community had a property right. Such a failure gave rise to an obligation to "abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities."⁴⁵

The last two examples show that the Court speaks out on the obligation to legislate and execute. Undoubtedly, proper national legislative framework is important as to the acts of private parties and their compliance with international human rights obligations of a State. It is equally true that where a State fails to comply with its own legislation this provides for more space for abuse in private party relations.

To sum up, the Inter-American system for the protection of human rights has developed a number of important elements as concerns the obligations of States Parties under the American Convention that are of relevance for the development of the accountability of private parties for human rights violations. These elements are as follows. First of all, there is a general obligation to prevent human rights violations by public and private parties. It seems that the Court is prepared to accept far-reaching obligations in this regard as shown by the *Velasquez-Rodriguez* case in which the lack of due diligence in preventing human rights violations was attributed to the respondent State. Secondly, the

⁴¹ *Paniagua Morales et al v. Guatemala*, judgment of 8 March 1998, § 91.

⁴² "In summary, employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination." See Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants*, § 153.

⁴³ "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages." See *Velásquez Rodríguez*, § 177; *Godínez-Cruz*, § 185.

⁴⁴ Resolution No 12/85, Case 7615, 5 March 1985 <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>

⁴⁵ *The Maygna (Sumo) Awas Tingni Community v. Nicaragua*, judgment of 31 August 2001, § 153.

test of imputability of certain acts to a State also appears quite far-reaching in a sense that where a State tolerates violations of human rights by third parties it will incur responsibility. Thirdly, the obligation to investigate on its own initiative, prosecute and punish and provide the compensation to the victims has been in detail outlined by the Court and the Commission. Fourthly, the human rights violations have to be outlawed at the national level. Finally, the Court has also elaborated on positive obligations entailed in the Convention. It is interesting to note that the Court is prepared to extend the notion of obligations on private persons and entities.⁴⁶

C. *The European Court of Human Rights*

The European Court of Human Rights has generally adopted the traditional view, imposing far-reaching obligations to protect on States while leaving to them the choice of means.⁴⁷ Article 1 of the European Convention of Human Rights (hereinafter – the Convention or ECHR) reads:

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

Some scholars have suggested that the European Convention of Human Rights establishes direct obligations between individuals. Andrew Clapham for instance argues that the fact that Convention only provides for an action of individuals against States and not against other individuals does not preclude the existence of obligations between individuals under the Convention.⁴⁸ Other scholars find this argument not convincing because there are no cases in which the European Court of Human Rights (hereinafter - ECtHR) has recognized horizontal obligations between non-state actors contrary to the wording of Article 1 of the Convention, which only addresses the High Contracting Parties. The debate in doctrine on the possible horizontal effect of the ECHR continues.⁴⁹

In the meantime, the Court in its case-law has stated that States parties to the Convention must adopt measures necessary to protect human rights and freedoms specified by the ECHR with respect to both actions of a State and that of private persons and entities. One can trace the developments by taking a chronological approach. As early as *Young, James and Webster v. the United Kingdom (1981)*, the Court focused on the absence of legislation to protect workers from being obliged to join a trade union. British Rail reached an agreement with rail unions and started to dismiss the employees who refused to join these trade unions. The Court ruled that the State is obliged to protect, through law, the freedom of association under Article 11, both with regard to employment in the State and private sectors.⁵⁰ Put another way, the Convention's Article 11 covers employment in the private sphere. It is important to stress that the Court didn't analyze whether actions of British Rail could be attributed to the Government; therefore Government's arguments that British Railways did not possess the status of a State organ were unsuccessful. In accordance with Clapham, this case opened the way for the conclusion that States have (in addition to the obligation to protect individual rights from arbitrary interference by public authorities) "positive obligations to secure the effective enjoyment" of a right to association in trade unions, even where the direct infringement is not done by a State.⁵¹

⁴⁶ *Supra*, note 35.

⁴⁷ Andrew Clapham has examined extensively the various aspects of the question of obligations of non-State actors. See A. Clapham, *Human rights obligations of non-state actors*, Oxford: Oxford University Press, 2006; A. Clapham, "Human Rights Obligations of Non-State Actors", in *Collected Courses of the Academy of European Law*, XV/1, 2006

⁴⁸ *Ibid.*

⁴⁹ See the text accompanying notes 77-78.

⁵⁰ *Young, James and Webster v. The United Kingdom*, judgment of 13 August 1981, Series A, No. 44 (1982) § 49.

⁵¹ See Andrew Clapham, *Human rights obligations of non-state actors*, Oxford: Oxford University Press, 2006, p. 353.

Article 2 of the ECHR protects one of the most fundamental human rights – right to life. The ECtHR has developed an important case-law dealing with violations of Article 2 committed by non-state actors. The said article imposes on States obligations which go beyond the mere adoption of relevant legislation permitting to bring criminal charges for taking life.

A classical case, which is often cited in the literature as the case where the ECtHR dealt with a State's obligation to prevent the murder of an individual by another individual, is the case of *Osman v the United Kingdom*.⁵² The facts of the case in brief are as follows. A teacher at Homerton House School, London, Paul Paget-Lewis, developed an attachment towards his 15-year-old pupil Ahmet Osman. He followed the boy home, invited to the class during the lunch brake, gave him money and small presents. Lately he started spreading rumors about Ahmet's friend, another pupil at the school, Leslie Green. On several occasions he followed Leslie home. Then the graffiti of the obscene contents appeared on the walls of the school. Paget-Lewis however denied his fault in this regard. It was also discovered that somebody had stolen the personal files of Ahmet and Leslie Green from the school, but Paget-Lewis again denied he had done it. The obsession of Paget-Lewis had been brought to the attention of education authorities and police. He was examined on three occasions by a psychiatrist, who decided that he was not mentally ill but should be transferred from the school on medical grounds. He was suspended from teaching duties and during this period a number of attacks were made on the Osmans' property. There was also a collision between the Paget-Lewis's car and a car carrying Leslie Green. During this time, there were various interviews between the teacher and the local authorities, as well as between the teacher and police. The car accident was investigated by the police. Following the attempt to arrest Paget-Lewis, he left London and travelled around England hiring cars under his newly-adopted name of Osman. He stole a gun and returned to London, where he was spotted near Ahmet's home. The neighbours reported to the police, the latter however failed to react. Paget-Lewis shot dead the father of Ahmet Osman and seriously wounded him as well. He then drove to the home of deputy head teacher, killed him and wounded his son. Next morning Paget-Lewis was arrested by the police. On being arrested he stated: "why didn't you stop me before I did it, I gave you all the warning signs?"

The ECtHR was faced with the complaint brought by the mother of Ahmet Osman about the failure of the authorities to appreciate and act on a series of warning signs that Paget-Lewis represented a serious threat to the physical safety of her son and family.⁵³ The ECtHR began by stating that:

[T]he first sentence of Article 2 §1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. (...) [T]he Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁵⁴

In determining the responsibility of a State, the question before the ECtHR was whether the failure to take steps by the police to the alleged threat posed by Paget-Lewis at that time was a problem in the eyes of the Convention. In view of the ECtHR the State violated its positive obligation to protect the right to life when it could be established:

⁵² *Osman v. the United Kingdom* (no. 23452/94), judgment of 28 October 1998.

⁵³ *Ibid.*, § 10.

⁵⁴ *Ibid.*, § 115

that the authorities *knew or ought to have known* at the time of the *existence of a real and immediate risk* (italics added – IZ) 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.⁵⁵

Thus the ECtHR proposed a test for the determination of the responsibility of a State under Article 2 of the ECHR. First, the risk must be real and immediate and the State authorities have to have known or ought to have known about the existence of this risk. Second, it must be established that they failed to respond to this risk. The development of a test which engages the positive obligation of a State to act is an interesting approach and the one that would typically be adopted by a court. The Court explained that this was necessary to avoid an impossible and disproportionate burden to be put on States. The ECtHR kept in mind the difficulties faced by State authorities in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.⁵⁶ Moreover, according to the ECtHR, not every claimed risk to life can entail for the authorities the requirement to take operational measures to prevent that risk from materializing.⁵⁷ The ECtHR has cited this passage in the other cases invoking State responsibility for the failure to protect individuals from killings committed by other individuals. The State is not under the duty to foresee the risk to life or to take preventive measures to avoid such a risk. The acceptance of such a standard would be difficult in view of the other competing interests and principles that derive from or are protected by the ECHR. In the words of the ECtHR:

[T]he police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticized for the attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.⁵⁸

In the *Osman* case, the ECtHR, having examined all the facts, came to the conclusion that, first of all, Paget-Lewis's attachment to Ahmet Osman could not be judged as constituting a threat to his life, and that, secondly, it could not be said that the police knew or ought to have known that the Osman family was at a real and immediate risk from Paget-Lewis.

Since the first criterion was not satisfied there was no need for the police to react with the aim to protect the Osman family. On the contrary, such actions might have led to a breach of the rights of Paget-Lewis. Thus the ECtHR concluded that in the given case there was no violation of Article 2 of the ECHR.

Since the *Osman* judgment, the ECtHR has applied the test on several other occasions. The case where both criteria were satisfied was *Kontrová v Slovakia*. The husband of the applicant had physically assaulted her on a regular basis. On one occasion the applicant turned to the police and complained about her injuries after her husband had beaten her with an electric cable. The seriousness of the injury was confirmed by a medical certificate. She later withdrew her complaint. On another occasion the applicant's husband was threatening to kill himself and their two children with a shotgun. The relatives of the applicant and later the applicant herself called the police and informed about the incident. When the police came to visit the premises, they found out that applicant's husband had already left the scene. The police officer did not undertake any investigative actions, just took the applicant to her parents' home and invited to visit the police station next morning. On the next day the

⁵⁵ Ibid, § 116.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid., § 121

applicant came to the police station and talked with the officer about her criminal complaint and the last night's incident. Later that day applicant's husband shot himself and their two children dead.⁵⁹

The applicant complained before the ECtHR about the State's failure to take preventive actions. She argued that the police had been under a positive obligation to protect the lives of her children and that they had failed to discharge that obligation. They should have classified her late husband's threats as criminal offences and should have investigated them and prosecuted him on their own motion.⁶⁰ The ECtHR began by citing the *Osman* judgment as regards the scope of State's positive obligations under Article 2 of the ECHR and then proceeded with the application of the *Osman* test. Since the applicant was constantly beaten by her husband and since he had already threatened to kill the children, the ECtHR concluded that the actions of the applicant's husband at that time indeed could be qualified as real and immediate risk. The police knew about the existence of this risk since the applicant complained about it. Since the first criterion was satisfied, the ECtHR found that the situation at the time called for the police intervention. The ECtHR further specified which actions the police had to undertake, but did not do. It came to the conclusion that Slovakia violated Article 2 of the ECHR.

The ECtHR has had to apply the *Osman* test several times in dealing with complaints about Turkey's failure to protect individuals from violence of non-State actors in the context of the instability in the Kurdish areas of Turkey. Thus, for instance, in cases *Yasa v. Turkey*, *Mahmut Kaya v. Turkey*, *Akkoc v. Turkey*, *Killic v. Turkey* the ECtHR had to deal with the State's duty to prevent the killings by unknown persons. In all cases the ECtHR first of all looked whether the risk to life of the victims was real and immediate. Despite the government's allegations, the ECtHR always found the existence of a real and immediate risk to the lives of victims based on the assessment of the overall situation in the south-east region of Turkey of which the State was aware or ought to have been aware. The ECtHR noted the significant number of killings which occurred in that region carried out by so-called 'unknown perpetrators'. The ECtHR hesitated to pronounce on whether official authorities were directly responsible for those killings and stated that for the State responsibility under Article 2 to arise it is sufficient to prove that the State failed to prevent the killings, even if they were committed by non-state actors. Since in all cases Turkey did nothing in order to avert the killings of the victims or provide them with special protection, the ECtHR found a violation of Article 2 of the ECHR.⁶¹

A comparison between the Inter-American Court's notion of obligation to prevent and the ECtHR's approach in applying the real and immediate risk criterion in the above Turkish cases is in place. The obligation to prevent has arisen or has been influenced by the specific regional context in the Americas. In situations where a population suffers from human rights violations carried out by military groups while the State should be able to guarantee some safety within its jurisdiction, the human rights court is likely to react by reminding the State of its functions. In Europe, the human rights court is more likely to be rather reserved as concerns any possible pronouncements on general obligation to prevent. This explains the need to develop criteria allowing for an individualized assessment of the risk. However, once the Court is also confronted with areas where instability and violence occurs within the jurisdiction of a State, the approach as to the end result becomes quite close to that of the Inter-American Court.

In the *Osmanoğlu v Turkey* case, the applicant complained about the State's failure to investigate the disappearance of his son. The ECtHR held that following the disappearance the life of the applicant's son was at a much more real and immediate risk than that of the other persons at that time. The action which was expected from the authorities was not to prevent the disappearance of the applicant's son - which had already taken place - but to take preventive operational measures to protect his life which

⁵⁹ *Kontrová v Slovakia* (no. 7510/04), judgment of 31 May 2007.

⁶⁰ *Ibid.*, § 48.

⁶¹ See judgments of the European Court of Human Rights in the following cases: *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).

was at risk from a criminal act of another individual.⁶² The ECtHR went on specifying which steps the State had to take in order to investigate the disappearance of the applicant's son. The case is interesting because the ECtHR found that State's duty to protect the life of an individual under Article 2 must be observed with special care in circumstances where there is obviously a higher risk to the life at stake. In other words the nature of State obligations for the purposes of Article 2 depends on the level of risk. This is in line with the logic adopted in the cases that are borne from conflict areas within the Member States where the risk to the lives of the population by the very nature of the situation is high.

The Government tried to escape its responsibility in the *Osmanoğlu* case by stressing that its agents were not involved in the abduction of the applicant's son. The ECtHR however expressly pointed out that for the purposes of State responsibility it does not matter whether the violation of Article 2 was committed by State agents or by private persons as long as the State failed to protect the respective individual.

In the *Ergi v Turkey* case, the ECtHR found that the government's counter-terrorism ambush has not been planned in a way to minimize the risk to civilian casualties which may have been caused either by State agents or by other private persons. The ECtHR held:

[T]he responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian; it may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life. Thus even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PPK members caught in the ambush.⁶³

The ECtHR also stressed the obligation to ensure an effective investigation and the fact that this duty is not confined only to cases where it had been established that the killings were caused by the State agents.⁶⁴

The *Costello-Roberts v. the United Kingdom (1993)* case concerned the corporal punishment in a private school. The Court had the possibility to elaborate on the State obligations under Articles 3 and 8 within the context of private education system. The Court said that: "The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools[T]he Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals" ⁶⁵ The Court therefore held that the acts of a headmaster of a private school engaged the responsibility of the State and found a violation of the Convention.

The Court elaborated its position on positive obligations of States Parties under Article 3 as applicable to relations between private persons in the *A v. the United Kingdom* case. The Court explained its reading of the Convention as follows:

The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the

⁶² *Osmanoğlu v Turkey* (no. 48804/99), judgment of 24 January 2008, § 76.

⁶³ *Ergi v Turkey* (no. 23818/94), judgment of 28 July 1998, § 79.

⁶⁴ *Ibid*, § 82.

⁶⁵ *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A, No. 247-C.

Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.⁶⁶

In the *M.C. v. Bulgaria* case, the ECtHR stressed that the State is left with a wide margin of appreciation as concerns the means of protection of individuals from acts of other individuals. Clearly, the Court is mindful of the fact that there is no right under the Convention to have another private person or entity criminally prosecuted and that there may be other individual rights at stake which have to be balanced by the State when deciding on an appropriate action.⁶⁷ Nevertheless, the Court has pointed out the duty to enact relevant legislation for these purposes. This duty extends in relation to Article 8 issues concerning privacy and family life which is typically a very delicate sphere of relations between individuals. In the *M.C.* case, the Court explained:

Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life as at stake, requires efficient criminal-law provisions.⁶⁸

The *M.C.* case confirmed that effective protection of rights under Articles 3 and 8, even within the sphere of relations between individuals, require also an effective investigation and prosecution.⁶⁹ The scope of a positive obligation to conduct a diligent investigation where violence has taken place between private persons was further elaborated in the *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia* case. The case concerned the series of attacks by a group of Orthodox believers on the members of Gldani Congregation of Jehovah's Witnesses and their property which were not properly investigated by the police. The ECtHR confirmed that State's positive obligation to carry out an official investigation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents. Moreover the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law.⁷⁰

The difficulty of the tasks facing States is well captured in the Article 8 case-law of the Court concerning the environmental issues. In the case *Powell and Rayner v. the United Kingdom* in which the applicant submitted a complaint under Article 8 concerning the noise from the Heathrow Airport the ECtHR determined that "the existence of large international airports, even in the densely populated urban areas and increasing use of jet aircraft without questions become necessary in the interest of a

⁶⁶ *A v. the United Kingdom* (no. 25599/94), judgment of 23 September 1998, ECHR 1998-VI.

⁶⁷ *Supra*, note 58.

⁶⁸ *M.C. v. Bulgaria* (no. 39272/98), judgment of 2003, ECHR 2003-XII, § 150.

⁶⁹ *Ibid.*, §§ 151, 153.

⁷⁰ *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia* (no. 48804/01), judgment of 3 May 2007, § 97.

country economic well-being.”⁷¹ In this case Court found that Government had achieved a fair balance of interests as required under Article 8

In another case of *López Ostra v Spain*, the ECtHR held Spain liable for damages as it failed to prevent a waste treatment plant from polluting nearby homes violating the applicant’s rights for private and family life. The case involved the operation of a waste treatment plant that had been built in order to deal with the effluent tanneries in the area of a town called Lorca in Spain. In this case, the ECtHR took the opportunity to express the general principle that environmental pollution could result in human rights violations. The Court stated as follows: “Naturally, severe environment pollution may affect individuals’ well-being and prevent them from enjoying their homes in such way as to affect their private and family life adversely, without, however, seriously endangering their health”.⁷²

The ECtHR did not find it necessary to decide whether this amounted to direct interference by a public authority or whether the question should be analyzed in terms of a positive duty upon the State – to take reasonable and appropriate measures to secure the applicants’ rights. Either way, ECtHR found that the government had failed to act commensurately with the harm being caused by the plant and that Article 8 had thereby been violated. The ECtHR carefully noted that it was irrelevant whether or not the municipality in question had a legal duty to act within Spanish law or whether, if it had such a duty, it had satisfied the legal requirements. In this regard ECtHR said:

at all events, the Court considers that in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law (...) it need only establish whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life under Article 8.⁷³

In a latter case of *Guerra v Italy* at issue were toxic emissions from a fertilized plant. Although at various stages, the relevant Italian authorities did act, the overall government response was such that the factory continued to operate for a considerable period of time before being shut down. A large number of families in the vicinity of the factory, as well as workers at the factory, were exposed to large quantities of inflammable gas and other toxic substances such as arsenic trioxide which were released during the regular course of the factory production cycles. There had also been an explosion which sent 150 people to hospital on account of acute arsenic poisoning. In the *Guerra v Italy*, the ECtHR slightly amended its earlier approach by putting forward the requirement that the protection of family and private life must be efficient. The State, however, is left with a freedom to choose the means to be used in its domestic legal system in order to comply with the provisions of the ECHR or to redress the situation which has given rise to a violation of the ECHR.⁷⁴

In the *Hatton and others v United Kingdom* case, the Heathrow Airport issue appeared again before the Court but this time the complaint, brought by the individuals living in the vicinity of the airport, concerned the so-called 1993 Scheme – a governmental programme which eased the quota regime for the night flights. As a result, the applicants suffered from sleep disturbances. This case however was absolutely different from the previous cases before the ECtHR concerning the noise around the Heathrow Airport since it involved a particular governmental act (1993 Scheme) which worsened the *status quo* of the applicants. This time the ECtHR held that in a particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of the others. It also considered that the States are required to minimize, as far as possible, the interference with the individual right to respect for home and private and family life. For this purpose, the States must try to find alternative solutions and must seek to achieve their aims in the

⁷¹ *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A, No. 172, § 42.

⁷² *López Ostra v Spain*, judgment of 9 December 1994, Series A, No. 303 – C, § 25.

⁷³ *Ibid.*, § 55.

⁷⁴ *Guerra v Italy* (no. 14967/89), judgment of 19 February 1998, §§ 71, 73-74.

least onerous way as regards human rights. In order to do that a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.⁷⁵ The ECtHR found that in this case the State failed to achieve a fair balance between economic interests and the rights of applicants to private and family life, therefore Article 8 of the ECHR was breached.

No doubt, it is difficult for the European Court of Human Rights to pronounce on economic or security policy choices taken by the States. However, the *Hatton* case is instructive and suggests that the Court may consider it necessary to point out that the State has resorted to a policy decision which disproportionately interferes with individual rights.

Finally, one should mention relatively recent cases in which a debate as to the possible horizontal effect of the Convention as between private persons and entities has taken place and which show prospects for future developments of the case-law. In the *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom (2007)* case, the Court had to look into the operation of the legislation on adverse possession in the United Kingdom. The applicant companies lost the beneficial ownership of 23 hectares of agricultural land as a result of the operation of the 1925 and 1980 Acts to a squatter after 12 years of adverse possession. The companies complained about a violation of the right to property under Article 1 of Protocol 1. The Court explained:

The responsibility of the Government in the present case is therefore not direct responsibility for an executive or legislative act aimed at the applicant companies, but is rather *their responsibility for legislation which is activated as a result of the inter-actions of private individuals* (emphasis added): in the same way as the law in *James and others* was applied (and the Government were responsible for it) because private individuals had requested enfranchisement, in the present case the law was applied to the applicant companies only when the pre-existing conditions for the acquisition of title by adverse possession had been met. ...

[...] the Court has underlined that *it is not in theory required to settle disputes of a private nature*. It can nevertheless not remain passive, in exercising the European supervision incumbent on it, where a domestic court's interpretation of a legal act appeared "unreasonable, arbitrary or ... inconsistent ... with the principles underlying the Convention" (*Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004-VIII). When discussing the proportionality of a refusal of a private television company to broadcast a television commercial, *the Court considered that a margin of appreciation was particularly essential in commercial matters* (*Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 69, ECHR 2001-VI). In a case concerning a dispute over the interpretation of patent law, and at the same time as noting that even in cases involving litigation between individuals and companies the State has obligations under Article 1 of Protocol No. 1 to take measures necessary to protect the right of property, the Court reiterated that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, and not to deal with errors of fact or law allegedly committed by a national court unless Convention rights and freedoms may have been infringed (*Anheuser-Busch Inc. v. Portugal*, cited above, § 83).⁷⁶

As can be seen, in the field of property rights States have been granted a fairly broad margin of appreciation. Typically, these disputes would be settled in the framework of domestic civil proceedings and the European Court of Human Rights will not substitute its judgment for that of domestic civil courts. This does not mean that certain positive obligations are not developed with respect to the peaceful enjoyment of property, in particular the obligation to compensate and the prohibition of discrimination.

⁷⁵ Ibid, § 97.

⁷⁶ *J.A.Pye (oxford) Ltd and J.A.Pye (Oxford) Land Ltd v. the United Kingdom* (no. 44302/02), judgment of 30 August 2007, §§ 57, 75.

In the *Pla and Puncernau v. Andorra* case, the question as to the role of the ECHR in disputes between private persons of a classical civil law nature was tested further. The case concerned a dispute over the interpretation of a will. National courts determined that adopted sons were not entitled to inherit the mother's estate. As stated by dissenting Judge Garlicki, a will contained a clause discriminating against adopted children. Classically a will is a private act *par excellence*. Judge Garlicki identified the question for the Court as follows: to what extent the Convention enjoys a 'horizontal' effect, that is, an effect prohibiting private parties from taking an action which interferes with the rights and liberties of other private parties? If translated into the terminology more commonly used by the Court, the question is as follows: is the State under an obligation to either prohibit or refuse to give effect to such a private action?

The Court explained the extent and the way in which it touches upon the relations between the private parties in the following manner:

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

In the present case, the High Court of Justice's interpretation of the testamentary disposition in question had the effect of depriving the first applicant of his right to inherit under his grandmother's estate and benefiting his cousin's daughters in this regard. Furthermore, the setting aside of the codicil of 3 July 1995 also resulted in the second applicant losing her right to the life tenancy of the estate assets left her by her late husband.

Since the testamentary disposition, as worded by Carolina Pujol Oller, made no distinction between biological and adopted children it was not necessary to interpret it in that way. Such an interpretation therefore amounts to the judicial deprivation of an adopted child's inheritance rights.⁷⁷

In other words, the Court considered that the actions contrary to the Convention derived from the Andorran courts' decisions and not from the way the will of the private person was worded. Two judges dissented on this point.

The two cases show the difficulties that the Court faces as to the assessment of the obligations that may 'indirectly' derive from the Convention prohibiting private persons from taking actions. The Court primarily examines the actions of State bodies *qua* legislation or judicial and executive decisions. Furthermore, as suggested by Judge Garlicki, there must be a difference between the level of protection against a private action and the level of protection against State action. This may well be true where classical civil law transactions are concerned. Nevertheless, the prohibition of torture must entail the same level of protection whether the alleged perpetrators are State or private agents. It is true that there is a difference in terms of how strict the positive obligations are and what margin is left to the States in implementing their obligations. The difference, however, is more in the nature of the rights. It seems to become less dependent on the author of a violation.

To sum up, as Judge Spielmann has identified, there are three methods that the Court uses in order to extend the application of the Convention in respect of the relations between the private parties.⁷⁸ It is

⁷⁷ *Pla and Puncernau v. Andorra* (no. 69498/01), judgment of 13 July 2004, ECHR 2004 –VIII.

⁷⁸ See Dean Spielmann, "European Court of Human Rights" (forth-coming, on file with author).

through the development of positive obligations of States, the interpretation of private law instruments in the light of the Convention and the balancing of private rights in the light of general interest.⁷⁹

As shown, there is a gradual evolution of the scope of substantive rights and obligations of States to ensure that in relations between private persons and entities the Convention is complied. The question that remains to be addressed concerns the jurisdiction of the Court over human rights violations allegedly committed by such entities as PMCs abroad and the imputability of their acts to the States Parties to the Convention. The judgments in the *Issa v Turkey* and the *Islamic Republic of Iran Shipping Lines v Turkey* case can be instructive as to the principles that the Court will look at in dealing with the question of jurisdiction and imputability. In the *Issa* case, the Court recapitulated its understanding of the notion of jurisdiction. It referred to “the term’s meaning in public international law”.⁸⁰ As concerns “the acts of Contracting States performed outside their territory or which produce effects therein (‘extra-territorial act’)”, the Court reiterated its previous case-law by saying 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.⁸¹

The Court has accepted the principle that a jurisdictional nexus can be established where State agents are in control of individuals in the other State. If the principle announced by the Court in the *A v. the United Kingdom* case is kept in mind and is combined with the principle that the Contracting States should not support abroad something that they do not support at home, there is a way to bring the actions of PMCs within the scope of the Convention. The national regulation and the terms of contracts for PMCs will be important in such a case since one will have to determine whether one can consider PMC personnel as State agents in a sense that they are carrying out tasks entrusted by the State.

The case-law of the Court determining what entities constitute ‘governmental organizations’ as opposed to ‘non-governmental organizations’ has to be borne in mind. Typically, the Court would include legal entities which participate in the exercise of governmental powers or run a public service under governmental control within the scope of governmental organizations. The Court has said that “account must be taken of [entity’s] legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of [entity’s] independence from the political authorities” for the purposes of drawing a distinction between governmental and non-governmental organizations.⁸² Once again, if confronted with a case of a PMC the Court will have to determine the possible connection with the respondent State. It may be quite clear that PMCs are commercial companies but the nature of their activities and the context may indeed distinguish them from the other businesses. Whether that may be sufficient to hold the State responsible for the purposes of the Convention remains to be seen. In this connexion, in addition to the above referred *Costello-Roberts v. the United Kingdom* case the *Van Der Musselle v Belgium* case can be relevant. It is to be recalled that in this case a young lawyer complained that the scheme developed by the professional association of lawyers in Belgium which obligated him to represent individuals for reduced fees represented a violation of his rights under Article 4. Since the scheme was imposed by a private organization, the Government tried to avoid its responsibility for the infringement of the rights of the applicant. The ECtHR was not convinced by the Government’s argument and stated that under

⁷⁹ For a recent example, see *Evans v. the United Kingdom*, (no. 6339/05), judgment of 10 April 2007.

⁸⁰ *Issa and Others v. Turkey* (no. 31821/96), judgment of 16 November 2004, ECHR 2004 - , § 67.

⁸¹ *Ibid.*, §§ 68, 71.

⁸² *Islamic Republic of Iranian Shipping Lines v. Turkey* (no. 40998/98), judgment of 13 December 2007, § 79.

national law the association of lawyers had the power to compel lawyers to defend individuals for a reduced fee. Thus the association of lawyers was empowered by the law of the State to exercise certain governmental functions and this was attributable to Belgium.⁸³ Indeed, the nature of the functions that a PMC might be asked to carry out by the State may be of a decisive importance as well as the national legislative framework. The question of attribution of responsibility to a State for actions or omissions of a PMC does not prejudice the evolvement of the scope of positive obligations, as shown by the case-law on Articles 2, 3 and 8, and there is a possibility for the Court to expect that the States enact certain legislation applicable to such companies and develop relevant enforcement mechanisms.

D. Conclusions

One can clearly observe that all human rights mechanisms through the various methods adapted to their specific mandates have advanced towards holding States more and more responsible for acts of private persons and entities. The development of the notion and scope of positive obligations of States has provided the monitoring bodies and the courts with important powers to demand certain actions to be taken by the States that, by extension, restrict the freedom of action of private persons and entities where rights of other persons or important public interests, even fundamental values, are concerned. In other words, the classical understanding that human rights exist and are to be enforced within the framework of the relations between the individuals and the State or public authorities has probably never really corresponded to the reality of social relations and the legal regulation therein. Private persons and entities can and do violate the rights of the other private persons and entities. Depending on the issue, it either may not be acceptable at all or at least call for a balancing between the rights concerned by the competent authority. As the survey presented above shows, the human rights mechanisms by demanding that States adopt variety of measures have made them more engaged even in very delicate areas of the relations between private persons, such as the area of private and family life. It is true, however, as confirmed by the case-law of the European Court of Human Rights, any further development of positive obligations should carefully weigh all the interests at stake, such individual freedoms, rights of the others and public interests.

3. Duties of Private Persons and Entities under International Human Rights Law

A. Duties

It is interesting to note that the drafters of the Universal Declaration of Human Rights considered it important to have a separate provision on duties towards the community. The Universal Declaration of Human Rights (UDHR) in Article 29 states that:

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

However, the concept of duties is followed by an important safeguard in paragraph 2 of the article which is subsequently taken up in the relevant human rights treaties and which limits the possibility of restrictions on individual human rights in the name of the society or the other persons.

⁸³ Clapham, *supra* note 47, p. 382.

The only other instrument which has developed the notion of duties of individuals is the African Charter on Human and Peoples' Rights in its Chapter II. For example, Article 27 states:

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

It is to be noted that this Chapter has been considered as rather controversial possibly leading to abuse of human rights by the governments.⁸⁴ The concept of duties in the African Charter appears to differ from the scope and the idea embodied in the UDHR. The fact that the notion of duties can be tricky was noted by Opsahl & Dimitrijevic who summed up the dangers built into this notion as follows:

Making the enjoyment of human rights dependent on the fulfillment of duties towards the State has a suspiciously illiberal ring; it has too frequently served as a cover to deny human rights altogether or to delay progress in this field.

... They are often said to concern values that have been expressed in human rights terminology, sometimes called a "third generation" or "dimension" of human rights, respectively "collective" or "solidarity" rights. Behind this terminology are serious concerns such as development, security, peace, and the environment. But the legislative needs cannot simply be met by recognizing new individual rights; rather there is a need for more international law, setting out more duties and responsibilities for individuals, as well as for groups and States.⁸⁵

The authors admit that the existing framework of international law offers sufficient possibilities to protect the existing human rights provided the mechanisms for holding private persons and entities and States responsible are strengthened.

The fifth preambular paragraph of both UN Covenants refers to the individual's "duties to other individuals and to the community to which he belongs". Where the provisions allow for legitimate restrictions and the balancing of interests, that implies certain obligations of private persons and entities with respect to the others. Both the ICCPR and the ECHR accompany the idea of permissible restrictions with another safeguard. For example, Article 18 of the ECHR provides that:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

In this way the human rights treaties follow the regulation of human rights as originally conceived in the UDHR. Private persons and entities have to realize that living in the society with others may bring about certain restrictions on their rights and freedoms. However, these restrictions should be necessary and justified and should not deprive anyone of the very essence of the rights. The reasons for this structure of international human rights law can be found in the very idea of human rights. As Rosalyn Higgins puts it: "Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of being a human person. And, although they may most effectively be implemented by the domestic legal system, that system is not the source of the right".⁸⁶ If we bring this definition further and place it within the context of the current research, we would say that private persons and entities are no more entitled than the States to violate integrity and dignity of another human being. In other words, just because the juxtaposition involves two private persons the

⁸⁴ See Torkel Opsahl and Vojin Dimitrijevic, „Articles 29 and 30”, in Alfredsson & Eide (eds.) *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, Boston, London: Martinus Nijhoff Publishers, 1999, pp. 639 – 640.

⁸⁵ Ibid., pp. 641-642.

⁸⁶ See Rosalyn Higgins, *Problems and Process. International Law and How We Use It*, Oxford: Clarendon Press, 1994, p. 96.

human right does not disappear. PMCs are no exception – they too bear duties towards the other individuals and the society. The UDHR saw very early on that the States will bear the responsibility for balancing the rights and duties of individuals.

B. Abuse of Rights

Furthermore, Article 30 of the UDHR determines another important element in the structure of international human rights law later taken over by all the relevant human rights treaties. It defines the notion of prohibition of abuse of rights as follows:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.⁸⁷

The prohibition of abuse of rights has had an effect for the purposes of access to international human rights enforcement bodies. For example, the European Court of Human Rights has applied Article 35 § 3 in declaring the application inadmissible when it considered that the applicant abuses the right of application.⁸⁸ The Court has also applied a wider notion of abuse of rights under Article 17 which states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

In the *Kühnen* decision the European Commission of Human Rights explained the scope of Article 17 by saying that it “covers essentially those rights which will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular, the Commission has found that the freedom of expression enshrined in Article 10 (Art. 10) of the Convention may not be invoked in a sense contrary to Article 17 (Art. 17) (see Nos. 8348/78, 8406/78, *Glimmerveen and Hagenbeek v. the Netherlands*, Dec. 11.10.79, DR 18 p.187).”⁸⁹

It is true that even if the treaty-monitoring bodies may refuse their availability to the individuals and legal entities, something which they do in exceptional circumstances only and which can be seen as a kind of a punishment for acting contrary to human rights, this is only an indirect way of ensuring responsibility at an international level and it is left to discretionary powers of the monitoring bodies. Nevertheless, such a tool exists.

4. General Conclusions and Some Suggestions

It seems that the existing human rights law contains all the necessary elements to hold such specific legal entities as private military or security contractors accountable for human rights violations. There

⁸⁷ Common Article 5 (1) of the ICCPR and ICESCR provides that the Covenants should not be interpreted as implying “for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights ... recognized herein”.

⁸⁸ See *Mohammad Hossein Bagheri and Malihe Maliki v. the Netherlands* (no. 30164/06), decision of 15 May 2007. The decision states: “The Court reiterates that an application may be rejected as abusive under Article 35 § 3 of the Convention, among other reasons, if it was knowingly based on untrue facts (see, as to abuse of the right of application, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Popov v. Moldova (no. 1)*, no. 74153/01, § 48, 18 January 2005; *Rehak v. Czech Republic* (dec.), no. 67208/01, 18 May 2004; and *Kérétchachvili v. Georgia* (dec.), no. 5667/02, 2 May 2006).”

⁸⁹ *Michael Kühnen v FRG* (dec.), no. 12194/86, 12 May 1988.

are a number of elements that are of a particular importance and that may need to be strengthened. The obligation to prevent which, as shown, is very well developed both at the UN level and by the Inter-American Court may need to be further elaborated within the European setting. There may be a room for a common European legislative initiative. The idea could be explored to draw upon the experience of the so-called human rights conditionality clauses common in the EU's enlargement and cooperation projects. The States could be required to insert such clauses in contracting some of their tasks to military or security companies.

In this context, the fact that PMCs are an important reality because States resort to their assistance in carrying out the functions that typically would have been ensured by the States themselves should not be used to absolve States from their responsibility. On the contrary, as done before by the UN monitoring bodies and the ECtHR when pronouncing on the responsibility of States for acts within private sector, the States should be held responsible for human rights violations where PM/SCs have been entrusted with functions of responsibility over human beings.

The question of a remedy for victims of human rights violations remains a difficult one. Where a contract is governed by the domestic law of the so-called sending State, the relevant legislative framework and the terms of the contract will be important. Normally, there has to be a remedy in civil law for the breach of contract. However, the access to the foreign courts by the victims, residents abroad will not be a simple issue. It is therefore that the focus of attention should be the obligation of the States to ensure a proper criminal investigation and prosecution. This approach would follow the approach of the regional courts where in the existing jurisprudence they require the enactment of criminal remedy and the carrying out of a diligent investigation for acts of violence between private persons.

The question of the access to the European Court of Human Rights should also be looked at. In this context, the issues of jurisdiction and imputability will have to be solved. *A priori*, where it can be established that the staff of a military company had a control over the victims of human rights violations and the Court would be prepared to accept that the contract between the State and the company whereby the State pays the company for its services can assimilated to the test of a political and financial support, its jurisdiction could be established, even if the company is institutionally totally independent from the respondent State. Again, also for the jurisdiction purposes of the Court a particular legislative framework in Europe would be useful since it would allow the Court to look into positive obligations of the States as concerns the behaviour of private military contractors in carrying out their contracts.

In the end, it should be reiterated that indeed international human rights offers various ways of holding PM/SCs accountable for their actions. However, there is a need for some political will and for cases being brought to the courts so as to test the conclusions reached in the scholarly writings.