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THE ROLE OF HUMAN RIGHTS IN THE REGULATION OF  
PRIVATE MILITARY AND SECURITY COMPANIES  
GENERAL REPORT – THE EUROPEAN SYSTEM

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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## **Abstract**

This report assesses the impact of the activities carried out by PMSCs on the enjoyment of human rights under the EU human rights regime.

It is submitted that that the state of nationality of a PMSC is bound to remedy the latter's violations of fundamental rights, even if the operation and the major activities of the PMSC in question fall outside the scope of EU's competence. As to the ECtHR, the historically narrow interpretation of jurisdictional limits may be expanding. Relevance of the EU Charter of Fundamental Rights and EU's secondary legislation of anti-discrimination in protecting the victims of human rights violations is questioned primarily because of the scope of the respective provisions and the difficulties related to their extra-territorial application. As to the addressees of human rights obligations, it is observed that although the EU's standard of protection is not uniform in all contexts. Further, where the activities of PMSCs have human rights implications, attribution of their acts to any of the Member States will be almost impossible. By contrast, human rights can be indirectly applicable to private relations, viz. individuals. The EU human rights regime is relevant for the availability of judicial remedies chiefly insofar as it may be hoped that with the entry into force of the Lisbon Treaty way will be paved for an eventual EU legislation imposing an obligation on the Member States with respect to the licensing of PMSCs as well as criminalization of their illegal conduct outside the EU.



*The Role of Human Rights in the Regulation of Private Military and Security Companies:  
The European System*

IEVA KALNINA\* AND UGIS ZELTINS\*

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

**1. The EU Human Rights Regime**

2. The EU's commitment to human rights has gradually increased over time. As is well known, the founding Treaties of the European Union contained virtually no provision very few provisions on fundamental human rights, such as the prohibition of discrimination on grounds of nationality and sex. Moreover, these provisions were included purely out of economic considerations, in view of achieving a successful operation of the common market. Although the EU has not been founded as a human rights organization, today there is no longer any doubt that human rights form an integral part of the European Community's legal order.
3. The need for protection of human rights was first significantly recognized with the entry into force of the Amsterdam Treaty, which not only brought human rights to the forefront of the EU legal system, but also acknowledged that these principles could be infringed by a Member State, and consequently laid down the procedures to be applied in such a situation, recalling that a 'serious and persistent' violation of human rights by a Member State may result in its rights under the Treaty being suspended (Article 7). The Amsterdam Treaty also formally recognized the role of the Court of Justice in protecting human rights and fundamental freedoms.
4. Moreover, since the 1990s, the EU has been more concerned about the observance of human rights also in its external policies. An especially important aspect of EU's human rights policy with respect to third-countries is the political conditionality principle (whereby respect for human rights is made a precondition for EU membership)<sup>1</sup>. The initiatives developed within the framework of the Common Foreign and Security Policy (CFSP) should not be neglected either. Finally, over the past decade, the EU, along with the Council of Europe and the OSCE, has also become increasingly involved in the resolution of humanitarian crisis in Europe and worldwide.
5. In the future, the EU human rights regime will be significantly impacted by the entry into force of the Treaty of Lisbon, which was signed by the Heads of State or Government of the EU Member States on 13 December 2007 and was initially supposed to enter into force on 1 January 2009, if it had not been for ratification problems that have currently postponed the Treaty's entry into force. The most important change brought about by the Treaty involves the abolishment of the European Union's three-pillar structure and the relation between the EU and the ECHR<sup>2</sup>, which is addressed in further detail below in the context of EU Charter of Fundamental Rights.

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<sup>1</sup> M Nowak, 'Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU', p. 687 and E Riedel and M Will, 'Human Rights Clauses in External Agreements of the EC', p. 723, in P Alston (ed.), *The EU and Human Rights* (1999).

<sup>2</sup> See, generally, H-M Blanke, S Mangiameli (eds.), *Governing Europe under a Constitution* (2006).

### **a) The European Court of Justice**

6. As is well known, the main tasks of the European Court of Justice (ECJ) involve, first, the review of the legality of Community law with respect to primary law provisions and conflicts between such provisions, and second, the supervision of EU Member State compliance with their duties under EC law. While the precise scope of all fundamental rights protected by the ECJ may not be clearly defined, nonetheless the Court has played a very significant role in the development of human rights in the EU. As will be further illustrated below, in its development of the law, the ECJ relies on the common constitutional principles and international treaties in force for the Member States, especially the ECHR and its application by the ECtHR. This is how important human rights such as human dignity, religious freedom, due process, procedural guarantees and other rights have become part of Community law.<sup>3</sup>
7. The importance of human rights was first recognized by the ECJ in *Stauder* (1969), where the Court underlined that fundamental human rights are “enshrined in the general principles of Community law and protected by the Court”<sup>4</sup>. A year later, *Stauder* was reinforced by *Internationale Handelsgesellschaft*, where it was commented that, “respect for fundamental human rights forms an integral part of the general principles of law protected by the Court of Justice”<sup>5</sup>. In *Nold* (1974)<sup>6</sup>, one of the most important cases on human rights to date, the Court made it clear that when the protection of fundamental rights is at stake, inspiration may be drawn not only from the constitutional traditions common to the Member States, but also from international treaties for the protection of human rights binding on EU Member States. Finally, the *Rutili*<sup>7</sup> case of 1974 must also be noted, since it was in *Rutili* that the ECJ for the first time made an explicit reference to the European Convention on Human Rights (ECHR). As a matter of fact, while the ECJ’s reliance on the ECHR and the case law of ECtHR is continuously increasing, some scholars have pointed out that it has not yet “proved itself to be a precursor in relation to the establishment of a high level of protection”; rather, the ECJ has merely “followed the raising of the level of protection [of human rights] which has taken place ‘externally’”<sup>8</sup>.
8. Over the past two decades, the case-law on the importance of human rights in EU’s legal order has become increasingly comprehensive. In fact, in a widely discussed recent judgment in the *Viking* (2007) case, the ECJ made the following important statement: “even if, in the areas which fall outside the scope of the Community’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence [...] Member States must nevertheless comply with Community law”<sup>9</sup>. In the *Viking* case, a Finnish company wanted to reflag its vessel under the Estonian flag in order to be permitted to staff the ship with an Estonian crew which would accept considerably lower wages than its current Finnish crew. The International Transport Workers’

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<sup>3</sup> K Stern, “From the European Convention on Human Rights to the European Charter of Fundamental Rights: The prospects for the protection of human rights in Europe”, in H-M Blanke, S Mangiameli (eds.), above n 2, 174

<sup>4</sup> Case 29/69, Erich Stauder v City of Ulm (1969) ECR 419.

<sup>5</sup> Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel (1970) ECR 1125.

<sup>6</sup> Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, (1974) ECR 491.

<sup>7</sup> Case 36/75 Rutili v. Minister for the Interior (1975) ECR 1219.

<sup>8</sup> H-J Blanke, “Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg”, in H-M Blanke, S Mangiameli (eds.), above n 2, 277.

<sup>9</sup> Case C-438/05, International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Laine Eesti [2007], paragraph 40, ECR I-000. The Court found support to this statement by noting that the concept has been employed with respect to other fields of law: “See, by analogy, in relation to social security, Case C-120/95 Decker [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 Kohll [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 Commission v France [2004] ECR I-2229, paragraph 21, and Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 29”, at para. 40.



Federation (ITF) encouraged its affiliated to boycott the vessel and moved on to take other solidarity industrial action. The Finnish Seaman's Union (FSU) also threatened a strike. In response, Viking sought an injunction in the English High Court in order to restrain the ITF and the FSU from committing acts arguably in breach of Article 43EC. The ECJ was thus faced with the difficult task of determining the delicate balance between a company's economic rights of free movement and the trade unions' social rights.<sup>10</sup> The Court's conclusion was, to put it in very general terms, that the protection of economic rights prevailed over the fundamental social rights, because the restriction on the free movement right did not meet the high threshold of the proportionality test applicable in these types of circumstances. Nonetheless, the judgment is of considerable importance since the Court recalled that protection of fundamental rights fell under the scope of Community law even in situations where the primary dispute at stake has arisen in an area of law that falls outside the scope of the Community's competence.<sup>11</sup>

9. *Interim conclusion*

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

**b) The European Court of Human Rights (ECtHR)**

10. The European Convention of Human Rights (ECHR) is of essential importance for the current research project and this report in particular, as for decades it has been seen as the cornerstone of EU human rights' regime. In fact, the need to include specific human rights legislation within EU's *acquis* has often been dismissed as redundant precisely because of the importance and efficiency of human rights enforcement mechanism offered under the ECHR.
11. Turning to the basic premise of the underlying research questions, it shall be recalled that generally, with some rare exceptions, States have no obligation to require the PMSCs registered in their national territory to take account of human rights obligations in situations that fall outside their jurisdiction, i.e., that do not take place within the national borders of the Contracting State. As the state hosting the PMSC will usually lack both the incentive and resources for effective enforcement of human rights, PMSCs, just like other multinational corporate enterprises, may appear to be operating in a legal vacuum. As one author has put it, "international law does not directly reach the corporate actor".<sup>12</sup>
12. As will be demonstrated below, the ECtHR has made remarkable achievements in bridging this gap. Nonetheless, several uncertainties remain. The role of the ECHR in determining the scope of PMSC's obligations in the field of human rights is inherently linked to two complex issues: first, the scope of Contracting States duties to ensure respect for human rights, punish and prevent such violations in situations where the breach of international law occurs at the hand of a private entity; and second, the Court's jurisdictional limits. Considering that both of these significant questions

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<sup>10</sup> For a similar case, see Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (2007)

<sup>11</sup> Viking case, n 9 above: "Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices." (para. 40)

<sup>12</sup> Olivier de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', in Philip Alston, *Non-State Actors and Human Rights* (2005), 228.

will be dealt in more depth as part of a separate doctrinal research in the framework of the PRIV-WAR Project, the purpose of the current report is merely to outline the substance and the complex legal issues relating to these two concepts, i.e., the Contracting State obligations under the ECHR and the Court's (extra-territorial) jurisdiction.

13. As to the first and perhaps slightly less problematic issue of State obligations regarding protection of human rights, it may be observed that the ECtHR has often had the occasion to pronounce on the obligation of States Parties to the ECHR with regard to human rights violations committed by private parties. A more detailed analysis of the issue of attribution of private conduct to the Contracting State and its obligation to punish and prevent the occurrence of human right violations has already been conducted in the framework of the current research project.<sup>13</sup> At this point it may suffice to underline that the ECtHR has frequently taken a bold approach when determining the scope of the *positive* obligations of the Contracting Parties under the Convention, thus indirectly including also the sphere of private relations. From a comparative perspective, the obligation to *prevent* human rights violations is, on the other hand, more developed under the Inter-American system.<sup>14</sup>
14. For example, in *Osman v the United Kingdom*<sup>15</sup>, a landmark case on State responsibility for alleged breaches of Article 2 of the ECHR (right to life), the Court was faced with the question of whether the failure of authorities to appreciate the threat posed to one private party by another private party and the consequent lack of intervention can amount to a violation of the State's positive obligation to protect the right to life. The Court responded by stating that State responsibility would only arise if: "the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which, judged reasonably, might have been expected to avoid that risk".<sup>16</sup> The Court's careful approach in wording the applicable test can be explained by its desire to avoid imposing a disproportionate burden on States, noting, *inter alia*, difficulties arising from evaluating operational choices in terms of priorities and resources and concluding that clearly not every claimed risk to life can entail an obligation on behalf of the State authorities to prevent it from materializing.<sup>17</sup>
15. To conclude, while the fairly high threshold set out by the Court has in fact been satisfied in several cases,<sup>18</sup> the ECtHR has so far remained very careful when pronouncing itself on the State obligation to *prevent* the occurrence of human rights violations and hence it appears unlikely, at least *prima facie*, that a State's responsibility could be invoked on grounds that it has failed to prevent human rights violations committed by a PMSC against a private party unless the *Osman* criterion is, of course, satisfied. In this context, the most complex question would however involve the exercise of the Court's jurisdiction, both personal and (extra-)territorial.
16. Article 1 of the ECHR provides:

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<sup>13</sup> Ineta Ziemele, 'Issues of Responsibility of Private Persons or Entities for Human Rights Violations: The Case-law of International Human Rights Courts and Monitoring Bodies', EUI Working Papers, AEL 2009/08, available at [http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL\\_2009\\_08.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL_2009_08.pdf).

<sup>14</sup> Note, however, that some scholars have praised the ECtHR with respect to the duty of prevention addressed to the State Parties: "perhaps in no other international or regional instrument for the protection of human rights has an obligation to protect been extended more fully than in the Convention, imposing on the Contracting States far-reaching duties to adopt measures to prevent violations committed by private parties", De Schutter, above n 12, 240.

<sup>15</sup> *Osman v. the United Kingdom* (no. 23452/94), judgment of 28 October 1998.

<sup>16</sup> *Ibid.*, para. 116, emphasis added.

<sup>17</sup> *Ibid.*, see also I Ziemele, n 13 above.

<sup>18</sup> See, among others, *Kontrová v Slovakia* (no. 7510/04), judgment of 31 May 2007, *Yasa v. Turkey* (2 September 1998), *Mahmut Kaya v. Turkey* (19 February 1998), *Akkoc v. Turkey* (10 October 2000), *Kilic v. Turkey* (28 March 2000).

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

The question thus arises as to whether Article 1 of the Convention places a territorial limitation on Contracting States’ duty to secure the rights and freedoms set forth in the Convention. The question was thoroughly considered by the ECtHR in the case of *Bankovic*<sup>19</sup>, which arose out of the human rights violations allegedly committed by the NATO forces as a result of the bombing of Belgrade. The applicants argued that the Court has jurisdiction to adjudicate the violation of their human rights since the illegal acts of the Respondent states have produced effect in the Federal Republic of Yugoslavia (FRY). The Court disagreed with this approach:

71. [...] the case-law of the Court demonstrates that its recognition of the exercise of *extra-territorial jurisdiction* by a Contracting State is *exceptional*: it has done so when the respondent State, through the *effective control* of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

72. In line with this approach, the Court has recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.), no. 31253/96, p. 7, 9 February 2000, unpublished). [...]

73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State. (emphasis added)

The Court found no jurisdictional link between the persons who were victims of the act complained of and the respondent States. The Court’s conclusion was that Article 1 must be understood as reflecting an “essentially territorial understanding of jurisdiction”,<sup>20</sup> since otherwise the phrase “within their jurisdiction” used in Article 1 would be rendered superfluous. In other words, the Court was not satisfied that the applicants were capable of falling within the jurisdiction of the respondent States on account of the extra-territorial act in question, which in and of itself cannot give rise to State responsibility under the Convention in the absence of any pre-existing relationship between the applicants and the Contracting State.<sup>21</sup>

17. While *Bankovic* has given rise to an extensive debate – and sometimes criticism - in the legal doctrine<sup>22</sup>, it is important to underline that the jurisdictional standard applied by the Court is two-

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<sup>19</sup> *Bankovic et al. v. Belgium and 16 other States* (App. No. 52207/99), Eur. Ct. H.R. (2001), available at 41 I.L.M. 517.

<sup>20</sup> *Ibid.*, para. 59-61

<sup>21</sup> *Ibid.*, para. 35-45

<sup>22</sup> A more in-depth analysis of the interpretation of Article 1 of the ECHR, the *Bankovic* case and its relationship to the Court’s previous case-law on the subject matter will be carried out in the framework of D4.3, devoted to the analysis of jurisdictional issues.

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

For the Court’s earlier case-law on the issue of jurisdictional limits, see *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep.72 (1975) and *Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) (1992), where the Court, in determining its jurisdiction, made the following important observation:

fold: territorial and personal. As a result, the Court will have jurisdiction over an agent whose illegal acts take place outside the territory of the Contracting State, as long as such an agent exercises *effective control* over the alleged victim. For example, in the *Issa* case<sup>23</sup> the Court relied on its previous case law to recall that: “a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former *State’s authority and control* through its agents operating – whether lawfully or unlawfully – in the latter State. ...*Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory*”.<sup>24</sup>

18. To conclude, while historically the Court has adhered to a rather narrow interpretation of its jurisdictional limits, the tide might be changing and the question may be settled more definitely once the (currently pending) case arising out of the last Iraq war is settled. In any case, even under the current case law, a Respondent State may be held responsible for human rights violations carried out by a PMSC, as long as a connection between the two can be established<sup>25</sup> and the PMSC is found to have had effective control of the territory where its illegal acts have been perpetrated.

### **c) The EU Charter of Fundamental Rights**

19. It has been repeatedly pointed out that it is high time to replace Community’s hesitation with respect to fundamental rights with a clear position in the matter: the EU Charter of Fundamental Rights (the Charter) has been tailored to fill this lacuna. Solemnly proclaimed during the Nice Intergovernmental Conference by the European Parliament, the Council and the Commission on 7 December 2001, the Charter not only constitutes the very essence of the European *acquis* in terms of fundamental rights, but also contains fundamental rights that apply to all people, irrespective of their nationality. While the Charter maintains a distinction between rights conferred upon EU citizens, EU residents and all other individuals in general, it entails a number of rights that apply merely to the latter category, such as dignity rights (Article 1-5)<sup>26</sup>, rights to various freedoms,<sup>27</sup> as well as nine out of twelve solidarity rights under Title IV of the Charter. In addition, various equality rights contained in the Charter are also applicable to all persons, as enshrined Article 21(1), which, mainly mirroring Article 14 of the ECHR,<sup>28</sup> provides:

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

(Contd.) \_\_\_\_\_

“the term ‘jurisdiction’ in Article 1 is not limited to the national territory of the High contracting parties; their responsibility can be involved because of acts of their authorities that occurred outside of their territories” (para. 91).

<sup>23</sup> *Issa and Others v. Turkey* (no. 31821/96), Judgment of 16 November 2004, ECHR 2004 - , para. 67.

<sup>24</sup> *Ibid.*, paras 68, 71, emphasis added.

<sup>25</sup> For a more elaborate analysis on the distinction between “governmental” and “non-governmental” organizations and the attribution of their conduct to the State, see I Ziemele, n 13, at 21.

<sup>26</sup> Human dignity (Art.1), Right to life (Art.2), Right to the integrity of the person (Art.3), Prohibition of torture and inhuman or degrading treatment or punishment (Art.4), Prohibition of slavery and forced labour (Art.5).

<sup>27</sup> Right to liberty and security (Art. 6), Respect for private and family life (Art.7), Protection of personal data (Art.8), Freedom of thought, conscience and religion (Art.10), Freedom of expression and information (Art.11), Freedom of assembly and association (Article 12(1)), Freedom of arts and sciences (Art.13), Right to education (Art.14), Freedom to choose an occupation and right to engage in work (Art.15 (1) and (2)), Right to property (Art.17).

<sup>28</sup> Note that discrimination on grounds of national origin has been carefully left out from Charter’s general non-discrimination clause.

prohibited.<sup>29</sup>

Providing the Community with a general anti-discrimination clause is a welcome and long-awaited development, since both the non-discrimination provisions contained in the Treaty, as well as in the secondary legislation (like, for example, in the Racial Equality Directive<sup>30</sup>, discussed below), are always limited in their material scope of application, whereas Article 21(1) appears to abolish discrimination on the mentioned grounds in all fields of Community law.

20. While the effect of the Charter in practice may largely depend upon the ECJ, due note should also be taken of Article 51(2), which explicitly states that the Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”, a view supported also by the European Commission<sup>31</sup>. In fact, it has been argued that “the proscription of discrimination does not extend the competence of the Union, but rather restrains it”.<sup>32</sup> Whether the ECJ will adopt a similar view when interpreting Article 21(1) of the Charter still remains to be seen. In any case, while the importance of a general non-discrimination clause in the Community legal order cannot be underestimated, it cannot escape one’s attention that Article 21(1) differs greatly from the non-discrimination clauses contained in the major international human rights instruments, since the Article does not list discrimination on grounds of nationality or national origin among the prohibited grounds of discrimination. This lacuna is partially filled by Article 21(2) which states that:

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

21. However, as becomes clear from the conditional wording of this Article and the praxis of both Community institutions and the ECJ, the provision certainly applies to EU citizens only.<sup>33</sup> In fact, the complex structure of the Constitution contains various, sometimes overlapping, equality clauses. For example, Article 4(2) in Part I of the Constitution also provides that in “the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited”. None of this, however, constitutes a step towards enforcement of non-EU citizen rights: the question of whether the EC Treaty also bans, at least in some degree, discrimination of other persons coming under the scope of Community law, such as third country nationals, is a matter of interpreting the Treaty,<sup>34</sup> rather than the Charter, especially since Article 21 (2) of the Charter is an exact recital of Article 12 of the EC Treaty. Finally, the fact that the scope of principle of democratic equality,<sup>35</sup> enshrined in

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<sup>29</sup> For the corresponding laws in different Member States ensuring compliance with the general non-discrimination clause of the Charter, see Hölscheidt, S., “Kommentar zu Kapitel III, Gleichheit” (p.263-318) in Meyer, J., (Hrsg.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden, 2003, p.277-281.

<sup>30</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. (*Official Journal L 180*, 19/07/2000 P. 0022 – 0026)

<sup>31</sup> Communication from the Commission on the nature of the European Charter of Fundamental Rights, COM (2000) 644 final, 11.10.2000, point 9.

<sup>32</sup> Ellis, E., “Social Advantages: A New Lease of Life?”, *CMLRev.* 40: 639-659, 2003, at 659.

<sup>33</sup> On the development of Article 21(2) by the members of the Convention and for a commentary, see Hölscheidt, S., “Kommentar zu Kapitel III, Gleichheit” (p.263-318) in Meyer, J., (Hrsg.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden (2003), 283, 289.

<sup>34</sup> Peers, S., “Immigration, Asylum and the European Union Charter of Fundamental Rights”, *European Journal of Migration and Law* 3 (2001) 162

<sup>35</sup> Article I-44 (principle of democratic equality) states: “In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union’s institutions”.

- Article 44 of Part I of the Constitution, is also limited to EU citizens, further enforces this view.
22. There are nevertheless two ways of rendering the concept of fundamental rights in the European Union more effective. The first avenue leads through the progressive interpretation of the Charter by the ECJ and granting it legally binding force through adoption of the European Constitution. The second avenue, perhaps more complementary rather than alternative, could involve the EU's accession to the ECHR. As noted above, the Community's commitment to respect fundamental human rights can be found not only in Article 6(2) of the EU Treaty, but it has also been demonstrated by the ECJ already since its early judgements in *Stauder*, (1969), *Internationale Handelsgesellschaft* (1970), *Nold* (1974), and *Rutili* (1975).
  23. As is well known, the ECJ is not bound by the ECHR judgements; in fact, it has always emphasized that the Convention and the rights contained therein serve the purpose of inspiration and should only be regarded as guidelines. The situation might change, however, with the Union's accession to the ECHR, and Article I-7(2) of the Constitution<sup>36</sup> provides the legal basis for such action. Article 52(3) of the Charter itself states: "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention", adding, as a matter of fact, that this "provision shall not prevent Union law providing more extensive protection". In addition, the proposed amendments to Article 6(2) TEU provide that, "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", and yet does not fail to add that "[s]uch accession shall not affect the Union's competences as defined in the Treaties".
  24. The views as to how realistic as well as desirable such an accession would be differ greatly. Some opine that the legal difficulties arising from the accession have already been largely overcome, which is also demonstrated by the interconnection of the two Courts – the ECJ referring to the ECHR in its judgements, and the ECtHR – to the EU Charter, thus concluding that the accession would be nothing but "*a recognition of the unity of fundamental values in Europe in its entirety*".<sup>37</sup> Others are less optimistic, pointing to the necessity for significant changes in the procedural mechanisms of both the ECJ and the ECtHR.<sup>38</sup> What is however certain is that accession of the Union to the ECHR will have an important impact not only on the relationship between the EU and the Council of Europe, but also between the ECJ and the ECtHR, considering that in the case of accession the Convention would be applicable to the Union institutions and consequently the ECtHR would have certain competence for measures adopted by EU's institutions.<sup>39</sup>
  25. Interim conclusion  
It is difficult to estimate to what extent the Charter could be relevant for the victims of human rights violations committed by PMCS registered in one of the EU Member States, especially considering the non-binding nature of the Charter as such. One situation where the Charter's provisions could play a complementary role would arguably be, for example, the case where the damage suffered by an individual of a host State of the PMSC arises from discriminatory treatment in his or her employment by the PMSC. However, considering the exclusion of discrimination on the grounds of nationality and national origin from the scope of the Charter, it is

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<sup>36</sup> Article I-7(2) states in a fairly imperative tone: "The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution".

<sup>37</sup> Dutheil de la Rochère, J., "The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty", *CMLRev.* 41: 345-354, 2004, at 353.

<sup>38</sup> Van Gerven, W., "Remedies for Infringements of Fundamental Rights", *European Public Law Journal*, Vol.10/2, 261-284, 2004, at 265.

<sup>39</sup> Richard Crowe, "The Treaty of Lisbon: A Revised Legal Framework for the Organisation and Functioning of the European Union", *ERA Forum* (2008) 9:163-208, p. 177, available at <http://www.springerlink.com/content/0p7830150w668026/fulltext.pdf>.

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

#### **d) The EU's Anti-discrimination Legislation**

26. One of the Amsterdam Treaty's main achievements is the adoption of a more comprehensive non-discrimination clause, enshrined in Article 13 EC,<sup>40</sup> which provides the Community with a legal basis to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. While true that the European Union has been concerned with discrimination issues since its very dawn, it was not until the adoption of the Treaty of Amsterdam in 1997 that this general anti-discrimination clause was included as a basic founding principle of the Union.
27. The Commission was granted the "green light" to start taking action in the field by the European Council in Tampere (1999) after the Council had called for an instant implementation of Article 13 EC. The Commission responded by coming forth with a whole package of anti-discrimination measures less than a year after Tampere. This "package", as often referred to in literature, includes the Racial Equality Directive, a Framework Directive prohibiting discrimination in employment and occupation on grounds of religion, belief, disability, age and sexual orientation (furthermore-the Employment Directive)<sup>41</sup> and a Community Action Program aiming at exchange of good practice, experience and information among Member States.<sup>42</sup> The importance of this so-called "anti-discrimination measure package" cannot be underestimated, since the two directives adopted under Article 13 provide, for the first time, a common legal framework of minimum protection against various forms of discrimination across all member states of the European Union.
28. The Racial Equality Directive, arguably the most significant element of the "package", represents the result of European Commission's recent efforts to get more involved in the combat of racism in the European Community. Adopted by the Council of Ministers on 29 June 2000 and in force a month later on 19 July 2000, the Racial Equality Directive is the result of almost a "decade of intensive work and lobbying by non-governmental organizations",<sup>43</sup> as well as the European Parliament and the European Commission. The main purpose of the Racial Equality Directive is the enforcement of the principle of equal treatment in the Union by ensuring effective combat against discrimination on grounds of racial and ethnic origin. It is recalled in the Preamble of the Directive that elimination of discrimination on grounds of race and ethnic origin is not only in line with the Community's obligations to respect and safeguard fundamental human rights, but also that discrimination undermines the achievement of the Union's objectives, such as attainment of high level of employment, social protection, economic and social cohesion and the overall development of the European Union as an area of freedom, security and justice. The scope of the Racial Equality Directive is quite wide: it applies to both "direct" and "indirect" discrimination, as

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<sup>40</sup> Article 13 of the E.C. Treaty, as amended by the Amsterdam Treaty, states:

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

<sup>41</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 02/12/2000 P. 0016 – 0022). The *Employment Directive* requires member states to make discrimination unlawful on grounds of religion or belief, disability, age or sexual orientation in the areas of employment and training.

<sup>42</sup> Council Decision 2000/750/EC of 27 November 2000 establishing a Community action program to combat discrimination (2001 to 2006). *Official Journal L 303*, 02/12/2000 p. 0023 – 002.

<sup>43</sup> Chopin, I. "Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European Union and Non-Governmental Proposals" 2 EJML (2001) 430.

well as to both public and private sectors. The Directive aims at combating discrimination regarding access to employment, vocational training and working conditions, as well as social security, healthcare, social advantages, and education, thus covering most of the areas where racial discrimination may occur.

29. Turning to a closer analysis of the Directive, it must be noted that probably the most controversial issue surrounding the Racial Equality Directive arises from its application to individuals who do not hold EU citizenship. While the Preamble of the Racial Equality Directive states that, “the prohibition of discrimination should also apply to nationals of third countries”, the respective prohibition is subject to the condition that it may not interfere with any provisions governing their entry, residence or access to employment. The Preamble also recalls that any differences of treatment based on nationality<sup>44</sup> are also excluded from the scope of the Racial Equality Directive (just as from the scope of the Employment Directive, the second most substantial part of the “package”<sup>45</sup>). Article 3(2) of the Directive expresses the views pronounced in the Preamble in even more explicit terms:

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

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

30. In the context of the present research, potential victims of discrimination at the hands of PMSCs would not only need to demonstrate that their discrimination is not merely based on their nationality, but would also need to tackle the complex question of extra-territorial application of the EU’s human rights legislation. Here, two different types of situations have to be distinguished. If a territorial link can be established between the infringement of the human right in question and the EU (i.e., the scope of application of Community law), EU law is likely to provide a remedy. If, however, no such direct territorial link can be established, the victim of the human rights violations will need to resort to the so-called “effects doctrine” in order to affirm his or her rights.
31. In the context of EU law, the “effects doctrine” has been extensively applied in EU competition law, and there is no reason why this should not be the case with respect to human rights law. The “effects doctrine” is, however, not absolute, and the prevailing view in the doctrine is that the applicant needs to demonstrate that the illegal act in question has not only had a direct effect in European Union but has also been implemented in the EU.<sup>46</sup> The nationality of victims may also play a role, as so far the leading case-law on the subject matter has involved “victims” of European nationality.<sup>47</sup>

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<sup>44</sup> The Preamble of the Directive, Recital 13.

<sup>45</sup> It is interesting to note that Article 3 (2) of the Racial Equality Directive is identical to the corresponding Article 3(2) of the Employment Directive which states: “This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of third country nationals and stateless persons concerned”. For an elaborate study on different treatment of discrimination and European law, with special regard to discrimination in employment, see Bell, M., Waddington, L., “Diversi eppure eguali. Riflessioni sul diverso trattamento delle discriminazioni nella normativa europea in materia di eguaglianza”, *Giornale di Diritto del Lavoro e di Relazioni Industriali*, N.99-100, anno XXV, 2003, 3-4, pp. 373- 432.

<sup>46</sup> P Torremans, ‘Extraterritoriality in Human Rights’, in N A Neuwahl, A Rosas (eds), *The European Union and Human Rights* (1995), 281, 293

<sup>47</sup> Case 36/74, *Walrave v Union Cycliste Internationale* (1974) ECR 1405. TO ADD



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

## 2. Addressees of Human Rights Obligations

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

### a) Human Rights Obligations of the EU

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

#### 1) Primary law

35. The basic primary law provision which establishes that the EU is bound by human rights is Article 6(2) of the EU Treaty:<sup>48</sup>

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

“Attachment” to human rights and fundamental freedoms, as well as to ‘fundamental social rights’, is confirmed also in the preamble to the EU Treaty.<sup>49</sup>

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

[t]he Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

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<sup>48</sup> Note that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, once it comes into force, will amend Article 6; according to the new text, “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union”, and “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

<sup>49</sup> See 3<sup>rd</sup> and 4<sup>th</sup> recital.

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter, [...]
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, [...]
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

37. Provisions of comparable generality do not appear in the sections of primary law covering the so-called First and Third Pillar, but more specific or implicit references to human rights are numerous. For example, the EC Treaty refers to human rights or ‘fundamental social rights’ in the context of Community action in certain areas,<sup>50</sup> and implicit references can easily be derived from provisions on judicial control, an approach which merits closer inspection because it introduces the point made in section a.2.<sup>51</sup>
38. The provisions of the EU Treaty and EC Treaty granting the Court jurisdiction are worded in a way suggestive of rules of law over and above the EU primary law. Thus, Article 220(1) of the EC Treaty provides that “[t]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed”. As regards this wording, “[i]t is usually thought that here the word ‘law’ must refer to something over and above the treaty itself; if correct, this means that Article 220 [...] not only entitles, but also obliges, the Court to take general principles into account”.<sup>52</sup> Of course, such a reading is by no means inevitable; indeed, the word ‘law’ may logically refer to the Treaty itself or to the theoretical construct of a ‘rule of recognition’ or ‘Grundnorm’ stating that ‘the law, i.e., the treaty shall be obeyed’.<sup>53</sup> Yet, the fact remains that much more has been read into the word ‘law’ as used in Article 220(1) of the EC Treaty, letting it incorporate general principles of law including human rights.
39. Other, more specific, provisions also contain language that seems or at least can be construed to imply that rules of law superior to the EC Treaty exist. Article 230(2) lays down the grounds on which the Court may review the legality of Community acts, and these grounds include an “infringement of this Treaty or of any rule of law relating to its application”. It is normally considered that “[t]he phrase ‘any rule of law relating to its application’ covers all those rules of Community law other than those in the Treaties themselves. This includes general principles of Community law,”<sup>54</sup> because the phrase “must refer to something other than the Treaty itself”.<sup>55</sup> The general principles, of course, include notably fundamental rights.<sup>56</sup> Assuming that this analysis is correct, Article 35(6) of the EU Treaty, when it entrusts the Court with “*jurisdiction to review the legality of framework decisions and decisions [...] on grounds of [...] infringement of this Treaty or of any rule of law relating to its application*”, reinforces the supremacy of human rights over EU Third pillar action.

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<sup>50</sup> See Article 136(1) (social policy), Article 177(2) (development cooperation) and Article 181a(1) (economic, financial and technical cooperation with third countries).

<sup>51</sup> The multiple provisions prohibiting discrimination are not listed separately for they are but a specific expression of a fundamental right to equal treatment.

<sup>52</sup> Trevor C Hartley, *The Foundations of European Community Law*, 6<sup>th</sup> ed., OUP, 2007, p. 132.

<sup>53</sup> Cf., however, Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., OUP, 2006, p.: 19: “[i]n fact, this concise and seemingly innocuous provision is replete with values, and arguably the most important provision of the founding Treaties. It establishes that the Community is bound by the rule of law [...]”

<sup>54</sup> Paul Craig, Gráinne de Búrca, *EU Law*, 3<sup>rd</sup> ed., OUP, 2003, p. 535.

<sup>55</sup> Hartley 2007, p. 132.

<sup>56</sup> See the seminal case 4/73 Nold, [1974] ECR 491, para. 13, relating to the similarly worded Article 33(1) of the now expired Treaty establishing the European Coal and Steel Community.

40. Interim Conclusion

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

2) Human Rights as General Principles

41. Yet, although it is clear that all forms of EU action are covered by human rights obligations, the Treaties alone do not reflect the particular ‘brand’ of rights that bind the EU. It will be recalled that the ECHR is explicitly referred to in Article 6(2) of the EU Treaty, but even there the mention appears simply alongside the reference to ‘general principles of Community law’. Further, the history of the Court’s jurisprudence and of the EU Treaty suggests that the said Article simply reflects case-law,<sup>57</sup> and thus it is there that one can learn more about the meaning of the words ‘general principles of Community law’ and also about human rights as a specific sort of these principles.
42. The general principles are ‘inspired’ from the constitutional traditions of the Member States, and so are those that relate to fundamental rights:<sup>58</sup>

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

43. In addition to the constitutional traditions, “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”,<sup>59</sup> and “[i]n that regard, the Court has stated that the [ECHR] has special significance”.<sup>60</sup> Accordingly, the human rights obligations which bind the EU are chiefly an amalgamation resulting from the ‘inspiration’ drawn from national constitutional traditions and from the ‘special significance’ attached to the ECHR. Insofar as it makes sense to speak of differing – lower or higher – levels of protection of human rights, one may safely say that the product of this alchemy is neither the lowest common denominator amongst the Member States and the jurisdiction established by the ECHR, nor a maximisation of intensity with which fundamental rights apply. Rather, the Community concept of fundamental rights is generally such as would enable “the most appropriate solution on the circumstances of the case. [...] [T]he Court seeks such elements from national laws as will enable it to build a system of rules which will provide ‘an appropriate, fair and viable solution’ to the legal issues raised, and the judicial enquiry has been referred to as ‘free-ranging’”.<sup>61</sup> The variable nature of this ‘free-ranging’ enquiry is indeed demonstrated by instances in which the EU version of fundamental rights is above or below the putative reference level set by the ECHR.

3) ‘High’ Standard of Protection

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<sup>57</sup> Hartley 2007, p. 140.

<sup>58</sup> Judgment in case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125.

<sup>59</sup> Nold, op. cit., para. 13.

<sup>60</sup> Opinion 2/94, [1996] ECR I-1759, para. 33.

<sup>61</sup> Tridimas, p. 21, references omitted.

44. An instructive example of different approaches to the protection of human rights appears in the cases concerning the control of acts of the United Nations Security Council. Both the Court and the ECtHR have recently dealt with the matter. The cases before the Court arose in the context of Security Council resolutions requiring all States to freeze the assets of the persons identified by the Security Council or its Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda network or the Taliban. A list of such persons was drawn up, yet they were not afforded any meaningful rights of defence or even told what they were supposed to have done wrong. In order to implement that resolution, the Council of the European Union adopted a Common Position<sup>62</sup> providing that “[f]unds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee [...]”.<sup>63</sup> Because the Common Position – a foreign affairs measure which binds the EU member states – lacks direct enforceability, an EC Regulation<sup>64</sup> was adopted, which, of course, was directly applicable in all Member States. The Regulation provided that “[a]ll funds and other financial resources belonging to any natural or legal person, entity or body designated by the [...] Sanctions Committee and listed in Annex I shall be frozen”.<sup>65</sup> A certain Mr. Yasin Al-Qadi and an organisation called Barakaat International Foundation were included in the list of the Sanctions Committee and eventually in Annex I of the Regulation.
45. Both challenged the Regulation, insofar as it included their names, before the Court of First Instance (CFI)<sup>66</sup> on grounds of lack of competence and infringement of the right to property protected by Article 1 of Protocol 1 to the ECHR, the right to a fair hearing in accordance with earlier case law of the ECJ, and the right to judicial process under Article 6 ECHR and ECJ case law. The CFI delivered judgments in which it ruled that “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law”<sup>67</sup> but continued to state that it was “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”.<sup>68</sup> Having rather controversially reviewed the state of *jus cogens* as regards the right to property,<sup>69</sup> fair hearing<sup>70</sup> and judicial process,<sup>71</sup> the CFI concluded that violation thereof could not be established. As the applicants had also been unsuccessful in arguing that the EC lacked competence to adopt the contested Regulation,<sup>72</sup> their actions were dismissed.
46. An appeal on points of law was brought before the Court. In what is commonly known as the *Kadi*

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<sup>62</sup> See Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1).

<sup>63</sup> Art. 4.

<sup>64</sup> See Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).

<sup>65</sup> Art. 1(2).

<sup>66</sup> See judgments in Case T-315/01, *Kadi*, [2005] ECR II-3649 and Case T-306/01, *Yusuf and Al Barakaat International Foundation*, [2005] ECR II-3533.

<sup>67</sup> *Kadi*, para. 225; *Yusuf*, para. 276.

<sup>68</sup> *Kadi*, para. 226; *Yusuf*, para. 277.

<sup>69</sup> See *Kadi*, paras. 234-252; *Yusuf*, paras. 285-303.

<sup>70</sup> See *Kadi*, paras. 253-276; *Yusuf*, paras. 304-331.

<sup>71</sup> See *Kadi*, paras. 277-291; *Yusuf*, paras. 332-346.

<sup>72</sup> See *Kadi*, paras. 87-135; *Yusuf*, paras. 125-170.

judgment,<sup>73</sup> it ruled, *inter alia* that, “an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system”<sup>74</sup> and accordingly “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”.<sup>75</sup> The abstract reference in these passages to ‘an international agreement’ points to nothing less than the Charter of the United Nations. The Court refused to admit that the Charter might have a place in the hierarchy of Community law, but if it had, it would enjoy “primacy over acts of secondary Community law [yet] [t]hat primacy at the level of Community law would not [...] extend to primary law, in particular to the general principles of which fundamental rights form part”.<sup>76</sup>

47. Having thus established full applicability of the constitutional (*viz.* general) principles of the EC Treaty, the Court checked the contested Regulation against the EU version of fundamental rights, rather than *jus cogens*, as the CFI had done. Unsurprisingly, violations of the right to defence and effective judicial protection,<sup>77</sup> as well as property<sup>78</sup> were found. The Regulation was annulled insofar as it concerned the applicants.<sup>79</sup> The ruling was given notwithstanding the fact that the Charter of the United Nations provides for the obligatory nature of Security Council’s Resolutions<sup>80</sup> and their prevalence over other international agreements, be they earlier or subsequent,<sup>81</sup> or that, as was argued by the CFI, “Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations”<sup>82</sup> because the EC Treaty leaves earlier international obligations unaffected<sup>83</sup> and requires the Member States to cooperate in maintaining international security.<sup>84</sup> It has been submitted that “[t]he Court’s reasoning was robustly dualist”<sup>85</sup> and that “[t]he bottom line of the judgment [...] is that the UN Charter and UN SC Resolutions, just like any other international law, exist on a separate plane and cannot call into question or affect the

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<sup>73</sup> See Joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation, judgment of 3 September 2008, nyr.

<sup>74</sup> Para. 282.

<sup>75</sup> Para. 285.

<sup>76</sup> Paras. 307-308.

<sup>77</sup> See paras. 333-353.

<sup>78</sup> See paras. 354-371.

<sup>79</sup> Although maintaining its effect for three months in order to give the Council an opportunity to remedy the breaches of fundamental rights.

<sup>80</sup> See Art. 25: “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*”

<sup>81</sup> See Art. 103: “*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*”

<sup>82</sup> Kadi, para. 190; Yusuf, para. 240.

<sup>83</sup> See Art. 307(1): “*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.*”

<sup>84</sup> See Art. 297: “*Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.*”

<sup>85</sup> G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09, p. 34, [www.jeanmonnetprogram.org/papers/09/090101.pdf](http://www.jeanmonnetprogram.org/papers/09/090101.pdf)

- nature, meaning or primacy of fundamental principles of EC law”.<sup>86</sup>
48. By contrast, when confronted with a similar problem, the ECtHR adopted a deferential approach. In its *Behrami/Saramati* admissibility decision<sup>87</sup> the Grand Chamber had to rule on whether the ECtHR may adjudicate on the alleged human rights violations by KFOR – a security presence established by a Security Council Resolution and staffed by “Member States [of the United Nations] and relevant international institutions”, “under UN auspices”, with “substantial NATO participation” but under “unified command and control”<sup>88</sup> – and by UNMIK – an interim administration under UN auspices established by the same Resolution – in Kosovo following the forced withdrawal of Federal Republic of Yugoslavia forces and the conflict between Serbian and Albanian forces in 1999.
49. One of the applicants was Mr Behrami, who complained on his own behalf, and on behalf of his deceased son who had died whilst playing with undetonated cluster bombs which had been dropped during the bombardment by NATO in 1999. In a UNMIK investigation, it was revealed that a French KFOR officer had accepted that KFOR had been aware of the unexploded cluster bombs for months but that they were not a high priority. Mr Behrami submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated bombs which those troops knew to be present on that site.
50. The *Saramati* application involved a Kosovar national of Albanian origin who was on 24 April 2001 arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 4 June the Supreme Court allowed Mr Saramati’s appeal and he was released, but on 13 July, when reporting to a police station which was located in an area where the lead nation was Germany, he was again arrested by UNMIK police officers by order of the Commander of KFOR, who at the time was a Norwegian officer. Eventually, after Mr Saramati’s detention had been extended several times, the Supreme Court of Kosovo quashed the conviction, his case was sent for re-trial and his release from detention was ordered. In the meantime, on 3 October 2001, a French General had been appointed to command the KFOR. Mr Saramati complained under Article 5 of the ECHR, concerning the right to liberty and security, alone and in conjunction with Article 13, concerning the right to an effective remedy, about his extra-judicial detention by KFOR. He also complained under Article 6(1), concerning the right to a fair trial, that he did not have access to court and about a breach of the respondent States’ positive obligation to guarantee the Convention rights of those residing in Kosovo.
51. The ECtHR decided not to recycle its earlier *Bosphorus* case law, which concerned the relationship between the ECHR and EU measures. There the ECtHR had, in effect, ruled that it would not review a national measure implementing an EU measure where the latter left no discretion to the Member States’ authorities, as long as there is no evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.<sup>89</sup> Rejection of this kind of approach in the *Behrami/Saramati* case<sup>90</sup> was based on a strictly territorial

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<sup>86</sup> Ibid., p. 35.

<sup>87</sup> See decision of 2 May 2007, *Behrami and Behrami v. France*, Application No 71412/01, and *Saramati v. France, Germany and Norway*, Application No 78166/01.

<sup>88</sup> See Resolution 1244 of 10 June 1999.

<sup>89</sup> See judgment of 7 July 2005, *Bosphorus Airways v. Ireland*, Application No 45036/98, para. 155: “State action taken in compliance with [international] obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. By “equivalent” the Court means “comparable”; any requirement that the organisation’s protection be “identical” could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.” For the position on State’s obligation where it has discretion, see para. 157.

<sup>90</sup> Once even described as ‘surprisingly formal’ and ‘unconvincing’: see de Búrca, p. 20.

argument.<sup>91</sup>

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

Somewhat more comprehensibly, the ECtHR went on to say that “[t]here exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases”.<sup>92</sup> Indeed, the applications were found to be inadmissible because the reproached conduct was attributable not to the Respondent States but rather to the United Nations on the basis of an intensely teleological argument that to decide otherwise “would be interfere with [...] effective conduct of [UN’s] operations”.<sup>93</sup>

52. Of course, one may attempt to explain the divergent approaches of the ECtHR and of the Court by saying that the former, being an international court proper, could not behave in the expansive manner of a supreme court, and that the latter simply used an opportunity to take a new step towards constitutionalising the EC. Although itself a creature of international law, it now levitates as a constitutional entity, much like traditional states do, by pulling itself up by its own bootstraps, i.e., by dismissing any need for a superior international legal order by virtue of which it might be said to exist. However, the ECtHR has also sought to assert the constitutional quality of the ECHR structure,<sup>94</sup> yet it chose not to reconsider its view of the hierarchical position of international law in the name of human rights. This indicates that the EU version of fundamental rights is probably rather more absolute. Furthermore, the daring and deferential statements by, respectively, the Court and the ECtHR, as well as the outcome of the cases, seem to go beyond what would be required if the two courts had been motivated merely by determining the best approach for positioning themselves vis-à-vis international law. It therefore appears that in substantial, if not procedural, terms the EU’s general principles are on occasion capable of offering more protection to individuals than the ECHR.
53. Yet, for the sake of a fair account, when discussing the scope of human rights obligations addressed to the EU it should be stated that in less exceptional circumstances the Community courts do not appear to discipline the institutions more than the ECHR and ECtHR’s case law would require. Despite the widely shared view that the general principles of EC law are not limited to the level of protection required by the ECHR,<sup>95</sup> it seems excessively difficult, not to say impossible, to find instances where the EU’s acts are subjected by the Community courts to more exacting standards. An idealist interpretation of this fact would suggest that the standard of protection is already consistently high and does not call for aggressive judicial intervention. A pragmatist would suspect that, “[t]he Court could also be accused of being influenced in its judicial decision-making by its interests as a Community institution and thereby failing in its duty of impartiality”.<sup>96</sup> The latter may be a harsh assessment, but it seems correct to assert that the

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<sup>91</sup> *Behrami / Saramati*, para. 151.

<sup>92</sup> *Ibid.*

<sup>93</sup> Para. 149.

<sup>94</sup> See, e.g. Judgment of 18 January 1987, *Ireland v. The United Kingdom*, Application No 5310/71, paras. 239 et seq..

<sup>95</sup> See, e.g. Xavier Groussot, *General Principles of Community Law*, Europa Law, 2006, p. 98.

<sup>96</sup> Trevor C. Hartley, *Constitutional Problems of the European Union*, Hart, 1999, p. 44.

human rights obligations binding the EU are not consistently more rigorous than those arising under the ECHR.

#### 4) 'Low' Standard of Protection

54. Indeed, in a number of instances it could be argued that the EU falls below the standard of protection that would be required by the ECHR. Two examples will suffice to prove the point, and, in addition, in the present context it may be pertinent to note that EU's external policy also allows for human rights goals to be counterbalanced by political pragmatism. First, as regards fair trial rights,<sup>97</sup> the position of the Advocate General – the Court's judicial officer who delivers non-binding opinions to which the parties have no right of response – appears rather precarious. In the *Emesa Sugar* case the Court rejected a litigant's request to submit observations in response to the Opinion of the Advocate General, principally because the latter has the same status as the Judges<sup>98</sup> and is “not entrusted with the defence of any particular interest in the exercise of [his] duties”.<sup>99</sup> However, in a subsequent case on the status of the *commissaire du Gouvernement* of the French *Conseil d'État* the ECtHR implied that conformity with Article 6(1) of the ECHR required that the parties may respond, if only in writing, to the *commissaire's* opinion even after the closure of oral proceedings.<sup>100</sup> No such right is afforded to litigants before the Court.<sup>101</sup>
55. Second, competition law is a notoriously problematic area when it comes to ensuring full compliance by the Commission with the ECHR. For example, the prohibition of double jeopardy has been interpreted by the Court as requiring not that the same competition law infringement may not be pursued by the Commission and by a Member State, but simply that in setting a fine an earlier fine must be taken into account:<sup>102</sup>

[i]n the field of Community competition law, the [non bis in idem] principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge.

[T]he possibility of concurrent sanctions, one a Community sanction, the other a national one, [...] is acceptable [...]. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where [...] the infringement was committed within the Community.

56. In view of this jurisprudence, it has been submitted that “*the case law of the ECJ concerning international ne bis in idem in competition cases is not fully in line with the ECHR case law on the national ne bis in idem by precluding the double prosecution from the ne bis idem principle and*

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<sup>97</sup> For a critical discussion, not reproduced here, on whether the case law regarding *locus standi* in accordance with Article 230 of the EC Treaty is fully compatible with the right of access to court under Article 6(1) of the ECHR, see notably the Concurring Opinion of Judge Ress in the *Bosphorus* case, op. cit..

<sup>98</sup> See Order of the Court in case C-17/98, *Emesa Sugar (Free Zone)*, [2000] ECR I-665, para. 11.

<sup>99</sup> Para. 12.

<sup>100</sup> See judgment of 7 June 2001, *Kress v. France*, Application No 39594/98, para. 76.

<sup>101</sup> For a more extensive commentary, making the point that “*Kress leaves the advocate general of the ECJ in a very precarious, indeed unsustainable, position*” see Tridimas, pp. 344-347; cf., however, Groussot, pp. 95-97, who argues that “*in the light of the Kress case, it could be asserted that the Emesa Sugar [order] used the right argumentation to find that the impossibility for the parties to reply to the Opinion of the AG did not amount to an infringement of the ECHR*”.

<sup>102</sup> Judgment in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon et al.*, [2004] ECR II-1181, paras. 131-132.



by accepting the accounting principle”,<sup>103</sup> i.e., the principle merely requiring that one penalty be taken into account when deciding on another, because under ECHR “Article 4 of Protocol No 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice”.<sup>104</sup> The perfectly valid practical argument that enforcement of competition law might be unduly hampered by ‘excessively strict’ application of human rights rules does not invalidate the point that the fundamental rights, as recognised by the EU, may be curtailed when convenience so requires.<sup>105</sup>

57. In the area of development cooperation, human rights safeguards have been modelled in an explicitly political fashion. The Cotonou Agreement,<sup>106</sup> which partly replaced the Lomé IV bis Convention, has the objective of promoting and expediting the economic, cultural and social development of the African, Caribbean and Pacific (ACP) States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.<sup>107</sup> Its three complementary pillars are development cooperation, economic and trade cooperation, and the political dimension.<sup>108</sup> Benefits available to the ACP States include preferential trading conditions. Article 96 provides that, “[i]f [...] a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law” it must commence a consultation procedure; if other ‘appropriate measures’ are not sufficient, “[i]t is understood that suspension would be a measure of last resort”. In 2005, Article 96 was watered down somewhat by placing an increased emphasis on political dialogue prior to adoption of sanctions.
58. It has been observed that “[i]n terms of practice, these clauses have been invoked on numerous occasions, usually in response to military coups. However, with one exception, the measures taken have involved the suspension of financial aid and other cooperation but not trade benefits”.<sup>109</sup> Thus, both the wording of the Cotonou Agreement and the practice of its application suggest that the human rights conditionality clause, the likes of which have systematically been used by the EC (EU) in cooperation agreements since 1991,<sup>110</sup> is essentially a mild political instrument eminently inappropriate for reinforcing the human rights obligations of PMSCs. The best that can be said for the conditionality clauses in general is that, assuming that they are constitutionally valid, they can be a “vehicle for positive measures”, but to ensure respect for human rights and democratic principles in other territories the Community will require legislative competence under Community law to adopt appropriate measures.<sup>111</sup>

## **b) Human Rights Obligations of Member States**

59. The starting point for a discussion on the extent to which EU fundamental rights are addressed to

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<sup>103</sup> John A.E. Vervaele, *European Criminal Law and General Principles of Union Law*, College of Europe research papers in law, No 5/2005, p.16, [www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper\\_5\\_2005\\_Vervaele.pdf](http://www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf)

<sup>104</sup> Judgment of 29 May 2001, *Fischer v. Austria*, Application No 37950/97, para. 29.

<sup>105</sup> For further examples on competition law practice that can hardly be reconciled with ECHR, see, e.g., *Tridimas*, pp. 342-344 and *Groussot*, pp. 98-99.

<sup>106</sup> Partnership Agreement between the members of the African, Caribbean and Pacific group of States of the one part, and the European Community and its Member States of the other part [2000] OJ L317/3, amended [2005] OJ L 287/1.

<sup>107</sup> See Art. 1.

<sup>108</sup> See [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm)

<sup>109</sup> Lorand Bartels, *The trade and development policy of the European Union*, [2007] 18 Eur. J. Int'l L., pp. 738-739. The one reported exception concerned the suspension of the EU's obligation not to impose any restrictions on any capital payments between residents of the Community and Zimbabwe.

<sup>110</sup> See Armin von Bogdandy, *The European Union as situation, executive, and promoter of the international law of cultural diversity – elements of a beautiful friendship*, [2008] 19 Eur. J. Int'l L., p. 262.

<sup>111</sup> Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, OUP, 2007, pp. 123 et seq.

the Member States must be a passage from the *ERT* judgment:<sup>112</sup>

[the Court] has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

60. Two important notions appear in the quoted passage. Firstly, as has been confirmed on other occasions, “where national legislation is concerned with a situation which [...] does not fall within the field of application of Community law, the Court cannot [...] give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the [ECHR]”.<sup>113</sup> Put in other words, national measures that fall outside the scope of Community law are not subject to review for compliance with general principles of EC law. Secondly, it is sufficient for a national measure to be within the ‘scope’ of Community law, as opposed to being an implementing measure or a measure which restricts the fundamental freedoms but comes within the ambit of an express derogation provided for in the Treaty, for Community general principles to apply.<sup>114</sup> By and large, this describes the state of the law.
61. Yet, three important notes must be made. Firstly, the Court has been extremely creative in recognising situations as falling within the ‘scope’ of Community law and thus triggering rights review of national measures. For example, in the *Carpenter* case, the UK was disallowed from expelling a certain Mrs. Carpenter, a national of the Philippines, because her separation from her husband “*would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom*”.<sup>115</sup> The situation thus having come within the scope of Community law, the Court instructed the Member State in question that expulsion would be a disproportionate intervention in Mr. Carpenter’s privacy. It has been recognised that “[t]here is [...] a clear and, indeed, remarkable tendency towards broad application of general principles, in particular, fundamental rights. Further, the case law has understood European citizenship as an autonomous source of rights thus bringing within the scope of application of Community law a range of situations not directly linked with free movement”.<sup>116</sup> On one occasion, the Court even engaged in a discussion on compatibility with fundamental rights of a national measure after having ruled that it did not come within the scope of Community law,<sup>117</sup> though the broader significance, if any, of this judgment by a Chamber consisting of merely three judges remains unclear.
62. Secondly, the interpretation of fundamental rights protected by the Community, when addressed to the Member States, has sometimes become very extensive. For instance, in the said *Carpenter* case the Court’s view of what was required for an adequate protection of family life went beyond what in all likelihood would have been demanded by the ECtHR.<sup>118</sup> In the *Mangold* case, one of

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<sup>112</sup> Judgment in case C-260/89, *Elliniki Radiophonia Tiléorassi*, [1991] ECR I-2925, para. 42.

<sup>113</sup> Judgment in case C-299/95, *Kremzow*, [1997] ECR I-2629 para. 19.

<sup>114</sup> Although this has relatively recently been described as merely an obiter – see Hartley 2007, p. 144 – the rule on ‘scope’ seems to be good law.

<sup>115</sup> Judgment in case C-60/00, *Carpenter*, [2002] ECR I-6279, para. 39.

<sup>116</sup> *Tridimas*, p. 39, references omitted.

<sup>117</sup> See judgment in case C-71/02, *Karner*, [2004] ECR I-3025, paras. 44-52.

<sup>118</sup> See, on one hand, the Court’s very generous proportionality analysis in para. 44, and, on the other hand, ECtHR’s rather more exacting criteria for prohibiting expulsion in, e.g., judgment of 19 February 1996, *Gül v. Switzerland*, Application No 23218/94, paras. 40-43.

the most daring of the Court's forays into human rights law of all time, the Grand Chamber referred to "various international instruments and [...] the constitutional traditions common to the Member States"<sup>119</sup> in the abstract and found, *inter alia* that "[t]he principle of non-discrimination on grounds of age must [...] be regarded as a general principle of Community law".<sup>120</sup> An editorial in the *Common Market Law Review* commented that the Court's reasoning would have provoked a thick red underlining if it had occurred in a student essay.<sup>121</sup>

63. Thirdly, in what has become known as a process of judicial de-pillarisation, the Court has understood its jurisdiction under the Third Pillar broadly, holding that individuals may invoke a framework decision adopted under Article 34(2) of the EU Treaty to create consistent interpretation of national law and that "the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law".<sup>122</sup> If the transposition to the Third Pillar of Community case-law on interpretation of law is meant to be complete, it follows that a Member State is bound by the EU version of fundamental rights also when acting within the scope of rules on police and judicial cooperation in criminal matters.
64. The above is relevant in the context of PMSCs because under international law they "might be considered [...] as agents of the state, and in this way, the normal rules for state responsibility would apply where the firm's activity is controlled by the state".<sup>123</sup> However, for such attribution to be possible, apart from the content of the respective entity's powers "the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise" must be assessed.<sup>124</sup> Such assessment is not carried out by reference to autonomous criteria but "depends on the particular society, its history and traditions"<sup>125</sup> and therefore appears to be an inexact exercise. Furthermore, in most contexts where PMSCs have not been commissioned by a Member State and their activities have human rights implications, attribution to any of the Member States will be almost impossible because the exercise of governmental authority as normally understood does not entail extraterritorial maintenance of peace and security. It follows that the human rights obligations of the Member States are unlikely to be triggered by acts of *locally recruited* PMSCs. That, of course, may be different when, upon invitation or by orders of the UN, States maintain peace and security abroad. The ECtHR has recognised that "a State may also be held accountable for violation of the Convention rights and 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".<sup>126</sup> Accordingly, *de facto* control of State agents may give rise to attribution of responsibility for acts of these agents to the respective State.

### **c) Direct and Indirect *Drittwirkung***

65. Horizontal applicability of human rights provisions – often referred to by the German noun *Drittwirkung* – is a perpetually vexing and contested issue of constitutional law. The first principal objection is that if human rights provisions were applicable in relations between individuals, this

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<sup>119</sup> Judgment in case C-144/04, Mangold, [2005] ECR I-9981, para. 74.

<sup>120</sup> Para. 75.

<sup>121</sup> Horizontal direct effect – A law of diminishing coherence?, [2006] 43 CMLRev 1.

<sup>122</sup> Judgment in case C-105/03, Pupino, [2005] ECR I-5285, para. 44.

<sup>123</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 2006, p. 320, references omitted.

<sup>124</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, adopted in 2001, United Nations, 2008, commentary on Art. 5, p. 43.

<sup>125</sup> *Ibid.*

<sup>126</sup> Issa and Others, n. 23 above, para. 71.

“would put an end to private autonomy”.<sup>127</sup> A second important objection is that given the legal principle status of human rights and the highly abstract nature of rules, they are eminently inappropriate for regulating the daily myriad of relationships between private parties who cannot be expected to undertake a balancing of competing principles and to cope with the open texture of fundamental rights provisions. Nevertheless, while these reasons might be very convincing grounds to reject the idea that human rights could be enforced directly by one private party against another, known as direct *Drittwirkung*, opinions differ widely as to the permissibility of indirect or ‘mittelbare’ *Drittwirkung*, i.e., the notion that human rights could or should guide the interpretation of private law rules and/or deny enforceability to private law obligations where that would be in an alleged conflict with the State’s obligation to ensure protection against abusive effects of private autonomy.

66. Direct *Drittwirkung* is not required by the ECHR which, it will be recalled, is a particularly important source of inspiration for general principles of EU law. The following passage adequately summarises the situation:<sup>128</sup>

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

67. As to indirect *Drittwirkung* under the ECHR, the obligations imposed upon the Member States seem to be very extensive.<sup>129</sup>
68. Under EC law, because “[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights”,<sup>130</sup> there can be no question of direct *Drittwirkung*. The indirect variety, by contrast, forms part and parcel of established case law. The *Schmidberger* case<sup>131</sup> is a particularly relevant example “which places the protection of fundamental rights on a par with the fundamental freedoms”.<sup>132</sup> Austrian authorities had allowed an environmental group to organize a demonstration on the Brenner motorway, the main transit road between Germany and Italy, which as a result was to be closed for almost 30 hours. The applicant was a transport company, and it sought damages from Austria, claiming that the failure to prevent the motorway from being closed amounted to a restriction on the free movement of goods. The Court agreed that failure to ban the demonstration was a measure having equivalent effect to a quantitative

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<sup>127</sup> David P. Currie, *The Constitution of the Federal Republic of Germany*, University of Chicago Press, 1994, p. 186, quoted in: Mark Tushnet: *The issue of state action / horizontal effect in comparative constitutional law*, [2003] 1 I.Con 84.

<sup>128</sup> Yutaka Arai et al., *Theory and Practice of the European Convention on Human Rights*, eds. Van Dijk et al., 4<sup>th</sup> ed., Intersentia, 2006, p. 32, references omitted.

<sup>129</sup> For an elaborate discussion see Ineta Ziemele, ‘Issues of Responsibility of Private Persons or Entities for Human Rights Violations: The Case-law of International Human Rights Courts and Monitoring Bodies’, EUI Working Papers, Academy of European Law WP 2009/08, [http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL\\_2009\\_08.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/11409/1/AEL_2009_08.pdf), esp. the commentary on the *Pla and Puncernau* case.

<sup>130</sup> Opinion 2/94, [1996] ECR I-1759, para. 27.

<sup>131</sup> See judgment in case C-112/00, *Schmidberger*, [2003] ECR I-5659.

<sup>132</sup> *Tridimas*, p. 209.

restriction. However, it also stated that the protection of fundamental rights, amongst them freedom of expression, “is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods”.<sup>133</sup> Having analysed the scope of freedom of expression and balanced it against the free movement of goods, the Court concluded that “the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade”.<sup>134</sup> Because freedom of expression was also described as a general principle of EC law,<sup>135</sup> it is clear that the Community fundamental rights can have a very intense indirect horizontal effect:<sup>136</sup> the exercise of freedom of speech by one private party validly precluded another private party from conducting its business.

69. *Interim conclusions*

As was reported in WP 7.1 sub b, “[t]he Court of Justice in a series of judgments has established the competence of the Commission according to which private security counts as an ‘economic sector’ and as such is subject to the same rules as other supply of services in the Internal Market”.<sup>137</sup> Therefore, the EC human rights rules affect PMSCs just as any other service providers. It is often argued that “indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance”.<sup>138</sup> Put more provocatively, however horizontal effect is formulated, in the final analysis it will always be direct.<sup>139</sup> That may be true from a radically substantive point of view. Yet, in reality, the extent to which human rights can be invoked against a private party depends also on rules of competence, standing and interpretation. Consequently, as regards the applicability of human rights in private relations, the distinction between direct and indirect *Drittwirkung* does hold some value. It therefore seems that the law could properly be described by saying that the human rights as general principles of EC law can be applicable to private relations, albeit indirectly.

### 3. Judicial Remedies

70. Human rights violations carried out by the PMSCs may give ground to both State responsibility as well as individual responsibility. With respect to the latter, it is questionable whether civil or criminal liability should be preferred. In fact, it has been pointed out in respect to responsibility of multinational enterprises, while civil liability is tailored to compensate the victims of the human rights violations, criminal liability may provide more efficient tools for repression if the State becomes involved in the investigatory process.<sup>140</sup> In any case, the invocation of the PMSC personnel’s individual criminal responsibility is most likely to occur before the national courts of the State that has territorial or personal jurisdiction over them. Another option involves the invocation of responsibility of the PMSC’s Home State, Contracting State or Host State<sup>141</sup> before the ECtHR (as long they are, of course, Contracting States to the ECHR) on grounds of violation

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<sup>133</sup> Schmidberger, para. 74.

<sup>134</sup> Para. 93.

<sup>135</sup> Para. 71.

<sup>136</sup> For an extreme example see Mangold, op. cit..

<sup>137</sup> *The Regulatory context of private military and security services at the European Union level*, not published, p. 6.

<sup>138</sup> *Viking Case*, n. 9 above, per AG Poiares Maduro, para.40.

<sup>139</sup> Robert Alexy, *A theory of Constitutional Rights*, OUP, 2002, p. 363.

<sup>140</sup> Olivier de Schutter, ‘The Accountability of Multinationals for Human Rights Violations in European Law’, in Philip Alston, *Non-State Actors and Human Rights* (2005), 228.

<sup>141</sup> The responsibility of the Home, Host and Contracting States is dealt with in three separate reports in the framework of WP4.

of such a State's positive obligation to observe human rights and prevent their infringement.

71. Any claim before the ECtHR would, however, only be successful if: 1) the admissibility criteria are met (*inter alia*, exhaustion of local remedies as provided under general international law), 2) a connection between the PMSC and the Respondent State can be established, in other words, if the PMSC's conduct is attributable to the Respondent State and, 3) if the Court's jurisdictional limits can be overcome by demonstrating that either the illegal act has been committed in a Contracting State's territory, or that the Respondent has exercised effective control of such a territory.
72. As far as invocation of State responsibility before the ECJ is concerned, the matters are more complex, not least because the ECJ is not a human rights court. In addition, the matters are further complicated by the unclear *locus standi* for private parties before the ECJ when Community acts are challenged. Generally the ECJ's approach with respect to individual access to the Community courts has been restrictive: the individual is expected to resort to national courts for judicial review, and it is the national court that is entitled to ask the Court for a preliminary ruling in case of doubt as to the interpretation of Community law. In fact, a number of scholars have observed that the present system is not always sufficient for protecting an individual's fundamental rights and have argued either in favour of an expansion of the ECJ's competence or its accession to the ECHR.<sup>142</sup> Given the current state of law the alleged shortcomings may be of little importance, because there is not much that an individual might be seeking from the Community with regard to the conduct of a PMSC, if one is to argue for a greater involvement by the EU in the regulation of such services and for solid foreign policy, one must also address the perceived lack of availability of *locus standi*.
73. Furthermore, in the context of PMSC (illegal) conduct, and in the (current) absence of any specific EU legislation in the field, action against a Member State on grounds of its PMSC's conduct, brought either by the Commission or indirectly by a private individual is unlikely. That is so in particular because of the Commission's wide discretion whether or not to pursue a Community law infringement.<sup>143</sup> Also, availability of remedies in national courts is subject to Member States' procedural autonomy, and, according to well-entrenched case law of the Court, Community law only requires that sanctions for its breach be equivalent to those penalising violations of national law,<sup>144</sup> that they be effective, i.e., dissuasive<sup>145</sup> and that they be proportionate.<sup>146</sup> It is excessively difficult to see how these rather abstract requirements might be used by a private party to successfully argue that a Member State has failed to comply with the Community human rights regime by inadequately reining in PMSCs.
74. In conclusion, there can be no doubt that fundamental rights are enforceable at Community level. At the same time, any possible EU legislation imposing an obligation on the Member States with respect to the licensing of PMSCs as well as criminalization of their illegal conduct outside the EU will need to strike a balance between human rights and economic rights. In other words, although the ECJ has acknowledged that fundamental rights may constitute justifiable grounds for imposing restrictions on the free movement provisions, any such restriction on, for example, the free movement of services, will be subjected to a narrow interpretation where the free movement provisions will constitute the main rule. Fundamental rights, however, are the exception in this respect.<sup>147</sup>

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<sup>142</sup> See, among others, A-M Roddick Christensen, *Judicial Accommodation of Human Rights in the European Union* (2007), at 80. For a forceful and as yet unsuccessful criticism of the current practice see Case C-50/00 P UPA v. Council [2002] ECR I-6677, per AG Jacobs, para. 33 et seq.

<sup>143</sup> See, e.g. Case 7/71 Commission v France [1971] ECR I-1003, para. 5 et seq.

<sup>144</sup> See, e.g. Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, para. 13.

<sup>145</sup> See, e.g. Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, para. 23.

<sup>146</sup> See, e.g. Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art [2003] ECR I-10155, para 62.

<sup>147</sup> M Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?* (2007), at 208.

75. However, in light of several recent cases the possibility of enacting legislation requiring Member States better to regulate the conduct of PMSCs can by no means be excluded. In the recent *Ship-Source Pollution*<sup>148</sup> case, which followed the important ECJ's ruling in the *Environmental Crimes*<sup>149</sup> case, the Court ruled that the EC may enact first pillar legislation thereby requiring Member States to adopt measures criminalizing certain conduct where such legislation is necessary for combating crimes of a considerable gravity, in these cases – in the field of environmental law. In addition, as already mentioned above, the EU competence to adopt any necessary measures in the field would also be enhanced by the entry into force of the Lisbon Treaty, which foresees the abolishment of the current three pillar structure and will, hopefully, do away with some of the complexity related to competence delimitation.

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<sup>148</sup> Case C-440/05 *Commission v Council*, Judgment of 23 October 2007

<sup>149</sup> Case C-176/03 *Commission v Council* [2005] ECR I-7879