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POSITIVE HUMAN RIGHTS OBLIGATIONS OF THE HIRING STATE
IN CONNECTION WITH THE PROVISION OF COERCIVE SERVICES
BY A PRIVATE MILITARY AND SECURITY COMPANY

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Abstract

The present paper addresses the positive human rights obligations of a hiring state with respect to violations of human rights by Private Military or Security Companies (PMSCs / contractors) that it employs, which arise from the obligation to prevent such violations, as well as the obligations to legislate, investigate, and prosecute and punish. The contribution is limited to scenarios where PMSCs provide coercive services in a theatre of conflict. Examples include combat, guarding and protection of persons or property, or detention and interrogation.

The analysis demonstrates that hiring states have numerous positive obligations under Human Rights Law that can be highly relevant to PMSC operations in situations of conflict, including duties to oversee, control, and where necessary physically prevent conduct likely to threaten the right to life or the prohibition of torture and cruel and inhuman treatment. Where violations have already occurred or have been alleged, the duty to investigate, prosecute and punish obligates states to provide for a structure facilitating the reporting of such allegations, to quickly and effectively follow up on them and to ensure that they are properly processed through the system of justice. These provisions can, for the most part, be extended to conduct of third persons and thus also to contractors providing coercive services, even where their conduct may not be attributable to the state.

*Positive Human Rights Obligations of the Hiring State in Connection with the Provision of
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CARSTEN HOPPE*

1. Introduction

The present paper addresses the positive human rights obligations of the hiring state with respect to violations of human rights arising from the conduct of Private Military or Security Companies (PMSCs / contractors).¹ Specifically, the obligation to prevent such violations, and the obligations to legislate, investigate, and prosecute and punish are discussed. This contribution complements the parallel papers on the respective responsibility of the home state (F. Francioni) and on the territorial or host state (C. Bakker). A discussion of the preliminary question of the extraterritorial applicability of human rights norms can be found in the general report on PMSCs and human rights by F. Francioni and F. Lenzerini.

The present paper is limited to scenarios where PMSCs provide services in a theatre of conflict. Moreover, it addresses the provision of coercive services, defined as those services that explicitly entail or can be expected to entail an element of coercion in their execution. Examples include combat, guarding and protection of persons or property, or detention or interrogation. A counterexample would be the provision of food services or construction, even if provided in a context of conflict. Contractors provide such services not only on behalf of states, but also for international organizations, private companies, and non-governmental organizations. The present paper, however, considers the specific scenario where a state enters into the contract with the PMSC, and analyzes the responsibility arising out of this relationship.

The hiring state or contracting state as discussed in the present paper is thus defined as the state that enters into an agreement with a PMSC to provide services, in contrast to the home state of the PMSC, and the territorial or host state, where the service is provided.²

The present paper does not separately address the question of attribution of the PMSCs conduct to the hiring state. In the great majority of cases, the positive obligations of the hiring state will arise independently of the issue whether the contractors' conduct giving rise to the violation was attributable to the hiring state.

In the following, part 1 introduces the duty to prevent violations arising from the conduct of PMSCs, and part 2 discusses the duties to legislate, investigate, and prosecute and punish. For each set of obligations, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the European Convention on Human Rights (ECHR) are separately considered.³

2. The Duty to Prevent

In the following we will set out to answer the question when and how a state hiring a PMSC to provide coercive services in the context of conflict has to take measures to prevent violations of human rights

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¹ The present working paper summarizes research conducted for my dissertation entitled "Passing the Buck – State Responsibility for the Conduct of Private Military Companies".

² Sometimes these labels will overlap. Note that in a situation of non-international armed conflict, for example, the hiring state could also be the territorial state.

by these contractors. Different approaches to the question when and how states have the positive obligation to prevent violations of human rights of private actors have been developed by the judicial and quasi-judicial bodies interpreting human rights instruments.

A. *The International Covenant on Civil and Political Rights*

The Covenant provides that every human being has the inherent right to life of which he or she shall not be arbitrarily deprived;⁴ and that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵ These provisions are not derogable, even in times of armed conflict.⁶ The right to life and the prohibition of torture as interpreted by the Human Rights Committee (the Committee) imply positive obligations extending to the conduct of private actors.⁷

Hence, where there is a credible “threat to the life of persons under their jurisdiction”, which the state should be aware of, it has to intervene.⁸ The state owes this duty to all persons within its territory and to all persons subject to its jurisdiction.⁹

States thus have to take reasonable and appropriate measures to protect individuals from harm at the hands of PMSC personnel. These include that the hiring state has to take all feasible precautions to avoid that contractors providing coercive services violate the right to life of individuals they encounter, including and ensure proper supervision and planning of their missions. But also the off-duty conduct of contractors has to be safeguarded if the state becomes aware that transgressions are likely to happen.

Let me now move on to the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Art. 7). Here too, the Committee confirmed a duty to prevent that can apply to conduct of PMSCs hired by the respective state,¹⁰ as the state has a duty to take measures beyond legislative ones “to afford everyone protection ... against the acts prohibited by article 7, whether inflicted by people

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³ For a discussion of the African system of human rights protection consult C. Bakker, *Private Military and Security Companies: Positive Human Rights Obligations of the Host State* at 11-12.

⁴ International Covenant on Civil and Political Rights, GA Res. 2200A (XXI). A/6316, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 6.1.

⁵ *Ibid.*, Article 7.

⁶ *Ibid.*, Article 4.2.

⁷ UNCHR, General Comment No. 06: The right to life (Art. 6) 27 July 1982; UNCHR, General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7) 30 May 1982 UN Doc CCPR/C/Rev.1, at para. 2; UNCHR, General Comment 20, Article 7 (Forty-fourth session, 1992) (1994) UN Doc HRI/GEN/1/Rev.1 at 30, at paras.2; UNCHR, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26 May 2004 UN Doc CCPR/C/21/Rev.1/Add.13; See, e.g., UNCHR, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985 1990 UN Doc CCPR/C/39/D/195/1985; UNCHR, *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983 1990 UN Doc CCPR/C/OP/2; UNCHR, *Mr. Joseph Semey v. Spain*, Communication No. 986/2001 2003 UN Doc CCPR/C/78/D/986/2001; UNCHR, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000 2003 UN Doc CCPR/C/78/D/950/2000; UNCHR, *Karina Arutyunyan v. Uzbekistan*, Communication No. 917/2000 2004 UN Doc CCPR/C/80/D/917/2000.

⁸ UNCHR, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985 1990 UN Doc CCPR/C/39/D/195/1985; For further references see K. Wiesbrock, *Internationaler Schutz der Menschenrechte vor Verletzungen durch Private* (Menschenrechtszentrum der Universität Potsdam, Spitz, Berlin 1999), at 137.

⁹ UNCHR, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26 May 2004 UN Doc CCPR/C/21/Rev.1/Add.13, at para. 7.

¹⁰ See, UNCHR, General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7) 30 May 1982 UN Doc CCPR/C/Rev.1, at para. 2.

acting in their official capacity, outside their official capacity or in a private capacity.”¹¹ These protections are especially strict in the context of interrogations.¹² While the duty to prevent violations of Article 7 is one of conduct, states have to ensure that independent inspection of contractor operations is not only incorporated into the contract, but in fact implemented.

Where violations have already occurred, the duty to prevent recurrence of a similar violation is heightened.¹³ States may thus have a duty to scrutinize conduct of contractors, improve the regulation of contractors, and change the planning of operations, or terminate a contract where systematic violations occurred.

B. The Inter-American System

The American Convention on Human Rights obligates its States Parties to respect and ensure the rights contained in it,¹⁴ and to take legislative and other measures necessary to that effect.¹⁵ Article 4.1. contains the basic provision on the right to life, while Articles 5.1 and 5.2. protect the integrity of the person and prohibit torture or cruel, inhuman, or degrading treatment or punishment.¹⁶ The IACHR’s has developed a rich jurisprudence on the issue of enforced disappearances, including the *Velásquez Rodríguez* case¹⁷

Under the ACHR positive obligations to prevent violations of human rights are violated where the state fails to exercise due diligence to prevent the violation,¹⁸ by taking all reasonable measures.¹⁹ The duty to prevent is broadly conceived.²⁰

The IACHR also addressed the special situation of individuals in custody, which is very relevant to contractors providing interrogation services. The Court found that states have a very high duty to protect the life and health of persons on their custody. Moreover, the burden of proof will be on the state to show that it is not responsible, once the petitioner discharged the burden of evidence.²¹

The Inter-American Court of Human Rights has also addressed the responsibility of states specifically in relation to private conduct in conflict situations, chiefly in the context of the massacre cases brought against Colombia.²²

¹¹ UNCHR, General Comment 20, Article 7 (Forty-fourth session, 1992) (1994) UN Doc HRI/GEN/1/Rev.1 at 30, at paras.2; See also, UNCHR, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, supra note 7, at para. 8

¹² See, General Comment No. 20, supra note 7, at para. 11.

¹³ See, e.g., UNCHR, General Comment No. 20, supra note 7, at para. 17; See also, e.g., UNCHR, *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983 1990 UN Doc CCPR/C/OP/2 at 192; UNCHR, *Mr. Joseph Semey v. Spain*, Communication No. 986/2001 2003 UN Doc CCPR/C/78/D/986/2001; UNCHR, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000 2003 UN Doc CCPR/C/78/D/950/2000; UNCHR, *Karina Arutyunyan v. Uzbekistan*, Communication No. 917/2000 2004 UN Doc CCPR/C/80/D/917/2000.

¹⁴ American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, Article 1.1.

¹⁵ *Ibid.*, Article 2.

¹⁶ *Ibid.*, Articles 4 and 5.

¹⁷ *Velásquez Rodríguez*, Inter-American Court of Human Rights, Series C No 4 (29 July 1988).

¹⁸ However, the language of *Godínez Cruz*, distinguishing prevention and response leaves this possibility open. *Godínez Cruz*, Inter-American Court of Human Rights, Series C No 5 (20 January 1989), at para. 182.

¹⁹ For the duty to investigate see, *Velásquez Rodríguez*, supra note 17, at para. 176-177.

²⁰ *Ibid.*, at para. 175; *Godínez Cruz*, supra note 18, at para. 185 (employing identical language).

²¹ *Juan Humberto Sánchez*, Inter-American Court of Human Rights, Series C No 99 (7 June 2003), at para. 111.

²² *Valle Jaramillo*, Inter-American Court of Human Rights Series C No 192 (27 November 2008); *Case of the La Rochela Massacre v. Colombia*, Inter-American Court of Human Rights Series C No 163 (11 May 2007); *Case of the Ituango Massacres v. Colombia*, Inter-American Court of Human Rights Series C No 148 (1 July 2006); *Case of the Pueblo Bello*

While in these cases known criminal organizations were at issue, and not per se legal entities, it remains interesting that, under the IACtHR's approach, constructive knowledge of high risks posed by persons providing coercive services may be sufficient to trigger the obligation to physically prevent violations.

Specifically, states can incur responsibility where they fail to prevent a violation of an individual's right to life,²³ if the state is aware of a situation of real and imminent risk for a specific individual or group of individuals, and there was a reasonable possibility of preventing or avoiding that danger.²⁴

The duty to prevent is still as one of due diligence, but may be heightened where the state allowed the formation or supported the paramilitary groups, and thus "created" the danger.²⁵

Moreover, the court recognizes a duty to "prioritize the protection" of especially vulnerable persons such as human rights defenders.²⁶ Recurring violation heighten this duty.²⁷ The court in some cases even inferred a failure to observe due diligence from facts of the violation itself without the need for further inquiry into questions of fault, akin to a *res ipsa loquitur* approach.²⁸

Where states should be aware of the high general risks that for example guarding and protection contractors pose to the civilian population they have to take measures to prevent violation of the right to life resulting from such activities. The duty to adopt these measures will be heightened where grave violations recur. Extending the ECtHR's analysis to contractors who, by their nature are only exercising their functions in the area due to the hiring state having "created" them by contract, again the hiring state's duty to prevent will be heightened. Lastly, some activities of contractors may be so outrageous, such as, for example, some of the abuses at Abu-Ghraib, that the IACtHR would find a violation of the duty to prevent without the need for any further evidence of fault.

C. The European System

Article 1, contains a duty obligating states parties to "secure" the rights contained in the convention to individuals within their jurisdiction. The Convention rights most likely to be endangered by PMSCs providing coercive services are the right to life (Article 2), which remains applicable in an armed conflict if the state concerned does not derogate from it,²⁹ and the prohibition of torture (Article 3), which cannot be derogated from under any circumstances. Under Articles 2 and 3 of the ECHR, several specific positive duties have been derived by the judicial and quasi-judicial bodies, including the duty to put in place an effective legal framework,³⁰ the duty to prevent breaches (also where the

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Massacre v. Colombia, Inter-American Court of Human Rights Series C No (31 January 2006); *Case of the "Mapiripán Massacre" v. Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *Case of the 19 Merchants v. Colombia*, Inter-American Court of Human Rights Series C No 109 (5 July 2004). See also, *Case of Cantoral-Huamani and Garcia-Santa Cruz v. Peru*, Inter-American Court of Human Rights Series C No 167 (10 July 2007).

²³ *Ibid.*, at paras. 76-78.

²⁴ *Ibid.*, at para. 78.

²⁵ *Valle Jaramillo*, Inter-American Court of Human Rights Series C No 192 (27 November 2008), *passim*.

²⁶ *Ibid.*

²⁷ *Ibid.*, at para. 76.

²⁸ *Case of the Pueblo Bello Massacre v. Colombia*, Inter-American Court of Human Rights Series C No (31 January 2006), at para 136.

²⁹ Under the ECHR's Article 15, States Parties can derogate from the treaty in times of emergencies threatening the life of the nation "to the extent strictly required by the exigencies of the situation". Deaths resulting from lawful acts of war will then not constitute a violation of the Convention. If a State were to rely on the provision, the result would be that IHL would apply to the conflict at hand, whether it is international or non-international. So far, however, States have not relied on this provision.

³⁰ See, e.g., *X and Y v. Netherlands* (1985) Series A, No.91 (no possibility for 16 year old mentally handicapped to bring a sexual abuse complaint).

direct involvement of the state could not be demonstrated); and the duty to investigate and where applicable prosecute.³¹ Immediately below this paper takes up the duty to prevent, while the duties investigate and prosecute are taken up in section 2.

Interpreting Articles 2 and 3 of the ECHR, the ECtHR has derived several specific positive duties, including a duty to prevent.

Accordingly, in *W. v. United Kingdom*,³² the Commission acknowledged that Article 2 not only mandates repressive measures. Rather, it also calls for preventive measures by the authorities, which can be conceptualized as entailing the proactive element of planning, and the reactive element of intervention in the face of imminent danger to an individual. In *McCann*, addressing an anti-terrorist operation of British special forces against IRA suspects in Gibraltar, the ECHR held for the first time that already the planning of operations that threaten the right to life can fall short of the requirements of the Convention.³³

Since then the Court has in *Andronicou and Constantinou* also confirmed its willingness to examine the planning and organization of operations of security forces.³⁴ Hence states have to observe due diligence in planning and organizing their activities. This duty applies no matter whether PMSC personnel form part of the security forces of a given state, by for example providing guarding and protection, or even combat services under a contract. However, as in both cases the conduct of state organs was at issue, *McCann* and *Andronicou and Constantinou* do not offer reasoning that could directly apply to conduct of most PMSC personnel.

The *Ergi* case may offer some support for the position that the positive obligation to plan and organize is independent of the question of attribution.

. There, the court clarified that the duty to plan operations includes factoring in the conduct of third parties without any relationship to the state such as the targets of security operations.³⁵ States *a fortiori* have a duty under the Convention to plan any security operation that risks to threaten the right to life, where they hire the third party.³⁶

A specific duty to prevent violations of the right to life by specific operational measures was the central issue in the *Osman* case.³⁷ The Court was presented with a teacher infatuated with one of his pupils, who later attacked the boy and his father. The Court held that, beyond a duty to put in place an effective criminal law to deter the commission of offenses, and law enforcement to back it up. Later the Court also confirmed that a state may have a duty to take operational measures to protect individuals whose lives are at risk may arise.³⁸ The duty is limited to cases where there is a real and

³¹ E.g., *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086) ECHR 1998-VIII, para 102.

³² *W. v. United Kingdom* (App. No. 9348/81) (1987) Series A, No.121, at 190 (dealing with a case of domestic abuse not halted by the authorities).

³³ *McCann and Others v. the United Kingdom* (App. No. 18984/91) (1995) Series A, No. 324, para. 213; The majority of ten judges was faced with a dissent of 9 judges who disagreed as to the facts and cautioned against the use of hindsight in the assessment of the state's decisions. *McCann*, Joint Dissenting Opinion, para. 8.

³⁴ *Andronicou and Constantinou v. Cyprus* (App. No. 25052/94) ECHR 1997-VI 52.

³⁵ *Ergi v. Turkey* ECHR 1998-IV, see also C. Droegge, *Positive Verpflichtungen der Staaten in der Europaischen Menschenrechtskonvention* (Beitraege zum auslaendischen oeffentlichen Recht und Voelkerrecht, Springer, Heidelberg 2003), 47-48; A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Human Rights Law in Perspective, Hart, Oxford 2004).

³⁶ *McCann*, supra note 33 and accompanying text.

³⁷ *Osman v. United Kingdom* (App. No. 23452/94) ECHR 1998-VIII.

³⁸ *Ibid.*, at para. 115.

tangible risk emanating from a specific person for the life of another specific person, and the authorities knew or should have known of a real and immediate danger to the victim(s).³⁹

With respect to how narrowly identifiable the danger and victims need to be, the Court held in *Mahmut Kaya* that the threatened individual(s) must be identified, but did not apply the same requirement with regard to the “third party” posing that threat,⁴⁰ but ultimately only referred to the fact that no investigations into the conduct of counter-terrorist groups were taken.⁴¹ In its subsequent jurisprudence the Court upheld this approach, and only in dictum hinted at situations in which society at large could be in danger.⁴²

In many cases in which the uncontrolled or off-duty conduct of contractors poses a danger to the right to life of individuals or groups, these will not be as closely identifiable as the Court deemed it necessary so far. There is still no positive obligation of the state elaborated by the Court for the benefit of the population at large. However, if the Court would be willing to expand the identification requirement for potential victims to a location, e.g. the passersby on a crowded marketplace, the positive obligation to prevent through intervention could be very relevant to contractor operations. The duty already covers situations in which organs of the hiring state observe or are otherwise alerted to imminent or ongoing violations of the right to life, by contractors, no matter whether they are otherwise under the state’s control at the time, or even off duty.⁴³

Also Article 3 ECHR is very relevant to PMSC’s activities, for example to interrogation services. With respect to violations of Article 2, and addressing the specific situation of detained individuals, the ECtHR has stressed their vulnerable position as grounds for more extensive duties of the state to protect their right to life. Here, states are decidedly not only responsible for the actions of their own organs, but also have to ensure that these persons are not subject to potentially lethal attacks at the hands of third persons.⁴⁴ Specifically, Article 1 taken together with Article 3 imposes a positive duty on the state to protect individuals against abuse by third parties, particularly those who are especially vulnerable,⁴⁵ with the factors to be assessed including the area of cell room allocated to an individual detainee, hygiene, isolation, strip searches, among others. Certain practices of interrogation preparation by contractors reported from Abu-Ghraib would clearly run afoul of these provisions.⁴⁶

In its jurisprudence with respect to detainees as vulnerable individuals whose dignity has to be preserved, the ECtHR has thus demonstrated its willingness to assess the circumstances under which detainees are kept independent of the questions whether the treatment occurs at the hands of the state or third parties. Hence, the state cannot retreat to the position that any given abuse occurred without its involvement, but has positive duties to check that detainees are ensured their Article 3 rights.

Let me next turn to the duties to investigate, prosecute, and punish.

³⁹ *Ibid.*, at para. 116.

⁴⁰ *Mahmut Kaya v. Turkey* (App. No. 22535/93) ECHR 2000-III, at para 86; See also *Akkoç v. Turkey* (App. No. 22947/93 and 22948/93) ECHR 2000-X (presenting parallel finding with regard to the duty to prevent); see also, *Kiliç v. Turkey* (App. No. 22492/93) ECHR 2000-III.

⁴¹ *Ibid.*, at para. 100.

⁴² In *Mastromatteo* a dangerous criminal had committed murder while on leave during his prison term. In dictum, the Court elaborated that nothing had indicated to the authorities a “need to take additional measures to ensure that, once released the two did not present a danger to society.” *Mastromatteo v. Italy* (App. No. 37703/97) ECHR 2002-VIII, at para. 76 (emphasis added); see also *Gongadze v. Ukraine* (App. No. 34056/02) ECHR 2005, at paras. 164-171.

⁴³ Of course, this finding still has to be carefully limited to the situations where the Convention is applicable.

⁴⁴ *Gezici v. Turkey* (App. No. 34594/97), at para. 49-54.

⁴⁵ *A v. United Kingdom* (App. No. 100/1997/884/1096) ECHR 1998-VI, at para. 22; see also, *Kalashnikov v. Russia* (App. No. 47095/99) ECHR 2002-VI; *Valašinas v. Lithuania* (App. No. 44558/98) ECHR 2001-VIII, at para. 102-106.

⁴⁶ See, *Kalashnikov*, supra note 45; *Valašinas*, supra note 45, at para. 102.

2. The Duties to Legislate, Investigate, Prosecute, and Punish

In addition to the positive obligation to prevent just discussed, the judicial and quasi-judicial bodies interpreting the International Covenant on Civil and Political Rights, the American Declaration on Human Rights, the American Convention on Human Rights, and the European Convention on Human Rights have all derived positive obligations of the state flowing from the right to an effective remedy and the provisions protecting the right to life and freedom from torture or cruel and inhuman treatment. These duties include a duty to legislate in conformity with the respective instruments, as well as the duties to investigate, prosecute, and punish offenders. I examine these in the following regarding their relevance to PMSCs providing coercive services in situations of armed conflict.

A. *The International Covenant on Civil and Political Rights*

Article 2.1 of the ICCPR sets out the obligation of state parties to “respect and ensure to all individuals within its territory and subject to its jurisdiction” the rights enshrined in the Covenant.⁴⁷ While only the wording of the right to life under Article 6 explicitly calls for protection “by law”, Article 2(3)⁴⁸ adds the specific obligation of states to ensure that an effective remedy is available in cases of violations. The Human Rights Committee (the Committee) has consistently expressed the view⁴⁹ that every violation of the Covenant triggers this obligation of the State Party under whose power or jurisdiction the victim was at the time, to provide for an effective remedy.⁵⁰ In its General Comment 31, the Committee stated that states have to take “legislative, judicial, administrative, educative and other appropriate measures” to fulfill their obligations under the Covenant.⁵¹ As interpreted by the Committee, the duties extend to the conduct of private persons.⁵²

The present paper discusses two aspects of the duty to provide an effective remedy, namely the duties to legislate on the one hand, and to investigate, prosecute and punish on the other.

⁴⁷International Covenant on Civil and Political Rights, GA Res. 2200A (XXI). A/6316, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 2(1).

⁴⁸ Ibid. Article 2(3) reads as follows:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

⁴⁹ For the discussion on the authority of the pronouncements of the HRC see, e.g., M. Scheinin, 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy : an Illustration of the Legal Nature of the Committee's Work under the Optional Protocol' in *Towards implementing universal human rights : Festschrift for the twenty-fifth anniversary of the Human Rights Committee* (Nijhoff, Leiden 2004), M. Nowak, *UN Covenant on Civil and political rights: CCPR commentary* (Engel, Kehl am Rhein [etc.] 2006).

⁵⁰ UNCHR *Basilio Laureano Atachagua v. Peru*, Communication No. 540/1993 1996, at para. 8.3 (stating that “States parties should also take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”).

⁵¹ UNCHR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26 May 2004 UN Doc CCPR/C/21/Rev.1/Add.13, at para. 7.

⁵²Ibid.

1. The Duty to Legislate

The Human Rights Committee has separately analyzed a duty to legislate with respect to the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment.

Regarding the duty to legislate, as interpreted by the Committee, the right to life requires that the state enact effective private and administrative law to protect it, and the necessary criminal law provisions.⁵³ This may for example be violated where the law allows security forces presumptions of self-defense where they kill on duty.⁵⁴ For “particularly serious violations of human rights” including of the right to life, disciplinary or administrative measures will not qualify as effective remedies.⁵⁵

In its General Comment 31, the Committee elaborated on the duty to legislate. As interpreted, the duty necessitates the creation of an administrative structure to investigate allegations of violations, which can be violated independently from, or on top of the duty to investigate.⁵⁶ It stressed that remedies need to take into account special vulnerabilities.⁵⁷ Moreover, referring to the conduct of state agents, the Committee has expressed the view that “impediments to the establishment of responsibility” such as immunities, or the defense of having obeyed superior orders should be removed.⁵⁸

Regarding the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the Committee has stressed that states also incur a duty to legislate in accordance with Article 7, to

protect both the dignity and the physical and mental integrity of the individual ... through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.⁵⁹

The duty is viewed as interrelated with the duties to investigate prosecute and punish – a necessary but not sufficient element of the protection of Article 7 rights.⁶⁰ General Comment 31 also underscores the approach of the Committee that extends the duty to legislate in conformity with the Covenant to Article 7.⁶¹

⁵³ Article 6.1 reads as follows: “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” ICCPR, supra note 4.

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. See also, Concluding Observations of the Human Rights Committee, Philippines, U.N. Doc. CCPR/CO/79/PHL (2003), para. 8.

⁵⁴ UNCHR *Pedro Pablo Camargo v. Colombia*, Communication No. 45/1979 1985, at para. 13.3 (stating that “Inasmuch as the police action [resulting in the death of Mrs. Maria Fanny Suarez de Guerrero] was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6 (1).”).

⁵⁵ UNCHR *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995 14 June 1994 UN Doc CCPR/C/60/D/612/1995, at para. 8.2.

⁵⁶ UNCHR General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, supra note 7, at para. 15.

⁵⁷ *Ibid.*, at para. 15 (“...remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.”).

⁵⁸ *Ibid.*, at para. 18.

⁵⁹ UNCHR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) 10 March 1992 UN Doc HRI/GEN/1/Rev.1 at 30, at para. 2.

⁶⁰ *Ibid.*, Article, para. 8; 14.

⁶¹ UNCHR General Comment 31, supra note 7, para. 8 (the Committee found that “[t]he Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. ... It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power”).

The duty to legislate under the ICCPR constitutes an obligation of conduct. Some clear lines can however be drawn. Where states fail to provide mechanisms to ensure that PMSC personnel violating the right to life or act in violation of Article 7, by for example, torturing a detainee, will be subject to criminal sanctions, they violate their obligations under the Covenant. States hiring PMSCs have to enact appropriate legislation that ensures that contractors can be effectively prosecuted for such violations in the host state or in their own justice system to comply with the ICCPR. Where the judicial system of the host state cannot be expected to provide an effective forum, as will often be the case in a theater of conflict, the hiring state will have to ensure the reach of its own justice system. In any event, affording contractors immunity from the host states justice system (as was the case for contractors in Iraq during the coalition occupation), while at the same time not ensuring that an alternative forum is available, violates the duty to legislate in conformance with the ICCPR.

Let me now turn to the duty to investigate, prosecute, and punish.

2. The Duty to Investigate, Prosecute and Punish

The Human Rights Committee has held that states have to create administrative mechanisms to ensure prompt investigations of alleged violations, and that a failure to investigate can in itself constitute a violation of the Covenant.⁶² Similarly, states have a duty to prosecute where investigations substantiate allegations.⁶³ A failure to do so can constitute a separate violation of the Covenant,⁶⁴ as can amnesties or certain defenses.⁶⁵ The approach thus expressed by the Committee permeates its reasoning in country reports⁶⁶ and individual complaints.⁶⁷

Moreover, the Committee has emphasized the state's duty, in accordance with article 2, paragraph 3 (a), of the Covenant, to provide an effective remedy, including a thorough and effective investigation producing adequate information.⁶⁸ Similarly, the Committee has highlighted the duty of states under article 2.3 "to provide the victim and the author with an effective remedy" through investigation, and prosecution of those responsible, irrespective of amnesty laws.⁶⁹ The Committee has repeatedly emphasized that the ICCPR does not ground an individual right to the prosecution of another

⁶² Ibid, at para. 8 and 15; see also, UNCHR General Comment No. 06: The right to life (art. 6) 27 July 1982 UN Doc CCPR/C/21/Rev.1 (stating, *inter alia*, that states should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate, thoroughly cases of missing and disappeared persons in circumstances that may involve a violation of the right to life).

⁶³ Ibid., at para. 18.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ UNCHR Concluding Observations of the Human Rights Committee, Russian Federation 2003 (denouncing the failure of Russian authorities to investigate, prosecute, and punish violations of *inter alia* Articles 6 and 7 in connection with its military operations in Chechnya); UNCHR Concluding Observations of the Human Rights Committee, Congo 2000 UN Doc CCPR/C/79/Add.118, at para 8 (expressing concern about the "information provided on summary and extrajudicial executions, disappearances and arbitrary arrests and detentions carried out ... not only by the armed forces but also by the militias and other paramilitary groups, as well as by foreign soldiers, in violation of articles 6, 7 and 9 of the Covenant"); UNCHR Concluding Observations of the Human Rights Committee, UNCHR Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland 2001 UN Doc CCPR/CO/73/UK, at para. 8 (finding that murders of persons (including human rights defenders) in Northern Ireland should be investigated independently and comprehensively, and the persons responsible are to be prosecuted, especially where "allegations of involvement and collusion by members of the State party's security forces, including the Force Research Unit, remain unresolved").

⁶⁷ UNCHR *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000 2003 UN Doc CCPR/C/78/D/950/2000, at para. 11; UNCHR *Basilio Laureano Atachahua v. Peru*, Communication No. 540/1993 1996 UN Doc CCPR/C/56/D/540/1993;

⁶⁸ UNCHR *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000 2003 UN Doc CCPR/C/78/D/950/2000, at para. 11.

⁶⁹ UNCHR *Basilio Laureano Atachahua v. Peru*, Communication No. 540/1993 1996 UN Doc CCPR/C/56/D/540/1993.

individual by the state.⁷⁰ However, states have a duty to investigate thoroughly alleged violations of human rights, and to criminally prosecute, and where appropriate punish the perpetrators of the violations.⁷¹ The duty to prosecute and punish “applies a fortiori in cases in which the perpetrators of such violations have been identified”.⁷² As a minimum, states thus have to launch an investigation of they are informed or otherwise become aware of alleged violations of the right to life, where they fail to take any such measures or delegate the investigation to the contractors themselves without result, the duty will be violated.

The prohibition of torture in Article 7 of the ICCPR does not contain an explicit duty to investigate, prosecute and punish. However, it is argued convincingly that the duty to ensure the rights contained in the Covenant extends these duties in principle to all of them. Moreover, Article 2.3 allows the interpretation that remedies have to be made available even where the state was not the author of the respective violation.⁷³ Moreover, in its General Comment 20 on the prohibition of torture, the Committee extends the duty to investigate, prosecute, and punish to persons “acting in their private capacity”.⁷⁴ In *Cabal and Bertran v. Australia*⁷⁵ the Committee held that “contracting out to the private commercial sector of core state activities which involve the use of force and the detention of persons does not absolve a state party of its obligations under the Covenant, notably under Articles 7 and 10”.⁷⁶

The Committee stressed also that domestic law has to provide vehicles to file claims for abuse of article 7 rights. Complaints are to be investigated promptly and impartially.⁷⁷ Amnesties are viewed to be “generally incompatible” with this duty,⁷⁸ and extends to the investigation of crimes of a former regime.⁷⁹ The duty to investigate, prosecute and punish applies a fortiori where the perpetrators have already been identified.⁸⁰

The Committee has already elaborated on the duty to investigate, prosecute and punish in several country reports, for example in its Concluding Observations on the situation in Sri Lanka, both in 2003 and 1995. The Committee specifically noted ... that allegations of “torture, abduction and illegal confinement”, as well as intimidation of witnesses had to be investigated, and where applicable

⁷⁰ UNCHR, *Arhuaco v. Colombia*, Communication No. 612/1995, 29 July 1997, CCPR/C/60/D/612/1995, para. 8.8.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Nowak, supra note 49, at 39-40, para. 20.

⁷⁴ UNCHR General Comment No. 20, supra note 7. “It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”; See also, UNCHR *Blanco v. Nicaragua*, Communication No. 328/1988 1994, at para. 10.6 (recalling General Comment No. 20).

⁷⁵ UNCHR *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia*, Communication No. 1020/2001 2003, at para. 7.2.

⁷⁶ In the specific case, the Committee addressed the complaint of two individuals who had been arrested in Australia, and placed into confinement at the privately-run detention center at Port Philip Prison. At the basis of their complaint was the fact that they were placed in a unit with common prisoners, and occasionally detained at Port Philip Prison, they were neither segregated nor treated separately from highly dangerous convicted prisoners. Moreover, they were routinely shackled during transports, and on one occasion placed for some time together in a cage-like structure that only allowed one of them to sit while the other had to remain standing. The Committee found no violation of Article 7 as the petitioners had provided proper justification for the treatment, with the exception of the cage incident, which it found to have constituted a violation of Article 10.

⁷⁷ UNCHR General Comment No. 20, supra note 7, at para. 14.

⁷⁸ Ibid., at para. 15; see also, UNCHR *Rodríguez v. Uruguay*, Communication No. 322/1988 1994, at para. 12.4.

⁷⁹ UNCHR *Rodríguez*, supra note 78, at para. 12.3.

⁸⁰ UNCHR *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995 14 June 1994, para. 8.8.

prosecuted, and punished.⁸¹ Similarly, it called on Congo to investigate inter alia violations of Article 7 by armed forces, as well as paramilitaries and militias, and to bring the perpetrators to justice.⁸² In its Concluding Observations on Russia it found that the state should ensure that violations of Article 7, among others, are not committed with impunity “*de jure or de facto*”.⁸³

In individual complaints under the Optional Protocol, the Committee has applied the same reasoning. Already in 1981, in *Lopez-Burgos*,⁸⁴ addressing the torture of a Uruguayan national detained by Uruguayan special forces on Argentinean soil with the help of Argentinean paramilitaries, it found that the state had a duty to investigate Article 7 violations,⁸⁵ even if they were committed by its agents outside the national territory.⁸⁶ In *Rodriguez v. Uruguay*,⁸⁷ the author and victim of the abuses chose to focus on the duty to investigate, prosecute and punish, rather than the violations of Article 7 proper. He had suffered extreme acts of abuse including torture by (soiled) water, electric shocks, and hanging by his arms.⁸⁸

With respect to abuse in detention, the Committee has stressed that the duty to investigate arises at the point the state is made aware of the allegations, even if these allegations may not be formally reflected in later proceedings (in the specific case transcripts of domestic proceedings were lacking).⁸⁹

From this extensive treatment, several basic conclusions can be drawn: specifically regarding the right to life, states have to conduct thorough and effective investigations of alleged violations. These procedures have to be conducted quickly, and all persons responsible brought to justice. Amnesties or immunities violate the Covenant, and especially where the perpetrators of violations have been identified, investigation, and where appropriate prosecution and punishment have to follow. States are thus not free under the ICCPR to leave violations of the right to life to the disciplinary system of the contractor they hired, even if the contractor operates one.

Also the prohibition of torture in Article 7 of the ICCPR extends to the actions of private individuals and specifically those of coercive service contractors. Complaints are to be investigated promptly and impartially, and can thus also not be left to the PMSC itself. The duty to investigate, prosecute and punish applies a fortiori where the perpetrators have already been identified, and amnesties or immunities cannot shield contractor personnel. The state has to observe due diligence in its efforts to investigate, prosecute and punish violations by contractors to which it is alerted and to which the ICCPR applies. Yet, there is no need for a formal complaint to be brought.

To discharge their obligation of due diligence, the duty to investigate, prosecute, and punish thus constitutes an obligation of conduct a minimum states have to ensure, as a minimum, that beyond their duties to provide for a basic legislative and administrative structure and penal laws already discussed,

⁸¹ See, e.g., UNCHR Human Rights Committee, Comments on Sri Lanka 1995 UN Doc CCPR/C/79/Add.56.

⁸² UNCHR Concluding Observations of the Human Rights Committee, Congo, supra note 66, paras. 8, 12.

⁸³ UNCHR Concluding Observations of the Human Rights Committee, Russian Federation, supra note 66.

⁸⁴ UNCHR *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979) 1981.

⁸⁵ *Ibid.*, at para. 11.3 (noting that “[t]he State party should have investigated the allegations in accordance with its laws and its obligations under the Covenant and the Optional Protocol.”).

⁸⁶ *Sergio Euben Lopez Burgos v. Uruguay*, supra note 84, at para. 12.1 - 12.3, (famously stating that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”).

⁸⁷ UNCHR *Rodríguez*, supra note 78.

⁸⁸ *Ibid.*, at para. 2.1.

⁸⁹ UNCHR *Mr. Abduali Ismatovich Kurbanov v. Tajikistan*, Communication No. 1096/2002 2003, at para. 7.4; see also, UNCHR *José Luis García Fuenzalida v. Ecuador*, Communication No. 480/1991 1996, at para. 9.4. (finding that the failure to investigate the circumstances of a prisoner’s bullet wound sustained in custody constituted a violation of his rights under Article 7 of the Covenant).

complaint mechanisms are in place by which violations can be brought to their attention. To that effect it will not suffice to have the duties of reporting rest with the contractor itself. Rather independent structures for formal complaints with the hiring state have to be in place. Examples would include a clearly identified and publicized office in charge of complaints. Similarly, a hotline for reports of abuses could be relied on. In any event, the hiring state has to investigate any credible allegations that come to its attention, whether formal or not. Hence, where a state fails to investigate allegations outright, or fails to provide meaningful access to lodge complaints against contractors it will have violated its international obligations. On the other hand, where such mechanisms exist, and a diligent investigation does not substantiate allegations, or does not lead to arrests, the state will have discharged its duty.

B. The Inter-American System

Also the Inter-American Commission on Human Rights and the Inter-American Court of human rights have derived duties to legislate, investigate, prosecute, and punish under the Inter-American system.

1. The Duty to Legislate

Article 2 of the American Convention on Human Rights, entitled “Domestic Legal Effects” contains an explicit duty of states to legislate in accordance with the Convention.⁹⁰ Moreover, “other” measures listed in Article 2 already ground the further duty to investigate, prosecute, and punish, and Article 25 of the American Convention specifically enshrines a right of the individual to effective recourse to a court or tribunal for violations of fundamental rights.⁹¹

The duty enshrined in Article 2 of the ACHR obligating states to legislate in accordance with the Convention may ground the argument that states cannot simply tolerate if contractors violating the right to life and the prohibition of torture due to the limited reach of existing laws. The duty constitutes an obligation of conduct. Yet, at a minimum, where states fail to take any steps that PMSC personnel violating the right to life or act in violation of torturing a detainee, can be not only subjected to disciplinary and administrative measures, but also to criminal sanctions, they violate their obligations under the Covenant. This duty entails that states hiring PMSCs in situations where the ACHR is applicable have to enact appropriate legislation that ensures that contractors can be effectively prosecuted for such violations in the host state or in their own justice system. Where the judicial system of the host state cannot be expected to provide an effective forum, as will often be the case in a theater of conflict, the hiring state will have to ensure the reach of its own justice system. In any event, the enactment of legislation inconsistent with this obligation constitutes a direct violation of the ACHR.⁹² Thus, to afford contractors immunity from the host states’ justice system (as was the case for contractors in Iraq during the coalition occupation) while at the same time not ensuring that an alternative forum is available would, as was the case under the ECHR, also violates the duty to legislate in conformance with the ACHR.

2. The Duty to Investigate, Prosecute, and Punish

The Inter-American Commission on Human Rights (IACoMHR) has in numerous country reports consistently found that the right to an effective remedy implies a duty of the state to investigate,

⁹⁰ American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, Article 2.

⁹¹ *Ibid.*, Article 25.

⁹² See, e.g., *Case of the Mapiripán Massacre v. Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005), Separate opinion of Judge A.A. Cancado Trindade, at paras. 6-7.

prosecute and punish violations.⁹³ The IACtHR for its part has developed a rich jurisprudence on the subject, holding consistently that the state has to investigate “every situation involving a violation of the rights protected by the Convention”.⁹⁴ This duty extends to violations committed by individuals not attributable to the state,⁹⁵ and will be violated if they go uninvestigated or unpunished.⁹⁶ In fact, the Court even hints at possible responsibility based on complicity of the state where it failed to investigate.⁹⁷ While this duty is not strict, in the sense that not every investigation that does not yield results will give automatically rise to a violation of the ACHR, investigations are to be undertaken by the state, even without private initiative.⁹⁸ The duty to investigate continues until the circumstances of the violation are clarified, possibly even when prosecution and punishment are no longer possible⁹⁹ (e.g. where the perpetrators are confirmed to have died).

In its subsequent jurisprudence, the IACtHR has routinely emphasized the duty of States Parties to investigate, prosecute, and punish.¹⁰⁰ Failure to comply with the duty to investigate, prosecute and punish results also in a violation of Article 1(1) of the Convention.¹⁰¹

Violations of the duty to investigate, prosecute, and punish leading to impunity¹⁰² are viewed by the Court to foster “chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”¹⁰³ Hence, amnesties are incompatible with the duty to investigate, prosecute, and

⁹³ Report on the Situation of Human Rights in The Republic of Nicaragua, Inter-Am. C.H.R., OEA/Ser.L/V/II.53, Doc. 25 (1981); Report on the Situation of Human Rights in Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.61, Doc. 47 rev. 1 (1983); see also, Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., OEA/Ser.L/V/II.74, Doc. 9 rev. 1 (1988); Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., OEA/Ser.L/V/II.77, Doc. 18 rev.1 (1990), at para. 180, 263 (criticizing ineffective investigations); Report on the Situation of Human Rights in the Peruvian State of Cayara, Inter-Am. C.H.R., OEA/Ser.L/V/II.83, Doc. 32 rev. (1993), Doc. 32 rev. (1993), at para. 48.3.

⁹⁴ See, e.g., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988) at para 187.

⁹⁵ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988) at para. 172; *Bulacio*, Inter-American Court of Human Rights Series C No 100 (18 September 2003), at para. 111.

⁹⁶ *Velásquez Rodríguez Case*, supra note 95, at para. 176; see also, *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989), para. 187.

⁹⁷ *Velásquez Rodríguez Case*, supra note 95, para. 177; see also, *Godínez Cruz*, supra note 96, at para. 188.

⁹⁸ See, e.g., *Bulacio*, supra note 95, at para. 112; *Juan Humberto Sánchez*, Inter-American Court of Human Rights Series C No 99 (7 June 2003), at para. 132.

⁹⁹ *Velásquez Rodríguez Case*, supra note 95, at para. 181; *Godínez Cruz*, supra note 96, at para. 191.

¹⁰⁰ *Carpio Nicolle Case*, Order of the Court of June 4, 1995, Inter-American Court of Human Rights Series E No 2 (4 June 1995), at op. para. 1; *Colotenango*, Inter-American Court of Human Rights Series E No 31 (31 May 1997), at op. para.; *Castillo Páez*, Inter-American Court of Human Rights Series C No 34 (3 November 1997), at para. 90; *Paniagua Morales*, Inter-American Court of Human Rights Series C No 37 (8 March 1998), at op. para. 6; *Blake Case*, (Interpretation of Reparations Judgment) (Article 67 American Convention on Human Rights), Inter-American Court of Human Rights Series C No 57 (1 October 1999), op. para. 3; *El Caracazo*, Inter-American Court of Human Rights Series C No 58 (11 November 1999), at op. para. 3; *Cantoral Benavides*, Inter-American Court of Human Rights Series C No 69 (18 August 2000), at op. para. 12; *Barrios Altos*, Inter-American Court of Human Rights Series C No 75 (14 May 2001), at op. para. 5; *Myrna Mack Chang*, Inter-American Court of Human Rights Series C No 101 (25 November 2003); *Bulacio*, supra note 95, at para. 121; *Juan Humberto Sánchez*, supra note 98, at para. 135; *Pueblo Bello Massacre*, Inter-American Court of Human Rights Series C No 143 (31 January 2006), operative para 8; *López Álvarez*, 141 Series C No (1 February 2006), at op. para. 7; *Baldeón-García*, Inter-American Court of Human Rights Series C No 147 (6 April 2006), at op. para. 6 – 8; *Detention Center of Catia*, Inter-American Court of Human Rights Series C No 150 (5 July 2006), at para. 136 et seq., op. para. 7; *Servellón-García*, Inter-American Court of Human Rights Series C No 152 (21 September 2006) (, at op. para. 8; *Ituango Massacres*, Inter-American Court of Human Rights Series C No 148 (1 July 2006), at para. 402; Inter-American Court of Human Rights, *La Rochela Massacre*, Inter-American Court of Human Rights Series C No 163 (11 May 2007), at op. para. 9.

¹⁰¹ *Cantoral Benavides*, Inter-American Court of Human Rights Series C No 69 (18 August 2000), at para. 104.

¹⁰² For a definition of impunity by the Court see, *Bulacio*, supra note 95, at para. 120.

¹⁰³ *Paniagua Morales*, Inter-American Court of Human Rights Series C No 37 (8 March 1998), at para. 173.

punish,¹⁰⁴ and existing laws to that effect may have to be repealed.¹⁰⁵ Similarly, undue delays or suspensions can also violate the duty.¹⁰⁶

Where the appropriate structures are lacking, states must in accordance with Article 1(1) and Article 4 (right to life) “adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals; and to protect the right of not being prevented from access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right.”¹⁰⁷

The investigation into the alleged violations cannot remain the mechanical execution of routine formalities, rather the state “must demonstrate that it has conducted an immediate, exhaustive, genuine and impartial investigation” and has to prosecute and punish the offenders.¹⁰⁸

Moreover, where the state had at one point close control over the victims, the burden of proof shifts to the state as to the whereabouts of disappeared individuals, and proper investigations have to be taken.¹⁰⁹ In addition, the Court has specified guidelines for the investigation of extralegal executions.¹¹⁰ Lastly, states parties to the Inter-American Convention against Torture have an additional specific duty to investigate and punish torture, as well as to enact the required legislation, under Articles 1, 6 and 8 of that instrument.¹¹¹

How do the duties to legislate, investigate, prosecute, and punish contained in the ACHR impact the responsibility of states hiring contractors to provide coercive services in theaters of conflict and occupation? The IACtHR has recognized a broad duty of states to investigate all violations of rights granted in the ACHR. Where the ACHR applies, the hiring state will have to investigate alleged violations of contractors even where their conduct is not attributable to it, independent of the service they provide.¹¹² In addition, the state will have to initiate such investigations as soon as it becomes aware of them, even without private complaints.¹¹³ Where the state did not exercise due diligence, and such violations go uninvestigated or unpunished, the state will be in breach of the ACHR.¹¹⁴

In a conflict to which the ACHR applies, immunities such as those granted to contractors of the United States in Iraq, would violate the Convention,¹¹⁵ and any state operating with coercive service contractors not otherwise subject to jurisdiction would need to create a statutory framework to

¹⁰⁴ *Barrios Altos*, Inter-American Court of Human Rights Series C No 75 (14 May 2001), at para. 41- 44; *Bulacio*, supra note 95, at para. 117-118; *Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights Series C No 123 (11 March 2005), at para. 17; *Ituango Massacres*, Inter-American Court of Human Rights Series C No 148 (1 July 2006), at para. 402.

¹⁰⁵ *Servellón-García*, Inter-American Court of Human Rights Series C No 152 (21 September 2006), at op. para 8.

¹⁰⁶ See, e.g., *Juan Humberto Sánchez*, at para. 131.

¹⁰⁷ *Sawhoyamaya Indigenous Community*, Inter-American Court of Human Rights Series C No 146 (29 March 2006), at para. 152-153.

¹⁰⁸ *Cantoral Benavides*, supra note 101, at para 104 *Bulacio*, supra note 95, at para. 112; *Juan Humberto Sánchez*, supra note 107, at para. 144.

¹⁰⁹ *Barrios Altos*, supra note 113, at paras. 135-136; *Bulacio*, supra note 95, at paras. 141-142; *Neira Alegría*, Inter-American Court of Human Rights Series C No 20 (19 January 1995), at para. 65.

¹¹⁰ *Juan Humberto Sánchez*, supra note 98, at para. 127-128.

¹¹¹ Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992); see also, *Cantoral Benavides*, supra note 101, at para 104.

¹¹² *Velásquez Rodríguez Case*, supra note 95, at para. 172; *Bulacio*, supra note 95, at para. 111.

¹¹³ See, e.g., *Bulacio*, supra note 95, para. 112; *Juan Humberto Sánchez*, supra note 98, at para. 132.

¹¹⁴ *Velásquez Rodríguez Case*, supra note 95, at para 176; see also, *Godínez Cruz*, supra note 96, at para. 187.

¹¹⁵ *Caesar v. Trinidad and Tobago*, supra note 104, at para. 17; *Ituango Massacres*, supra note 100, at para. 402;

discourage violations and to put in place an effective system of justice to investigate prosecute and punish them.¹¹⁶

Especially relevant to interrogation and detention contractors, the burden of proof is reversed as to investigating the whereabouts of individuals who disappeared after having been taken into custody.¹¹⁷

C. The European System

Also the European Convention on Human Rights as interpreted by the European Court of Human Rights (ECtHR), contains positive obligations to investigate, prosecute, and punish that can be relevant to states contracting with PMSCs for the provision of coercive services in the context of armed conflict.

The ECtHR does not analyze a separate duty to legislate, rather the Court has addressed the issue in terms of the right to an effective remedy under Article 13 of the ECHR. The ECtHR has progressively developed the duties to investigate, prosecute and punished in separate strands of jurisprudence with respect to the right to life and the prohibition of torture.

Starting with *McCann*,¹¹⁸ the ECtHR has consistently held that the obligation to protect the right to life under Article 2 of the Convention, together with the duty under Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, implies that there should be “some form of effective official investigation when individuals have been killed as a result of the use of force.”¹¹⁹ The duty to investigate violations of Article 2 is non-derogable even in armed conflict.¹²⁰

Compensation without investigation does not satisfy the state’s obligation to investigate, prosecute and punish under the ECHR.¹²¹ The state has to investigate allegations of violations of the right to life brought to its attention, even absent a formal complaint.¹²² The purpose of the investigations is to ensure the protection of the right to life through the domestic legal norms, and “in those cases involving state agents or bodies to ensure their accountability for deaths occurring under their responsibility.”¹²³ The state has to ensure that the investigation is conducted independently,¹²⁴ and promptly executed, and effective.¹²⁵ Of course this is an obligation of conduct, or means, rather than

¹¹⁶ *Sawhoyamaya Indigenous Community*, Inter-American Court of Human Rights Series C No 146 (29 March 2006), at para. 152-153.

¹¹⁷ *Velásquez Rodríguez Case*, supra note 95, at paras. 135-136; *Godínez Cruz*, supra note 96, at paras. 141-142; *Neira Alegría*, supra note 109, at para. 65.

¹¹⁸ *McCann and Others v. the United Kingdom* (App. No. 18984/91) (1995) Series A, No. 324, at para. 161.

¹¹⁹ *Kaya v. Turkey*, (158/1996/777/978), at para. 105; for reiterations of this formulation see also, *Timurtaş v. Turkey* (App. No. 23531/94) ECHR 2000-VI, at para. 87; *Taş v. Turkey* (App. No. 24396/94), at para. 113; *İrfan Bilgin v. Turkey* (App. No. 25659/94) ECHR 2001-VIII, at para. 142; *Akdeniz and Others v. Turkey* (App. No. 23954/94), at para. 90; *Isayeva and Others v. Russia* (App. No. 57947/00, 57948/00 and 57949/00), at para. 208; *Bitiyeva and X v. Russia* (App. No. 57953/00 and 37392/03), at para. 144; *Angelova and Iliev v. Bulgaria* (App. No. 55523/00) ECHR 2007-, at para. 94.

¹²⁰ *Akpınar and Altun v. Turkey* (App. No. 56760/00) ECHR 2007; *Isayeva and Others v. Russia* (App. No. , para. 215-225; see also, *Yaşa v. Turkey* (App. No. 63/1997/847/1054) ECHR 1998-VI, at para. 104.

¹²¹ *Bazorkina v. Russia* (App. No. 69481/01), at para. 117; *Akpınar and Altun*, supra note 120, at para. 57.

¹²² See, e.g., *Angelova and Iliev*, supra note 119, at para. 96; *İkincisoğlu v. Turkey* (App. No. 26144/95), at para. 76-77; see also, *Bazorkina*, supra note 121, at para 117; *Ilhan v. Turkey* (App. No. 22277/93) ECHR 2000-VII, at para. 63.

¹²³ *Bazorkina*, supra note 121, at para. 117.

¹²⁴ *McShane v. the United Kingdom* (App. No. 43290/98), at para. 95; see also, *Bazorkina*, supra note 121, at para. 118; *Güleç v. Turkey* (App. No. 21593/93) 1998-IV 80, at para. 81-82; *Ogur v. Turkey* (App. No. 21594/93) 1999-III, at para. 91-92; *Ramsahai and Others v. the Netherlands* (App. No. 52391/99) ECHR 2005-*Scavuzzo-Hager and Others v. Switzerland* (App. No. 41773/98), para. 81; *Isayeva and Others v. Russia*, supra note 120, at para. 210.

¹²⁵ See, e.g., *Osmanoğlu v. Turkey* (App. No. 48804/99), at para. 89; *Angelova and Iliev*, supra note 120, at para. 97; *Isayeva and Others v. Russia*, supra note 120, at para. 212; *Akpınar and Altun*, supra note 121, at para 58; *Bazorkina*, supra note 121,

result.¹²⁶ Hence, the state has to take all reasonable steps available to investigate the alleged violation,¹²⁷ including, where applicable, eyewitness testimony,¹²⁸ forensic evidence,¹²⁹ and autopsies,¹³⁰ among others.

There also has to be an element of public scrutiny of the investigations.¹³¹ Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard.¹³²

In the specific case of the disappearance in life-threatening circumstances (such as a civil war) of persons last seen in the custody of state agents gives rise to a duty to investigate arises.¹³³

The ECtHR does not specifically identify duties to prosecute and punish flowing from Article 2 of the Convention. However, the ECtHR has interpreted Article 13 of the Convention (the right to an effective remedy), to the effect that required investigations must be able to assess whether the force used in such cases was or was not justified in the circumstances,¹³⁴ and to lead to the identification and punishment of those responsible.¹³⁵ Hence, combining Article 2 with Article 13, the ECtHR derived a duty to prosecute alleged violations of Article 2 going beyond the duty to investigate flowing directly from article 2.

The duty to investigate violations of the right to life under the ECHR extends to cases perpetrated by individuals not attributable to the state such as PMSC personnel.¹³⁶

The ECtHR may have also derived a duty to investigate flowing directly from Article 3, but does not analyze it separately.¹³⁷ Instead, the Court routinely analyzes a duty to investigate alleged violations of the prohibition of torture by relying on Article 13, the ECHR right to an effective remedy.¹³⁸

(Contd.)

at para. 119; *Yaşa v. Turkey* (App. No. , at para. 102-104; *Çakici v. Turkey* (App. No. 23657/94) ECHR 1999-IV, at para. 80, 87, 106; *Tanrıkulu v. Turkey* (App. No. 23763/94) ECHR 1999-IV, at para. 109; *Mahmut Kaya v. Turkey* (App. No. 22535/93) ECHR 2000-III , at para. 106-107; *McShane*, supra note 124, at para. 97.

¹²⁶ See, e.g., *Osmanoğlu*, supra note 125, at para. 88; *Angelova and Iliev*, supra note 120, at para. 95; *Isayeva and Others v. Russia*, supra note 120, at para. 211; *Bazorkina*, supra note 121, at para. 118.

¹²⁷ See, e.g., *Angelova and Iliev*, supra note 120, at para. 95; *Isayeva and Others v. Russia* , supra note 84 , at para. 211; *Bazorkina*, supra note 121, at para. 118.

¹²⁸ See, e.g., *Angelova and Iliev*, supra note 120, at para. 95; *Tanrıkulu v. Turkey*, supra note 90.

¹²⁹ See, e.g., *Angelova and Iliev*, supra note 120, at para. 95; *Gül v. Turkey* (App. No. 22676/93), at para. 89.

¹³⁰ See, e.g., *Angelova and Iliev*, supra note 120, at para. 95; *Salman v. Turkey* (App. No. 21986/93) ECHR 2000-VII, at para. 106.

¹³¹ See, e.g., *Isayeva and Others v. Russia*, supra note 120, at para. 213; *McShane*, supra note 124, at para. 98.

¹³² *Bazorkina*, supra note 121, at para. 118.

¹³³ *Cyprus v. Turkey* (App. No. 25781/94) ECHR 2001-IV , at para. 132; see also, *Taş* supra note 119, at para. 68-69; *İrfan Bilgin* supra note 119, at para. 142-145; *Akdeniz and Others v. Turkey* , supra note 121, at para. 90-93; *Osmanoğlu*, supra note 125, at para. 90.

¹³⁴ See, e.g., *Kaya v. Turkey*, supra note 119, at para. 87;

¹³⁵ *Ibid.*, at para. 106-108; *Ogur v. Turkey*, supra note 124, at para. 88; *McKerr v. the United Kingdom* (App. No. 28883/95) ECHR 2001-III , at para. 121.

¹³⁶ *Osmanoğlu*, supra note 125, at para. 87; see also, *Angelova and Iliev*, supra note 120 , at para. 98; see also *Ertak v. Turkey* (App. No. 20764/92) ECHR 2000-V, at para. 134; *Isayeva and Others v. Russia*, supra note 120, at para. 209; *Yaşa v. Turkey*, supra note 90, at para. 100; see also *Şemsi Önen v. Turkey* (App. No. 22876/93) , at para. 87; *Güngör v. Turkey* (App. No. 28290/95) , at para. 67.

¹³⁷ While the language of case in which the issue of a duty to investigate violations of Article 3 arising out of Article 3 itself does not exclude such a duty, neither does one find direct confirmation for it. For an example of the ECtHR sidestepping the issue see, *Bazorkina*, supra note 121, at para. 134-136; see also *Akpınar and Altun*, supra note 121, at para. 88.

¹³⁸ See, e.g., *Bazorkina*, supra note 121, at para. 161-165.

According to the ECtHR, Article 13 thus implies a duty to investigate on the part of the state extending to both the right to life, and the prohibition of torture. The implicit duty to investigate violations of Article 3 was recognized by the ECtHR in *Aksoy*, where the Court stated that “where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails ... a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”; the Court clearly stated “such a requirement is implicit in the notion of an ‘effective remedy’ under Article 13”.¹³⁹

Similar to the duty under Article 2, the state has to engage in a “thorough and effective investigation capable of leading to the identification and punishment of those responsible”.¹⁴⁰ If the investigation into the violation of the right to life remains ineffective, this may at the same time ground a violation of the Article 13 duty to investigate alleged violations of Article 3 based on the same facts.¹⁴¹

The Court has also applied this approach to circumstances not reaching the ECHR’s threshold of torture, but qualifying as inhuman or degrading treatment.¹⁴²

While the Court has not explicitly stated whether the duty to investigate violations of Article 3 is non-derogable even in armed conflict, one would expect its observations regarding Article 2 to apply with equal force to violations of Article 3.

As we have seen, the ECtHR has interpreted the Convention to give rise to 1) a duty to investigate violations of the right to life flowing directly from Article 2; 2) a duty to investigate violations of the right to life *and* the prohibition of torture, flowing from Article 13 (the right to an effective remedy),¹⁴³ and 3) a duty to prosecute and punish that applies to both violations of the right to life and the prohibition of torture, which is implied in the duty to investigate flowing from the Article 13 right to an effective remedy, which mandates an investigation capable to ensure the “identification and punishment of those responsible”.¹⁴⁴

In sum, where the Convention applies, it is evident from the above analysis that states will have to investigate alleged violations of the right to life by contractors, no matter what coercive service they provide. As we have seen, even the acts of combat contractors would have to be investigated, whenever individuals have been killed as a result of the use of force, or treated in violation of Article 3. Moreover, for example the practice of the United States in Iraq to compensate victims without publicized investigation would not conform to the ECHR.¹⁴⁵ The investigations confirming to the ECHR cannot be executed by the contractors themselves, or contractors within the same company, to ensure that independence is not compromised. It is doubtful whether an investigation by contractors could ever qualify as an official investigation under the ECHR. While the obligation is one of conduct, even in a theater of conflict the state has to take all reasonable steps available to investigate the alleged

¹³⁹ *Aksoy v. Turkey* (App. No. 21987/93) ECHR 1996-VI 26, at para. 98; see also, *Tekin v. Turkey* (App. No. 52/1997/836/1042) ECHR 1998-IV, at para. 66.

¹⁴⁰ *Bazorkina*, supra note 121, at para. 161; see also, *Angelova v. Bulgaria* (App. No. 38361/97) ECHR 2002-IV, at para. 161-162; *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086) ECHR 1998-VIII, at para. 114 et seq.; *Süheyla Aydın v. Turkey* (App. No. 25660/94) , at para. 208, 24 May 2005; *Khashiyev and Akayeva v. Russia* (App. No. 57942/00 and 57945/00), at para. 183.

¹⁴¹ *Bazorkina*, supra note 121, at para. 163.

¹⁴² *Tekin*, supra note 139; *Assenov*, supra note 140; *Mikheyev v. Russia* (App. No. 77617/01).

¹⁴³ For the clear statement that the Article 13 investigation duties apply both to violations of Article 2 and 3 see *Mikheyev*, supra note 142.

¹⁴⁴ *Bazorkina*, supra note 121, at para. 161.

¹⁴⁵ Hearing on Private Security Contracting in Iraq and Afghanistan Before the House Committee on Oversight and Government Reform (Statement by Eric Prince, CEO of Blackwater International) (Video) 2007.

violation and for example try to obtain eyewitness testimony, forensic evidence, and conduct autopsies, to ascertain the cause of death where applicable.

Specifically with regard to interrogation and detention, the hiring state has to investigate any disappearances of persons that have last been seen in its custody. In all cases, the required investigations must be able to assess whether the force used was justified and to lead to the identification and punishment of those responsible. As a minimum, complete inaction by the state will of course ground a violation of the obligation.

3. Conclusion

As this paper has demonstrated, hiring states have numerous positive obligations under Human Rights Law that can be highly relevant to PMSC operations in situations of conflict. Among those duties the duty to prevent violations of the right to life and the prohibition of torture and cruel and inhuman treatment are pertinent. The interpretations of the International Covenant on Civil and Political Rights, and the regional conventions by the respective judicial and quasi-judicial bodies provide for specific duties to oversee, control, and where necessary physically prevent conduct likely to threaten the rights to life or the prohibition of torture and cruel and inhuman treatment. Where violations have already occurred or have been alleged, the duty to investigate, prosecute and punish as interpreted by the Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights obligates states to provide for a structure facilitating the reporting of such allegations, to quickly and effectively follow up on them and to ensure that they are properly processed through the system of justice. These provisions can, for the most part, be extended to conduct of third persons and thus also to contractors providing coercive services, even where their conduct may not be attributable to the state.