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PRIVATE MILITARY AND SECURITY COMPANIES:
POSITIVE HUMAN RIGHTS OBLIGATIONS OF THE HOST STATE

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Abstract

This paper examines the positive human rights obligations of states on whose territory private military and security companies (PMSCs) operate. It considers the obligations to prevent human rights violations; the obligations to investigate violations, to prosecute their perpetrators and to provide reparations to the victims. The paper analyses the case-law and views of the monitoring bodies of the main universal and regional human rights instruments, applying it to the host state of PMSCs. This case-law confirms that the general duty to protect human rights is primarily conferred upon the state in whose territory violations may occur.

The lack of institutional capacities often complicates or precludes compliance with these obligations. Moreover, military occupation or other forms of effective control exercised in the state's territory by third states also affect the host state's obligations and may give rise to extra-territorial application of human rights. The paper argues that the host state of a PMSC can nevertheless be held accountable for violation of a positive obligation, when human rights violations occur which do not fall within the scope of such effective control and where the institutional capacities are sufficiently developed to comply with at least some of these obligations. Such capacities vary among states and may evolve over time, such as in a transitional post-conflict phase. Therefore, host states of PMSCs should be aware of their obligations under human rights law and, to the extent possible, ensure compliance with these duties.

Private Military and Security Companies: Positive Human Rights Obligations of the Host State

CHRISTINE BAKKER*

1. Introduction

Building on the General Report examining the human rights obligations of states included in various international and regional human rights instruments¹, this contribution to the PRIV-WAR project is complementary to the papers examining the positive human rights obligations of the home state² and those of the hiring state.³ Positive obligations are understood as those obligations contained in human rights instruments which require states parties to take certain measures to ensure respect for these rights, as opposed to the negative obligations, requiring states parties to refrain from violating the human rights protected by these instruments themselves.

This paper aims to examine which of the positive human rights obligations specifically pertain to those states on whose territory private military and security companies (PMSCs) operate. These states will be referred to as 'host states'. First, the *obligations to prevent* human rights violations will be considered (paragraph 2) followed by an examination of the *obligations to investigate* violations, *to prosecute* their perpetrators and *to provide reparations* to the victims (paragraph 3).

In practice, some limiting factors exist which complicate or even preclude compliance with these obligations. They consist, in particular of (1) the lack of institutional capacities and governmental structures; and (2) military occupation or other forms of 'effective control' exercised in its territory by one or more third states in an armed conflict or post-conflict situation. Finally, states may formally derogate from their human rights obligations by invoking a derogation clause included in the different human rights instruments (3).

As a preliminary observation, it should be noted that the positive obligations to prevent and, to a certain extent also the obligations to investigate and punish human rights violations, pertain to all states that are involved in the deployment of a PMSC. Besides the host state, these are the state which has concluded the contract with the PMSC (hiring state or contracting state) and the state where the PMSC is registered (home state); at least when they are parties to the human rights instruments from which the obligations derive.⁴ Often the hiring state and the home state are the same - for example when Blackwater - now Xe Services -, or DynCorp are contracted by the US or Control Risks by the UK-, but this is not always the case. Therefore, the same obligations will generally apply to two or three states simultaneously.

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¹ Francesco Francioni and, Federico Lenzerini, *The Role of Human Rights in Regulating Private Military and Security Companies. General Report – Universal and Regional Systems: Latin-America, Africa and Asia*, EUI Working Papers, AEL 2009/16; Ieva Kalnina and Uģis Zeltins, *The Role of Human Rights in Regulating Private Military and Security Companies. General Report - The European System*, EUI Working Papers, AEL 2009/17.

² Francesco Francioni, *The Responsibility of the PMSC's Home State for Human Rights Violations Arising from the Export of Military and Security Services*, EUI Working Papers, AEL 2009/18.

³ Carsten Hoppe, *Positive Obligations of the Hiring State for Human Rights Violations Arising in Connection with the Provision of Coercive Services by a PMSC*, EUI Working Papers, AEL 2009/19.

⁴ See De Schutter, O., *The Responsibility of States*, in Chesterman, S. and Fischer, A., *Private Security, Public Order* (OUP, 2009), pp. 27-45, at p. 33 (obligations of the host state) and pp. 34-44 (obligations of the home state). See also Farrior, S., *State responsibility for Human Rights Abuses by Non-State Actors*, in *Proceedings of the American society of International Law*, vol. 92(1998), at p. 299, cited by De Schutter, O., at p. 33, note 29.

In practice, the situation may occur that the hiring state or the home state is in a better position to comply with these obligations, for instance when the hiring state exercises full control over the PMSC activities and the host state is not involved in the oversight at all. The ‘matrix’, as it were, of human rights obligations pertaining to these different states may also change due to the evolving circumstances. If the effective control over a territory is first exercised by an occupying power, and this control is subsequently passed over to the host state, this may have consequences for the positive human rights obligations, even if the host state has not developed sufficient institutional capacities to comply with these obligations. It is especially in these transitional phases that there is a risk of a ‘human rights void’, where no state is actually taking the measures required to ensure the protection of these rights.

A. *Lack of Institutional Capacities*

In practice, the lack of institutional capacities often limits the *de facto* possibilities for the host state to comply with its positive human rights obligations. However, the degree to which these institutional capacities are dysfunctional varies from one state to another. Moreover, as mentioned above, the institutional framework may evolve over time, for instance with external support for reconstruction and institutional development; and/or due to improving economic and political conditions in a post-conflict situation. It is difficult to assess to what extent the host state is, or is not capable of taking certain measures, and in which circumstances the positive human rights duties (also) pertain to the contracting and home states. To date, the monitoring bodies of the main human rights conventions have not developed any specific criteria in this regard.

However, the notion of the *inability* of a state to comply with certain obligations under international law is explicitly included in the Statute of the International Criminal Court (ICC Statute). In the context of its complementarity regime, the ICC Statute also foresees the situation in which a state is *unwilling* to genuinely investigate and prosecute international crimes. It is acknowledged that provisions of international criminal law cannot, by themselves, be applied to human rights law due to the differences between these two bodies of law in terms of their addressees and the nature of responsibility to which they give rise (individual criminal responsibility vs state responsibility). Nevertheless, this parallel could provide some useful elements when considering in which circumstances a state can be considered not to be capable to comply with its obligations under human rights law as well. This is especially true as regards the positive obligations of states to investigate human rights violations and to prosecute the responsible persons.

The ICC Statute states, in Article 17(3), that in order to determine *inability* of a state to comply with its obligation to investigate and prosecute in a particular case,

...the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The terms ‘total or substantial collapse or unavailability of its national judicial system’ point to a rather high threshold. In other words, if the national judicial system is only partially ‘collapsed’ this would not be considered as a sufficient justification for the state not to comply with its obligations under the statute. The Office of the Prosecutor explained in a Policy Paper of 2003, that

(t)his provision was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder

*leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.*⁵

The criteria of a 'lack of central government' and 'a state of chaos due to the conflict or crisis' may be useful when analyzing the inability of a state to comply with its international obligations, including its positive human rights obligations.

Finally, Article 17(2) enumerates some criteria for determining *unwillingness* of a state to genuinely investigate and prosecute: (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility; (b) an unjustified delay in the proceedings; (c) the proceedings were not or are not being conducted independently or impartially. With regard to the two last-mentioned criteria, the Court will consider whether in the circumstances, such delays or the lack of independence or impartiality in the proceedings are inconsistent with the intent to bring the person concerned to justice.

The abovementioned elements support the argument that the positive obligations of the host state of a PMSC deriving from human rights instruments to which it is a party, cannot be considered to be 'waived' in all situations where there is a lack of institutional capacities. When considering whether a host state is unable to comply with its obligations, the threshold should not be set too low. Possible criteria in this regard include the lack of central government, or a total collapse of its institutional and administrative system, which prevent the state from discharging its duties.

Therefore, the host state's authorities should be aware of these obligations and make maximum efforts to take the necessary measures to prevent and sanction violations of human rights. This situation changes, however, in certain circumstances, which will now be considered.

B. Military Occupation or Effective Control by a Third State

Suspension of the human rights obligations of the host state may arise in the case of a military occupation by a foreign state in (part of) the state's territory; or in a situation not amounting to occupation, but where a third state nevertheless exercises effective control over (part of) the territory. The positive human rights obligations then temporarily pertain to the state exercising such control. As outlined in the general report on human rights obligations, the case-law of the human rights courts and monitoring bodies provides some clarification on the term effective control, while addressing the question of extraterritorial application of human rights instruments. It should be noted that this case law focuses on the question to what extent the *foreign state* (e.g. military operations by Turkey in Cyprus or Iraq; or by NATO member states in former Yugoslavia) is bound to ensure the human rights obligations on the territory of the state where these operations are carried out. However, it does provide some elements on the consequences for the obligations of the host state as well. The main positions of the monitoring bodies can be summarized as follows:

(1) the European Court of Human Rights (ECtHR) emphasizes 'effective control' of a territorial area in a foreign state as the main criterion for extraterritorial application of the Convention⁶, while acts of state agents, exercising some authority or control may also constitute the basis for such an application.⁷ These two criteria are still considered as exceptional situations.⁸ The Court has

⁵ Paper on some policy issues before the Office of the Prosecutor, ICC-OTP 2003-4, September 2003, available at www.icc-cpi.int.

⁶ *Loizidou v. Turkey (prel.obj.)*, EComHR (1995), Series A, vol. 310, at par. 62; *Cyprus v Turkey*, ECtHR (2001), Appl. No. 25781/94, par. 77; this position was confirmed in *Demades v. Turkey*, ECtHR (2003), Appl.No. 16219/90.

⁷ ECtHR, *Cyprus v. Turkey*, (Appl Nos. 6780/74 and 6950/75), EComHR 26 May 1975, stating that '*the authorised agents of the state, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other person or property "within the jurisdiction" of that State, to the extent that they exercise authority over such*

underlined the essentially regional nature of the Convention and its primary application within the legal sphere of the Contracting States.⁹ At the same time; since 2004, the Court has also recognized the possibility of extraterritorial application in third States, in the same above-mentioned exceptional situations.¹⁰

(2) While the Inter-American Commission on Human Rights (IACoHR) also bases its acceptance of extraterritorial application of the American Declaration and the American Convention on the criterion of effective control, this ‘control’ is not related to the territory, but rather to the acts of the state agents exercising authority or control in the foreign State.¹¹ Its interpretation of such control seems to be broader than that of the ECtHR, since the IACoHR also recognized the shooting of civilian airplanes in international airspace as falling within that scope (as opposed to the more restrictive interpretation adopted by the ECtHR in *Bankovic*).¹²

(3) The United Nations Human Rights Committee (HRC) has also linked the notion of ‘effective control’ more to the persons/agents exercising such control than to the territory. It has adopted a more contextual approach, also considering the factual situation in relation to the *violation* which occurred.¹³

The case-law of the ECtHR on extraterritoriality is not entirely consistent, or at least gives rise to uncertainty as to its exact meaning. This is also relevant for the subject of this paper, because the recognition of positive human rights obligations of a state abroad may have consequences for the same obligations of the host state. In particular, the statement in *Bankovic* emphasizing that the Convention operates in an essentially regional context and notably within the legal space of its Contracting Parties, is at odds with its later decisions adopting the broader formulation of *Issa*, confirming the possible extraterritorial application in third states, even if they are not a party to the European Convention on Human rights (ECHR). These differences have led some national courts to selectively apply the

(Contd.) _____

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

⁸ *Banković a. o. v. Belgium and 16 Other Contracting States*, ECHR (2001), Appl. No. 52207/99, at par. 71.

⁹ *Ibid* at par. 80.

¹⁰ *Issa and Others v Turkey*, Judgment (2004), App. No. 31821/96, at paras 69-71; this position was reiterated in *Ben el Mahi and Others v. Denmark*, ECtHR (2006), Appl.no. 5853/06, at 9; *Mansur PAD and Others v. Turkey*, ECtHR (2007), Appl. no. 60167/00, at par. 53; *Isaak and Others v. Turkey*, ECtHR (2006) Appl.No. 44587/98, at 19. The Issa Judgment is also mentioned in *Stephens v. Malta (no. 1)*, Appl. No. 11956/07, Final Judgment of 14 September 2009, at par. 49, as providing an example of the exceptional situations in which an extra-territorial application of the Convention is accepted.

¹¹ *Victor Saldaño v. Argentina*, IACHR report No. 38/99, 11 March 1999; *Coard and Others v. the United States*, IACoHR Report No. 109/99, Case No. 10.951, 29 September 1999.

¹² *Armando Alejandro Jr. And Others v. Cuba*, IACHR Report No. 86/99, Case No. 11.589, 29 September 1999 at par. 25.

¹³ *Saldias de Lopez v. Uruguay*, HRC, Communication No. 52/1979, CCPR/C/13D/52/1979; *Lopez Burgos v. Uruguay*, HRC (1981), Communication No. 52/1979, CCPR/C///13/D/1979, at par. 12.3., and *Celeberti de Casariego v. Uruguay*, HRC (1981) Communication No. 56/1979, at par. 10.3, stating that : *Article 2(1) does not imply that the State Party cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.* In its Concluding Observations on Israel (2003), the HRC no longer refers to the notion of ‘effective control’, but states: ‘(...)in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by [Israel’s] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law . Concluding Observations on Israel (2003), UN Doc. CCPR/CO/78/ISR, at par 11.

European case-law, thereby adding to the lack of clarity. Indeed, the UK House of Lords in *Al-Skeini*¹⁴ has followed the Court's restrictive reasoning in *Bankovic*, while dismissing the *Issa* position. In this case, which concerned six Iraqi citizens who were killed by British troops in Iraq, the Law Lords found that only one of the incidents -which occurred in a British-run detention facility-, fell within the scope of the Convention (and thus under the British Human Rights Act), since the UK had effective control over that detention facility. This selective application of certain elements of the Strasbourg case-law, without a detailed consideration whether the other incidents in the case might fall under the second exception expressly mentioned by the Court itself, namely through the specific actions of its agents abroad, is regrettable.¹⁵ On the other hand, one could also welcome the fact that the House of Lords has expressly recognized the applicability of the UK's positive human rights obligations abroad, - even in the territory of a non-state party to the ECHR-, at least in those situations where it exercises effective control.

Based on this case-law, the following example could be given of a possible application in practice. Whereas during the military occupation of Iraq by the US and the Coalition Forces the positive human rights obligations of Iraq were suspended (and these obligations then pertained to the Coalition Forces); after the transfer of power to the newly elected government, in principle, these obligations pertain once again to the Iraqi authorities. Clearly, exceptions will occur as long as foreign forces provide substantial military support. To the extent that these forces -or PMSCs-, as part of their operations again exercise 'effective control' over a certain area; or through their acts put Iraqi citizens under their authority or control, this foreign state will once again be bound to ensure the human rights of the individuals within that territory or under such control.

Indeed, the ECtHR has held that in a situation of effective control (military occupation of Turkey in Northern Cyprus Turkey's 'responsibility cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that (...) Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'¹⁶ This means that in such a situation, the positive obligations of the host state in the occupied territory are considered to be suspended. On the other hand, it also implies that when the occupation comes to an end, these obligations would again have to be fulfilled by the host state.

Moreover, in a situation of effective control exercised over, e.g. a detention facility by the agents of a foreign state such as in *Al-Skeini*, it follows from the existing European and British case-law that the full range of positive obligations in respect of the individuals present in that facility, pertain to the state exercising such control. Even though there are no specific cases on PMSCs, it is argued that the same conclusion could be drawn when the state exercises such effective control by delegating the task to guard a detention facility to a PMSC.

¹⁴ UKHL, *Al-Skeini and Others v Secretary of State for Defence*, 2007.

¹⁵ For a critical analysis of the *Al-Skeini* decision, see Abdel-Monem, Tarik a.o., *R (On the application of Al-Skeini) v. Secretary of Defence: a Look at the United Kingdom's Extraterritorial Obligations in Iraq and Beyond*, 17 Florida Journal of International Law (2005), pp 345-364 (criticizing the High Court's analysis of the Strasbourg law, arguing that by neglecting the more recent decision in *Issa*, the High Court has side-stepped the possibility that it marks a new, broader expansion of the European Convention's coverage outside the boundaries of Europe); Kerem Altiparmak, Kerem Altiparmak, *Human Rights Act: Extra-territorial Application; Al-Skeini a.o. v Secretary of State for Defence*, in 72 Journal of Criminal Law (2008), pp 27-33, at 30, citing L.J. Brooke in 69 Journal of Criminal Law (2005), pp.295-301, (arguing, that a more plausible explanation is needed of the contradiction between *Bankovic* and the post-*Bankovic* case-law and criticizing that the House of Lords failed to apply the 'state agent authority doctrine' by relying so strongly on *Bankovic*).

¹⁶ *Cyprus v. Turkey*, *supra* note 6, at par.77

As mentioned above, the case-law and views of the IACtHR and the HRC recognize a broader scope of extraterritorial application, less strictly tied to the notion of effective control over *territory*. As a consequence, the threshold for recognizing the applicability of positive obligations of the hiring state or the home state of a PMSC is lower. This may also lead to the conclusion that, consequently, the obligations of the host state would be considered to be suspended in a broader range of situations.

C. Derogation Clauses

Many international and regional human rights instruments include a provision enabling states parties to derogate from its obligations in exceptional situations.¹⁷ The state party invoking its right to derogate from its obligations shall immediately inform the other states parties of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made on the date on which it terminates such derogation. However, such derogation or suspension is not permitted for certain fundamental rights. The prohibition of torture is excluded from derogation in all instruments. The right to life cannot be derogated according to the ICCPR and the ACHR; the ECHR states that no derogation from this right can be made, ‘except in respect of deaths resulting from lawful acts of war.’ Also the freedom from slavery may not be derogated according these three instruments. On the other hand, the right not to be subjected to arbitrary or unlawful detention is not excluded from the derogation clause.

Moreover, the right to life (with the above specification in the ECHR); the freedom from torture and the freedom from slavery may not be derogated even in a time of war or public emergency. In practice, these derogations have only been invoked in very few instances.¹⁸ However, the fact that states are allowed, if they invoke the derogation procedure, to suspend their obligation to protect persons from arbitrary or unlawful detention, could be of relevance here. This is one of the violations that could, in theory, be committed by a PMSC. Thus if the host state would invoke the derogation clause and suspend all rights and obligations except those explicitly excluded, this state could not be held accountable for having failed to prevent such conduct. It becomes even more serious if the unlawful detention results in ‘enforced disappearance’ of the detainees.

It follows from this first examination that both the lack of institutional capacities, and the exercise of effective control or state agent authority by one or more foreign states in an armed conflict or post-conflict situation, substantially limit the possibilities for the host state to comply with its positive human rights obligations. Even though in practice the host state may very often not be able to comply with these obligations, this needs to be established on a case-by-case basis. Therefore, it is argued that a host state of a PMSC could be held accountable for violation of a positive obligation; precisely in situations where human rights violations occur which do not fall within the scope of effective control of a foreign state; and where the institutional capacities in the host state are sufficiently developed to enable it to comply with –at least some- of these obligations. For these reasons, it is nevertheless appropriate to consider how these positive obligations as interpreted by the human rights courts and monitoring bodies can be applied to the host state, to the extent that the factual constraints do not exclude their compliance from the outset.

¹⁷ International Covenant on Political and Civil Rights (ICCPR), General Assembly resolution 2200A (XXI) of 16 December 1966, Article 4 ; ECHR Article 15; American Convention on Human Rights (ACHR), O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, Article 27.

¹⁸ The UK has invoked the derogation clause of the ECHR on 18 December 2001 after the terrorist attacks of 9/11 in the USA, with a view to adopting provisions in the Anti-terrorism, Crime and Security Act 2001, granting the Government an extended power to arrest and detain foreign nationals suspected to pose a risk to the national security. The derogation specifically concerned Article 5(1) of the Convention, which prohibits arbitrary or unlawful detention. The derogation was challenged before the ECtHR in *A. and Others v. the United Kingdom*, App. no. 3455/05, Judgment of 19 February 2009. The Court concluded that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals (par.90).

2. Positive Obligations to Prevent Human Rights Violations: Applying the Case-Law on the General Obligation to Prevent to the Host State of PMSCs

The positive obligations to prevent human rights violations fall within the scope of the obligations to ensure respect for these rights. Each human rights instrument contains the general obligation of all states parties to respect and ensure the rights included therein to all persons within their jurisdiction. This general obligation implies a series of other obligations which are more specifically geared towards the protection of each individual right, such as the right to life or the freedom from torture. In principle, these obligations pertain to all states parties to the relevant convention.

In this paragraph, the main elements of the relevant case-law of the human rights courts and monitoring bodies as reviewed in the general report will be applied to the host state in connection with the operation of PMSCs in its territory.

A. UN Human Rights Committee

The general obligation to respect and ensure the rights enshrined in the ICCPR requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.¹⁹

This general duty implies that the host state must ensure that the acts amounting to violations of human rights,- in particular the right to life; the prohibition on torture; the prohibition on slavery; and the prohibition on arbitrary or unlawful detention- are incorporated as crimes in its national criminal code. The host state should take administrative measures to exercise a minimum of control over the functions performed by PMSCs and over the selection of these corporations. To this end, it could consider establishing an authorization regime for PMSCs at the national level requiring these companies to obtain prior authorization to perform services within the host state's territory. In this regard, the host state could establish an authorization authority for PMSCs responsible for checking the background of each PMSC; their internal accountability procedures; the training provided to its personnel including on human rights, IHL, and the use of force; their past involvement in human rights or IHL incidents. The granting of such an authorization could then be made conditional on the fulfillment of certain criteria in terms of training; accountability; chains of command; supervision by/reporting to military commanders of (most likely) the hiring state, depending on the role and functions performed by the latter state in the territory in a certain period of time.²⁰ If the host state lacks the institutional capacities and governmental structures to ensure an effective authorization system –which will often be the case-, it could consider requiring the necessary safeguards and information from the hiring state, especially if this is also the home state of the corporation. This corresponds to the situation in Iraq and Afghanistan, where PMSCs are contracted by, in particular, the US and the UK, each applying their own national requirements in this respect.

The HRC has also expressed itself on the question what the obligation to prevent entails in terms of more specific duties, as follows:

¹⁹ Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, at para 7.

²⁰ The Montreux Document, adopted on 18 September 2008 as part of the Swiss Initiative, sets out a series of ‘good practices’ for the different states involved with PMSCs, including the territorial state. These practices also include such an authorization regime and provide a detailed description of the criteria that could be used for granting it. See Montreux Document, Good Practices, paras 24-52.

- States have a due diligence obligation to prevent violations of the right to life, which may also include the duty to intervene where there is a credible threat to the life of persons under their jurisdiction;²¹

Since PMSCs usually do not operate under the command of the host state, this latter state will often not be able to foresee any threats to the life of persons by acts of such corporations. However, if the host state authorities are aware of such a threat, they are bound to intervene in order to prevent such a violation.

- The state party has to take ‘legislative and other measures’ to protect individuals against acts prohibited by Article 7 (prohibition on torture), even when they are inflicted by persons in their private capacity.²²

This implies that the host state, when granting authorization to a PMSC, -if an authorization regime exists in that state-, or when it is informed that a PMSC contracted by another state will be given the task to exercise full authority, for example over a detention center, or to perform interrogation tasks; it should specifically require strict supervision over these tasks, in order to avoid the risk that torture or other inhumane or degrading treatment or punishment is inflicted upon detainees.

- The duty to prevent also entails the duty to prevent recurring violations through, inter alia, changing the state’s ‘laws or practices’.²³

The obligation to prevent recurring violations as recognized by the HRC is of particular relevance to PMSCs, considering the series of incidents in Iraq which repeatedly involved the violations of the right to life and of the prohibition of torture. This means that the host state has to take measures to exercise increased control over the PMSCs, and if necessary withdraw their authorization or license – if issued by the host state-, or force the hiring state to terminate the contract with those companies who were involved in recurring violations. The Iraqi government has given a positive example in this regard by refusing, in January 2009, to renew the licence of the firm Blackwater to perform security services for the US in Baghdad.²⁴ This refusal was directly linked to the Nisour Square incident in September 2007, whereby 17 civilians were killed and several others injured by employees of that PMSC.

- The positive obligations on states also entail protection of individuals 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”.²⁵

This means that the positive obligations as discussed above are, in principle, also valid with respect to PMSCs, and not only to acts of state agents.

²¹ *Delgado Paez v. Colombia*, UN doc. CCPR/C/39/D/195/1985 (1990).

²² HRC, General Comment No. 20: replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), (1992), UN Doc HRI/GEN/1/Rev.1, at 30, paras 2, 10, and 13; see also Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004

at par. 8

²³ HRC General Comment No. 31, at par 17.

²⁴ <http://edition.cnn.com/2009/WORLD/meast/01/29/iraq.blackwater/index.html>

²⁵ *Idem*, at par.8 (emphasis added).

B. The Inter-American Court of Human Rights (IACtHR)

The IACtHR has interpreted the duty to prevent violations of the American Convention on Human Rights, both in general and in more specific terms. The main points of the relevant case-law can be summarized as follows:

- The 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.’²⁶

As indicated above (HRC), this general duty implies that the host state must incorporate the acts amounting to violations of human rights as crimes in its national criminal law and take administrative measures to ensure sufficient oversight over the authorization and licence of PMSCs operating in its territory.

- The state must organize its governmental apparatus in such a way that it is capable of ensuring such protection.²⁷

The establishment of an authorization authority for PMSCs, as mentioned above (HRC) could be an example thereof.

- Regarding due diligence and state responsibility for private acts, the test is the state’s “awareness of a situation of real and imminent risk for a specific individual or group of individuals, and of the existence of a reasonable possibility of preventing or avoiding that danger”.²⁸
- Such test of “awareness” includes the situation where the state has actual knowledge of the real and imminent risk and the situation of “constructive” knowledge, i.e. where the state ought to have known of the imminent risk.²⁹

In theory, the host state should, as far as its military and police forces have sufficient capacity for doing so –which will most often not be the case in a conflict situation where PMSCs are employed to take over certain functions-, endeavour to follow the threats to security in different parts of its territory and assess the risks and the possibilities of preventing or avoiding danger for individuals or groups who may be at risk through the operations of a PMSC. In practice, the host state will not always be in a position to comply with this obligation, precisely because if it *were* capable of doing so, there would probably not have been a need for PMSCs to intervene.

However, the situation may also occur that a host state is unwilling, rather than unable to take any preventive measures. For example, the government in Colombia has not taken any steps to prevent human rights violations by PMSC employees who participate in the US-led Plan Colombia, which is aimed at reducing the production and traffic of narcotics. Human rights incidents were not investigated and no prosecutions followed, due to an immunity agreement with the US. The possible unwillingness to take any preventive measures seems to be related to the ongoing internal armed conflict. The human

²⁶ IACtHR, Judgment of 29 July 1988, Ser. C, No. 4, par. 175, and *Godinex Cruz*, Judgment of 20 January 1989, Ser.C, No.5, par. 185. See also IACtHR, *Paniagua Morales and others v Guatemala*, Judgment of 8 March 1998, Ser. C, No. 37; IACtHR, *Suarez Rosero v Ecuador*, Ser. C, No. 35, at par. 65; IACtHR, *Villagran Morales and others v Guatemala*, Judgment of 19 November 1999, Ser. C, No. 63, at par. 225; IACtHR, *Bamaca Velasquez v Honduras*, Judgment of 25 November 2000, Ser. C, No. 70, at par. 194; IACtHR, *Durand and Ugarte v Peru*, Judgment of 16 August 2000, Ser. C, No. 68; IACtHR, *Barrios Altos (Chumbipumba Aguirre v Peru)*, Judgment of 14 March 2001, Ser. C, No. 75.

²⁷ *Velazquez Rodriguez*, at par. 18

²⁸ I/A Court *Valle Jaramillo et al. V. Colombia*, Judgment of 27 November 2008, Series C No 192, at par. 78

²⁹ I/A Court *Case of the Pueblo Bello Massacre v Colombia*, Series C , 31 January, 2006

rights abuses occurred in areas controlled by the non-governmental armed groups, which may negatively affect the government's priority to take measures protecting the population of those areas.³⁰

C. *European Court of Human Rights (ECtHR)*

The case-law of the ECtHR on the duty to prevent is quite extensive. Some elements that may be of relevance for the host state of a PMSC are the following:

- Positive obligations of states include the duty to put in place an effective legal framework;³¹

In addition to the incorporation of the relevant crimes in the criminal code as mentioned above, a host state should also consider including corporate responsibility for acts amounting to serious human rights violations in its criminal legislation. It should avoid, wherever possible considering the availability and capacities of its judicial system, the conclusion of immunity agreements with hiring states of PMSCs. However, where the judicial system is not functioning effectively, the host state must require guarantees from the hiring state that any crimes committed by the PMSC or its employees are duly investigated and prosecuted by the authorities of the contracting (or home) state.

- The duty to prevent breaches may include the duty to ensure an adequate planning of security operations threatening the right to life,³²

Since the ECtHR specifically applied this criterion to operations of security forces of the state itself, it is questionable whether this is also relevant for PMSCs which are employed by another state than the host state. This would only be the case if the host state is directly involved in the planning of the PMSCs operations; this is unlikely in practice.

- In limited circumstances a duty to take operational measures to protect individuals whose lives are at risk may arise.³³ The duty is limited to cases where there is a real and tangible risk emanating from a specific person for the life of another specific person, and the authorities knew or should have known of a real and immediate danger to the victim(s).³⁴

The life of individuals is especially at risk in combat operations, when the risks for the life of specific persons cannot usually be foreseen. Otherwise, the right to life is most often violated either by excessive violence in the performance of a duty which normally would not have entailed this risk; or by arbitrary shootings (such as in the Nisoor Square incident in Iraq), which by their nature cannot be foreseen.

³⁰ See Cabrera, I. and Perret, A., *Colombia: Regulating PMSCs in a "Territorial State"*, PRIV-WAR Reports on National Legislation and Case-law, No.19/09, available at www.priv-war.eu/publications.

³¹ *X and Y v. Netherlands*, 91 EctHR (Ser.A), para 23 (1985). See Hoppe, Carsten, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EJIL (2008), No. 5, 989-1014, at 1001.

³² *McCann v. UK*, 21 ECtHR (1996)97, par. 213. The Court found with 10 to 9 votes that the planning of an anti-terrorist operation by British special forces against IRA suspects was a violation of the right to life. The planning and organization of another operation by Greek special forces was also considered to violate the right to life in *Andronicou and Constantinou v Cyprus*, Judgment of 9 October 1997, ECtHR 1997-VI 52.

³³ *Osman v. UK*, ECtHR 1998-VIII 95, at par. 115-116

³⁴ *Ibid.*, at para. 116. See also *Mahmut Kaya v. Turkey*, ECHR 2000-III, at par. 86.

4. African Commission on Human and Peoples' Rights³⁵

The African Commission has also addressed the scope of the duty to prevent violations including by private actors. The following points should be noted in this regard.

- An act by a private individual can generate responsibility of the state because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation³⁶;

The same considerations as mentioned above apply; the question of reparation will be discussed in paragraph 3.

- The standard of due diligence describes the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by private individuals.³⁷
- Factors to be taken into account to determine whether the standard of due diligence has been met, are:
 1. The specific circumstances of the case and the rights violated³⁸, considering the means which are "at the disposal" of the State, although "for non-derogable human rights the positive obligations of states would go further than in other areas".³⁹

This criterion of means being 'at the disposal' of the state limits the scope of the due diligence obligations to what is actually possible for a host state in the given circumstances (*e.g.* armed conflict, insufficient institutional structures and capacities).

2. An "analysis of the feasibility of effective state action" as well as the extent to which the State concerned could "have foreseen the violence and taken measures to prevent it";⁴⁰

The feasibility of such effective action and the possibility to foresee violence by PMSCs may be limited for the host state, but is not excluded.

3. Usually a single violation of human rights, such as individual cases of policy failure or sporadic incidents of non-punishment do not establish a lack of due diligence by a state;⁴¹ a violation of due diligence occurs in the case of systematic failure of the state to provide protection of violations from private actors who deprive any person of his/her human rights;

Even such a systematic failure to provide protection of violations by PMSCs cannot always be attributed to the host state, especially when it lacks all the institutional capacities for doing so. However, to the extent that this institutional capacity is more developed or restored, the responsibility of the host state to exercise some form of control and take measures to prevent recurring violations by

³⁵ Hereafter 'African Commission'. See for a more detailed analysis on this point, General Report, *supra* note 1, at paras 92-96.

³⁶ See *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, 2006, 2006 AHRLR 128, at par. 143 (emphasis added).

³⁷ *Ibid.*, at par. 147.

³⁸ *Ibid.*, at par. 155.

³⁹ See *Zimbabwean Human Rights NGO Forum v. Zimbabwe*, *cit.*, at par. 155.

⁴⁰ *Ibid.*, at par. 157.

⁴¹ *Ibid.*, at par. 158 f.

PMSCs (e.g. by withdrawing their authorization, or requiring the hiring state to terminate the contract with a PMSC which has been involved in several incidents) may increase.

4. The standard for establishing state responsibility in violations committed by private actors is more relative than for direct state action. Responsibility must be demonstrated by establishing that the state condones a pattern of abuse through pervasive non-action.⁴²

If a host state would condone a pattern of abuse, this would most often be due to a lack of institutional capacity. However, as mentioned above, a state may also be unwilling to take action to prevent or to sanction abuses, for example if a PMSC would intervene in support of an armed opposition group, or otherwise against its own interests. The threshold for establishing state responsibility for a failure to prevent violations by private actors is clearly higher than for violations by state agents.

3. Positive Obligations to Investigate, Prosecute and Provide Reparations

The general obligation to ensure human rights as included in the different human rights instruments also entails the obligation to provide an effective remedy for human rights violations. This obligation consists of two separate duties, on the one hand the duty to investigate violations and to prosecute their perpetrators; and on the other hand the duty to provide reparation to the victims of human rights violations or their family members.

A. *Obligation to Investigate and Prosecute*

The ECtHR, the Inter-American human rights bodies, and the HRC have all developed a consistent case-law in which the duty of states to ensure the substantial rights of the human rights instruments in combination with their obligation to guarantee the right to an effective remedy, includes the duty to investigate serious human rights violations, and to criminally prosecute those responsible for these violations.⁴³ These duties to investigate and prosecute form part of the positive obligations to ensure the rights protected by these instruments.⁴⁴ The monitoring bodies have developed some criteria on these investigations and prosecutions.⁴⁵ In particular, as stated in a consistent case-law of the Inter-American Commission and Court, investigations must be complete and impartial and they must be

⁴² *Ibid.*, at par. 160, emphasis added.

⁴³ For a detailed analysis of this case-law, see Bakker, Christine, *The Obligation of States to Prosecute Employees of PMSCs for Serious Human Rights Violations*, EUI Working Paper, AEL Series, PRIV-WAR Project (2009)

⁴⁴ Only the African Commission on Human and Peoples' Rights has not recognized these duties. Whereas the Inter-American Commission and the Inter-American Court do not distinguish between 'serious' and 'other' human rights violations, this distinction is explicitly made by the European Court on Human Rights and the UN Human Rights Committee. The criterion of 'seriousness' refers to the rights protected by the relevant instrument; only violations of the most fundamental human rights, including the right to life, the prohibition on torture and the liberty of person carry the duty to investigate and to prosecute.

⁴⁵ For example, Inter-American Commission for Human Rights, Resolution N° 48/82, Case 6586 (Haiti), March 9, 1982, Conclusion, at para 3; IACtHR, *Velasquez Rodriguez*, Judgment of 29 July 1988, Ser. C, No. 4, par. 18; IACtHR, *Paniagua Morales and others v Guatemala*, Judgment of 8 March 1998, Ser. C, No. 37; IACtHR, *Suarez Rosero v Ecuador*, Ser. C, No. 35, at par. 65; IACtHR, *Villagran Morales and others v Guatemala*, Judgment of 19 November 1999, Ser. C, No. 63, at par. 225; IACtHR, *Bamaca Velasquez v Honduras*, Judgment of 25 November 2000, Ser. C, No. 70, at par. 194; IACtHR, *Durand and Ugarte v Peru*, Judgment of 16 August 2000, Ser. C, No. 68; IACtHR, *Barrios Altos (Chumbipumba Aguirre v Peru)*, Judgment of 14 March 2001, Ser. C, No. 75; *Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006, at par. 470 (8).

carried out effectively and independently.⁴⁶ The ECtHR affirmed for the first time in *Kaya v Turkey* that in the case of an arguable claim of unlawful killing by agents of the state, Article 13 (right to an effective remedy) entails, in addition to payment of compensation where appropriate, *a thorough and effective investigation capable of leading to the identification and punishment of those responsible (...)*.⁴⁷ The same formulation, implying a duty to prosecute has also been upheld for torture;⁴⁸ serious ill-treatment,⁴⁹ and for the intentional destruction of a person's home and possessions by agents of the State.⁵⁰ In some cases concerning the violation of the right to life through Russian armed attacks on civilians in Chechnya, the ECtHR held that Article 13 is also violated when a criminal investigation into the attack lacked sufficient objectivity and thoroughness.⁵¹

Also the HRC has consistently taken the position that whenever a violation of one of the substantive provisions of the Covenant is established the state party has a positive obligation to provide an effective remedy to the victim. This obligation is considered as a consequence of the violation itself.⁵² The Committee has gradually refined the criteria of what constitutes an effective remedy. In this regard, also the duty to prosecute those responsible for violations of the Covenant came to be recognised, for the first time in 1982.⁵³ In its Views addressed to Colombia in 1995, the HRC considered that the duty to criminally prosecute, try and punish those deemed responsible for human rights violations arises particularly in cases of enforced disappearances and violations of the right to life.⁵⁴ In its General Comment 31⁵⁵ the HRC specifically states that '*A failure by a State to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.*' (par. 15) Where these investigations reveal violations of certain Covenant rights, states parties must ensure that those responsible are brought to justice. '*As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.*' (par 18). The Committee stresses that these obligations arise notably in respect of those violations

⁴⁶ Some examples of older cases of the ECtHR are *Klass and others v Germany*, Judgment of 6 September 1978, at par 67; *Silver and others v United Kingdom*, Judgment of 25 March 1983, at par. 113; *Leander v Sweden*, Judgment of 26 March 1987, at par. 77; and *Chahal v United Kingdom*, Judgment of 15 November 1996, at par. 154.

⁴⁷ ECtHR, *Kaya v Turkey*, Judgment of 19 February 1998(158/1996/777/978) at par. 107 (emphasis added) and *Buldan v Turkey*, Judgment of 20 April 2004 (28298/95), at par. 103.

⁴⁸ ECtHR, *Kaya v Turkey*, Judgment of 19 February 1998(158/1996/777/978) at par. 107 (emphasis added) and *Buldan v Turkey*, Judgment of 20 April 2004 (28298/95), at par. 134.

⁴⁹ *Tekin v Turkey*, Judgment of 9 June 1998, (52/1997/836/1042), at par. 66; *Assenov and others v Bulgaria*, Judgment of 28 October 1998, Reports 1998-VIII, 3264, at par. 102; *Mikheyev v Russia*, Judgment Of 26 January 2006, (77617/01), at par. 142.

⁵⁰ ECtHR, *Hasan Ilhan v Turkey*, Judgment of 9 November 2004 (22494/93), at par. 121.

⁵¹ ECtHR, *Isayeva v Russia*, Judgment of 24 February 2004 (57950/00), at par. 229; *Isayeva, Yusupova and Bazayeva v Russia*, Judgment of 24 February 2004 (5747/00, 5748/00 and 57949/00), at par. 239; *Khashiyev and Akayeva v Russia*, Judgment of 24 February 2005 (Final Text published on 6 July 2005), at par. 185. See also *Kallis and Androulla Panayi v Turkey*, Appl. no. 45388/99, Judgment of 29 October 2009, and *Satabeyeva v. Russia*, Appl. no. 21486/06, Judgment of 29 October 2009, at par. 119. For more details on the case law of the ECtHR see Carsten Hoppe, *supra* note 3.

⁵² UNHRC, Communication No. 5/1977 (*Moriana Hernandez Valentini de Bazzano et al. V Uruguay*), Views adopted on 15 August 1979, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 1, p. 40, at par. 10.

⁵³ UNCHR, Views adopted on 21 October 1982, (*Dermit Barbato v Uruguay*), Selected Decisions of the UNHRC under the Optional Protocol, vol. II, p. 112, at p. 116, par. 11, cited by Tomuschat, Christian, *The Duty to Prosecute International Crimes Committed by Individuals*, at 323 (emphasis added). See also Views of 24 July 1984 (*Muteba v Zaire*), *idem*, at p. 160, par. 13; Views of 4 April 1985, *idem*, p. 176, at par 16, both cited by Tomuschat, at 323.

⁵⁴ Views of 27 October 1995 (*Nydia Bautista de Arellana v Colombia*), Report of the Human Rights Committee, Vol. II, General Assembly Official Records, 51st session, Supp. No. 40 (A/51/40), p. 142, at par. 8.6.

⁵⁵ Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

recognized as criminal under either domestic or international law, such as torture, summary and arbitrary killings and enforced disappearances.

Host states of PMSCs are, in theory, also bound to comply with these duties. This raises, again, the issue of its institutional capacities. Investigations of violations such as killings or torture require qualified legal experts, who can perform their duties immediately after the acts were committed. Considering that PMSC employees often do not have the nationality of the host state, professional translation/interpretation services are needed as well. The same requirement of professional capacities applies to the prosecution of the persons who may be accused of the violations. The complexity of the applicable national and international norms and of the contractual and command structures involved, do not facilitate these tasks. Moreover, the immunity agreements concluded between host states and hiring states often render such investigations and prosecutions by the host state impossible from the outset, although this depends on the exact term of the agreement.⁵⁶ In this regard, the host state has the duty to assist the investigatory authorities of the hiring state –if any investigations are indeed launched-, to gather all possible evidence, such as providing logistical support and translation services when witnesses are interviewed.

B. Obligation to Provide Reparations

The case-law and views of the monitoring bodies have consistently affirmed that the obligation to guarantee an effective remedy also includes the provision of reparations to the victims of violations, or their next of kin. The essence of the obligation to make reparations for an international wrongful act was defined by the Permanent Court of International Justice in the *Factory at Chorzów* case:

*The essential principle contained in the actual notion of an illegal act...is that reparation must, so far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if that act had not been committed.*⁵⁷

This definition, often referred to as the principle of full reparation,⁵⁸ has subsequently been followed in several cases by the ICJ⁵⁹, but also by regional human rights courts.⁶⁰

The Inter-American Court has developed specific criteria for the types of reparation which should be granted for serious violations. Although financial compensation is the most important form of reparation, the IACtHR has also required states to make a public apology or create a monument for the

⁵⁶ For a detailed analysis of the question of immunity for PMSC personnel in international law, see Michaela Frulli, *Immunity versus Accountability for Private Military and Security Companies and their Employees: Legal Hurdles or Political Snags?*, EUI Working Papers, AEL 2009/24.

⁵⁷ *Factory at Chorzów*, (Merits), 1928, PCIJ Series A, No. 17, at par. 47

⁵⁸ See McCarthy, Conor, 'Reparation for Gross Violations of Human rights Law and International Humanitarian Law at the International Court of Justice', in Ferstman, Carla, a.o. (eds), *Reparations for victims of Genocide, War Crimes and Crimes against Humanity* (M.Nijhoff Publishers, 2009), pp. 283-312, at 285. For an analysis of several aspects of the question of reparations, see also Du Plessis, Max and Stephen Peté (eds), *Repairing the Past? International Perspectives on Reparations for Gross Human rights Abuses*, (Intersentia, Antwerp, 2007), and Shelton, Diane, *Remedies in International Human Rights Law* (OUP, Oxford, 2005)

⁵⁹ See for example *Bosnia and Herzegovina v Serbia and Montenegro (Merits)*, 26 February 2007, at par. 460; *DRC v. Uganda (Merits)*, ICJ Reports 2005, at par. 259, cited by McCarthy, *supra* note 58.

⁶⁰ See for example *Velasquez Rodriguez v. Honduras*, Judgment, 21 July 1989, reparation and costs, IACtHR Series C No. 7, at par. 26, *Papamichalopoulos and Others v Greece*, Just Satisfaction, 31 October 1995, 21 ECtHR 439, at par. 34.

victims, especially in cases of massive human rights violations.⁶¹ Also the HRC has adopted a broad definition of the term reparations.

*The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.*⁶²

For the purpose of this paper, financial compensation is the most relevant form of reparation to be considered, besides the prosecution of the perpetrators as outlined in the preceding paragraph. Since human rights violations involving PMSC personnel are more likely to consist of incidents related to small groups of individuals, rather than massive human rights violations with large numbers of victims, the other forms of reparations, such as public memorials and apologies, do not apply to these situations.

The case law and views of the regional human rights courts and the HRC have addressed many questions related to the award of reparations, such as the definition of victims; the concept of ‘injured party’; the different forms of reparation and the scope of financial compensation. In the context of this paper, the main questions to consider are: (1) Does the positive obligation to provide reparation also cover conduct by private actors, such as PMSCs? And if so, (2) Does this obligation also pertain to the host state of PMSCs, even when the PMSC is contracted by a third state?

On the first question, some elements can be found in the jurisprudence of the ECtHR and the IACtHR. Indeed, in several cases where the injury suffered by a victim was inflicted by a private actor, but where the responsibility of the state was engaged for failing to take sufficient measures to prevent that injury, the state’s obligation to provide reparation was confirmed. In *Kaya v Turkey*, the ECtHR held:

*The Court notes that there have been findings of violations of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya, whose body was found bearing signs of serious ill-treatment after being held by his captors for six days. It finds it appropriate in the circumstances of the present case to award GBP 15,000, which amount is to be paid to the applicant and held by him for his brother's heirs.*⁶³

In this case the Court had not found it proved beyond reasonable doubt ‘that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's brother.’ However, in the words of the Court, ‘that does not preclude the complaint in relation to Article 2 from being an “arguable” one for the purposes of Article 13’. Thus, the financial compensation was awarded, irrespective of the question whether the violation was committed by a state agent or a private actor, such as members of a contra-guerrilla group involving confessors or terrorists who ‘were targeting individuals perceived to be acting against State interests with the acquiescence, and possible assistance, of members of the security forces.’⁶⁴

Similarly, in *Pueblo Bello Massacre v Colombia*, the IACtHR held that the state had violated its positive obligations to prevent serious violations of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty) and 19 (Rights of the Child) :

⁶¹ Add references to case-law and some details.

⁶² HRC, General Comment 31, par. 16.’

⁶³ *Kaya v Turkey*, Appl. no. 22535/93, Judgment of 28 March 2000, at par. 138

⁶⁴ *Ibid.* at par. 91

*The responsibility for the acts of the members of the paramilitary group in this case in particular can be attributed to the State, to the extent that the latter did not adopt diligently the necessary measures to protect the civilian population in function of the circumstances that have been described.*⁶⁵

The IACtHR subsequently awarded substantial amounts of financial compensation for pecuniary and non-pecuniary damages to the victims and their next of kin⁶⁶, as well as other forms of reparation.

These examples demonstrate that a state that fails to prevent serious human rights violations within its jurisdiction can be held to make reparations, also if the persons responsible for the violations were private actors. This leads to the next abovementioned question, whether this obligation also extends to the host state of a PMSC whose personnel becomes involved in such violations.

The answer to this question depends on the factual circumstances of each case, as was also concluded with regard to the obligation to prevent violations. *A priori*, the host state, as the territorial state where a violation occurs, has the positive obligation to prevent such violations, to investigate, to prosecute and thus also to provide reparations. These obligations are, in principle, only suspended in a situation of military occupation by a foreign state. As outlined in paragraph 2, also in a situation of effective control exercised by a third state over (part of) the territory, or over a certain area, detention facility etc; or in certain other situations specified in the case law of the monitoring bodies, these positive obligations also pertain to that third state.

In this regard, mention should be made of the *principle of concurrent causation* in international customary law. One commentator notes that '(i)n circumstances where several states or a state and one or more private groups are responsible for conduct, which entails the international responsibility of the state, it is well established that any single responsible state is liable to provide full reparation for the damage caused by the wrongful act.'⁶⁷ This conclusion was also drawn in the ILC commentary on the Articles of State Responsibility, maintaining that where '...injury is caused by a combination of factors, only one of which is to be ascribed to the responsible state, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes.'⁶⁸ When applying this principle to the positive obligations of states to provide reparations, this would support the position that even if the home state or the hiring state of a PMSC failed to comply with its obligation to prevent a violation and is therefore under an obligation to make reparation, this latter obligation could also pertain to the host state if it failed to comply with the obligation to prevent as well.

In the UN framework, a set of principles were adopted by the General Assembly in 2005, with a view to providing guidance for the implementation of the positive obligations to make reparations as included in the various human rights instruments. These are the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁶⁹ Even though this document has no legally binding force, it does provide some elements which can be useful for the analysis of the obligations of states and non-state actors to provide reparations. Notably, Article 15 of these Basic Principles, states that also private actors may be liable for reparations:

⁶⁵ *Pueblo Bello Massacre v Colombia*, IACtHR, Merits, Reparations and costs, Judgment of 31 January 2006, Series C No. 140, at par. 140

⁶⁶ *Ibid*, paras 226-259

⁶⁷ McCarthy, Conor, note 55, at p. 296.

⁶⁸ Cited by McCarthy, *supra* note 58 at p. 296.

⁶⁹ General Assembly Resolution 60/147 of 16 December 2005. See Van Boven, Theo, 'Victims' Rights to a Remedy and Reparation', in Ferstman, Carla a. o. (eds), *supra* note 58, pp. 19- 40, at p. 35.

(...)In cases where a person, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparations to the victim.⁷⁰

This implies that if a PMSC or members of its personnel are found to be accountable for conduct amounting to a gross human rights violation, the PMSC, or the employees may also be found liable for reparations to a victim of such violations. The PMSC or the employees concerned should provide reparation to the victims or compensate the State if the latter has already done so. The application of this principle would require the existence of effective mechanisms under domestic law for victims to claim reparations; as well as for the enforcement of reparation judgments.⁷¹

4. Conclusion

The analysis in this paper shows that the positive obligations of states to ensure human rights also pertain to the host states of PMSCs. Indeed, despite the tendency in the case-law and views of the human rights courts and monitoring bodies that the jurisdiction of states –and thus their positive human rights obligations- may also apply extraterritorially; the general duty to ensure these rights is primarily conferred upon the state in whose territory violations may occur. Nevertheless, two main factual constraints have been examined, which may render it impossible for the host state to comply with these obligations: in the first place the lack of institutional capacities (including an appropriate legal framework; governmental structures; administrative bodies and judicial capacities); and in the second place a situation of military occupation or other form of effective control exercised by one or more foreign states, mostly in an international or internal armed conflict, which may result in a suspension of the human rights obligations of the host state.

In practice, PMSCs are most often deployed in situations of armed conflict or post-conflict situations, in which one or more third states⁷² exercise either effective control or state agent authority over the individuals in the territory of the host state. Consequently, the positive human rights obligations will then generally be considered to pertain to these third states. Nevertheless, it is argued that these limiting factors vary from one state to the other, and may evolve over time. For example, when a military occupation comes to an end and governmental authority is transferred to a newly elected government, the host state will then also regain its primary responsibility for complying with its positive human rights obligations. Moreover, when institutional capacities improve in a post-conflict situation, e.g. with external support for institutional development; the limiting factor of lacking such capacities also diminishes.

Therefore, host states should be aware of their positive obligations under human rights law, and consider, in each particular situation, to what extent they are bound and able to comply with these duties. This paper thus provides some examples of how the case-law and views of the human rights courts and monitoring bodies on the positive obligations to prevent; and the positive obligations to investigate, prosecute and provide reparations may be applied to the host state of PMSCs. These obligations should be considered as part of a ‘matrix’ of positive obligations pertaining to the hiring state, the home state and the host state of PMSCs.

⁷⁰ Emphasis added

⁷¹ See *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA, A/Res/60/147, adopted on 16 December 2005, *Principle 17*.

⁷² or possibly an international force under the command of NATO, the UN or an ESDP operation