



Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations

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28 April 2016



Frame

Fostering Human Rights among European Policies

Large-Scale FP7 Collaborative Project

GA No. 320000

1 May 2013-30 April 2017

Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations

Work Package No. 7 – Deliverable No. 7.5

Due date	30 April 2016
Submission date	28 April 2016
Dissemination level	PU
Lead Beneficiary	University of Nottingham
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<http://www.fp7-frame.eu>

Acknowledgment

The research leading to these results has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (project n° 320000).

Executive Summary

This case study examines how to hold private military and security companies (PSCs) accountable for human rights violations. It follows on from previous reports in this work package which identified PSCs as perpetrators of some of the most egregious human rights violations perpetrated by any businesses. The regulation of PSCs has also been identified as a specific gap in the EU's business and human rights policy as the EU has not yet established a legal framework for effective regulation of PSC activities. The current legal framework at both national and supra-national levels is widely seen as inadequate and the need for greater regulation has been explicitly recognised by the European Parliament. In this project, PSCs will act as a lens through which the effectiveness of various remedial mechanisms in the field of business and human rights are analysed.

The case study identifies the key factors or criteria underpinning the effectiveness of grievance mechanisms. These include: the ability to investigate and determine the facts of a given case; the accessibility of the remedy to the victims of a human rights abuse; the speed of the remedy; the transparency of the overall process; and the redress offered by the remedy to successful claimants. The case study then proceeds to analyse a number of grievance mechanisms at operational/company level, national level and international level to see whether they meet these criteria for effective grievance mechanisms. In particular it looks at five judicial and non-judicial remedies: the grievance mechanism operated by the Private Security Company Aegis; the National Contact Points system operated under the auspices of the OECD; the UK judicial system; the Association established by the International Code of Conduct for private security providers; and the European Court of Human Rights.

List of Abbreviations

CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
EUPOL	European Union Police
ICoC	International Code of Conduct for Private Security Providers
ICoCA	International Code of Conduct Association
IHRL	International Human Rights Law
ISO	International Organization for Standardization
ISOA	International Stability Operations Association
MNE	Multi National Enterprises
MS	Member State
NCP	National Contact Point
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PMC	Private Military Companies
PMSC	Private Military and Security Company
PSC	Private Security Company
QMRB	Quality Management Review Board
RAID	Rights and Accountability in Development
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNGC	United Nations Global Compact
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council

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I. Introduction

A. Research Overview

This case study examines a particularly intractable issue in human rights law – how to hold private military and security companies (PSCs) accountable for human rights violations.¹ PSCs are defined as

‘private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel’.²

PSCs have expanded rapidly in recent years and they are increasingly being utilised by States, international organisations, businesses, and even Non-Governmental Organisations (NGOs), to provide protection, training and, in some cases, conducting full scale military operations.³ They have expanded into a relatively unregulated space between the State and non-State actors and this has precipitated calls for clarification of the pertinent legal obligations under international humanitarian law and human rights law.⁴ Previous reports in this work package have identified PSCs as perpetrators of some of the most egregious human rights violations perpetrated by any businesses, including violations of the right to life,⁵ the prohibition on torture, inhuman and degrading treatment and security of the person.⁶

PSCs are also unique in that they generate scope for inter-business human rights violations, whereby one business hires another (the PSC) to carry out activities that may violate human rights on their behalf. In a previous report for the FRAME project, it was stated that ‘[PSCs] perform military activities, which are

¹ These companies are referred to in several different ways in the literature such as Private Military and Security Companies (PMSCs) and Private Military Companies (PMCs), see Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’ (FRAME D7.2 2015) 63 (hereinafter FRAME D7.2).

² Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 17 September 2008 (hereinafter Montreux Document), preamble s.9.

³ Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) 1-2.

⁴ Montreux Document, informal summary.

⁵ Nicky Woolf, ‘Former Blackwater guards sentenced for massacre of unarmed Iraqi civilians’ *The Guardian* (London, 13 April 2015) <<http://www.theguardian.com/us-news/2015/apr/13/former-blackwater-guards-sentencing-baghdad-massacre>> accessed 29 June 2015.

⁶ Michael Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’ (2005) 5 *Chicago Journal of International Law* 511, 512; Nicolas David, Mary Dowell-Jones, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Aoife Nolan, Petr Pribyla, ‘Report on the positive and negative human rights impacts of non-state actors’ (FRAME D7.1 2014) 46-47 (hereinafter FRAME D7.1).

substantially different from the activities of most other businesses and create unique scope for human rights violations'.⁷ Our previous reports have also identified this as a specific gap in the EU's business and human rights policy as 'the EU has not yet developed or established a legal framework for effective regulation of [PSC] activities'.⁸ Indeed the current legal framework at both national and supra-national levels is widely seen as inadequate and the need for greater regulation has been explicitly recognised by the European Parliament.⁹ In this project, PSCs will act as a lens through which the effectiveness of various remedial mechanisms in the field of business and human rights are analysed.

B. UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) were developed by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. They are designed to implement the "Protect, Respect and Remedy" Framework encompassing the State's duty to protect human rights, the obligation of businesses to respect human rights and a shared obligation to provide access to remedies for human rights violations where they arise.¹⁰ The final aspect of this framework, the remedy, is often referred to as the 'third pillar' of the UNGPs and most of the focus of this report will be on this pillar.

While the operations of businesses have spread to a global scale, regulation of their activities has not kept pace with these developments.¹¹ Although States have a number of positive obligations under international human rights law (IHRL), both to investigate human rights abuses perpetrated by companies and to protect people within their jurisdiction from harm caused by third parties,¹² the remedial structures

⁷ FRAME D7.2, 64; PSCs are more likely to commit human rights violations than violations of IHL as they are more likely to be deployed in post-conflict situations – Nigel White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11(1) Human Rights Law Review 133, 135.

⁸ FRAME D7.2, 64; Guido den Dekker, 'The Regulatory Context of Private Military and Security Contractors at the EU Level' in Christine Bakker and Mirko Sossai, *Multilevel Regulation of Military and Security Contractors* (Hart Publishing 2012) 31.

⁹ EU Parliament Resolution of 11 May 2011 on development of the common security and defence policy following the entry into force of the Lisbon Treaty P7_TA(2011)0228 at [53]; Marco Gestri, 'The European Union and Private Military and Security Contractors: Existing Controls and Legal Bases for Further Regulation' in Christine Bakker and Mirko Sossai (eds) *Multilevel Regulation of Military and Security Contractors* (Hart Publishing, 2012) 53.

¹⁰ UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, 1 (hereinafter UNGPs and commentary); for detailed analysis of the UN Guiding Principles in the European context see Stephanie Bijlmakers, Mary Footer and Nicolas Hachez, 'Report on tracking CSR responses' (FRAME D7.4 2016) 4-56.

¹¹ Gwynne Skinner, Robert McCorquodale, Olivier De Schutter And Andie Lambe, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013) ICAR, ECCJ, CORE, 7 <<http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>> accessed 7 August 2015.

¹² See generally *Guerra v Italy* (App No 14967/89) ECtHR 19 February 1998; *Vilnes v Norway* (App No 52806/09) ECtHR 5 December 2013; *Lopez Ostra v Spain* (App No 16798/90) ECtHR 9 December 1994.

of human rights law, including national courts and supra-national courts, like the European Court of Human Rights (ECtHR), have struggled to provide access to justice for victims of human rights abuses perpetrated by businesses outside their jurisdiction.¹³ These problems are amplified in the case of PSCs, as they often work in fragile States or States emerging from armed conflict where the rule of law may be weak or non-existent.¹⁴ Krahmann and Abzhaparova argue that the limited ability of failed, weak or developing States engaged in conflict to monitor and enforce national regulations of PSCs has resulted in a free-for-all in some cases, citing the inability of the Iraqi State to effectively monitor PSCs operating in their territory as an example.¹⁵

The activities giving rise to human rights abuses are occurring at various levels of large, multi-national businesses and their subsidiaries in various territories. Those territories often have limited capacity to monitor and effectively sanction human rights abuses. There can be no panacea for these complex, intractable problems.¹⁶ The variety of human rights abuses will likely require a variety of multi-lateral solutions. It is clear that for successful regulation of PSCs, as with any other attempt to regulate non-State actors, there needs to be a synthesis between international standard setting, supervision and accountability, and robust national systems of licensing and regulation.¹⁷

The UNGPs, to their credit, attempt to address some of these issues in their remedial principles. The UNGPs envisage the creation of a multilateral human rights due diligence framework. This framework is supposed to contain a smart mix of voluntary and mandatory regulations,¹⁸ and a complementary mixture of judicial and non-judicial remedial mechanisms.¹⁹ While effective judicial mechanisms lie at the core of the remedial system,²⁰ the UNGPs also envisage the creation of non-judicial remedies at lower levels to complement the judicial remedies, including company-based grievance mechanisms and sectoral remedies. This case study examines remedial mechanisms of each kind, judicial and non-judicial, and at each level, company, national and supra-national levels, to determine their effectiveness.

¹³ Skinner et al (n 11) 8.

¹⁴ Peter Singer, 'The Private Military Industry and Iraq: What Have We Learned and Where to Next?' (2004) Geneva Centre for the Democratic Control of Armed Forces Policy Paper, 12-13 <http://kms2.isn.ethz.ch/serviceengine/Files/ESDP/14132/ipublicationdocument_singledocument/6C72CA8B-2711-4B18-8103-55305E8136E3/en/PP4_Singer.pdf> accessed 7 August 2015.

¹⁵ Elke Krahmann and Aida Abzhaparova, 'The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options' (2010) EUI Working Paper AEL 2010/8, 2 <http://cadmus.eui.eu/bitstream/handle/1814/18295/AEL_2010_8.pdf?sequence=1> accessed 20 July 2015.

¹⁶ Eugenio Cusumano, 'Policy Prospects for Regulating Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011) 20.

¹⁷ White, 'The Privatisation of Military' (n 7) 137.

¹⁸ UNGPs and commentary, 5.

¹⁹ UNGPs and commentary, 30; UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework: Addendum 1 Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned' (2011) UN Doc A/HRC/17/31/Add.1, 7.

²⁰ UNGPs and commentary, 28.

C. EU Action on PSC Regulation

As mentioned above, the regulation of PSCs is a latent gap in the EU's business and human rights policy. However that does not mean that the EU has been completely inactive in efforts to regulate PSCs.²¹ Many of the EU's actions in other fields have had incidental regulatory effects on the PSC industry. Within the Member States (MSs) themselves, the EU has been active in regulating private security and policing through licensing and registration requirements.²² The EU has introduced regulations on armament exports, which have limited the activities of PSCs. Restrictions on the sale of dual use items, for example, may limit the PSCs' ability to provide services to third states as it may not be possible for the PSC to sell goods as part of their service provision.²³ On the political front, under the Common Foreign and Security Policy and Common Foreign and Defence Policies of the EU, joint actions and common positions have been used to restrict the actions of PSCs. The European Council Common Position 2008/944/CFSP, for example, introduces controls on the granting of export licences for military equipment, software and technology where the export would violate international obligations. States must deny export licences, for example, where there is a clear risk that the military technology or equipment to be exported might be used for internal repression.²⁴ The EU has also introduced a series of embargoes against third States, such as Afghanistan and Belarus, to restrict both the arms trade and the provision of technical advice, assistance or training related to military activities.²⁵

At the international level, the European External Action Service (EEAS) has been actively engaging with other States on the subject of regulating PSCs. The EU has joined the Montreux Document along with 23 EU MSs and is a member of the Montreux Document Participant Advisory Forum.²⁶ The EU is a member of the Working Group on the International Code of Conduct Association (ICoCA) for private security service

²¹ For a good overview see Marco Gestri, 'The European Union and Private Military and Security Contractors: Existing Controls and Legal Bases for Further Regulation' in Christine Bakker and Mirko Sossai (eds) *Multilevel Regulation of Military and Security Contractors* (Hart Publishing, 2012) 53.

²² Elke Krahmann, 'Regulating Private Military Companies: What Role for the EU?' (2005) 26(1) *Contemporary Security Policy* 103, 109-110.

²³ See for example European Council, 'Code of Conduct on Arms Export' (*European Council*, 5 June 1998) <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>> accessed 5 October 2015; Council Regulation (EC) 428/2009 of 5 May 2009 on setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L 134/1. See generally Cusumano (n 16) 34.

²⁴ European Council Common Position 2008/944/CFSP of 8 December 2008 on defining common rules governing control of exports of military technology and equipment [2009] OJ L 335/99.

²⁵ A comprehensive list of the embargoed States and the nature of the restrictions are available here – European Commission, 'European Commission – Restrictive measures in force (Article 215 TFEU)' <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf> accessed 2 October 2015.

²⁶ European External Action Service, 'Launch of the Association of the 'International Code of Conduct for Private Security Service Providers' in Geneva' (EEAS, 19 September 2013) <http://eeas.europa.eu/delegations/un_geneva/press_corner/all_news/news/2013/20190919_icoc_en.htm> accessed 2 October 2015.

providers and was active in the creation of the International Code of Conduct and the Association overseeing the implementation of the Code.²⁷ It has also engaged with the UN Human Rights Council on the possible development of an international regulatory framework on the regulation, monitoring and oversight of PSCs.²⁸

The EU has also provided funding for research on PSCs through the PRIV WAR project, which completed its research in 2011.²⁹ This collaborative project assessed the impact of the increasing use of private military companies and security companies in situations of armed conflict and the regulatory framework at national, European and international levels. This project produced a number of recommendations to the EU in 2011, which included options for EU regulatory measures.³⁰ In spite of these recommendations, direct regulation of PSCs remains an outstanding issue for the EU. There are sound practical, moral and economic imperatives underpinning the need for specific EU regulation of PSCs. The PRIV WAR project analysed the need for regulation from the perspective of the internal market, noting that there were stark anomalies between MSSs, which could lead to appreciable distortions of competition and obstacles to trade, thereby justifying EU regulation.³¹ The EU would do well to heed the advice in the recommendations as both the EU and its MSs are increasingly reliant on contracted personnel in the PSC sector for a variety of different activities. The EU itself increasingly uses PSCs for its activities in third countries e.g. protecting the European Union Police (EUPOL) headquarters in Afghanistan, security for the EULEX mission in Kosovo and guarding the EUPOL mission in the Democratic Republic of Congo.³² This also gives both the MSs and the EU a great deal of power to use their status as market actors to influence the behaviour of PSCs. As consumers of PSC services, international organisations like the EU can use market incentives to push self-regulation initiatives and compliance with domestic and international law and best practice forward and this will be discussed further below.

²⁷ European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play' SWD(2015) 144 final, 21.

²⁸ Ibid.

²⁹ Priv-War, 'About the Project' <<http://priv-war.eu/>> accessed 5 October 2015.

³⁰ The options included a directive regulating PMSCs, a council recommendation with guidelines, a CFSP decision on the export of PMSC services and a strategy document defining guidelines for the export of services - Priv-War, 'Priv-War Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services' (Priv-War, March 2011) <http://priv-war.eu/wp-content/uploads/2013/03/Priv-War_Recommendations-FINAL-.pdf> accessed 5 October 2015.

³¹ Ibid. C-376/98 *Germany v Parliament and Council* ('Tobacco Advertising I') [2000] ECR I-8419 at [106]-[118].

³² European Commission, 'The Role of Private Security Companies (PSCs) in CSDP Missions and Operations' (Directorate-General for External Policies of the Union 2011) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET\(2011\)433829_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET(2011)433829_EN.pdf)> accessed 5 October 2015.

D. Methodology and Structure

The case study begins by introducing and contextualising the key issues, it introduces the UNGPs and other important regulatory instruments in the business and human rights field, it defines PSCs and identifies problems with the third pillar of the UNGPs and the effectiveness of remedies overall. Chapter 2 examines the parameters of an effective remedy under international human rights law utilising standards under specific instruments of business and human rights as well as provisions from international human rights jurisprudence. Chapter 3 examines the pros and cons of operational level grievance mechanisms and looks at a specific example of an operational level grievance mechanism to determine the effectiveness of the remedies it offers. Chapter 4 examines remedial mechanisms at the national level. It looks at a non-judicial mechanism, the national contact points (NCP) system of the Organisation for Economic Co-operation and Development (OECD), and a judicial mechanism, the UK court system, to determine how effective these are as remedies for human rights violations perpetrated by PSCs. Chapter 5 looks at the international level, examining the efficacy of a non-judicial remedy at the international level, specifically the efficacy of the ICoCA, and a judicial remedy, namely the European Court of Human Rights.

The study utilised predominantly desk-based research methods, although the author was kindly provided with access to documents on the functioning of the operational level grievance mechanism from Aegis Defence Services Ltd. I would also like to acknowledge the assistance of the staff at Aegis Defence Services Ltd. in clarifying how the grievance mechanism functioned in further correspondence. The annex outlining the complaints process at Aegis is reproduced with the permission of the company.

II. Effective Remedies

A. Grievances and Grievance Mechanisms

In the business and human rights context, the term grievance is often used to describe an issue arising between a company and an individual or group of persons. This term is more neutral and broad than the term ‘human rights violation’ and a grievance is understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.³³ Rather than referring to courts and tribunals, the UNGPs refer to a broader category of ‘grievance mechanisms’ which are defined as ‘any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought’.³⁴ Thus, the term grievance mechanism and remedial mechanism are interchangeable. The primary objective of this project is to identify effective mechanisms through which PSCs that are responsible for human rights abuses can be held accountable. It is thus imperative to establish what constitutes ‘an effective mechanism’ and what determines effectiveness. In the following sections, I attempt to distil the characteristics of an effective remedial mechanism through analysing international human rights law standards and the standards set out in the UNGPs. Once this synthetic analysis has been completed, the assessment of the various remedies identified in this case study can begin to see whether they conform to these central effectiveness criteria.

B. Standards of Effectiveness

In defining standards of effectiveness for the purposes of this case study, the primary source of inspiration will be IHRL. This is not only a logical starting point, but also an imperative set out in the UNGPs which, in the context of establishing the contours of non-judicial remedies, state that the designers of such remedies should ‘[ensure] that outcomes and remedies accord with internationally recognized human rights’.³⁵ Of course the standards defining an effective remedy under IHRL are primarily aimed at States, whereas there is a need here to also examine a much broader category of remedies including international, non-judicial and operational level grievance mechanisms. In these circumstances, the primary inspiration for the effectiveness criteria can be drawn from IHRL, but tailored to the different contexts. It is important also to note at the outset that the procedural aspects of the rights, such as

³³ UNGPs and commentary, 27.

³⁴ UNGPs and commentary, 27.

³⁵ UNGPs and commentary, 34.

conditions applicable to investigations, are just as important as the substantive rights when it comes to determining whether a remedy is effective or not.

The right to an effective remedy is widely recognised under IHRL.³⁶ In the European context, for example, Article 13 of the European Convention on Human Rights (ECHR) stipulates that ‘everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’. However, the simplicity of this statement belies a complex, multi-dimensional right comprising a range of related express and implied rights. Thus, for example, the right to an effective remedy is closely associated with the right of access to a court,³⁷ the right to test the legality of one’s detention,³⁸ the right to just satisfaction,³⁹ and the right to effective judicial protection.⁴⁰

The primary guarantor of this right to an effective remedy is the State. The UNGPs specify that States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to an effective remedy.⁴¹ However, State-based judicial and non-judicial remedies form the foundation of the wider system of remedy in the business and human rights sphere. The OECD Guidelines for Multinational Enterprises recommend that enterprises have processes in place to enable remediation,⁴² while the UNGPs state that business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities.⁴³ In this broader system, company-based grievance mechanisms and international grievance mechanisms can provide resolutions, supplementing and enhancing the State-based mechanisms.⁴⁴

Generally speaking the form that the remedy takes is not important. It is for each State to determine which procedure best meets the criterion of effectiveness and fairness.⁴⁵ The important thing is that the remedy allows the competent authorities to deal with the substance of a complaint and grant appropriate relief.⁴⁶ This is reflected in the UNGPs, which state that the remedy must include ‘investigation,

³⁶ See *inter alia* Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 14.

³⁷ European Convention on Human Rights, art 6(1).

³⁸ European Convention on Human Rights, art 5(4).

³⁹ European Convention on Human Rights, art 41.

⁴⁰ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02, art 47; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 25.

⁴¹ UNGPs and commentary, 27.

⁴² OECD, ‘OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment’ (OECD, 25 May 2011) 34 <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 28 July 2015.

⁴³ UNGPs and commentary, 31.

⁴⁴ UNGPs and commentary, 27-28.

⁴⁵ *Scordino v Italy* (No. 1) (2007) 45 EHRR 7 at [200]; UNGPs and commentary, 27.

⁴⁶ *MSS v Belgium and Greece* (2011) 53 EHRR 2 at [288].

punishment and redress'.⁴⁷ The remedy must be effective both in theory and in practice.⁴⁸ It must also offer a genuine prospect of success,⁴⁹ if a remedy is too speculative it may not be considered effective.⁵⁰ It is important to note that even if an individual remedy itself is insufficient, the cumulative effect of a number of remedies may satisfy the effectiveness criterion.⁵¹

1. Investigation and Fact-Finding

The obligation to investigate engages a number of measures on effectiveness and serves as a good starting point for discussion. The UNGPs specify that investigation is a general requirement of remedies regardless of the nature of the violation. Many of the IHRL standards on investigations have developed as procedural obligations to substantive rights, such as the right to life. In principle, once a potential human rights abuse is brought to the attention of the relevant authority they should actively investigate the issue.⁵² This investigation must be capable of establishing the facts and identifying and punishing those responsible for the violation of human rights.⁵³ The duty to carry out an effective investigation is linked to the 'right to the truth', a right for the victims of human rights violations and the public at large to know about the abuses committed by the State or third parties.⁵⁴

A central tenet of the investigation obligation is the principle of independence. As a general rule, the remedial mechanisms need to offer sufficient independence from the people that they are investigating. The Court of Justice of the European Union, for example, has defined the concept of independence in the broader context of an examination of the defining characteristics of a court or tribunal under EU law.⁵⁵ The CJEU considered independence and impartiality as defining characteristics of these remedial mechanisms. Firstly, the CJEU has stated that independence primarily involves 'an authority acting as a third party in relation to the authority which adopted the contested decision'.⁵⁶ Secondly, independence 'presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them'.⁵⁷ Finally, the body must

⁴⁷ UNGPs and commentary, 3.

⁴⁸ *İlhan v Turkey* (2002) 34 EHRR 36 at [97]; *Karamitrov v Bulgaria* (App No 53321/99) 10 January 2008 at [78].

⁴⁹ *Costello Roberts v UK* (1995) 19 EHRR 112 at [59].

⁵⁰ *McFarlane v Ireland* (2011) 52 EHRR 20.

⁵¹ *De Souza Ribeiro v France* (2014) 59 EHRR 10 at [79]; Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1202.

⁵² *Ergi v Turkey* (2001) 32 EHRR 18 at [82]. The UNGPs stipulate that where a business enterprise identifies that they have caused or contributed to adverse impacts on human rights, they should provide for or cooperate in their remediation through legitimate processes – UNGPs and commentary, 24.

⁵³ *Keenan v United Kingdom* (2001) 33 EHRR 38 at [122]; *Ogur v Turkey* (2001) 31 EHRR 40 at [88].

⁵⁴ *El-Masri v Macedonia* (2013) 57 EHRR 25 at [191]. See also Fabio Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14 Human Rights Law Review 85.

⁵⁵ Case C-506/04 *Graham Wilson* [2006] ECR I-08613.

⁵⁶ *Ibid* at [49].

⁵⁷ *Ibid* at [51].

ensure a level playing field for the parties, ensuring objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.⁵⁸

Elsewhere the ECtHR has examined the concept of independence in the context of murder investigations stating that there should be hierarchical, operational and practical independence in investigations. Hierarchical independence requires that the chain of command controlling the investigators must be independent from that of the accused parties.⁵⁹ In *Jordan v UK*, for example, a violation was found, in part, because there was a hierarchical link between the officers conducting the investigation and the officers subject to investigation.⁶⁰ As each were ultimately responsible to the same leader, there was insufficient independence to achieve an effective investigation. In *Al-Skeini v UK*, the ECtHR stated that the military police investigating the incidents had to be institutionally separate from the soldiers they were investigating.⁶¹ Finally, practical independence demands that investigators have access to their own resources and be self-reliant.⁶² While these statements were made in a different context, namely violations of the right to life, the principles underpinning them can be extrapolated and similar standards should apply to the grievance mechanisms providing remedies for abuses perpetrated by PSCs.

In the context of judicial remedies, the UNGPs state that the ability of 'effective judicial mechanisms' to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.⁶³ The UNGPs also refer indirectly to the criterion of practical independence noting that where State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes it can become a practical barrier to accessing judicial remedies.⁶⁴ The UNGPs do not specify independence as an explicit criterion of the non-judicial grievance mechanisms. However, they do specify that such remedies must enable trust from the stakeholder groups for whose use they are intended.⁶⁵ If these remedies do not appear to be sufficiently independent and impartial, they are unlikely to engender trust among their users. Furthermore, the UNGPs say that the remedies must be 'rights compatible' in a more general sense, which means that their investigations should accord with these standards as well.

⁵⁸ Ibid at [52].

⁵⁹ Ibid at [52].

⁶⁰ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [120].

⁶¹ *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18 at [167].

⁶² Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 ICLQ 437, 440.

⁶³ UNGPs and commentary, 28-30.

⁶⁴ UNGPs and commentary, 29.

⁶⁵ UNGPs and commentary, 33.

2. Accessibility

The UNGPs specify that an important factor in determining the effectiveness of a remedy is that of accessibility. This requires that the remedy is known to all stakeholder groups for whose use they are intended, and provides adequate assistance for those who may face particular barriers to access.⁶⁶ These barriers could include lack of awareness of the remedy, language and cost. In the context of human rights law, much of the rulings on accessibility are made in the context of fair trial rights and the right of access to a court, however, there are a number of parallels that can be drawn.

As a general principle, and related to the idea that the remedy should be known to stakeholders, human rights law requires that the remedy be available in theory and practice.⁶⁷ If a remedy is too speculative, or not well known, it will impinge on its effectiveness.⁶⁸ As a general rule, everyone who is party to a complaint should have a reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantage vis-à-vis their opponent.⁶⁹ The cost of seeking a remedy may create a substantial barrier to access and human rights law may require the provision of legal aid to applicants for a particular remedy.⁷⁰ This is especially pertinent where there is a significant disparity in the levels of legal assistance available to each party, as may often be the case in a complaint between a large company and private individuals. An interesting example is that of *Steel and Morris v UK* where a large multi-national, in this case McDonalds, successfully sued some environmental campaigners for defamation and were awarded thousands of pounds in damages. The campaigners, in turn, successfully sued the UK for failing to provide them with legal aid. The ECtHR held that the disparity between the levels of legal assistance available to each party could not have failed to give rise to unfairness.⁷¹

Language may also generate a barrier to access for applicants. In the context of criminal trials, human rights law demands that the State provide translations of relevant court documents, such as indictments,⁷² and translations of court proceedings.⁷³ The cost of these translations should also be borne by the State.⁷⁴ Both judicial and non-judicial remedies for violations by PSCs may have to make similar arrangements for those seeking to access the remedies in third countries. Overall CSR Europe recommends that grievance mechanisms have multiple access points such as hotlines, online services and meetings and that designers should consider the differences in audiences and tailor the access points to the circumstances.⁷⁵

⁶⁶ UNGPs and commentary, 33.

⁶⁷ *Kudla v Poland* (2002) 35 EHRR 11 at [157].

⁶⁸ *McFarlane v Ireland* (App No 31333/06) ECtHR 10 September 2010 at [117].

⁶⁹ *De Haes v Belgium* (1998) 25 EHRR 1 at [53].

⁷⁰ *Airey v Ireland* (1981) 3 EHRR 592.

⁷¹ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22 at [69].

⁷² *Kamasinski v Austria* (1991) 13 EHRR 36 at [79].

⁷³ *Cuscani v United Kingdom* (2003) 36 EHRR 2 at [38].

⁷⁴ *Luedicke and Ors v Germany* (1979-80) 2 EHRR 149 at [45].

⁷⁵ CSR Europe, 'Assessing the Effectiveness of Company Grievance Mechanisms: CSR Europe's Management of Complaints Assessment (Moc-A) Results' (CSR Europe, 2012) 12-13.

3. Speed

International human rights law requires that remedies be delivered within a reasonable time. Under the European Convention on Human Rights (ECHR), for example, there is a positive obligation on contracting States to organise their legal systems in such a way as to ensure that legal proceedings are conducted in an efficient and speedy manner,⁷⁶ while article 6(1) guarantees the right to have a case heard in a reasonable time. The Council of Europe's Venice Commission for Democracy through Law notes that the speed of a remedial action itself is a factor in assessing its effectiveness. Remedies which can themselves take a long time to conclude will not be considered effective.⁷⁷ Even where the remedy is generally considered effective, this effectiveness could be undermined by its excessive duration.⁷⁸

Generally speaking there is no fixed timescale for the length of time a grievance should take to resolve. The UNGPs mention that non-judicial remedies should provide an indicative time frame for each stage and the outcomes and remedies need to 'accord with internationally recognised human rights', which would include the speed requirement.⁷⁹ However, the speed of the remedy is a relative concept and the conduct of the parties is a significant factor. When the ECtHR, for example, is considering whether a particular case has taken too long it looks at

'the circumstances of the case and having regard to the criteria laid down in the Court's case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation'.⁸⁰

Thus, the failure to meet this criterion of providing a speedy remedy may not be the fault of the State or the PSC involved.

Careful assessment is required when evaluating the speed of remedies in cases involving PSCs in third States, where there are likely to be delays for a number of reasons, it may be difficult to obtain evidence, to gather witness statements in other jurisdictions and the region where the alleged violation occurred may be unsafe or inaccessible. Thus, while speed is a factor in determining effectiveness, it is a relative one which should be subject to careful individual assessment.

4. Transparency

⁷⁶ *Süssman v Germany* (1998) 25 EHRR 64 at [55].

⁷⁷ European Commission for Democracy through Law (Venice Commission), 'Report on the effectiveness of national remedies in respect of excessive length of proceedings' (Council of Europe 2008) CDL-STD (2007) 044 at [161]; see also *Vaney v France* (App No 53946/00) ECtHR 30 November 2004 and *Pine Valley Developments Ltd and Others v Ireland* (1992) 14 EHRR 319 at [47].

⁷⁸ *McFarlane v Ireland* (2011) 52 EHRR 20 at [125].

⁷⁹ UNGPs and commentary, 34.

⁸⁰ *Comingersoll v Portugal* (2001) 31 EHRR 31 at [19].

The criterion of transparency encompasses a number of different obligations, which touch on other criteria. In the first place remedial mechanisms must have transparent processes and outcomes.⁸¹ They should be predictable and clear and in this sense the condition of transparency is linked to accessibility in that the remedy must be clear and certain in theory and practice for it to be considered effective.⁸² In general, states have an obligation to inform the general public and victims of human rights abuses of the remedies available to them.⁸³

Secondly, transparency entails an element of information disclosure. The UN Guiding Principles stipulate that grievance mechanisms should provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.⁸⁴ There is a broader 'right to the truth' about serious violations of human rights law, which is linked to the right to an effective remedy.⁸⁵ This has an element of transparency enabling a victim of a human rights violation to seek and obtain information on the causes and conditions pertaining to the violation and to learn the truth about what happened.⁸⁶ These elements of information disclosure and public interest are closely related. Many national legal systems also have detailed rules on the disclosure of evidence between parties to a case, as having access to this information is extremely important for litigants to defend or prosecute their respective cases.⁸⁷

Thirdly, there should be a degree of public scrutiny of the remedy and how it functions, although this will vary from case to case.⁸⁸ Private companies are not accountable to the public in the same way as State authorities. Yet, where a company is involved in a human rights abuse and has undertaken to investigate the situation, there is arguably a need for some public accountability in such situations. Under human rights law, there must be a sufficient element of public scrutiny of investigations and their results to secure accountability and public confidence in the authorities.⁸⁹ The victims or their next of kin must be involved in the remedial action to the extent necessary to safeguard their legitimate interests.⁹⁰ While there is no requirement that the victim have access to an investigation while it is ongoing, access to the investigation or documents should occur at other stages, such as after completion and complainants should be kept

⁸¹ UN Guiding Principles, 26.

⁸² *Mifsud v France* (App No 57220/00) ECtHR 11 September 2002 at [15]; *Da Silva v Luxembourg* (App No 30273/07) ECtHR 11 February 2010 at [40].

⁸³ UN Office of the High Commissioner for Human Rights, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res. 60/147, 16 December 2005 at [24].

⁸⁴ UN Guiding Principles, 26.

⁸⁵ See generally UN Commission on Human Rights, 'Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights', (2006) UN Doc. E/CN.4/2006/91.

⁸⁶ UN Office of the High Commissioner for Human Rights (n 83) at [24].

⁸⁷ See, for example, England and Wales Civil Procedure Rules, rule 31.6.

⁸⁸ *Ramsahai v Netherlands* (2008) 46 EHRR 43 at [347]; UN Guiding Principles, 26.

⁸⁹ *Ramsahai v Netherlands* (2008) 46 EHRR 43 at [321]; *Anguelova v Bulgaria* (2004) 38 EHRR 31 at [140].

⁹⁰ *Anguelova v Bulgaria* (2004) 38 EHRR 31 at [140].

informed about the progress of the complaint.⁹¹ Finally, the UN Guiding Principles specify that openness and transparency should be the default position and transparency should be presumed wherever possible.⁹²

5. Redress

The final piece of the puzzle for effective remedies is providing some kind of redress to make good the wrong perpetrated by the company. There is a great deal of flexibility in terms of the potential redress a grievance mechanism can offer. Restitution is the preferred form of redress,⁹³ but when this is not possible discretion can be left to the State and other options for redress can include apologies, compensation and guarantees of non-repetition.⁹⁴ It may be necessary for the grievance procedure to offer some kind of interim relief or suspension of adverse activities while a complaint is investigated.⁹⁵ It is also important that grievance mechanisms advise complainants at the outset what the mechanism may and may not do in terms of providing remedies for human rights violations.⁹⁶

Dialogue between the parties aimed at settling the dispute prior to adjudication is encouraged and we can see examples of this at the level of IHRL through friendly settlements at the ECtHR,⁹⁷ and at the national level where grievance mechanisms like the NCPs of the OECD offer good offices to complainants in an attempt to resolve the dispute.⁹⁸ Dialogue is particularly encouraged in the context of operational level grievance mechanisms.⁹⁹

When compensation is offered, it must be adequate and where a low level of compensation is offered it may be considered so derisory that it impacts on the effectiveness of the remedy at issue.¹⁰⁰ Equally compensation should be paid in a timely manner and delays can impact upon effectiveness.¹⁰¹ Redress may also involve the adoption of general or specific measures to put an end to a violation or prevent its

⁹¹ *McKerr v United Kingdom* (2002) 34 EHRR 20 at [129].

⁹² UN Guiding Principles, 26.

⁹³ Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP, 2011) 83.

⁹⁴ *Selcuk and Asker v Turkey* (App No 12/1997/796/998-999) ECtHR 24 April 1998 at [125]; UNGPs and commentary, 27; *Kudla v Poland* (App No 30210/96) ECtHR 26 October 2000 at [157]-[158].

⁹⁵ Rules of Court of the European Court of Human Rights 2010, Rule 39.

⁹⁶ Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP, 2011) 83.

⁹⁷ European Convention on Human Rights 1950, art 39.

⁹⁸ Department of Business Innovation and Skills, 'UK National Contact Point Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises' s.4.1.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf> accessed 5 October 2015.

⁹⁹ UNGPs and commentary, 34.

¹⁰⁰ *Keenan v United Kingdom* (2001) 33 EHRR 38 at [129].

¹⁰¹ *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [152].

re-occurrence.¹⁰² These remedial measures may need to address structural deficiencies or systemic problems which have given rise to a particular human rights abuse(s) in order to be effective.¹⁰³

¹⁰² *Scozzari and Giunta v Italy* (2002) 35 EHRR 12 at [249].

¹⁰³ Rules of Court of the European Court of Human Rights 2010, Rule 61; *Olaru and Ors v Moldova* (App No 17911/08) ECtHR 28 July 2009; *Broniowski v Poland* (App No 31443/96) ECtHR 22 June 2004.

III. Operational Level Mechanisms

A. Operational Level Grievance Mechanisms

The UNGPs envisage the creation of operational or company-based grievance mechanisms. Guiding Principle 29 states that: '[t]o make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted'.¹⁰⁴ These grievance mechanisms are typically administered by the business alone or in collaboration with other stakeholders. The mechanisms allow aggrieved parties to engage the company directly in assessing the issues and seeking remediation of any harm.¹⁰⁵ The mechanisms may also involve external experts to resolve complaints and must not preclude recourse to national judicial or non-judicial remedies.¹⁰⁶ Thus they do not serve as a substitute for effective judicial systems, which must be at the core of a system of remedy for business and human rights. However, these other mechanisms are not always available, accessible, appropriate, or the desired avenue of those impacted. The judiciary or traditional systems of justice may not be trusted by the company or the complainants in some cases.¹⁰⁷ In these circumstances non-judicial grievance mechanisms, such as operational level grievance mechanisms, provide an important complement and supplement for such situations.¹⁰⁸

Companies have come under increasing pressure from various external sources to adopt operational level grievance mechanisms in recent years.¹⁰⁹ The establishment of effective operational grievance mechanisms is, for example, increasingly becoming a required standard for overseas development projects.¹¹⁰ According to Wilson and Blackmore, 'the use of operational grievance mechanisms has grown significantly in recent years in response to the increasingly evident business case for addressing and avoiding conflict and getting community relations right'.¹¹¹ These operational level mechanisms can also offer a number of benefits to victims. They offer recourse and resolution at an early stage before an issue becomes a fully-fledged human rights abuse and they are accessible to individuals and communities who

¹⁰⁴ UNGPs and commentary, 31.

¹⁰⁵ UNHRC (n 19) 8.

¹⁰⁶ Ibid.

¹⁰⁷ Office of the Compliance Advisor for the International Finance Corporation, 'A Guide to Designing and Implementing Grievance Mechanisms for Development Projects' (CAO, 2008) 14.

¹⁰⁸ Corporate Social Responsibility Initiative, 'Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders' (2008) CSRI Working Paper No. 41, 7 <http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/programs/csri/publications/Workingpaper_41_Rights-Compatible%20Grievance%20Mechanisms_May2008FNL.pdf> accessed 10 September 2015.

¹⁰⁹ Emma Wilson and Emma Blackmore (eds), *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms* (International Institute for Environment and Development, 2013) 26-27.

¹¹⁰ Office of the Compliance Advisor for the International Finance Corporation (n 107) 1.

¹¹¹ Wilson and Blackmore (n 109) 136.

may be adversely affected by the actions of the company.¹¹² They are also incredibly flexible as these mechanisms are not restricted by either rules of procedure or substantive constraints that frame judicial mechanisms. They can be particularly useful in the context of PSCs because they can fill regulatory gaps. The existence of a remedial system which follows the PSC wherever it goes and functions consistently across different jurisdictions is welcome because the rule of law in the States where PSCs operate is often weak and the extra-territorial reach of the legislation applicable in the State where the PSC is registered may be unclear.¹¹³

According to the UNGPs, operational level grievance mechanisms must satisfy the following criteria to be considered effective:

Grievance Mechanism Requirements	
Legitimacy	Having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.
Accessibility	Being publicised to those who may wish to access it and providing adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal.
Predictability	Providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome.
Equitability	Ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms.
Rights-Compatibility	Ensuring that its outcomes and remedies accord with internationally recognised human rights standards.

¹¹² UNGPs and Commentary, 28, 31-31.

¹¹³ Nicola Jägers, 'Regulating the Private Security Industry: Connecting the Public and the Private through Transnational Private Regulation' (2012) 6 Human Rights and International Legal Discourse 56, 68.

Transparency	Providing sufficient transparency of process and outcome to meet the public interest concerns at stake and presuming transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.
Engagement and Dialogue	Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances. ¹¹⁴

These effectiveness principles are essentially ‘characteristics’ that any grievance mechanism should have if it is to be successful in the medium to long run, and guidelines to assist companies developing grievance mechanisms from scratch.¹¹⁵ They correspond well with many of the standards of effectiveness identified in the first section and when we look in detail at how these principles are operationalised, the correspondence increases.

A number of studies have attempted to flesh out and operationalise these principles. The Office of the Compliance Advisor to the World Bank Group put forward some analysis on how to operationalise these principles in the context of development projects.¹¹⁶ CSR Europe set out a series of process requirements for effective operational grievance mechanisms.¹¹⁷ The Corporate Social Responsibility Initiative at Harvard University has produced a guidance tool for companies and stakeholders on the creation of rights compatible grievance mechanisms.¹¹⁸ By combining their respective analyses we can synthesise and identify a number of specific, practical steps that grievance mechanisms should take and compare an operational grievance mechanism against these criteria.

B. Case Study: Aegis Grievance Mechanism

The PSC Aegis was founded in 2002 by Colonel Tim Spicer, a retired officer in the British Army.¹¹⁹ The company is a leading global player in the PSC industry, which has held a number of lucrative contracts

¹¹⁴ UNGPS and commentary, 33-34.

¹¹⁵ Wilson and Blackmore (n 109) 39.

¹¹⁶ Office of the Compliance Advisor for the International Finance Corporation (n 107).

¹¹⁷ CSR Europe ‘Assessing the Effectiveness’ (n 75).

¹¹⁸ Corporate Social Responsibility Initiative (n 108).

¹¹⁹ Stephen Armstrong, ‘The enforcer’ (*The Guardian*, 20 May 2006) <<http://www.theguardian.com/commentisfree/2006/may/20/comment.military>> accessed 4 September 2015.

with the US government for work in Iraq and Afghanistan.¹²⁰ The company has been the subject of negative media coverage in the past, it was linked to videos posted online, which appeared to show security guards in Baghdad ‘randomly shooting Iraqi civilians’.¹²¹ However, both a subsequent investigation by the US Army Criminal Investigation Division and an internal investigation, headed by a British judge and former senior police officer, concluded that the contractors had not done anything wrong.¹²² US auditors also condemned the company in a 2005 report for failing to sufficiently vet and train its personnel in Iraq,¹²³ although a subsequent audit report in 2009 from the same auditors was complimentary about Aegis’s vetting and training record.¹²⁴ The company was also initially refused membership of a trade association for PSCs, the International Peace Operations Association (now International Stability Operations Association (ISOA)), although its US subsidiary has since become a member of ISOA.¹²⁵ The company has been involved in work with governments on regulating PSCs for many years, most recently on the development of the International Code of Conduct for Private Security Service Providers in 2010,¹²⁶ and the establishment of the International Code of Conduct Association in 2013, where it worked as a member of the multi-stakeholder Temporary Steering Committee.¹²⁷

The company has implemented a code of conduct for its employees, a detailed whistleblowing policy and issued reports on compliance with the UN Global Compact (UNGC). More importantly for our current purposes, the company has implemented a structured, comprehensive grievance mechanism aimed at resolving complaints of varying kinds and in 2013 became one of the first companies to be certified to the American National Standards Institute’s PSC 1 standard,¹²⁸ which has been developed specifically to

¹²⁰ Aegis World, ‘Government & Diplomatic’ (Aegis World, 4 September 2015) <<http://www.aegisworld.com/sectors/government-diplomatic/>> accessed 4 September 2015.

¹²¹ Sean Rayment, ‘“Trophy” video exposes private security contractors shooting up Iraqi drivers’ (*The Telegraph*, 27 November 2005) <<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1504161/Trophy-video-exposes-private-security-contractors-shooting-up-Iraqi-drivers.html>> accessed 4 September 2015.

¹²² Human Rights First, ‘Private Security Contractors at War: Ending the Culture of Impunity’ (Human Rights First, 2008) 49-50.

¹²³ Benjamin Perrin, ‘Promoting compliance of private security and military companies with international humanitarian law’ (2006) 88 *International Review of the Red Cross* 613, 618; Special Inspector General Iraq Reconstruction, ‘Audit Report: Compliance with Contract No. W911S0-04-C-0003 Awarded to Aegis Defence Services Limited’ (20 April 2005) <http://cybercemetery.unt.edu/archive/sigir/20131001160206/http://www.sigir.mil/files/audits/SIGIR_Audit-Compliance_Contract_Aegis.pdf#view=fit> accessed 4 September 2015.

¹²⁴ Special Inspector General Iraq Reconstruction, ‘Oversight of Aegis’s Performance on Security Services Contracts in Iraq with the Department of Defense’ (14 January 2009) 25-26 <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA493378>> accessed 28 September 2015.

¹²⁵ International Stability Operations Association, ‘Member Search Results’ (*International Stability Operations Association*, 4 September 2015) <<http://www.stability-operations.org/search/newsearch.asp>> 4 September 2015.

¹²⁶ International Code of Conduct for Private Security Service Providers (adopted 8 March 2011) FSC.DEL/61/11.

¹²⁷ US Department of State, ‘The International Code of Conduct for Private Security Service Providers’ <<http://www.humanrights.gov/wp-content/uploads/2013/08/icoc-fact-sheet.pdf>> accessed 5 October 2015.

¹²⁸ Aegis World, ‘Compliance’ (Aegis World, 4 September 2015) <<http://www.aegisworld.com/compliance/>> accessed 4 September 2015.

enshrine the protection of human rights within the industry's business practices and to provide confidence in the quality and professionalism of security firms operating worldwide in high risk locations.

1. PSC 1 Standard

The PSC 1 standard requires PSCs to introduce a quality assurance management system, which assists companies working in circumstances of weakened governance where the rule of law has been undermined due to human or naturally caused events.¹²⁹ This standard provides auditable criteria and guidance for PSCs, which is consistent with the Montreux document¹³⁰ and the International Code of Conduct for Private Security Providers (ICoC).¹³¹ The entire PSC 1 system is designed to minimise risks and reduce the potential for grievances at their source. It includes an obligation for the company to identify relevant IHRL, international humanitarian law, customary law and agreements, determine how these provisions apply to its operations, thoroughly document this information and communicate it to persons working on its behalf, including subcontractors.¹³² It also demands that the company carry out comprehensive human rights impact assessments before undertaking any project and on a regular basis thereafter. When the company is being assessed for certification to this standard, auditors examine company documentation and records, interview personnel, and observe management controls from head office. Unusually for an international standard, auditors also test these issues at the point of service delivery.¹³³ Auditors travel to locations where the company operates and test how company policies are implemented on the ground. Auditors also carry out follow up activities with periodic surveillance audits.¹³⁴ The PSC 1 standard forms the basis for an ISO (International Organization for Standardization) standard published on 15th September 2015, ISO 18788,¹³⁵ and became the first standard to be endorsed by the ICoCA as complying with its code of conduct.¹³⁶ In the following sections the effectiveness criteria

¹²⁹ American National Standards Institute, *Management System for Quality of Private Security Operations: Requirements with Guidance* (ANSI, 2012) PSC.1-2012, 2-3.

¹³⁰ The Montreux document sets out the international humanitarian law and international human rights law obligations applicable to PMSCs, their host States and the contracting States and identifies both soft law 'best practice' standards and measures of hard law applicable to PMSCs - White, 'The Privatisation of Military' (n 7) 134.

¹³¹ American National Standards Institute (n 129) xxi.

¹³² American National Standards Institute (n 129) 11.

¹³³ MSS Global, 'Introduction to ANSI/ASIS PSC 1 Private Security Company Management System' <http://www.mssglobalservices.com/userfiles/downloads/MSSGlobal_Intro_PSC1.pdf> accessed 15 September 2015.

¹³⁴ American National Standards Institute, *Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations* (ANSI, 2012) PSC.2-2012, 19-20.

¹³⁵ International Organization for Standardization, 'ISO 18788' <http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380> accessed 15 September 2015.

¹³⁶ International Code of Conduct Association, 'ICoCA Recognition Statement for ANSI/ASIS PSC.1-2012' <<http://www.icoca.ch/sites/default/files/uploads/ICoCA%20Recognition%20Statement%20for%20PSC%201.pdf>> accessed 28 September 2015.

identified above (see section II.B.) will be examined in greater detail and applied to the Aegis grievance mechanism and PSC 1 standard to determine whether the mechanism satisfies the effectiveness criteria.

2. Investigation and Fact-Finding

There should be a transparent receipt, registration and record system for complaints.¹³⁷ The mechanism should assess complaints to see if they fit the mandate of the procedure.¹³⁸ The investigators should clarify issues and gather information.¹³⁹ All complaints should be taken seriously and all complainants should be treated with respect.¹⁴⁰ The company should have procedures to prevent reprisals against complainants.¹⁴¹ It should protect the anonymity of complainants when requested to do so.¹⁴² The procedure should have the possibility of appeal through successive levels of the company management hierarchy.¹⁴³ The grievance mechanism should also avoid undermining legal mechanisms.¹⁴⁴

The PSC 1 standard requires that the organisation establish procedures to document grievances.¹⁴⁵ The complaints flowchart (see annex 1) clearly shows that Aegis maintains a complaints database and that individual complaints are assigned reference numbers, which are in turn communicated to the complainant. The flowchart also shows a filtration system, which determines the nature of the correspondence and filters it accordingly and an assessment phase where it determines the type of complaint at issue and further filters it to the appropriate stream. Aegis's internal complaints directive requires that every complaint made should be dealt with in accordance with clear procedures which support the flowchart. An independently chaired Quality Management Review Board (QMRB) requires that regular reports on numbers of complaints and whether they have been handled in accordance with the company's internal procedures be prepared. Aegis has included a commitment on complaints handling in its annual reports to the UN Global Compact, including details about the protection afforded to whistleblowers.¹⁴⁶ It is not possible to confirm these commitments in the abstract, although the company advised that their internal procedures include the following checks – after the conclusion of the investigation, the Complaints Handling Officer will inform the complainant (i) whether any action will be

¹³⁷ Office of the Compliance Advisor for the International Finance Corporation (n 107) 18; Corporate Social Responsibility Initiative (n 108) 22-24; CSR Europe 'Assessing the Effectiveness' (n 75) 21.

¹³⁸ Office of the Compliance Advisor for the International Finance Corporation (n 107) 35-36.

¹³⁹ Ibid 37.

¹⁴⁰ Corporate Social Responsibility Initiative (n 108) 29-30.

¹⁴¹ CSR Europe 'Assessing the Effectiveness' (n 75) 14.

¹⁴² Corporate Social Responsibility Initiative (n 108) 24.

¹⁴³ Office of the Compliance Advisor for the International Finance Corporation (n 107) 9 and 18.

¹⁴⁴ Corporate Social Responsibility Initiative (n 108) 20-21.

¹⁴⁵ American National Standards Institute (n 129) 26.

¹⁴⁶ Aegis Defence Services, 'United Nations Global Compact Aegis Communication On Progress' (Aegis, 12 August 2015) 6

<https://www.unglobalcompact.org/system/attachments/cop_2015/182041/original/150812_UNGC_Communication_on_Progress_Final.pdf?1439397786> accessed 5 October 2015.

taken and (ii) that he/she has the right to appeal (see below) and the QMRB will be advised on how the complaint was resolved.

The PSC 1 standard, to which Aegis has been certified following an independent audit, requires that the organisation protect individuals submitting a complaint or grievance in good faith from retaliation,¹⁴⁷ including express commitments that the organisation or persons working on its behalf may not retaliate against anyone who files a grievance or cooperates in the investigation of a grievance.¹⁴⁸ A PSC 1-compliant grievance mechanism must also make provisions for confidentiality and privacy,¹⁴⁹ including procedures for registering anonymous complaints and grievances.¹⁵⁰ Aegis have confirmed that these requirements are specifically covered in their internal complaints procedures and some are specifically mentioned in Aegis's report to the UNGC.¹⁵¹

While smaller companies can struggle to facilitate upwards accountability structures that are independent of management,¹⁵² this is one of the benefits of scale and the Aegis grievance mechanism offers an avenue of appeal to the independently-chaired QMRB. The complaint is forwarded to the QMRB or the company's Board of Directors, who will appoint a different hearer than the initial assessor. The grievance mechanism also expressly encourages staff to consider, if relevant and appropriate, whether external mechanisms can assist with the provision of a remedy, meaning that if the complaint cannot be resolved internally there is scope to appeal to external mechanisms. The company has advised that the nature of external appellate structures differ depending on the host country of the complainant and the nature of the complaint and for this reason has not included examples in its flow chart.

In the future, the company could look to improve its co-ordination with external appellate structures, perhaps by indicating specific potential appellate avenues for the different types of complaints when the operational level grievance mechanism fails to resolve a complaint itself. Aegis has formalised the requirement to report events that might impact on its PSC 1 certification to its external auditors. However, the International Federation for Human Rights, a federation of NGOs that commented on the draft of the UNGPs, recommends that PSCs also consider reporting any human rights grievances to public human rights authorities, such as national human rights institutions, so that they can monitor the outcomes and any potential public interest in them.¹⁵³ This would also improve the transparency of the grievance mechanism and should be adopted by Aegis. Monitoring will be undertaken by the ICoCA once its

¹⁴⁷ American National Standards Institute (n 129) 26.

¹⁴⁸ Ibid 73.

¹⁴⁹ Ibid 74.

¹⁵⁰ Ibid 67.

¹⁵¹ Aegis Defence Services, 'United Nations Global Compact Aegis Communication On Progress' (Aegis, 12 August 2015) 6
<https://www.unglobalcompact.org/system/attachments/cop_2015/182041/original/150812_UNGC_Communication_on_Progress_Final.pdf?1439397786> accessed 5 October 2015.

¹⁵² Caroline Rees, 'Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned' (CSR Initiative, 2011) 13.

¹⁵³ International Federation for Human Rights, 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (FIDH, January 2011) 3
<https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 11 September 2015.

monitoring procedures have been fully established and Aegis has emphasised that it regards the ICoCA as its first port of call.

There are some discretionary elements in the system, for example, the company has discretion over whether a complaint is actionable in the first place. The provision has a failsafe in that all decisions that a complaint is 'without foundation, merit or substance' must be referred to the legal department and endorsed by them, limiting the ability of the company to dispose of challenging complaints by changing their categorisation.

3. Accessibility

The grievance mechanism should offer multiple access points, preferably including access points independent of the company itself.¹⁵⁴ The mechanism must try to alleviate barriers to access for complainants.¹⁵⁵ Accessibility also entails an element of awareness of the grievance mechanism and the company should publicise the grievance mechanism to an appropriate degree.¹⁵⁶ It should also provide information to the complainants about the grievance mechanism's processes,¹⁵⁷ and facilitate access to neutral expertise and advice.¹⁵⁸ These expert resources should be funded transparently.¹⁵⁹

The Aegis grievance mechanism has multiple access points allowing complainants to present issues via email, in person, or by using a hotline number, which can be used to maintain anonymity. As Aegis is a member of the ICoCA, the association also provides an access point for complaints, which is independent of the company.¹⁶⁰ In addition, any complainant may go directly to the company's external PSC 1 auditor or to the UK Accreditation Service, which oversees the auditors for the PSC 1 standard. Stakeholders are often at a considerable disadvantage when dealing with a company in terms of the expertise they have available to them on issues, such as their rights, scientific data, and other relevant information.¹⁶¹ The PSC 1 standard demands that Aegis minimise obstacles to access caused by language, educational level, or fear of reprisal.¹⁶² The PSC 1 standard does not contain a specific requirement for the company to provide funding support for neutral third party expertise and advice, however the company is obliged to minimise obstacles to accessing the grievance mechanism caused by educational level, which could implicitly require the company to provide expert assistance to complainants. The Aegis grievance mechanism is

¹⁵⁴ CSR Europe 'Assessing the Effectiveness' (n 75) 13; Corporate Social Responsibility Initiative (n 108) 21-22.

¹⁵⁵ CSR Europe 'Assessing the Effectiveness' (n 75) 14.

¹⁵⁶ Corporate Social Responsibility Initiative (n 108) 22; CSR Europe 'Assessing the Effectiveness' (n 75) 12-13; Office of the Compliance Advisor for the International Finance Corporation (n 107) 51.

¹⁵⁷ Corporate Social Responsibility Initiative (n 108) 21-24; CSR Europe 'Assessing the Effectiveness' (n 75) 18.

¹⁵⁸ Corporate Social Responsibility Initiative (n 108) 34-35; CSR Europe 'Assessing the Effectiveness' (n 75) 17.

¹⁵⁹ Corporate Social Responsibility Initiative (n 108) 18-20.

¹⁶⁰ International Code of Conduct Association, 'Articles of Association' (20 September 2013) art. 13 <http://www.icoca.ch/en/articles_of_association#article-15-formation-and-dissolution> accessed 17 August 2015.

¹⁶¹ Corporate Social Responsibility Initiative (n 108) 19.

¹⁶² American National Standards Institute (n 129) 23.

prominently advertised on the company's website, signs advertising the complaints mechanism are placed in the workplace and deployed staff are given cards explaining contact points for grievances, which they can hand to potential complainants. The PSC 1 standard also demands that the company train staff in how to receive and transmit complaints from the civilian population to appropriate authorities and Aegis includes this in its mandatory induction and continuation training programmes.¹⁶³

4. Speed

Generally speaking speed is not a particularly pressing issue for operational level grievance mechanisms as this is the first point of contact for many grievances. However, the whole purpose of operational grievance mechanisms is to resolve issues early.¹⁶⁴ It is therefore important that the operational level grievance mechanism has an established timeframe for handling complaints, which should include a window for dialogue.¹⁶⁵ It is arguably most important for an operational grievance mechanism to strike the correct balance between speed, effectiveness and due diligence, which can be most keenly observed in the recording of complaints. The company must try to avoid over-formalising the resolution of simple issues, while avoiding the pitfalls of de-formalising, such as reducing the company's ability to identify patterns of repeat complaints and address systemic problems they may reflect.¹⁶⁶ Companies must provide indicative timeframes for investigations and outcomes to comply with PSC 1.¹⁶⁷

In relation to Aegis's procedures, while the timeframe for each step is not illustrated in the company's complaints flowchart, such timeframes are included in internal directives, which state that the complainant must be informed of the timelines at the various stages of the process. In relation to a whistleblowing complaint, for example, this will be passed to a Designated Whistleblowing Officer who will take responsibility for the handling of the complaint until resolution and will inform the individual that they have taken responsibility. This step should be completed within five working days of the complaint. Similar timelines exist for other types of complaint and appeals and dialogue with the complainant on timelines occurs throughout the complaints process.

¹⁶³ Ibid 21.

¹⁶⁴ UNGPs and commentary 28 and 31-32; John Ruggie, 'The Future of Corporate Accountability for Violations of Human Rights' (2009) 103 American Society of International Law Proceedings 282, 285.

¹⁶⁵ CSR Europe 'Assessing the Effectiveness' (n 75) 16; Corporate Social Responsibility Initiative (n 108) 35; Office of the Compliance Advisor for the International Finance Corporation (n 107) 2.

¹⁶⁶ Corporate Social Responsibility Initiative (n 108) 18.

¹⁶⁷ American National Standards Institute (n 129) 74.

5. Transparency

The company should establish clear lines of accountability and clear roles for the parties involved in the complaint process.¹⁶⁸ A single member of senior management should have overall responsibility for the grievance mechanism,¹⁶⁹ and stakeholders should have an oversight role.¹⁷⁰ The company should clarify expectations about what the mechanism does and does not do.¹⁷¹ The PSC 1 standard obliges Aegis to establish a mechanism that documents and communicates the outcomes of the grievance procedure and it is clear from the flowchart that all outcomes are communicated to the relevant complainant and internally.¹⁷² The company should gather feedback from complainants and stakeholders.¹⁷³ It should assess and report on the mechanism's performance on an ongoing basis.¹⁷⁴ This may require the development of key performance indicators that can be used to measure the performance of the grievance mechanism.¹⁷⁵ This could include, for example, measuring a reduction, over time, in the number of grievances pursued through other non-judicial mechanisms, NGOs or the media.¹⁷⁶ Reports should be disseminated to relevant stakeholders.¹⁷⁷ Information reported back might include types of cases and how they were resolved, and the way the grievance has influenced company policies, procedures, operations, and the grievance mechanism itself.¹⁷⁸

All complaints in the Aegis mechanism are currently channelled to a single nominated individual, the Aegis Group General Counsel, who oversees the grievance mechanism. The process establishes clear lines of accountability for the different complaint types. The roles and input of the relevant internal actors – legal department, the independently-chaired QMRB and board of directors – are clearly set out in the flowchart. Statistics on the number and type of complaints, whether timelines are met, and how they have been concluded, are reported to the QMRB as part of its audit and compliance function. The PSC 1 standard also demands that the company engage with the local communities in which they operate, which would offer the company the opportunity to engage on the subject of the grievance mechanism. While the PSC 1 standard demands that the organisation adopt and publish its grievance procedures,¹⁷⁹ Aegis does not openly publish information on the types of complaints the mechanism can or has dealt with or

¹⁶⁸ Office of the Compliance Advisor for the International Finance Corporation (n 107) 48; CSR Europe 'Assessing the Effectiveness' (n 75) 11.

¹⁶⁹ Corporate Social Responsibility Initiative (n 108) 28.

¹⁷⁰ Corporate Social Responsibility Initiative (n 108) 15-16; CSR Europe 'Assessing the Effectiveness' (n 75) 11-12.

¹⁷¹ Office of the Compliance Advisor for the International Finance Corporation (n 107) 3.

¹⁷² American National Standards Institute (n 129) 73-74.

¹⁷³ CSR Europe 'Assessing the Effectiveness' (n 75) 23.

¹⁷⁴ Office of the Compliance Advisor for the International Finance Corporation (n 107) 18 and 59; CSR Europe 'Assessing the Effectiveness' (n 75) 18 and 21; Corporate Social Responsibility Initiative (n 108) 38.

¹⁷⁵ Wilson and Blackmore (n 109) 39-40; See also generally Damiano de Felice, 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities' (2015) 37 Human Rights Quarterly 511.

¹⁷⁶ Wilson and Blackmore (n 109) 40.

¹⁷⁷ Office of the Compliance Advisor for the International Finance Corporation (n 107) 59.

¹⁷⁸ Ibid 3.

¹⁷⁹ American National Standards Institute (n 129) 73.

details on what the grievance mechanism does more generally. Aegis has confirmed that this is a deliberate action on their part because of the nature of its work and the fragile States in which it operates. For example, publishing information on the nature of complaints received from members of the community in which Aegis operates could put communities or individuals at risk of extortion, or could encourage spurious complaints aimed at extorting from the company. The company has provided a confidential report to the ICoCA as part of its membership application and expects this to be a regular feature of ICoCA monitoring of the sector.

6. Redress

The mechanism needs to be open in its search for a resolution and identify possible resolutions to the complaint.¹⁸⁰ These resolutions could include improving the human rights policy and due diligence process of the company, continuous dialogue between the company and a local community, monetary redress, or the creation of a general memorandum of understanding.¹⁸¹ The company should record and be open about the outcomes of the grievance procedure.¹⁸² It should seek rights-compliant outcomes.¹⁸³ It should agree on provisions for implementing the agreed outcomes, including monitoring and follow up where necessary.¹⁸⁴ Engaging in dialogue with the affected parties should be an integral part of the resolution process.¹⁸⁵ Finally, the company should collate any lessons learned from the process of grievance handling,¹⁸⁶ identify systemic problems and alter institutional behaviour to prevent repetition of problematic behaviour.¹⁸⁷

The Aegis flowchart indicates that when resolving complaints the company will ‘consult internally, reach resolution and communicate to [the] complainant’. The company’s internal procedures set out how communications will take place with the complainant, including the Complaints Handling Officer interviewing persons that he/she deems to be relevant to the proper conduct of the investigation. The company considers that it is not good practice once a formal investigation has been initiated to have a continuing dialogue with the complainant beyond establishing the precise nature of the complaint or when dialogue is relevant to the proper conduct of the investigation.

¹⁸⁰ Corporate Social Responsibility Initiative (n 108) 36-37; Office of the Compliance Advisor for the International Finance Corporation (n 107) 18.

¹⁸¹ Martin Scheltema, ‘Assessing Effectiveness of International Private Regulation in the CSR Arena’ (2015) 13 Richmond Journal of Global Law & Business 263, 337.

¹⁸² Corporate Social Responsibility Initiative (n 108) 37-38.

¹⁸³ CSR Europe ‘Assessing the Effectiveness’ (n 75) 20.

¹⁸⁴ Corporate Social Responsibility Initiative (n 108) 37.

¹⁸⁵ CSR Europe ‘Assessing the Effectiveness’ (n 75) 23.

¹⁸⁶ Corporate Social Responsibility Initiative (n 108) 38.

¹⁸⁷ CSR Europe ‘Assessing the Effectiveness’ (n 75) 22; Office of the Compliance Advisor for the International Finance Corporation (n 107) 18.

The company advises that internal directives ensure the proper communication of outcomes as well through the QMRB, which will consider the need for wider management action or embedding of good practice. Scheltema has questioned the practical application of this transparency criterion and whether documents relied on in the judicial process should be disseminated beyond the parties to the process.¹⁸⁸ The Corporate Social Responsibility Initiative advocate a much higher level of disclosure stating: ‘unless all parties agree otherwise, the outcome should be made public, preferably in its entirety, but at least in its key elements’.¹⁸⁹ The outcomes of grievances may entail confidentiality as a condition of the settlement or be legally and commercially sensitive, meaning that there may be limited scope for public disclosure. In this regard, Aegis could provide some indicative examples of possible outcomes from complaints or selected anonymised outcomes of previous grievances that have gone through the system, which are then disclosed to the public. It is likely that the ICoCA will impose such a reporting obligation, or a comparable obligation, on its members once its procedures are fully developed and Aegis confirms that anonymising across ICoCA membership would remove much of the concern it has about publication.

While the UNGPs and implementing guidelines recommend that operational grievance mechanisms are human rights-compliant, the gravity of some human rights violations, such as the right to life or prohibition on torture, will require an official investigation by public authorities to comply with IHRL. In these cases it will not be possible for the operational level mechanism to investigate and it cannot therefore satisfy all human rights requirements.¹⁹⁰ The PSC 1 standard demands that the company identify applicable human rights law standards and determine how they apply to their operations.¹⁹¹ The company may also ensure rights-compliant outcomes through the consistent role of the legal department in the grievance resolution process and the commitment to ‘always act in accordance with the principles of natural justice’. The regular monitoring by PSC 1 auditors will also act as a safeguard in this respect.

The Aegis flowchart also indicates that the company carries out a ‘lessons learnt wrap-up meeting’ on the resolution of each grievance in the process, which facilitates learning from mistakes and rectifying any potential systemic problems within the company’s operations. This is also a requirement of the PSC 1 standard.¹⁹²

¹⁸⁸ Scheltema (n 181) 337.

¹⁸⁹ Corporate Social Responsibility Initiative (n 108) 37.

¹⁹⁰ OECD, ‘OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment’ (OECD, 25 May 2011) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 28 July 2015 (hereinafter ‘OECD Guidelines’); International Federation for Human Rights, ‘Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights’ (FIDH, January 2011) <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 11 September 2015.

¹⁹¹ American National Standards Institute (n 129) 11.

¹⁹² American National Standards Institute (n 129) xviii.

7. Preliminary Findings

The evaluation of this grievance mechanism is based on how the mechanism functions on paper and these conclusions are derived from that analysis, further research would be required to assess how the mechanism functions in practice. Overall the Aegis grievance mechanism satisfies the effectiveness criteria in the UNGPs, although some elements, for example, the reporting of outcomes of the grievance mechanism, await development of the ICoCA's role and requirements. The Aegis grievance mechanism has a number of commendable features with a very clear system containing different checks and balances and scope for appeals. The roles of the different parties are clear and there is scope for continual learning for the business through the grievance mechanism. There are a few issues which the company should keep under review. The way in which decisions are taken in practice on whether complaints are actionable and the speed of response of the Board-level approval system for referring matters to the relevant criminal justice system should be closely monitored. If the grievance mechanism has an Achilles heel it is transparency and the company could make the grievance mechanism and the process more transparent, publishing its procedures clearly and publicly reporting on the performance of its grievance mechanism and outcomes of the process. It would also be beneficial for the company to signpost clear outlets for grievances to transfer to other grievance mechanisms and offer clear guidelines on when this should happen in practice. The development of the ICoCA should help the company to achieve greater transparency and provide an independent point of contact for complainants.

IV. State Level Mechanisms

A. State-based Non-Judicial Grievance Mechanisms

The UNGPs declare that States should provide ‘effective and appropriate’ non-judicial mechanisms alongside judicial mechanisms as part of a comprehensive State-based system.¹⁹³ Non-judicial mechanisms include ombudsmen processes and monitoring and reporting by national human rights institutions. There has been a steady growth in these types of mechanisms over the past number of years.¹⁹⁴ The mechanisms are often adapted to specific areas, such as non-discrimination, and can therefore offer more tailored solutions to human rights issues than more generic mechanisms. They play an ‘essential role’ in complementing and supplementing judicial mechanisms.¹⁹⁵ They can do this in a number of ways such as by identifying systemic problems, making recommendations for law reforms and clarifying standards through practice, which can inform legal standards further down the line.¹⁹⁶

Overall, non-judicial mechanisms tend to be more accessible, more flexible, and less costly ways of resolving disputes than resorting to court action.¹⁹⁷ These processes also often rely on mediation as a means of resolution, which companies are more comfortable and familiar with when compared to adversarial judicial processes. However, the corollary of this is that these mechanisms also tend to be less transparent and less independent than judicial mechanisms and can suffer from problems with enforcement.¹⁹⁸ This can discourage NGOs and victims from utilising non-judicial mechanisms, but the fact that these mechanisms operate under a threat of judicial action in practice tends to encourage the parties to seek an acceptable outcome.¹⁹⁹ In the following section we will examine the efficacy of one of the most ubiquitous non-judicial mechanisms in business and human rights – the National Contact Points (NCPs) system, which implements the OECD guidelines governing multinational enterprises (MNEs).

¹⁹³ UNGPs and commentary, 30.

¹⁹⁴ Corporate Responsibility Coalition, ‘Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities’ (2010) 10 <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf>> accessed 12 October 2015.

¹⁹⁵ UNGPs and commentary, 30.

¹⁹⁶ Corporate Social Responsibility Initiative, ‘Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms: Report of a Multi-Stakeholder Workshop’ (Boston, 21-22 November 2008) 2; Corporate Responsibility Coalition (n 194) 12.

¹⁹⁷ Corporate Responsibility Coalition (n 194) 1. Although see analysis in section IV B 4 below, which casts doubt on this assumption.

¹⁹⁸ Corporate Responsibility Coalition (n 194) 4.

¹⁹⁹ Corporate Social Responsibility Initiative, ‘Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms: Report of a Multi-Stakeholder Workshop’ (Boston, 21-22 November 2008) 2.

B. Case Study: OECD National Contact Points

The OECD first introduced guidelines governing MNEs in the 1970s. Since then they have been updated a number of times and from 2011 they have incorporated human rights standards. The guidelines oblige States to establish NCPs, which are meant to ‘further the implementation of the Guidelines’.²⁰⁰ The role of these NCPs ranges from providing information and raising awareness of guidelines, to handling enquiries. However, the most interesting aspect of this mechanism for our present purposes is their role in resolving issues that arise from the alleged non-observance of the guidelines in cases brought to NCPs known as ‘specific instances’ and the mediation and conciliation platform they can offer in that context.²⁰¹ The NCP system does not handle a large number of complaints when compared to the potential human rights abuses carried out by companies throughout the world. During the most recent annual reporting period on record, there were only 34 specific instances brought before the entire network of NCPs.²⁰² Of these only a small number were complaints lodged against PSCs, with only three involving allegations of insufficient human rights due diligence by companies in the security sector.²⁰³ In spite of this, the NCP system clearly justifies further study. The MNE guidelines cover a large number of countries including all 34 OECD member States and a further 12 non-OECD members that have chosen to adhere to the guidelines.²⁰⁴ These include countries like the US and the UK, which have large PSC industries and other countries where PSCs may be operating. As Ruggie and Nelson rightly note, the NCP system is a potential venue to which human rights complaints regarding any and all internationally recognised rights can be brought against multinational enterprises operating in or from the 46 countries that adhere to the Guidelines.²⁰⁵ One of the key benefits the OECD guidelines system offers is that it applies to corporations not only in the OECD States, but also worldwide, meaning they extend to territories of non-OECD States where the corporations registered in the OECD Member State operate.²⁰⁶ This gives the guidelines global scope and the potential to reach into the supply chains of corporations operating transnationally. The network of contact points and the possibility of consulting NCPs in other States to assist in transnational violations is also a helpful feature of this system. The guidelines also cover all the main areas of responsible business conduct such as human rights, industrial and employment relations, environmental impacts etc.

²⁰⁰ OECD Guidelines, 3.

²⁰¹ OECD Guidelines, 68.

²⁰² OECD, ‘Activities of National Contact Points for the OECD Guidelines for Multinational Enterprises’ in OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector* (OECD Publishing 2014) 18.

²⁰³ Ibid 41.

²⁰⁴ John Ruggie and Tamaryn Nelson, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and implementation Challenges’ Corporate Social Responsibility Initiative, Working Paper No. 66, May 2015, 20fn <<http://www.ksg.harvard.edu/index.php/content/.../1/.../workingpaper66.pdf>> accessed 10 October 2015.

²⁰⁵ Ibid, 6.

²⁰⁶ Jernej Letnar Cernic, ‘Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises’ (2008) 4(1) *Hanse Law Review* 71, 78; Juan Carlos Ochoa Sanchez, ‘The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation’ (2015) 84 *Nordic Journal of International Law* 89, 91.

As the NCPs have the capacity to issue public final statements and recommendations, which can have a significant impact on the reputations of companies, it has the potential to be a powerful mechanism.²⁰⁷ This section begins with a more general evaluation of the NCP system as a remedial mechanism, followed by a more specific evaluation of complaints against PSCs brought through the NCP system at the end.

1. Effectiveness of NCPs

The MNE guidelines themselves refer to a number of the effectiveness criteria we have already identified above. The NCPs are, for example, meant to resolve issues in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the guidelines.²⁰⁸ The NCPs are supposed to ensure visibility, accessibility, transparency and accountability in their work and deal with issues in an efficient and timely manner and in accordance with applicable law.²⁰⁹ The results of the NCPs' investigations of specific instances should also be made publicly available as a general rule,²¹⁰ which supports the objective of transparency mentioned above. Equally, the guidelines recognise the practical barriers that can exist to obtaining a remedy, specifically mentioning the need for NCPs to be properly resourced to carry out their work: '[a]dhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices'.²¹¹ All of these considerations indicate that the NCP system should provide an effective remedy, which is capable of operating transnationally.

However, one of the key problems with the NCP system is the diverse nature of its role and the flexibility left to States as to how they organise their NCPs.²¹² The NCPs are supposed to be functionally equivalent, meaning that although they may be structured in different ways, they should each be able to perform the same functions and in accordance with the same criteria namely visibility, accessibility, transparency, accountability.²¹³ However, despite this objective of functional equivalence, many authors have noted that the effectiveness of the NCP system in dealing with specific instance procedures and monitoring is largely dependent on its structure. As this is largely left to the discretion of the contracting States, there is generally a lack of coherence and consistency in the organisation of the NCPs.²¹⁴ This discretion often results in the NCP being rooted in a government department,²¹⁵ which can lead to issues with the

²⁰⁷ Juan Carlos Ochoa Sanchez (n 206) 91.

²⁰⁸ OECD Guidelines, 72.

²⁰⁹ OECD Guidelines, 71.

²¹⁰ OECD Guidelines, 73.

²¹¹ OECD Guidelines, 68.

²¹² OECD Guidelines, 71.

²¹³ Juan Carlos Ochoa Sanchez (n 206) 95; OECD Guidelines, 78.

²¹⁴ Corinna Seiberth, *Private Military and Security Companies in International Law* (Intersentia 2014) 211; There is a breakdown of the organisation structures of all of the NCPs in the 2014 Annual Report - OECD 'Annual Report 2014' (n 202) 19-20.

²¹⁵ Sorch MacLeod and Scarlett McArdle, 'International Responsibility and Accountability of the Corporation: International Initiatives for Holding Corporations to Account and their Viability with regard to Private Military and

independence, objectivity, transparency and accountability of the NCP.²¹⁶ When the same government department that is responsible for developing a successful foreign investment policy is also responsible for monitoring the investing company's behaviour there is a clear conflict of interest, which can lead to bias, or at least a perception of bias.²¹⁷ The Irish NCP, for example, is based within a government department, the Department of Jobs, Enterprise and Innovation, with the contact point appearing to simultaneously hold the title of Director of Trade Policy.²¹⁸ This issue may improve with time as in 2013 the OECD established a specific working party in their investment committee, the Working Party on Responsible Business Conduct, whose role is to foster the functional equivalence of NCPs and promote engagement with non-adhering countries.²¹⁹ The aim is to achieve this through more frequent peer-reviews among the NCPs and feedback mechanisms.²²⁰ Indeed some NCPs have reformed in recent years, the Norwegian NCP, for example, reformed in 2012 and now consists of four independent experts appointed by government on the recommendation of stakeholders among business, trade unions and civil society.²²¹

2. Investigation and Fact-Finding

One of the key criticisms of the NCP mechanism is the standard of proof demanded of the applicants. Evidence supplied by OECD Watch suggests that the standard of proof is often unduly high and inconsistent.²²² The inconsistency is unsurprising in many respects given the lack of guidance supplied to NCPs on the standards to apply. The procedural guidance given to NCPs does not offer advice on when issues raised in complaints merit further examination.²²³ While it directs NCPs to determine whether a complaint raises a *bona fide* issue and whether the issue is 'material and substantiated', the Procedural

Security Companies' (2009) EUI Working Papers AEL 2009/29, 13
<http://cadmus.eui.eu/bitstream/handle/1814/13575/AEL_2009_29.pdf?sequence=1> accessed 31 July 2015; The NCPs are mainly located within governmental departments in charge of economic and financial issues, or of foreign affairs see OECD 'Annual Report 2014' (n 202) 19.

²¹⁶ Evaristus Oshionebo, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?' (2013) 17 *Lewis and Clark Law Review* 545, 577; OECD, 'Review of NCP Performance: Key Findings' (OECD-ILO Conference on Corporate Social Responsibility, Paris, June 2008) 7.

²¹⁷ Oshionebo (n 216) 577-578.

²¹⁸ See OECD, 'Ireland National Contact Point' <<https://mneguidelines.oecd.org/ncps/ireland.htm>> accessed 5 April 2016.

²¹⁹ Juan Carlos Ochoa Sanchez (n 206) 94.

²²⁰ OECD 'Annual Report 2014' (n 202) 18. The OECD guidelines encourage the NCPs to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations – See OECD Guidelines, 81. To date three NCPs have undertaken such reviews Japan, Netherlands and Norway – See OECD, 'NCP peer reviews' <<https://mneguidelines.oecd.org/ncppeerreviews.htm>> accessed 5 April 2016.

²²¹ NCP Norway, 'About us' <<http://www.responsiblebusiness.no/>> accessed 5 April 2016.

²²² OECD Watch, *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct* (OECD Watch, 2015) 22.

²²³ Jernej Letnar Cernic (n 206) 85.

Guidance does not define ‘substantiated’, which has led to widely varying interpretations by different NCPs.²²⁴

A related issue is the capacity of the NCPs to engage in fact-finding activities. The commentary to the MNE guidelines recognises that even though it may not be possible for NCPs to access all pertinent information, they may still be able to pursue enquiries and engage in other fact-finding activities, such as contacting the management of the enterprise in the home country and embassies and government officials in the non-adhering country.²²⁵ The structure and regulations underpinning the activities of the NCP again have a strong bearing here, with a corresponding impact on the effectiveness of the remedy offered in the State. Thus, the Mexican and US NCPs do not consider that they have the power to conduct a thorough examination of the facts before issuing a final statement when a party does not agree to mediation or no agreement is reached. By contrast, both the Norwegian and UK NCPs’ regulations empower them to conduct a thorough investigation before issuing a final statement in the same circumstances.²²⁶ Despite the fortitude of the UK NCP’s regulations on fact-finding, Cernic notes that these powers are used inconsistently in practice. On occasion the UK NCP has undertaken field visits and sought expert advice from specialists, while at other times it has failed to utilise its fact-finding powers properly.²²⁷

3. Transparency

There is an inherent tension between ensuring transparency and the confidentiality measures that often accompany procedures like mediation and conciliation that the NCPs carry out. The most important thing is to ensure that there is a balance between the two and in the case of the NCPs, this balance seems skewed in favour of confidentiality rather than transparency. While NCPs are meant to ensure transparency in their work, this standard is far from universally observed. We already observed above in section IV B 1 that the location of NCPs within government departments can act as a barrier to transparency. In 2013-2014, for example, while NCPs published final statements in 28 different specific instances, three others were not published.²²⁸ Transparency varied from country to country with some NCPs, particularly the US NCP, appearing reluctant to prepare and publish final statements. The US NCP, for example, has only issued a statement or report on three of the 32 specific instances that it has dealt with.²²⁹ The confidentiality measures employed by the NCPs in certain instances have also been a cause for disquiet. Some NGOs see preservation of confidentiality within the mediation process as problematic, especially where the matters dealt with are of public interest.²³⁰ Equally the practice of keeping the names of the parties to specific instances anonymous in many cases has prompted criticism from academics. Only

²²⁴ OECD Watch, *Remedy Remains Rare* (n 222) 24.

²²⁵ OECD Guidelines, 86.

²²⁶ Juan Carlos Ochoa Sanchez (n 206) 103-104; Oshionebo (n 216) 580-581.

²²⁷ Jernej Letnar Cernic (n 206) 86.

²²⁸ OECD ‘Annual Report 2014’ (n 202) 27.

²²⁹ Oshionebo (n 216) 579-580.

²³⁰ Claes Cronstedt and Robert C. Thompson, ‘An International Arbitration Tribunal on Business and Human Rights’ (Lawyers for Better Business, 13 April 2015) 7 <<http://www.l4bb.org/news/TribunalV5B.pdf>> accessed 31 July 2015.

the UK and the Netherlands, as a general rule, publish the names of the parties when carrying out an initial assessment and where the case is rejected every NCP except the Netherlands keeps the parties anonymous.²³¹ OECD Watch have criticised the transparency of the specific instance procedure. They argue that some NCPs, such as the US NCP, impose such strict confidentiality requirements that they destroy any commitment to transparency. The US NCP, for example, requires complete confidentiality regarding all communications with the NCP and between the parties, requiring complainants to keep secret even the contents of their own complaint.²³² Publicity can strongly incentivise companies to improve their practices and engage in mediation with the NCP and the other party to resolve the complaint, thus maintaining strict confidentiality requirements can be counter-productive.

4. Accessibility

As we noted above in section IV A, non-judicial remedies are, generally speaking, supposed to be more accessible and cheaper than judicial remedies. However, the cost to NGOs of bringing a claim under the NCP specific instance procedure has been estimated to amount to an average of €100,000 per claim.²³³ This cost severely impacts on the accessibility of the procedure as a whole. There are also other barriers to accessibility in the NCP structure. Complainants in non-OECD countries will, for example, need to raise their complaints with the NCP of the State in which the specific PSC is registered. This can give rise to an array of practical problems, including linguistic barriers, difficulties with attending mediation sessions, travel and visa issues.²³⁴ The NCPs themselves often contribute to these underlying issues by requiring impecunious complainants to pay for services that are a necessary part of the complaint process and should be provided by the mechanism itself, such as the translation of documents and travel to mediation meetings.²³⁵ This indicates that concerns over the resources allocated to NCPs are well founded, with some NCPs clearly lacking the required resources or capacity to carry out their tasks. Many do not have allocated budgets or dedicated staff.²³⁶ When one considers the diversity of complaints NCPs may have to handle, including claims on environmental law, human rights, financial services, labour relations among others, it is difficult to see how the NCPs that are poorly resourced could possibly cover all of these disparate areas successfully.

5. Redress

²³¹ MacLeod and McArdle (n 215) 14.

²³² OECD Watch, *Remedy Remains Rare* (n 222) 37-38.

²³³ OECD Watch, *10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct* (OECD Watch, 2010) 11.

²³⁴ Oshionebo (n 216) 582.

²³⁵ OECD Watch, *Remedy Remains Rare* (n 222) 21-22.

²³⁶ Only 15 NCPs had an allocated budget in 2014, while 8 NCPs did not have dedicated staff - OECD 'Annual Report 2014' (n 202) 23.

The OECD has been keen to stress that mediation activities among the NCPs are increasing and that the capacity of the NCPs to facilitate mediation and dialogue is improving.²³⁷ However, the benefits of mediation are debatable. On the one hand, mediation can offer parties more flexibility in terms of the outcomes and nature of the agreements undertaken than other remedial mechanisms, such as court orders. It is also quite a familiar process to many companies who may have used mediation and arbitration in other fields of their commercial activity. On the other hand, Augenstein notes that while NCPs may offer a 'remedial outcome for those who have suffered human rights harm', these outcomes are 'dependant on the voluntary cooperation of the company that is alleged to have harmed rights in the first place'.²³⁸ Some NCPs, like the Mexican and US NCPs may decline to investigate further when they do not have the voluntary co-operation of a party.²³⁹ Furthermore, while NCPs have the power to issue final statements, their practice on this is inconsistent. Many NCPs refuse to make a statement on whether or not the guidelines have been breached in the specific instance before them.²⁴⁰ Even when the NCPs do find that the guidelines have been infringed, the NCPs cannot impose any sanction on the company as the companies themselves are not legally obliged to abide by the guidelines, they are merely recommendations.²⁴¹ This state of affairs has prompted OECD Watch to recommend that the NCPs should, at the very least, determine whether there has been a breach and offer recommendations to the companies on how to better implement the guidelines in future.²⁴²

Two further problems undermine the effectiveness of the mechanism after the conclusion of the specific instance procedure. Firstly, the NCPs do not have any appellate structure to provide meaningful oversight of the NCPs decisions and activities in specific instances, meaning that when erroneous decisions are made there is no means of correcting them.²⁴³ Secondly, the NCPs rarely follow up on their final statements or mediation agreements to see whether they have actually been implemented in practice. The absence of enforcement machinery and meaningful follow up constitutes a major weakness in the NCP mechanism.²⁴⁴ Overall, MacLeod and McArdle argue that the NCP procedure does not provide for punishment and redress and can at best only act as a deterrent.²⁴⁵ As a result, Seiberth concludes that the specific instance procedure cannot be an effective remedy in the context of PSC activities.²⁴⁶

²³⁷ OECD 'Annual Report 2014' (n 202) 18.

²³⁸ Daniel Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' 78 <http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf> accessed 31 July 2015.

²³⁹ Juan Carlos Ochoa Sanchez (n 206) 98.

²⁴⁰ Ibid 98 and 105-106; Oshionebo (n 216) 581.

²⁴¹ Oshionebo (n 216) 573 and 582.

²⁴² OECD Watch, *10 Years On* (n 233) 22.

²⁴³ Oshionebo (n 216) 578.

²⁴⁴ OECD Watch, *10 Years On* (n 233) 23.

²⁴⁵ MacLeod and McArdle (n 215) 15.

²⁴⁶ Seiberth (n 214) 211.

6. Complaints Against PSCs

Despite the limited number of complaints brought against PSCs through the NCP system noted above in section IV B, it appears that these types of cases are particularly difficult for NCPs to deal with as the 2014 Annual report stated:

‘NCPs often face complaints that transcend many borders and encounter multiple conflicting interests from business, government, and stakeholders. For example, during the 2013-2014 reporting period three allegations of insufficient human rights due diligence by companies in the security sector were raised, all of which involved sensitive information and compelled NCPs to carefully examine both the obligations and boundaries of their responsibility.’²⁴⁷

This appears to be a long running issue for the NCPs going back to the early 2000s with a specific instance complaint against a UK-based company called Avient. It should be noted that this complaint was dealt with prior to the introduction of the specific chapter of the guidelines on human rights in 2011. Although the guidelines at that time did contain a clause which stated that ‘[Enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments’.²⁴⁸ Avient came to prominence when the UN expert panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (DRC) reported in 2002 that it was one of a number of companies that was fuelling the conflict in the DRC.²⁴⁹ It was alleged that Avient had provided military supplies to the Congolese Army and Zimbabwean Defence Forces, provided crews for aircraft that had engaged in indiscriminate bombing and had brokered the sale of military equipment to parties to the conflict.²⁵⁰ The report stated that Avient was suspected of violating the OECD guidelines and called on governments to investigate.²⁵¹ As a result the UK NCP opened a specific instance.

The NCP’s subsequent actions have been widely criticised. Firstly, the NCP refused to allow the NGO Rights and Accountability in Development’s (RAID) participation in the complaint or consider RAID’s complaint about Avient in parallel with the UN panel’s complaint.²⁵² Secondly, although the NCP claimed that ‘the

²⁴⁷ OECD ‘Annual Report 2014’ (n 202) 18.

²⁴⁸ OECD, ‘OECD Guidelines for Multinational Enterprises’ (OECD, 27 June 2000) 14 <<http://www.oecd.org/investment/mne/1922428.pdf>> accessed 28 July 2015.

²⁴⁹ UN Security Council, ‘Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo’ (16 October 2002) UN Doc S/2002/1146 at [55].

²⁵⁰ OECD, ‘UK NCP Statement on Avient’ (UK NCP, 8 September 2004) 1 <http://oecdwatch.org/cases/Case_40/148/at_download/file> accessed 31 July 2015.

²⁵¹ UN Security Council (n 249) at [178].

²⁵² Rights and Accountability in Development, ‘AVIENT Ltd’ (RAID, 1 February 2005) 2 <http://oecdwatch.org/cases/Case_40/380/at_download/file> accessed 31 July 2015; OECD Watch, *10 Years On* (n 233) 32. Involving NGOs in the activities of the NCPs has been an ongoing problem at the OECD - MacLeod and McArdle (n 215) 11-12.

Panel supplied very little evidence to support the allegations made',²⁵³ it did not seem to make any concerted efforts to gather evidence itself or pursue leads. The evidence against Avient included bank records linking it to a notorious arms dealer named Leonid Minin and a contract signed by Andrew Smith, a director of Avient, and Joseph Kabila, the President of the DRC, to provide a crew to operate aircraft owned by the Congolese Air Force.²⁵⁴ This crew would 'operate on behalf of the Military on Operational Missions' and they were to be advised that they are 'operating along and behind enemy lines in support of Ground Troops and against the invading forces'.²⁵⁵ OECD Watch also claim that the NCP had a letter from the DRC Air Force in its possession, which clearly implicated Avient in military campaigns on behalf of the DRC government.²⁵⁶ Thirdly, the final statement issued by the NCP was deeply problematic for a number of reasons. OECD Watch states that the final statement 'essentially record[ed] Avient's response to the allegations'.²⁵⁷ A core complaint raised in the UN report and by RAID that Avient had participated in indiscriminate bombing raids in the DRC was not even addressed by the NCP in the final statement. The statement did not make a conclusion as to whether the allegations were true or not, or whether the guidelines had been breached. Finally, the recommendations of the NCP were particularly insipid and vague offering no practical benefit to the company or meaningful guidance on how the company should change its commercial activity.²⁵⁸ Avient was invited, for example, to carefully consider the recommendation that it should 'contribute to economic, social and environmental progress with a view to achieving sustainable development'.²⁵⁹

Although improvements have been made both to the OECD guidelines and to the operations of the NCPs themselves since,²⁶⁰ even recent NCP activity on PSCs has been inconsistent. In February 2013, a number of NGOs submitted a complaint against a company, Trovicor GmbH, which offers intelligence solutions to States throughout the world.²⁶¹ The complainants alleged that in 2009 Trovicor had taken over maintenance responsibilities for mass surveillance technology for the Bahraini government, which in turn contributed to human rights violations by the Bahraini State against factions opposed to their government.²⁶² The complainants alleged that German-made surveillance technology was being used by

²⁵³ OECD, 'UK NCP Statement on Avient' (UK NCP, 8 September 2004) 2 <http://oecdwatch.org/cases/Case_40/148/at_download/file> accessed 31 July 2015.

²⁵⁴ UN Security Council (n 249) at [55]; Antony Barnett and Paul Harris, 'How a perfect English gent in a rural idyll profits from a bloody African war' (The Guardian, 24 November 2002) <<http://www.theguardian.com/world/2002/nov/24/politics.uk>> accessed 31 July 2015; Rights and Accountability in Development (n 252).

²⁵⁵ Rights and Accountability in Development (n 252) 2-3.

²⁵⁶ OECD Watch, *10 Years On* (n 233) 32.

²⁵⁷ Ibid.

²⁵⁸ Daniel Leader, 'Business and Human Rights - Time to Hold Companies to Account' (2008) 8 International Criminal Law Review 447, 459.

²⁵⁹ Ibid 459.

²⁶⁰ MacLeod and McArdle (n 215) 13.

²⁶¹ Trovicor, 'About the Company' (Trovicor, 31 July 2015) <<http://www.trovicor.com/en/company-en.html>> accessed 31 July 2015.

²⁶² German National Contact Point, 'Final statement by the German National Contact Point' (Federal Ministry for Economic Affairs and Energy, 21 May 2014) <<http://www.bmwi.de/English/Redaktion/Pdf/oecd-ac-final-statement-ecchr,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>> accessed 31 July 2015.

the Bahraini government to target and suppress pro-democracy activists. The technology was, in their view, instrumental in violations of the right to privacy, free expression, freedom of association, liberty and security of the person and the prohibition on torture, inhuman and degrading treatment or punishment.²⁶³ The German NCP accepted the complaint and offered assistance to the parties on the issue of whether Trovicor had a management system to analyse the risk of any possible negative effects of its business activities on human rights, but rejected the allegation that Trovicor was partly responsible for the violations of human rights in Bahrain. The NCP stated that Trovicor 'had not provided information on business relations meaning that it was impossible to determine whether the company had any business relations with Bahrain'.²⁶⁴ The complainants argued that they had provided sufficient evidence of the existence of business relations between Trovicor and Bahrain and refused to take part in the mediation, which led the NCP to close the case.

Interestingly a very similar complaint was made to the UK NCP, which highlights the inconsistencies in the approach different NCPs take to similar complaints. In the UK, a number of NGOs complained to the UK NCP that a company called Gamma International had supplied a spyware product to agencies of the Bahrain government, which had used it to target pro-democracy activists. The spyware infiltrated their electronic devices and was used to track their communications. In a similar vein to Trovicor, Gamma refused to confirm or deny which States they supplied the software to.²⁶⁵ Even though neither party provided direct evidence proving or disproving the claims, the complainants made a strong circumstantial case and the UK NCP continued the process.²⁶⁶ When mediation failed, the NCP notified the parties that it would undertake a further examination of the complaint.²⁶⁷ In its final statement, despite not being able to verify key facts relating to the complaint, the NCP concluded that 'based on the information reviewed and shared by the UK NCP, the NCP considers that it is reasonably certain that the product reported by the activists as having been sent to them was Gamma's'.²⁶⁸ It went on to conclude that Gamma International UK Limited had not acted consistently with provisions of the OECD guidelines requiring enterprises to carry out appropriate due diligence, to encourage business partners to observe the

²⁶³ Privacy International, 'German OECD NCP Unwilling to Investigate Role of German Company in Human Rights Violations in Bahrain' (Privacy International, 20 December 2013) <<https://www.privacyinternational.org/?q=node/169>> accessed 31 July 2015.

²⁶⁴ German National Contact Point, (n 262) 1.

²⁶⁵ UK National Contact Point, 'Initial Assessment: Complaint from Privacy International and Others against Gamma International UK Ltd' (Department for Business, Innovation and Skills, June 2013) para 8 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf> accessed 3 August 2015.

²⁶⁶ Ibid para 26.

²⁶⁷ Ibid para 14.

²⁶⁸ UK National Contact Point, 'Privacy International & Gamma International UK Ltd: Final Statement after Examination of Complaint' (Department for Business, Innovation and Skills, December 2014) para 56 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402462/BIS-15-93-Final_statement_after_examination_of_complaint_Privacy_International_and_Gamma_International_UK_Ltd.pdf> accessed 3 August 2015.

guidelines, to have a policy commitment to respect human rights, and to provide for or co-operate through processes to remediate human rights impacts.²⁶⁹

These two cases perfectly illustrate some of the key shortcomings in the effectiveness of the NCP process. The first and most obvious shortcoming is that the complaints mechanism remains inconsistent. When virtually identical complaints were presented to two different NCPs, the results were wildly different. Much of this has to do with the NCPs willingness to engage in fact-finding of its own volition, which corresponds with the issue identified earlier in the Avient case and shows the problem persists to this day. The fact that PSCs often operate in very challenging environments where the rule of law is weak could mean that the fact-finding capacity of the NCPs is further impaired. The OECD guidelines, for example, recommend contacting embassies and government officials in third States.²⁷⁰ However, in the context of an ongoing conflict this could prove difficult, as would any field visit, which some NCPs have been known to undertake.²⁷¹ Equally, the NCPs are unable to compel disclosure of information that is necessary for them to carry out their work.²⁷² There is a need for further guidance on these issues and Cernic argues recommendations should be drafted as to what fact-finding activities the parties can expect the NCP to undertake once a specific instance has been deemed admissible.²⁷³

Another severe shortcoming of this process is the extent to which it depends on the voluntary participation of companies and NGOs, when either party does not fully engage, it can result in the process stalling or ending completely. Sanchez notes, for example, that some NCPs simply drop cases where the company limits its engagement in some way, such as by declining to participate in mediation.²⁷⁴ The NCPs' activities should not be completely dependent on voluntary participation and even if a party declines to participate, the NCP should still carry out an investigation. Oshionebo argues that at present there is no incentive for companies to voluntarily submit themselves to the NCP process,²⁷⁵ and Amnesty International states that there are no consequences for companies who fail to comply with the guidelines or refuse to engage in mediation.²⁷⁶ This obviously severely undermines the capacity of the NCP to deliver remedies. Sanchez argues that the authority to conduct a thorough examination of the facts, and to make a conclusion on whether or not the concerned company has breached the guidelines should be standard powers among all NCPs.²⁷⁷ Exercising this power would also incentivise company participation as the reputational damage that could arise from an adverse statement generates leverage for the NCP.

²⁶⁹ Ibid para 68.

²⁷⁰ OECD Guidelines, 86.

²⁷¹ Juan Carlos Ochoa Sanchez (n 206) 105.

²⁷² Oshionebo (n 216) 582; OECD Watch, *10 Years On* (n 233) 50.

²⁷³ Jernej Letnar Cernic (n 206) 86.

²⁷⁴ Juan Carlos Ochoa Sanchez (n 206) 98-100.

²⁷⁵ Oshionebo (n 216) 582.

²⁷⁶ Amnesty International, 'The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation' (23 May 2011) IOR 30/001/2011 <<https://www.amnesty.org/en/documents/IO30/001/2011/en/>> accessed 3 August 2015.

²⁷⁷ Juan Carlos Ochoa Sanchez (n 206) 108.

7. Preliminary Findings

MacLeod and McArdle argue that NCPs are only as effective as their structure allows and that is certainly the case when it comes to delivering effective remedies.²⁷⁸ The NCP system undoubtedly has a number of strengths, it covers a wide range of areas, offers a network of potential investigators and the prospect of tracking violations through the supply chain. However, as Ruggie points out, the NCPs have not yet realised their potential as an effective remedy against corporate human rights abuse.²⁷⁹ Many NCPs lack sufficient independence from the government and businesses to offer a credible outlet for human rights complaints, while their inadequate investigatory and fact-finding facilities limit their overall effectiveness. The NCPs themselves have conflicting views on what their role and function is or should be and the desired objective of functional equivalence is far from realisation. The overall verdict of both OECD Watch and Amnesty International on the effectiveness of the NCPs has been damning. Amnesty International stated that many NCPs grossly under-perform and that this is largely due to the defects and shortcomings of the institutional architecture within which NCPs operate.²⁸⁰ OECD Watch for their part noted that NCP handling of specific instances has been erratic, unpredictable and largely ineffectual.²⁸¹ They went on to state that using the OECD guidelines is a ‘timeconsuming [sic], resource-intensive process that, even in the best case scenario, results in only minor improvements’.²⁸² In light of these criticisms and the analysis above we can conclude that the NCP system in general does not currently provide an effective remedy for human rights abuses perpetrated by PSCs.

C. State-based Judicial Mechanisms

The UNGPs indicate that effective judicial mechanisms are at the core of ensuring access to remedies in the business and human rights context.²⁸³ In some cases judicial remedies have been used to supplement non-judicial actions. Thus, for example, following on from the Gamma International case above, the NGO Privacy International took a successful judicial review action in the English courts against the revenue commissioners for refusing to disclose details of their export control functions and investigations into Gamma International.²⁸⁴

²⁷⁸ MacLeod and McArdle (n 215) 12.

²⁷⁹ John Ruggie, ‘10th OECD Roundtable on Corporate Responsibility - Updating the Guidelines for Multinational Enterprises – Discussion Paper’ (Paris, 30 June 2010) 5.

²⁸⁰ Amnesty International (n 276).

²⁸¹ OECD Watch, *Remedy Remains Rare* (n 222) 11.

²⁸² *Ibid* 23.

²⁸³ UNGPs and commentary, 28.

²⁸⁴ *R. (Privacy International) v Revenue and Customs Commissioners* [2014] EWHC 1475 (Admin).

There are multiple remedial avenues in domestic judicial systems – civil law remedies for breach of contract, tort, nuisance and criminal law remedies for corporate homicide and manslaughter. While many of these avenues of redress can be adapted to provide remedies for human rights violations by companies, few are specifically designed for that purpose. The national judicial systems can also offer powerful redress to victims with an array of potential sanctions: administrative penalties e.g. loss of licenses to operate, criminal law sanctions e.g. detention, civil law remedies such as damages and equitable remedies such as injunctive relief. These options for redress place judicial remedies a step ahead of many non-judicial remedies simply because there is a much wider array of options for relief and much more powerful enforcement procedures than most non-judicial remedies possess. However, the UNGPs also recognise that there can be significant legal, practical and other barriers to seeking redress in the judicial system,²⁸⁵ for example, it can often prove very costly and time consuming to sue companies within the judicial system. In the next section I will analyse some of the benefits and drawbacks of using the UK legal system to take action against PSCs and analyse the effectiveness of this remedial avenue from the perspective of human rights law. The UK legal system offers an interesting case study for a number of reasons. Firstly, it is an EU-based jurisdiction making it an appropriate study for the FRAME project. Secondly, it has a well-developed, and well-functioning, international human rights law system and few issues with delay. However, more importantly the UK is host to a large number of PSCs when compared to other EU countries.²⁸⁶ As a result, it is more likely that litigation related to PSCs in the EU will take place in this jurisdiction, making it an ideal case study.

D. Case Study: UK Judicial System

1. Investigation and Fact-Finding

This section examines the investigation and fact-finding processes within the UK judicial system. It should be noted at the outset that a great deal of litigation against PSCs is likely to take the form of civil litigation in tort. The fact that States are generally speaking the guarantors of human rights law makes it difficult to hold companies directly responsible for human rights violations as the companies are not the direct subjects of international human rights treaties,²⁸⁷ thus tort law has been used as a serviceable proxy in

²⁸⁵ UNGPs and commentary, 28.

²⁸⁶ Out of 97 companies that have signed up to the International Code of Conduct for Private Security Providers, 23 companies are based in the UK, which is more than the rest of the EU combined. List accurate as of 8 February 2016 see International Code of Conduct Association, 'Membership' <http://www.icoca.ch/en/membership?private_security_companies=companies&op=Search&view_type=list&for_m_id=_search_for_members_filter_form> accessed 8 February 2016.

²⁸⁷ Although where the PSC performs functions which are normally the preserve of States, such as running prisons or deporting people, litigation against both the State and the PSC on human rights issues has occurred in the UK. See *McDowall v G4S Care and Justice Services (UK) Ltd* (2015) S.L.T. (Sh Ct) 129; *R. (FI) v Home Secretary and Ors.* [2014] EWCA Civ 1272.

most cases, although it does not provide a cause of action for all human rights violations.²⁸⁸ I will discuss aspects of fact-finding and evidence gathering in tort cases further in the sections below, but here I wish to focus on investigation and fact-finding in criminal investigations related to violations of the right to life and the prohibition on torture, inhuman and degrading treatment or punishment.

The UNGPs identify the lack of adequate resources, expertise and support for State prosecutors to investigate individual and business involvement in human rights-related crimes as a potential barrier to the effectiveness of national legal systems.²⁸⁹ As a developed western European State, the UK should in principle have a well-resourced police force, prosecutors and the necessary experts required to investigate potential human rights violations carried out by PSCs, however, in practice this position may not be as clear cut. Budgetary cuts to the Crown Prosecution Service, for example, have significantly reduced its capacity and led to ‘de-skilling’ of prosecutors.²⁹⁰

When you take into account the fact that many cases involving human rights abuses by PSCs will occur outside the UK’s territory, the potential for UK government investigation becomes more limited as a range of practical barriers come to the fore. The UK government itself has expressed concerns about how firms’ behaviour overseas could be effectively monitored from the UK.²⁹¹ Indeed, when the UK government was challenged for not adopting compulsory regulations governing PSCs it responded that ‘any regulatory regime would be unenforceable, as many breaches would be likely to occur overseas, making the chances of prosecution remote’.²⁹² As a general rule, UK criminal law is limited to acts done within the territory of the State and only statutory provisions asserting extra-territorial jurisdiction will criminalise acts committed abroad.²⁹³ Thus, while the Corporate Manslaughter and Corporate Homicide Act 2007 paved the way for businesses to be charged with crimes, it does not apply extra-territorially.²⁹⁴ Significant practical problems remain, such as controlling the crime scene, gathering evidence, the standards of evidence collection and its location overseas.²⁹⁵

Even if the criminal law did apply, PSC staff overseas often fall between two different investigative jurisdictions. The staff of PSCs are quite often made immune from the local legal process as part of their deployment in a similar way to military forces deployed under specifically negotiated Status of Forces

²⁸⁸ Youseph Farah, ‘Toward a Multi-Directional Approach to Corporate Accountability’ in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2014) 42-43. There is no direct cause of action in tort for breach of the right to a fair trial or the right to marry for example.

²⁸⁹ UNGPs and commentary, 29.

²⁹⁰ HM Crown Prosecution Service Inspectorate, ‘Thematic review of the CPS advocacy strategy and progress against the recommendations of the follow-up report of the quality of prosecution advocacy and case presentation’ (HM Crown Prosecution Service Inspectorate 2015) 2 and 27.

²⁹¹ Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (2009-10, HL Paper 5-I, HC 64-I) at [204].

²⁹² Ibid at [272].

²⁹³ Skinner et al (n 11) 42.

²⁹⁴ Ministry of Justice, ‘A guide to the Corporate Manslaughter and Corporate Homicide Act 2007’ 17 <<http://www.hseni.gov.uk/guidetomanslaughterhomicide07.pdf>> accessed 6 October 2015.

²⁹⁵ Ibid.

Agreements.²⁹⁶ This immunity from local criminal jurisdiction can prevent local police from properly investigating deaths involving deployed contractors, at the same time the agreement shielding the PSCs may not permit the sending State to exercise criminal jurisdiction in the receiving State's territory. This has hampered the ability of European States to investigate in third States in the past. Thus, in *Jaloud v Netherlands*, which involved an investigation into a killing perpetrated by a Dutch soldier at a checkpoint in Iraq, the State claimed that it could not satisfy its human rights obligations to investigate the death because it lacked the authority to investigate anyone other than Netherlands personnel and it was not in a position to seize goods or arrest people other than Netherlands personnel in the State.²⁹⁷ The European Court of Human Rights ultimately held that there were a number of shortcomings in the investigation by the Dutch authorities which constituted a violation of Article 2 of the Convention. Thus the capacity of both the indigenous authorities and the national authorities to investigate was hampered by the agreements governing their deployment and while this was not enough to avoid responsibility in the individual case at issue, it is certainly possible that such an issue could be enough for a State to avoid responsibility in the future. This can have an adverse effect on human rights protection where, for example, a PSC employee is involved in an unlawful killing in a third State.

Overall, the cuts in funding to the Crown Prosecution Service, the frank admission that the UK's capacity to investigate the overseas activities of companies and the nature of existing agreements governing the deployment of PSC contractors overseas, limit the possibility that effective investigations of human rights abuses perpetrated by PSCs will occur, especially where these abuses occur overseas. While there can be no excuse for the State to negotiate agreements which curtail their capacity to protect human rights, the practicalities of upholding human rights obligations in third states are very real and in many cases extremely difficult to overcome. It is highly likely that other EU MSs would encounter similar difficulties when faced with an extra-territorial investigation.

There are some legislative provisions which could provide an outlet for responsibility here. UK law provides, for example, for the establishment of Service Civilian Courts, which can be established anywhere outside the British Islands.²⁹⁸ These courts have the power to try any civilians subject to service discipline.²⁹⁹ These tend to be established only where the UK has permanent bases overseas and could be used to try PSC personnel. This could overcome some of the difficulties in fact-finding identified above as

²⁹⁶ Elke Krahmann and Aida Abzhaparova, 'The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options' (2010) EUI Working Paper AEL 2010/8, 1 <http://cadmus.eui.eu/bitstream/handle/1814/18295/AEL_2010_8.pdf?sequence=1> accessed 20 July 2015; Although the US has permitted a Status of Forces Agreement that allows PSC contractors to be tried in Iraqi courts – see Robert Nichols, 'New U.S.-Iraq SOFA Lifts Contractor Immunity' (2008) 5 International Government Contractor 103.

²⁹⁷ 'Jaloud v Netherlands Hearing' (European Court of Human Rights, 19 February 2014) <http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=4770808_19022014&language=lang&c=&py=2014> accessed 6 October 2015.

²⁹⁸ Armed Forces Act 2006, s.277(2).

²⁹⁹ Armed Forces Act 2006, s.51.

the close proximity to the crime scene increases the chances of efficient and successful prosecutions.³⁰⁰ However, the process does have significant shortcomings, its jurisdiction is limited to relatively minor offences and contractors who do not work for the armed forces are not subject to the jurisdiction of those courts.³⁰¹

2. Accessibility

The accessibility of the UK courts is a significant issue when it comes to holding PSCs responsible for human rights violations. Many of the human rights violations perpetrated by PSCs occur outside the State in which the company is registered and as national legislation typically lacks extraterritorial reach, this makes it difficult for the legislation to encompass the transnational activities of PSCs.³⁰² In the UK, common law provides a basis for claims to be brought against businesses for their extraterritorial actions that violate human rights under tort law.³⁰³ Although tort law does not provide a cause of action for all human rights violations as we noted in the previous section.

The UK is currently subject to European legislation governing issues of jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters, which assists in determining conflict of laws issues between different jurisdictions and harmonises the law.³⁰⁴ The prospect of litigation in the UK courts gives rise to an interesting jurisdiction issue given the nature of the acts undertaken by PSCs. As PSCs sometimes perform functions, which are normally the preserve of States, it prompts the question whether these actions can be termed 'civil and commercial matters',³⁰⁵ or are more accurately characterised as the exercise of delegated State authority. If the acts at issue are not civil and commercial matters, the relevant EU legislation harmonising the law in this area may not apply. The recast Brussels 1 Regulation, states that '[i]t shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority'.³⁰⁶ The CJEU remarked, in the case of *Lechouritou v Dimosio*, that:

'The term 'civil and commercial matters' does not cover disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals'.³⁰⁷

³⁰⁰ Cedric Ryngaert, 'Litigating Abuses Committed by Private Military Companies' (2008) 19(5) European Journal of International Law 1035, 1048.

³⁰¹ Ibid 1047-1048.

³⁰² Jägers, (n 113) 68.

³⁰³ Skinner et al (n 11) 32.

³⁰⁴ European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play' SWD(2015) 144 final, 23.

³⁰⁵ Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, art. 1.

³⁰⁶ Ibid art 1. If the EU legislation on jurisdiction and choice of laws is inapplicable, the rules of common law and Private International Law (Miscellaneous Provisions) Act 1995 would apply instead.

³⁰⁷ C-292/05 *Irimi Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ECR I - 1540

Thus the issue becomes whether the PSC is exercising what could be described as ‘public powers’ as if it is, the issue may not be governed by the EU legislation. The Articles on State Responsibility provide some guidance on situations where persons or entities that are not organs of the State exercise State power, it notes that:

‘The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance’.³⁰⁸

Therefore if the PSC was exercising public powers/governmental authority, its acts could be attributable to the State and would not fall within the scope of the Brussels 1 Regulation. Gillard points out, for example, that ‘operations related to war fighting and related detention are intuitively elements of the governmental authority’.³⁰⁹ However, as she further notes, there are a few issues with this proposition. Article 5 requires that the PSC be ‘empowered by internal law to exercise governmental functions’ and the existence of a contract between the State and the company is obviously not sufficient *per se* to bring it within the scope of the provision.³¹⁰ Ultimately she concludes that the position under international law is at best unclear. Overall, the activities of PSCs are not solely directed toward assisting States, PSCs are increasingly contracting with other private entities to provide their services in challenging areas e.g. the protection of oil installations, and these actions do not connote governmental authority. Even if PSCs did contract exclusively with States, many of the actions they undertook would fall beneath the threshold of exercising governmental authority or public powers. Therefore, there is a sufficient margin of appreciation for private international law measures, such as the Brussels 1 Regulation, to apply and the analysis will proceed as though it does.

The recast Brussels 1 Regulation is particularly important to the subject at hand.³¹¹ Under Article 4 of this Regulation, the courts of EU MSs are competent to adjudicate civil proceedings against companies based in the EU for acts which have taken place outside the EU, even where the victim is not domiciled in the EU and the damage also occurred elsewhere.³¹² The definition of ‘domiciled’ in the Regulation is also flexible in the sense that it does not rely solely on where the company’s statutory seat (or, in the case of UK companies, registered office) is located, but looks to where the central administration or the principal

³⁰⁸ James Crawford, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2 Yearbook of the International Law Commission, 43.

³⁰⁹ Emanuela-Chiara Gillard, ‘Business goes to war: private military/ security companies and international humanitarian law’ (2006) 88 International Review of the Red Cross 525, 554.

³¹⁰ Ibid 555.

³¹¹ Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.

³¹² Jan Wouters and Cedric Ryngaert, ‘Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction’ (2009) 40 The George Washington International Law Review 939, 944-945.

place of business of the company is.³¹³ Again these rules are applicable throughout the EU, making the many observations on the UK's situation also relevant to other EU countries.

One idiosyncrasy of the UK system is the *forum non conveniens* doctrine and the Brussels 1 Regulation has been interpreted by the CJEU to preclude States from applying this doctrine in practice.³¹⁴ Under this doctrine, the UK courts could prevent a case from moving forward in the jurisdiction where another jurisdiction was considered more suitable or appropriate. In the seminal case of *Spiliada v Cansulex*, the House of Lords stated 'the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction'.³¹⁵ The objective of the court was 'to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'.³¹⁶ Needless to say this doctrine generated problems for applicants trying to bring cases in the UK.³¹⁷ While the removal of *forum non conveniens* from the equation is a positive development overall, the courts of EU MSs can only adjudicate cases against defendant companies domiciled in an EU Member State. Some have argued these nationality and territoriality requirements may discourage victims of corporate-related human rights abuse from litigating in EU countries, thereby reducing their accessibility.³¹⁸ However, the EU legislation guarantees access to at least one court in the EU and does not forbid litigation in the victim's home country if they prefer this.

The so-called 'corporate veil' generates further accessibility issues in litigation. Under the principle of separate corporate legal personality, a parent company is generally speaking not liable for the conduct of its subsidiaries simply by virtue of being a shareholder.³¹⁹ This is a particularly salient point in the PSC industry, which has a number of large conglomerates, such as G4S and Olive Group, and has seen a number of large scale mergers recently such as the merger between Constellis and Olive Group and Garda World and Aegis.³²⁰ Litigators have attempted to circumvent the corporate veil by claiming that a company

³¹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, art 60; European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play' SWD(2015) 144 final, 24.

³¹⁴ Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 International and Comparative Law Quarterly 1, 12-13; *Owusu v. N.B. Jackson* [2005] ECR I-1383.

³¹⁵ *Spiliada v Cansulex* [1987] A.C. 460 at 474.

³¹⁶ *Ibid* at 480.

³¹⁷ Skinner et al (n 11) 34-40.

³¹⁸ Wouters and Ryngaert (n 312) 943; Iman Prihandono, 'Barriers to transnational human rights litigation against transnational corporations (TNCs): The need for cooperation between home and host countries' (2011) 3 Journal of Law and Conflict Resolution 89, 94.

³¹⁹ Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City University of Hong Kong Law Review 1, 5.

³²⁰ Street Insider, 'GardaWorld Announces Strategic Expansion to Become the Premier Security Provider in Africa and the Middle East' (*Street Insider*, 13 July 2015) <<http://www.streetinsider.com/Press+Releases/GardaWorld+Announces+Strategic+Expansion+to+Become+the+Premier+Security+Provider+in+Africa+and+the+Middle+East/10718308.html>> accessed 9 October 2015; Andrew Critchlow, 'British security firm Olive plans expansion after US merger' (*The Telegraph*, 7 May 2015)

has been directly negligent for harm caused by its own wrongdoing for functions over which it had direct control, instead of alleging its responsibility for the negligence of its subsidiaries.³²¹ The UK courts have demonstrated a willingness to adjudicate on this issue in transnational business and human rights cases. In *Lubbe and Ors v. Cape plc*, for example, the House of Lords allowed a case brought by victims of asbestos-related illnesses to continue when it had been stayed on the grounds of *forum non conveniens*. The case was taken against the English parent company of a South African subsidiary which manufactured asbestos products. The court ruled that even though South Africa was the more appropriate forum, the strong probability that the claimants would be unable to obtain both the legal representation and the expert evidence required to substantiate their claims in South Africa would amount to a denial of justice.³²² The case is seen as paving the way for foreigners to seek redress in UK courts against British parent companies.³²³

While the Brussels 1 Regulation has since cleared up many of the jurisdictional barriers to bringing a case against a PSC in a UK court, including *forum non conveniens*, a number of barriers to accessibility remain more generally across the EU. Litigating tort cases against multi-national corporations can be complex, risky, resource-intensive and hard-fought by the companies themselves.³²⁴ A further point, related to our discussion of investigation and fact-finding, is that the costs associated with gathering evidence in any foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate make them prohibitively expensive.³²⁵ The UK has some beneficial provisions in this regard and one way to reduce costs and improve accessibility in the UK system is to use video link evidence. There are provisions to use video links to obtain evidence from other jurisdictions in UK law, which can involve considerable savings in time and cost. However, the approach of the court is that its convenience should not dictate the use of video links and it is at the discretion of the court whether the video link should be used.³²⁶

The cost of litigation is specifically mentioned in the UNGPs, which state that costs could pose a practical barrier where the cost of bringing claims goes beyond being an appropriate deterrent to unmeritorious cases and/or where it cannot be reduced to reasonable levels through Government support, "market-based" mechanisms (such as litigation insurance and legal fee structures), or other means.³²⁷ The UK has seen recent changes for the worse in both these areas. While it has been possible in the past for cases to be litigated under the UK's legal aid scheme, reforms to the recovery of success fees and insurance

<<http://www.telegraph.co.uk/finance/newsbysector/industry/defence/11589413/British-security-firm-Olive-plans-expansion-after-US-merger.html>> accessed 9 October 2015.

³²¹ Prihandono (n 318) 93-94; Meeran (n 319) 5; John Ruggie has suggested that the UK should adopt a 'parent-based regulation' approach to business and human rights issues by demanding that a parent company exercise oversight of its own subsidiaries, and holding the parent company responsible rather than relying exclusively on the extra-territorial reach of legislation etc - see Joint Committee on Human Rights (n 291) at [204].

³²² *Lubbe and Ors v Cape* [2000] 4 All ER 268.

³²³ Prihandono (n 318) 94.

³²⁴ Meeran (n 319) 18.

³²⁵ Skinner et al (n 11) 54.

³²⁶ England and Wales Civil Procedure Rules, rule 29.1 annex 3.

³²⁷ UNGPs and commentary, 29.

premiums from the defendants, along with reductions in damages caused by the changes arising from the Rome II Regulation, have made it much less attractive to pursue tort litigation against multi-national corporations.³²⁸ Furthermore, reforms to the provision of legal aid in the UK have further limited the ability to fund cases in tort against multi-national corporations through legal aid.³²⁹

3. Speed

We already noted above that cases against companies in tort can be very complex and resource intensive. As a result they can take a long time to litigate and the speed of the remedy provided by the UK's judicial system is a salient issue. In contrast with many European jurisdictions,³³⁰ the UK does not have a substantial problem with delay in civil and criminal proceedings. However, it is likely that evidence gathering activities and legal arguments over liability will nonetheless mean that litigation becomes protracted thereby reducing its effectiveness in offering redress for victims of human rights abuses. Where the PSC is alleged to be involved in human rights abuses in a third State, obtaining discovery of documents could cause significant delays. There is an international treaty governing the taking of evidence abroad in civil and commercial matters and where the third State has acceded to this convention it should ostensibly speed up the process.³³¹ However, it is generally recognised that utilising municipal discovery procedures to gain access to information from abroad can be a very difficult and time consuming process, posing a challenge to the effectiveness of the remedial process.³³² These requests can also generate diplomatic tensions between States and cases involving private contractors perpetrating human rights abuses in third States are likely to be contentious.³³³ There can also be protracted arguments among the lawyers for each side over the extent of disclosure undertaken by a party, which can also delay trials.³³⁴

A further issue is the statute of limitations. The statute of limitations can present a serious barrier to tort litigation against companies,³³⁵ which as we noted is likely to be the primary legal action used to guarantee

³²⁸ See Legal Aid, Sentencing and Punishment of Offenders Act 2012; Meeran (n 319) 18-19.

³²⁹ See Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, part 2; Owen Bowcott, 'Legal aid cuts will stop cases like Trafigura, UN official warns' (*The Guardian*, 16 June 2011) <<http://www.theguardian.com/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura>> accessed 7 October 2015.

³³⁰ Italy for example has experienced persistent problems with delay in legal cases see *Gaglione and Others v Italy* (App No 45867/07) ECtHR 21 December 2010.

³³¹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (adopted 18 March 1970, entered into force 7 October 1972) 847 UNTS 231, art 9. There is also an EU Regulation governing this area Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.

³³² Jennifer Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies' 84 <<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>> accessed 9 October 2015.

³³³ Ibid 84.

³³⁴ Meeran (n 319) 26.

³³⁵ See for example the adverse application of the statute of limitations in *Connelly v RTZ Corporation plc* (unreported 4 December 1998).

human rights against PSCs. In the UK, the general limitation on actions in tort is six years, but there is a shorter three-year limitation period for claims of personal injury or death,³³⁶ which could be more likely in the context of PSC claims. Under the Rome II Regulation, the prescription rules of other jurisdictions can apply to bar claims in UK courts where the damage occurs in the other jurisdiction.³³⁷ Short statutes of limitations have been identified as a significant obstacle to human rights claims. It can be extremely difficult for victims to organise themselves and complete preparations for filing a lawsuit,³³⁸ such as investigating and gathering evidence, in three years.³³⁹ The basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law recommend that time limits applicable to civil claims ‘should not be unduly restrictive’,³⁴⁰ and it would be beneficial if the UK parliament extended the limitation period to reflect the difficulties victims of human rights abuses can face in bringing cases.

4. Transparency

Transparency is generally speaking not a significant barrier to the effectiveness of judicial remedies in the UK. Justice is generally administered and judgments handed down in public.³⁴¹ The disclosure rules applicable to civil trials are robust. As part of the standard disclosure procedure, the parties to a case must disclose documents they rely on in the case, including documents which adversely affect their own case.³⁴² The disclosure obligations apply throughout the trial.³⁴³ The judge hearing the case can also order specific disclosure or searches for specific evidence where necessary,³⁴⁴ and even order disclosure of evidence from non-parties to the case in certain circumstances.³⁴⁵ Although as we already noted above, obtaining discovery overseas can be a difficult process. A lack of transparency concerning the ultimate ownership or control of a company can also cause problems with evidence gathering as companies can be owned by a number of other foreign businesses or their shareholders, parent companies and investors can be domiciled in a number of countries.³⁴⁶

As we mentioned above, the State has a duty under human rights law to keep the victims of a human rights violation informed of the progress of investigations into the alleged conduct, particularly criminal investigations, to the extent necessary to safeguard their interests.³⁴⁷ There may however be a few circumstances in which trials involving PSCs are not held in open court. Sections of a trial involving PSCs

³³⁶ Limitation Act 1980, s11; Prihandono (n 318) 94.

³³⁷ Skinner et al (n 11) 13-14; Zerk (n 332) 74.

³³⁸ Mark Taylor, Robert Thompson and Anita Ramasastry, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses* (Fafo 2010) 16.

³³⁹ Ibid; Skinner et al (n 11) 13-14.

³⁴⁰ UN Office of the High Commissioner for Human Rights (n 83) at [7].

³⁴¹ *DE v AB* [2014] EWCA Civ 1064; *Scott v Scott* [1913] AC 417.

³⁴² England and Wales Civil Procedure Rules, rule 31.6.

³⁴³ Ibid rule 31.11.

³⁴⁴ Ibid rule 31.12.

³⁴⁵ Ibid rule 31.17.

³⁴⁶ Taylor, Thompson and Ramasastry (n 338) 10-11.

³⁴⁷ See section II B 4 above.

could be held in camera, for example, where commercially valuable secret information is at issue.³⁴⁸ It is also possible that as PSCs assist the military overseas, the disclosure of certain evidence could have implications for national security and may need to be disclosed in camera using so-called ‘closed material procedures’. The UK has recently expanded the use of closed material procedures in the Justice and Security Act 2013. These procedures allow the government to refuse to disclose evidence to other parties in a case where the disclosure would be ‘contrary to the public interest’. Instead, special advocates, approved by the government, are permitted to see the evidence and represent the interests of the parties who cannot see the evidence.³⁴⁹ These procedures had previously been confined to specific limited areas of litigation.³⁵⁰ However, the UK significantly extended their scope to include all civil proceedings before the courts of England and Wales.³⁵¹ In sum, while transparency is not a significant issue impacting upon the effectiveness of the UK judicial system, the expansion of closed material procedures and lack of transparency concerning company ownership could cause problems in the future.

5. Redress

As we have already noted the cost of litigation in the courts of the UK can be prohibitively expensive. One way to combat this problem is to utilise forms of collective redress and claims aggregation to share the cost of litigation among a group affected by the activities of a PSC. So-called ‘group litigation orders’ can be made for any claim where there are multiple parties or claimants to the same cause of action and aids in case management of claims which give rise to common or related issues of fact or law.³⁵² These forms of action provide economies of scale and access to larger and better resourced legal teams than would be possible otherwise. However, these actions are not a panacea. Firstly, this form of collective action does not resolve all the problems with costs.³⁵³ These collective actions require plaintiffs to opt-in to the litigation and opt-out style litigation may be more beneficial for some claims. As Meeran notes, the opt-in nature of the litigation means that commencement of legal action on behalf of a small number of individuals does not stop the limitation clock from running for the remainder of the group. This may mean that instructions must be taken from the entire group, which increases costs and reduces the financial viability of the action, negating a key benefit for this type of action.³⁵⁴ The EU issued a recommendation on collective redress which solely advocated the creation of opt-in collective redress mechanisms,³⁵⁵ while

³⁴⁸ *Bank Mellat v HM Treasury* [2013] UKSC 38.

³⁴⁹ Adrian Zuckerman, ‘Closed material procedure - denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34’ (2011) 30(4) *Civil Justice Quarterly* 345, 345-346.

³⁵⁰ Terrorism Prevention and Investigation Measures Act 2011, Schedule 4; Counter-Terrorism Act 2008, Part 6.

³⁵¹ Justice and Security Act 2013, s. 6(11).

³⁵² Ministry of Justice, ‘Group litigation orders’ (*Ministry of Justice*, 24 July 2015) <<https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>> accessed 6 October 2015.

³⁵³ Duncan Fairgrieve and Geraint Howells, ‘Collective Redress Procedures - European Debates’ (2009) 58 *International and Comparative Law Quarterly* 379, 395-396.

³⁵⁴ Meeran (n 319) 20.

³⁵⁵ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

the UK Civil Justice Council recommended that opt-in and opt-out style actions should both be available.³⁵⁶ Furthermore, group litigation orders require each party's lawyers to engage in a considerable amount of negotiation for the process to be effective.³⁵⁷ It is also at the discretion of the court whether to grant a group order,³⁵⁸ and there is little guidance given to judges on when to grant the orders. While this flexibility can be beneficial, it can also lead to serious inconsistencies in the utilisation of group litigation orders.³⁵⁹

The array of damages and remedial actions available in the UK legal system is impressive and the courts have the capacity to provide both legal and equitable remedies. Damages can be awarded for a range of injuries – loss of earnings, pain and suffering, loss of faculty and amenity, medical expenses and even aggravated and exemplary damages are available in certain circumstances,³⁶⁰ although it can be difficult to enforce judgments and claims for damages extra-territorially outside the EU.³⁶¹ The courts also have wide powers to issue injunctive relief with the capacity to issue prohibitory injunctions, mandatory injunctions, *quia timet* injunctions and interim injunctions pending trial.³⁶² The range of remedies available increases the likelihood that the UK courts can provide an effective remedy.³⁶³ However these benefits only arise where UK law is applied, which is not a foregone conclusion. As PSCs may cause damage predominantly in the context of extra-territorial actions, conflict of laws may become an issue and the level of damages and array of remedies available in the UK system may become irrelevant. This is because, as a general rule, EU law requires damages to be assessed in accordance with the law of the country where the harm occurred.³⁶⁴ In practice this could mean that victims of human rights abuses caused by PSCs in third States that seek redress in the UK courts may receive inadequate redress as the law of a third country is applied and lacks the same level of compensation or remedial action available in the UK.

6. Preliminary Findings

Overall, the effectiveness of the UK judicial system in holding PSCs accountable for human rights abuses is limited. While the UK legal system provides a number of options in both criminal and civil law to hold PSCs accountable, these suffer from a number of shortcomings, the cost and speed of the remedial actions being especially challenging. Criminal investigations into human rights abuses within the territory of the UK are achievable, notwithstanding funding cuts to the police and prosecution services, but the situation for human rights abuses perpetrated by PSCs overseas is different and the prospect of British-led police

³⁵⁶ Fairgrieve and Howells (n 353) 398-399.

³⁵⁷ Skinner et al (n 11) 65.

³⁵⁸ Ibid.

³⁵⁹ Fairgrieve and Howells (n 353) 395.

³⁶⁰ See *Rookes v Barnard* (1964) AC 1129.

³⁶¹ Zerk (n 332) 85.

³⁶² A *quia timet* injunction is used to restrain wrongful acts which are threatened or imminent but have not yet commenced. A prohibitory injunction requires a party to a case refrain from doing a specific act. A mandatory injunction compels a party to carry out a particular act. An interim injunction preserves the status quo between two parties in advance of a trial.

³⁶³ See examples of the beneficial use of injunctions in litigation against companies in Meeran (n 319) 22 and 41.

³⁶⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, arts 4 and 15.

investigations and prosecutions tackling human rights abuses perpetrated by PSCs in third States is extremely limited by both practical and legal constraints. Furthermore, the agreements negotiated by States underpinning deployments of PSCs overseas can simultaneously limit the ability of indigenous authorities to investigate creating a worrying gap of impunity. We noted that tort law can provide a cause of action against companies for certain human rights abuses, but the scope for this type of action does not align completely with human rights law, making it inadequate overall. EU legislation has cleared some of the barriers to civil litigation, for example by limiting the *forum non conveniens* doctrine, but it has also generated problems by demanding that the substantive and procedural laws of the State where the damage occurred should be applied. There are also significant barriers to the accessibility of the UK legal system as civil litigation against companies in tort can be incredibly time-consuming and expensive. Recent changes to the law such as the restrictions on legal aid and the expansion of the use of closed material procedures have made the legal system less accessible and less transparent. Equally while collective redress is possible under the UK legal system, it suffers from a number of shortcomings, which negate some of its key benefits and the collective redress system would benefit from having both opt-in and opt-out type mechanisms.

V. International-Level Mechanisms

PSCs have grown into transnational corporations, located in one country, recruiting employees outside that jurisdiction and deploying personnel across the world. As a result, regulation by individual States is unlikely to be sufficient to properly control their activities.³⁶⁵ In fact adopting tougher regulations at the domestic level may trigger a counter-productive ‘race to the bottom’ with PSCs moving to the States with the least stringent domestic regulations.³⁶⁶ It makes sense to regulate them at the international level.³⁶⁷ Regulation at the international level would reduce the capacity of PSCs to undertake such changes and prevent them from capitalising on the current disparities between different regulatory regimes in different States. However, even if one accepts the logic behind international regulation, the actual process of regulating at the international level can be protracted, complex and riven with political issues. There are a range of options to be considered, utilising international trade associations (such as the ISOA), utilising international courts (like the International Criminal Court),³⁶⁸ using treaty bodies or regional human rights courts (like the ECtHR) or developing entirely novel bespoke solutions (such as the International Code of Conduct for PSCs). Analysing all of the potential options at the international level is beyond the scope of this work. Even addressing a preliminary issue, such as where to place the burden of responsibility in such international mechanisms, is complex. Should the mechanism adopt a criminal responsibility approach against individuals? Should States be held vicariously responsible for the activities of PSCs for failing to uphold their positive obligations under human rights law? Should the company as a whole face financial sanctions? These questions alone could take up the entire study.

Thus in this section, as in the others, we address two cases studies, the first a bespoke non-judicial international grievance mechanism in the form of the ICoCA and the second an existing international legal mechanism in the form of the ECtHR.

A. International Non-Judicial Remedies

The impetus to develop a voluntary non-judicial international mechanism in this field has resulted in part from the weakness of the public law response to the regulation of PSCs.³⁶⁹ A binding international convention was proposed by the UN Working Group on the Use of Mercenaries as a Means of Violating

³⁶⁵ Gabor Rona, ‘A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group’ (2013) 22 *Minnesota Journal of International Law* 324, 344.

³⁶⁶ Erica Gaston, ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’ (2008) 49 *Harvard International Law Journal* 221, 241; European Commission for Democracy through Law (Venice Commission), ‘Report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force’ adopted 29 June 2009 at [8].

³⁶⁷ Cusumano (n 16) 26.

³⁶⁸ Peter Singer, ‘War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law’ (2004) 42 *Columbia Journal of Transnational Law* 521, 545-546.

³⁶⁹ Jägers (n 113) 91.

Human Rights and Impeding the Exercise of Rights of Peoples to Self-Determination and a draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies was released in July 2009.³⁷⁰ However, the Convention has been opposed by States which have large private security industries, like the US and the UK and will have to overcome significant opposition before it ever becomes law.³⁷¹ Critics argue that the Draft Convention highlights the inability of conventional international law to provide a response to the challenges posed by PSC regulation.³⁷² Shah argues that there is insufficient international consensus to take forward a comprehensive treaty, pointing to the Montreux process, which led to the adoption of the non-binding Montreux Document, as a clear example of the lack of consensus.³⁷³

In many ways the debate over the draft treaty is simply a repetition of the age old debate about voluntary vs mandatory regulation of businesses. There have been attempts to regulate the industry through voluntary international codes in the past through initiatives like the voluntary principles on security and human rights,³⁷⁴ and the Sarajevo code of conduct for PSCs.³⁷⁵ These codes of conduct have incorporated human rights standards to varying degrees.³⁷⁶ The International Code of Conduct for Private Security Providers, which will be discussed in the next section, represents a new type of voluntary agreement incorporating a collaboration of States, civil society organisations (CSOs) and members of the PSC industry and attempting to synthesise existing industry standards into its regulatory framework.

B. Case Study: International Code of Conduct Association

The ICoC is a spin off from the Montreux process. While the Montreux process was directed toward the States' obligations, the ICoC was directed toward the companies' obligations.³⁷⁷ The Code itself and the Association attached to it (the ICoCA) are still very new bodies, whose procedures and working modalities

³⁷⁰ A copy of the draft Convention is annexed to UNHRC, 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' (2010) UN Doc A/HRC/15/25.

³⁷¹ Laurence Juma, 'Privatisation, human rights and security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies' (2011) 15 Law, Democracy and Development 1, 2-3; White, 'The Privatisation of Military' (n 7) 150.

³⁷² Jägers (n 113) 88; White, 'The Privatisation of Military' (n 7) 149.

³⁷³ Reema Shah, 'Beating Blackwater: Using Domestic Legislation To Enforce The International Code Of Conduct For Private Military Companies' (2013-2014) 123 Yale Law Journal 2559, 2564.

³⁷⁴ Voluntary Principles on Security and Human Rights Standards 2000 <<http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>> accessed 9 October 2015.

³⁷⁵ Sarajevo Code of Conduct for PSCs 2006 <<http://www.seesac.org/res/files/publication/544.pdf>> accessed 9 October 2015.

³⁷⁶ Carsten Hoppe and Ottavio Quirico, 'Codes of Conduct for Private Military and Security Companies: The State of Self-regulation in the Industry' in Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011) 368.

³⁷⁷ Seiberth (n 214) 164.

are still germinating. The Code establishes a multifaceted compliance regime which includes certification of companies, internal and potentially external grievance mechanisms, rules on procurement, a regime of periodic reporting gathering information within the companies themselves and in the field and obligations of co-operation with different authorities.

The ICoCA serves as the oversight mechanism for the ICoC and is comprised of a Board of Directors, a General Assembly (GA) and a Secretariat. The GA serves as a forum for multistakeholder dialogue, voting on ICoC matters and appoints the Board of Directors.³⁷⁸ The Board of Directors includes an even distribution of representatives from civil society, States and the industry and serves as the executive body, overseeing the Secretariat, reporting on the implementation of the Code, making recommendations to the General Assembly and it is developing the ICoCA's operating procedures.³⁷⁹ The Secretariat's key role is to gather information for compliance reports on the companies, receive complaints from third parties about the activities of the PSCs and engage in dialogue with the PSCs on these issues.³⁸⁰

A key element of the Code involves certification which is defined as

‘a process through which the governance and oversight mechanism [ICoCA] will certify that a Company's systems and policies meet the Code's principles and the standards derived from the Code and that a Company is undergoing monitoring, auditing, and verification, including in the field, by the governance and oversight mechanism’.³⁸¹

The aim here is to harmonise the Code with existing standards, such as the American National Standards Institute's PSC 1 (2012),³⁸² and emerging national and international standards for the private security industry. The certification committee assesses submissions from members of any relevant standard related to security operations as a potential pathway to ICoCA certification.³⁸³ The committee evaluates both the content of the standard and the process by which a company is, or would be, certified to it.³⁸⁴ Once this assessment is complete, the committee drafts a recognition statement for it, which includes its assessment of the standard. Members can then comment on this and the ICoCA Board of Directors ultimately vote on whether or not to accept the proposed standard. As of April 2016, the committee has only accepted the PSC 1 standard as compatible with the ICoCA.³⁸⁵

³⁷⁸ International Code of Conduct Association, 'Articles of Association' (n 160) art. 6.

³⁷⁹ Ibid art. 7.

³⁸⁰ Ibid arts. 12 and 13.

³⁸¹ The International Code of Conduct for Private Security Providers 2010 (opened for signature on 10 November 2010), section B.

³⁸² American National Standards Institute (n 129).

³⁸³ International Code of Conduct Association, 'Draft ICoCA Certification Principles and Procedure' (1 July 2015) 2 <<http://www.icoca.ch/sites/default/files/resources/Final%20Draft%20ICoCA%20Certification%20Procedure.pdf>> accessed 17 August 2015.

³⁸⁴ Ibid 2.

³⁸⁵ International Code of Conduct Association, 'Certification' <<http://icoca.ch/en/certification>> accessed 7 April 2016. Although other standards including ISO 28007 are actively being considered by the ICoCA.

As the ICoCA is so new, it is difficult to assess its effectiveness as a remedial mechanism at this time. However, we can evaluate the mechanism as it currently stands, evaluate the PSC 1 standard accepted by the ICoCA and assess their future prospects. At first glance, the ICoC and ICoCA appear to be a promising prospect for regulating PSCs. The ICoC's objective of establishing external and independent mechanisms for effective governance and oversight of PSCs is sorely needed in the industry. Where other instruments, like the Montreux document, focused solely on PSC activities during armed conflict,³⁸⁶ the ICoC covers a much broader category of PSC action. It covers the actions of signatory companies while performing security services in 'complex environments' which encompass 'any areas experiencing or recovering from unrest or instability',³⁸⁷ which means it applies to the actions of PSCs in both pre and post-conflict contexts as well.

Many have commented on the need to engage a wide network of stakeholders in the process of regulating PSCs.³⁸⁸ The fact that the ICoCA is a multistakeholder affair comprised of States, PSCs and CSOs is a welcome development. The Board of Directors, for example, is comprised of twelve members, with four representatives from each stakeholder group.³⁸⁹ The involvement of CSOs in particular is welcome as they can play a valuable role in regulating PSCs through transnational networks, exerting pressure on PSCs' home States and financing litigation.³⁹⁰ There have been two criticisms of this approach though. Firstly, there is a lack of geographical diversity among the Association's members,³⁹¹ over 60% of the PSCs involved are either based in the US or Europe.³⁹² Secondly, there is a clear and significant disparity in the membership of the Association, which currently consists of six States, sixteen CSOs and ninety-four PSCs. The dominance of PSCs could affect the ICoCA's independence. As all members get a vote in the election of directors and as the industry significantly outnumbers the other factions, it can exert a substantial amount of influence.³⁹³

The Code has been praised for its detailed articulation of a wide range of norms and procedures that PSCs should adhere to.³⁹⁴ However, while the Code offers detailed rules on issues like, for example, the use of force and detention, the absence of any economic, social, or cultural rights is concerning given the capacity of PSCs to impact upon these rights.³⁹⁵ Despite largely following the approach of the UNGPs, not

³⁸⁶ Daphne Richemond-Barak, 'Can Self-Regulation Work? Lessons from the Private Security and Military Industry' (2013-2014) 35 *Michigan Journal of International Law* 773, 784.

³⁸⁷ The International Code of Conduct for Private Security Providers 2010 (opened for signature on 10 November 2010), section B.

³⁸⁸ Meg Roggensack, 'U.S. Legislative and Regulatory Developments and the International Code of Conduct for Private Security Providers: Filling the Accountability Gap' (2013) 107 *American Society of International Law Proceedings* 203, 204.

³⁸⁹ International Code of Conduct Association, 'Articles of Association' (n 160) art 7.2.

³⁹⁰ Cusumano (n 16) 27.

³⁹¹ Jägers (n 113) 80.

³⁹² This statistic is based on analysis of the 94 PSC members of the association as of 7 April 2016, 59 of which were based in Europe or the United States – See International Code of Conduct Association, 'Membership' <<http://www.icoca.ch/en/membership>> accessed 7 April 2016.

³⁹³ Shah (n 373) 2567; White, 'Due Diligence' (n 391) 251.

³⁹⁴ Jägers (n 113) 74.

³⁹⁵ White, 'Due Diligence' (n 391) 249-250.

all of the due diligence obligations of corporations identified in Ruggie's Framework are covered in the Code, for example, there is little on PSCs undertaking a proper assessment of their likely human rights impacts.³⁹⁶

1. Investigation and Fact-finding

The Secretariat of the ICoC can receive complaints from third parties about the activities of the PSCs.³⁹⁷ The Code also contains provisions aimed at ongoing compliance monitoring, this is described as a 'process for gathering data on whether Company Personnel, or subcontractors, are operating in compliance with the Code's principles and standards derived from this Code'.³⁹⁸ The mechanism is clearly capable of identifying the facts of an alleged human rights abuse, but it is unclear how deep investigations can or will go in practice and the degree of co-operation from companies that will be required for any investigations to be successful. It should also be noted that where companies are certified to the PSC 1 standard in order to comply with the ICoC, the certification procedure includes assessment by an external auditor, who can also receive complaints about the company's behaviour and investigate them.

The ICoCA is currently developing the monitoring procedures of the Code, but we know there will be elements of reporting, remote monitoring and monitoring in the field in the procedures. The Secretariat of the ICoCA will gather and receive information from the public and other available sources on whether the members are complying with the Code.³⁹⁹ It reviews the information, identifies compliance concerns, assesses the human rights impacts of the company's operations and tries to identify and analyse broader patterns.⁴⁰⁰ There are legitimate concerns about how thorough this process will be given that there are over 90 PSCs signed up to the Code and the Secretariat is only a team of 5 people. To offset this, the companies themselves will provide a written assessment of their performance pursuant to a set of criteria covered by 'necessary confidentiality and nondisclosure arrangements'.⁴⁰¹ The Articles of Association are not very clear about the periodicity of the reports and the level of detail that is required e.g. whether they are general reviews or detailed reports with specific proof of how each criterion of the Code is satisfied.⁴⁰² Thirdly, the Code makes provision for some on-site monitoring of PSCs in third countries, however this is limited to situations where risk assessments have identified the need for further monitoring or in response

³⁹⁶ Ibid 250.

³⁹⁷ International Code of Conduct Association, 'Articles of Association' (n 160) arts. 12 and 13.

³⁹⁸ The International Code of Conduct for Private Security Providers 2010 (opened for signature on 10 November 2010), section B.

³⁹⁹ International Code of Conduct Association, 'Articles of Association' (n 160) art. 12.2.1.

⁴⁰⁰ Ibid art. 12.2.4.

⁴⁰¹ Ibid art. 12.2.2.

⁴⁰² Seiberth (n 214) 197.

to a specific request from a member of the ICoCA.⁴⁰³ This indicates that there will be more active investigation by the Secretariat once specific human rights concerns are identified.

The possibility of carrying out on-site monitoring represented a very positive development in the ICoC as it could offer a means of assessing whether the company's commitment to the Code is actually being operationalised.⁴⁰⁴ While it can be expensive, it does offer a beneficial avenue for assessing compliance. It is lamentable that this process appears to have been watered down significantly and instead of all companies being subject to inspections, only a few companies will be subjected to on-site monitoring and only in limited circumstances.

As far as the independence and impartiality of the ICoCA is concerned, the Secretariat is composed of IHRL and CSR experts, not industry figures. It is separated from the people it is investigating and has its own allocated budget. The budget is based on voluntary contributions from governments, along with joining fees and annual dues from companies that have joined the association, which vary in size depending on the revenue of the company.⁴⁰⁵ At present government contributions outweigh those of the companies.⁴⁰⁶ As the contributions are set and reasonably balanced between members, apart from CSOs who make a nominal voluntary contribution, there is limited scope for the financing to influence the impartiality of the association. Equally, while the Secretariat is overseen by some people from the PSC industry sitting on the Board of Directors, the Board is balanced between States, PSCs and CSOs, which reduces concerns over impartiality and independence.

2. Accessibility

There are some concerns over the accessibility of the ICoCA's remedial mechanism. The overall approach of the ICoC lacks predictability and transparency and may be difficult for complainants to grasp. Individual complaints could take a number of different paths. In the first place it seems the ICoCA will recommend using the company's grievance mechanism. The ICoC imposes an obligation on businesses to create company-based grievance mechanisms that are 'fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence'.⁴⁰⁷ If a complainant alleges that a company's grievance mechanism is not fair, not accessible, does not or cannot offer an effective remedy, or otherwise does not comply with the Code, the Secretariat shall review that allegation.⁴⁰⁸ This can result in dialogue

⁴⁰³ International Code of Conduct Association, 'Articles of Association' (n 160) art. 12.2.3; Seiberth (n 214) 199.

⁴⁰⁴ Seiberth (n 214) 199.

⁴⁰⁵ International Code of Conduct Association, 'Budget of the ICoC Association: YEAR ONE' <http://www.icoca.ch/sites/default/files/u3/ICoCA_Budget%202014.pdf> accessed 4 April 2016.

⁴⁰⁶ International Code of Conduct Association, 'Approved Budget 2015 and 2016' <<http://www.icoca.ch/sites/default/files/uploads/Approved%20Budgets%202015%20and%202016.docx>> accessed 4 April 2016.

⁴⁰⁷ The International Code of Conduct for Private Security Providers 2010 (opened for signature on 10 November 2010), para 67(a).

⁴⁰⁸ International Code of Conduct Association, 'Articles of Association' (n 160) art. 13.2.3.

between the complainant company and the Board and possible recommendations for corrective actions or referral of the complaint to a different mechanism.⁴⁰⁹ The ICoCA can provide an avenue for mediation between the parties to a grievance, but this is seen as an absolute last resort and there is a clear emphasis on utilising company-based mechanisms and existing judicial and non-judicial machinery to address complaints first. This is in keeping with the UNGPs approach, but White argues that in the absence of some effective oversight, all the remedies will be at the whim of businesses.⁴¹⁰ This unpredictability and obligation to exhaust other avenues before the ICoC will offer meaningful assistance undermines the accessibility of the ICoC as a remedy. Equally, the ICoC relies too much on other mechanisms, which may not themselves offer effective remedies while failing to offer a better solution itself.⁴¹¹

Stakeholders are often at a considerable disadvantage when dealing with a company in terms of the expertise they have available to them on issues, such as their rights, scientific data, and other relevant information.⁴¹² In practice companies certified to the PSC 1 standard must minimise obstacles to access caused by language, educational level, or fear of reprisal.⁴¹³ It requires that the organisation protect individuals submitting a complaint or grievance in good faith from retaliation,⁴¹⁴ including express commitments that the organisation or persons working on its behalf may not retaliate against anyone who files a grievance or cooperates in the investigation of a grievance.⁴¹⁵ While the PSC 1 standard does not explicitly require companies to provide funding support for neutral third party expertise and advice, this could be read into the obligation to minimise obstacles caused by educational level.

3. Speed

On the positive side, the PSC 1 standard obliges companies to provide indicative timeframes for investigations and outcomes,⁴¹⁶ which is one of UNGPs' recommendations for non-judicial remedies. However, the aforementioned issues with the predictability of the ICoCA remedial mechanism also generate concerns over the speed of the remedy. The ICoCA is reliant on the PSC providing a quick and effective remedy. Where the PSC's grievance mechanism proves ineffective, the prospect of entering into dialogue with the complainant to establish how the grievance mechanism is deficient is unlikely to produce swift results. It may be beneficial for both the ICoC and the companies to engage in this dialogue to improve the grievance mechanisms, but it is difficult to see how this process will benefit the complainant. There also appears to be a presumption that the grievance mechanisms are effective and an onus on the complainant to prove otherwise. The complainant may require expert advice to determine these deficiencies and they may not be apparent *ab initio* meaning that the complainant may waste time

⁴⁰⁹ Ibid art. 13.2.4.

⁴¹⁰ Nigel White, 'Due Diligence' (n 391) 250.

⁴¹¹ Seiberth (n 214) 211-212.

⁴¹² Corporate Social Responsibility Initiative (n 108) 19.

⁴¹³ American National Standards Institute (n 129) 23.

⁴¹⁴ Ibid 26.

⁴¹⁵ Ibid 73.

⁴¹⁶ Ibid 74.

utilising the mechanism, which will negate the speed and utility of the remedy. Ultimately, victims of human rights violations do not want to have to debate the merits or demerits of a particular grievance mechanism, they want redress for the violations they have suffered. The fact that the ICoC requires applicants to pursue potentially ineffective remedies and engage in these dialogues means that it will be unlikely to provide a sufficiently speedy remedy to satisfy human rights law requirements.

4. Transparency

The PSC 1 standard requires PSCs to establish set procedures to document grievances.⁴¹⁷ They must also make provisions for the confidentiality and privacy of complainants,⁴¹⁸ including procedures for registering anonymous complaints and grievances.⁴¹⁹ By having a clear process for complaints handling it should satisfy some of the transparency criteria discussed above. As for the ICoC itself, a number of commentators have remarked on how transparent the process of adopting and implementing the ICoC has been overall.⁴²⁰ The fact that the companies' assessments of their performance are to be covered by 'confidentiality and nondisclosure arrangements',⁴²¹ is a cause for concern. This generates scope for companies to refuse to share information with the monitoring mechanisms owing to contractual provisions or the potential for parallel legal proceedings.⁴²² The issue of confidentiality has been a sticking point for other codes of conduct in the past,⁴²³ and the innate secrecy of the PSC industry could make achieving transparency in reporting problematic.⁴²⁴ The Board of Directors retains the power to adopt rules on confidentiality and non-disclosure.⁴²⁵ We can only hope that they strike the correct balance between transparency and protecting the interests of parties as these issues with transparency could seriously undermine the ICoCA's effectiveness.

It is worth re-iterating that the ICoCA's own grievance procedure lacks predictability as to its potential outcomes. It could also be argued, as Seiberth does, that the ICoC relies on external third parties too much to properly assess and evaluate the standards upheld by the PSCs e.g. bodies evaluating accreditation for PSC 1. The ICoC's oversight role is thus delegated to private accreditation and certification bodies in practice, meaning it is only as strong as the processes employed by these third parties. The process of contracting out the task to industry members developing their own standards carries the danger of a

⁴¹⁷ Ibid 26.

⁴¹⁸ Ibid 74.

⁴¹⁹ Ibid 67.

⁴²⁰ Richemond-Barak (n 386) 796; Jägers (n 113) 80-81.

⁴²¹ International Code of Conduct Association, 'Articles of Association' (n 160) art. 12.2.2.

⁴²² UNHRC, 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' (2012) UN Doc A/HRC/21/43, 7.

⁴²³ Jägers (n 113) 80-81.

⁴²⁴ Ibid 72.

⁴²⁵ International Code of Conduct Association, 'Articles of Association' (n 160) art. 7.7 and 12.2.9.

conflict of interests and there is a need for careful oversight to ensure industry-made standards still comply with IHRL.⁴²⁶

5. Redress

On paper the ICoC seems to provide good redress options, it enables review and follow up on PSC human rights compliance and an avenue for third party complaints. The ICoC also contains a welcome commitment on the part of PSCs

‘to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses’.⁴²⁷

However, as we noted already the ICoCA is too reliant on third parties for remedial activities and its own remedial mechanism is very unpredictable and unclear.

Many commentators have criticised the approach the ICoC takes to remedy. Rona argues that the voluntary nature of the Code means that it cannot meet the goal of ensuring that all PSCs are covered by it.⁴²⁸ The UN working group on the use of mercenaries maintained that while the approach of the ICoC was ‘useful’, it was an insufficient mechanism to regulate and monitor the activities of PSCs.⁴²⁹ Hoppe and Quirico argue that a code of conduct cannot be effective if both the act of committing to a code and compliance with it are entirely voluntary and breaches remain without consequence.⁴³⁰ This is not entirely true as breaches can result in a loss of certification to the Code and suspension and termination of membership of the ICoCA. Jägers in contrast argues that even voluntary commitments may ultimately have legal effect, for example, by being included in contracts.⁴³¹

Before the ICoC was even drafted, Rosemann proposed that States should make compliance with any international code a condition for awarding contracts to PSCs.⁴³² This is starting to happen in practice with

⁴²⁶ Seiberth (n 214) 204-205.

⁴²⁷ The International Code of Conduct for Private Security Providers 2010 (opened for signature on 10 November 2010), para 6(f).

⁴²⁸ Rona (n 365) 341-342.

⁴²⁹ UNGA, ‘Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination’ (2013) UN Doc A/68/339 at [69].

⁴³⁰ Hoppe and Quirico (n 376) 373.

⁴³¹ Jägers (n 113) 82.

⁴³² Nils Rosemann, ‘Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies’ (2008) Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 15, 39 <http://mercury.ethz.ch/serviceengine/Files/ISN/94781/ipublicationdocument_singledocument/5af67983-6392-472a-b4aa-ec6fd3c04d82/en/occasional_15.pdf> accessed 7 August 2015.

the US, UK and UN all making compliance with the ICoC a pre-condition for awarding contracts.⁴³³ Thus, suspension or exclusion from the ICoCA could have a significant impact on a company's procurement eligibility, making it, in theory at least, a strong driver for compliance.⁴³⁴

However, using the market to regulate depends on clients a) actually valuing human rights and b) having sufficient market power to make compliance with the ICoC a factor that firms compete on,⁴³⁵ which may not be the case in practice. Many governments have renewed contracts with PSCs even while the companies were associated with significant human rights abuses and scandals.⁴³⁶ Furthermore, not all States will follow the lead of the US and UK and lucrative contracts may be available where human rights are less of a concern e.g. China, Saudi Arabia and Russia.⁴³⁷ While award, renewal and termination of public contracts are important means of regulating,⁴³⁸ relying on market forces alone as the basis for regulation is not going to be sufficient and hasn't worked in the past.⁴³⁹ Beyond suspension and termination of membership, the ICoCA's punitive measures are limited and while it can engage in mediation, the ICoCA does not have the power to bestow specific awards on the parties to a complaint,⁴⁴⁰ which limits the effectiveness of its redress apparatus.

6. Preliminary Findings

Overall, the ICoC has introduced some extremely positive developments, while suffering from some debilitating shortcomings. On the positive side, the multistakeholder approach adopted by the Code is welcome and the combination of State buy-in, CSO oversight and PSC support has great potential to properly regulate the industry. The multi-faceted approach to regulation, which includes certification, reporting and monitoring is also useful and certification could play a powerful role in homogenising standards within the industry. Del Prado wisely cautions against rushing to judgment of the ICoC though noting it is a document of 'good intentions' and many of the factors to oversee the Code still need to be established.⁴⁴¹

⁴³³ Shah (n 373) 2565.

⁴³⁴ Roggensack (n 388) 204.

⁴³⁵ Hoppe and Quirico (n 376) 375.

⁴³⁶ Cusumano (n 16) 23.

⁴³⁷ Shah (n 373) 2565.

⁴³⁸ Cusumano (n 16) 22.

⁴³⁹ Hoppe and Quirico (n 376) 377; Peter Singer, 'The Private Military Industry and Iraq: What Have We Learned and Where to Next?' (2004) Geneva Centre for the Democratic Control of Armed Forces Policy Paper, 21-22 <http://kms2.isn.ethz.ch/serviceengine/Files/ESDP/14132/ipublicationdocument_singledocument/6C72CA8B-2711-4B18-8103-55305E8136E3/en/PP4_Singer.pdf> accessed 7 August 2015.

⁴⁴⁰ International Code of Conduct Association, 'Articles of Association' (n 160) art. 13.2.5.

⁴⁴¹ Jose Gomez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors' (2011) 1 Notre Dame Journal of International, Comparative and Human Rights Law 1, 36.

There are a number of shortcomings that reduce the effectiveness of the ICoCA as a remedial mechanism. While the ICoCA has the power and mandate to identify and investigate suspected human rights abuses, there are clear concerns about its capacity to fulfil this mandate. Equally although the ICoCA has been refreshingly transparent in its activities thus far, the confidentiality and non-disclosure rules surrounding the reporting process are a cause for concern. The remedial mechanism itself lacks predictability and transparency and it is unclear how complaints will be handled in practice. The requirement that complainants exhaust other avenues of redress, both within the company itself and national remedies, before coming to the ICoCA means it is unlikely to provide swift remedies. The fact that the Code relies so heavily on external factors, from groups offering certification services to external remedial mechanisms, leaves its effectiveness worryingly at the mercy of these third parties. Furthermore, enforcement remains a significant stumbling block with market forces unlikely to adequately regulate the PSC industry and the remedial mechanism itself offering limited sanctions and redress where violations are identified. It is difficult to see how the complaints procedure, in-field assessments etc. will engender compliance with the Code without any punitive mechanisms.⁴⁴² While the ICoC has a great deal of promise, at present it is far from providing an effective remedy for victims of human rights abuses at the hands of PSCs.

C. International Judicial Remedies

As mentioned above, the need for remedies that transcend national boundaries to cover transnational corporations is palpable. There are a range of potential judicial remedies available for international human rights complaints at the international level and regional level, through mechanisms like the ECtHR and Inter-American Court of Human Rights. However, despite the plethora of potential judicial avenues in which to bring human rights based claims, as we shall see the international remedial mechanisms are ill-suited to remedying complaints against PSCs as they are aimed at holding States responsible for human rights violations rather than companies. Utilising this avenue of redress throws up a number of significant problems, particularly at the admissibility stage of proceedings with issues concerning jurisdiction, attribution and exhaustion of domestic remedies limiting the availability of these remedies to victims of human rights abuses perpetrated by companies. The following section will analyse how effective a leading human rights court, the European Court of Human Rights, is in providing remedies for victims of human rights abuses perpetrated by PSCs.

⁴⁴² Shah (n 373) 2564.

D. Case Study: European Court of Human Rights

1. Accessibility

a) *Exhaustion of Domestic Remedies*

The first issue an applicant will encounter when trying to utilise the ECtHR as a remedy against PSCs is the obligation under the ECHR to exhaust domestic remedies. We must bear in mind that the ECtHR is not designed to be a free-standing remedy, but is meant to be complementary to national remedies. This obligation has the capacity to severely undermine the effectiveness of the ECHR as a remedy for abuses of human rights by businesses. The Convention stipulates that:

‘[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken’.⁴⁴³

This means applications are typically brought against decisions made by domestic bodies and we have already discussed a number of shortcomings in the domestic systems of redress above, which limit their ability to provide an effective remedy. The obligation to exhaust such remedies prior to approaching the ECtHR will reduce the speed of remedy in a similar way to that of the ICoCA discussed above.⁴⁴⁴ However, the saving grace of this approach is that applicants need not exhaust a domestic remedy if it is not going to provide an effective remedy. As the ECtHR noted in *McFarlane v Ireland*:

‘the only remedies which Article 35 paragraph 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice’.⁴⁴⁵

Thus, where there are obvious shortcomings in the domestic remedy, such as those noted with the NCPs above,⁴⁴⁶ the applicant may argue that they need not exhaust such remedies before taking a case to the ECtHR. Indeed one of the key benefits that the ECtHR could offer is a means of making the other remedies more effective. As the State is obliged to provide an effective remedy for violations of the ECHR in the domestic sphere,⁴⁴⁷ the ECtHR could demand that the State improve the structure or practice of the domestic complaints machinery. The ECtHR has engaged in such remedy crafting in the past, as it has, for example, radically altered the inquest system and police investigation systems of contracting States, such

⁴⁴³ European Convention on Human Rights 1950, art 35(1). Although protocol 15 will reduce this to four months once it comes into force.

⁴⁴⁴ See Section V B 2.

⁴⁴⁵ *McFarlane v Ireland* (2011) 52 EHRR 20 at [107].

⁴⁴⁶ See Section IV B.

⁴⁴⁷ European Convention on Human Rights, art 13.

as the UK.⁴⁴⁸ It has also demanded significant law reforms in Italy to address the issue of delay in their legal system.⁴⁴⁹ In some instances the ECtHR even issues pilot judgments which contain very prescriptive details on how to remedy a specific problem and what form the remedy should take.⁴⁵⁰ As the Committee of Ministers of the Council of Europe subsequently supervises the measures taken by States to comply with the judgments of the court,⁴⁵¹ application to the ECtHR could serve as a powerful means of changing the domestic remedial regime.

b) Ratione Personae

An applicant attempting to bring a case against a PSC for perpetrating human rights abuses will also have to contend with the ECtHR's *ratione personae* rules. These rules require that the alleged violation of the Convention must have been committed by a Contracting State or be in some way attributable to it.⁴⁵² The rights in the ECHR do not have any direct horizontal effect between individuals and companies.⁴⁵³ At first glance this would appear to preclude any applications being brought against PSCs for violations of human rights through the Convention's machinery. However, as with most things in the legal world, there are exceptions to this general rule and there are links between the responsibility of States and the actions of PSCs.⁴⁵⁴

To illustrate these links, I will use the example of a PSC violating an individual's right to life. Where such an event occurs in the home territory of a State, the situation is relatively straightforward. Under the ECHR, the State has a series of positive obligations or duties to undertake certain actions to pro-actively safeguard life.⁴⁵⁵ Firstly, the State must protect people within its jurisdiction from avoidable loss of life resulting from the criminal acts of private individuals where the authorities knew, or ought to have known, of a real and immediate risk to the life of the individual and failed to take reasonable measures, within

⁴⁴⁸ See changes brought in following cases like *Jordan v United Kingdom* (2003) 37 EHRR 2; *McKerr v United Kingdom* (2002) 34 EHRR 20; *McShane v United Kingdom* (2002) 35 EHRR 23.

⁴⁴⁹ The Italian government introduced the Pinto Law to provide compensation for delay in their legal system, although the success of this provision is an ongoing concern see e.g. *Daddi v Italy* (App No 15476/09) ECtHR 2 June 2009.

⁴⁵⁰ Stuart Wallace, 'Much ado about nothing? The pilot judgment procedure at the European Court of Human Rights' [2011] European Human Rights Law Review 71, 76.

⁴⁵¹ European Convention on Human Rights 1950, art 41.

⁴⁵² European Convention on Human Rights 1950, art 35(3)(a).

⁴⁵³ Council of Europe Steering Committee for Human Rights, *Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues* (CDDH (2012) 012) 10.

⁴⁵⁴ For an overview see Ineta Ziemele, 'Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies' (2009) EUI Working Papers AEL 2009/8 <http://cadmus.eui.eu/bitstream/handle/1814/11409/AEL_2009_08.pdf;jsessionid=4EF26887A3D1EF6195D24DFA2C47265D?sequence=1> accessed 18 September 2015.

⁴⁵⁵ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 7.

the scope of their powers, to avoid that risk.⁴⁵⁶ Interestingly there is a series of cases where unlawful killings perpetrated by armed non-State actors/ groups in Turkey triggered the responsibility of the State.⁴⁵⁷ Thus, if the State knew or ought to have known of the risk that a PSC could kill someone, it could be obliged to uphold a positive obligation in these circumstances. While this obligation is inherently variable and subjective, it does generate scope for States to be held vicariously responsible for failing to protect the lives of people against PSC actions within their jurisdiction. Secondly, the positive obligations on the State extend to regulatory duties. Thus, the State must put in place legal measures, including criminal law and enforcement mechanisms, which effectively protect life and discourage wilful or arbitrary deprivations of life and harm.⁴⁵⁸ Furthermore, the State must properly regulate dangerous situations to minimise the risk to people partaking in or affected by them.⁴⁵⁹ In light of these obligations, we can infer an obligation on the State to properly regulate the activities of PSCs at the very least within their home territories and a failure to do so could provide a cause of action for an individual affected by the actions of a PSC, although the caution the ECtHR has exercised in imposing positive obligations in this context has led some commentators to argue such actions would be unlikely.⁴⁶⁰

c) *Extra-Territorial Jurisdiction*

The situation outside the home territory of the contracting State is much less clear. The Convention states that: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.⁴⁶¹ The application of the Convention is contingent upon the State exercising jurisdiction over the applicant. The State's jurisdiction is therefore a threshold criterion, which must be met before the treaty obligations begin to apply.⁴⁶² Jurisdiction is presumed to be exercised within the home territory of the contracting State.⁴⁶³ However, outside the home territory this presumption is absent and jurisdiction must be established on a case-by-case basis. Thus, the extra-territorial context is complicated by doubts over the State's jurisdiction and further by whether there is a link of responsibility to the PSC. Before we discuss these issues further it is important to clarify the

⁴⁵⁶ *Osman v United Kingdom* (2000) 29 EHRR 245 at [116]; *Kontrova v Slovakia* (App No 7510/04) ECtHR 31 May 2007 at [50].

⁴⁵⁷ See, for example, *Yasa v Turkey* (App No 63/1997/847/1054) ECtHR 2 September 1998; *Akkoc v Turkey* (App No 22947/93 and 22948/93) ECtHR 10 October 2000; Ziemele (n 454) 15.

⁴⁵⁸ *Keenan v United Kingdom* (2001) 33 EHRR 38 at [88].

⁴⁵⁹ *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [93].

⁴⁶⁰ Ieva Kalnina and Ugis Zeltins, 'The Impact of the EU Human Rights System on Operations of Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011) 85.

⁴⁶¹ European Convention on Human Rights 1950, art 1.

⁴⁶² *Ilascu and Others v Moldova and Russia* (2005) 40 EHRR 46 at [312]; Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411, 415.

⁴⁶³ *Assanidze v Georgia* (2004) 39 EHRR 32 at [139]; *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18 at [131].

distinction between the State's jurisdiction and State responsibility. The distinction can easily be seen in the Articles on State Responsibility drafted by the International Law Commission, which determine the legal consequences of a failure to fulfil international obligations e.g. treaty obligations. For State responsibility to arise two criteria must be met. The conduct consisting of an action or omission must be (a) attributable to the State under international law and (b) it must constitute a breach of the State's international obligations.⁴⁶⁴ Before a State can breach an obligation, the obligation must first be owed.⁴⁶⁵ In the context of the Convention, this means that the applicant must, generally speaking, be within the State's jurisdiction before attribution is determined and State responsibility held to arise.⁴⁶⁶ Thus, State responsibility may not arise for every act/omission that occurs within a State's jurisdiction. The State may not be held responsible for the acts of private actors, because those acts may not be attributable to it.⁴⁶⁷

One can draw a very basic distinction between two types of extra-territorial jurisdiction, spatial jurisdiction and personal (sometimes referred to as State Agent Authority) jurisdiction. The ECtHR outlined the first type of jurisdiction in the case of *Loizidou v Turkey* where it stated that:

'the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration'.⁴⁶⁸

The personal form of jurisdiction refers to individuals rather than space or territory and arises where: 'authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property'.⁴⁶⁹

Where the State is exercising spatial jurisdiction, the situation is comparable to that in the home territory because 'the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols

⁴⁶⁴ James Crawford, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2 Yearbook of the International Law Commission, 34.

⁴⁶⁵ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 867; Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 130.

⁴⁶⁶ Crawford (n 464) 35; Milanovic (n 462) 437; Occasionally the Court may be required to determine whether the acts of particular soldiers are attributable to the State first before considering the issue of control - Marko Milanovic and Tatjana Papić, 'As bad as it gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law' (2009) 58 International and Comparative Law Quarterly 267, 273.

⁴⁶⁷ James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (3rd edn, OUP 2010) 454.

⁴⁶⁸ *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99 at [62].

⁴⁶⁹ *Cyprus v Turkey* (1982) 4 EHRR 482 at [83]; this has been applied in numerous decisions since such as *Ocalan v Turkey* (Merits) (2005) 41 EHRR 45 at [91]; *Freda v Italy* (App No 8916/80) EComHR 7 October 1980.

which it has ratified'.⁴⁷⁰ This would include positive obligations meaning the State can be held responsible for the actions of third parties, including PSCs. There are many examples in the ECtHR's case law of States being held responsible for a failure to protect an individual from the actions of a company, albeit mostly concerning rights under Article 8 of the Convention.⁴⁷¹ Despite this possibility, the application of positive obligations extra-territorially is far from clear cut. Positive obligations demand that the State take reasonable measures, within the scope of their powers to counteract a situation. This is an inherently variable standard and one which depends on institutional capacity. The very fact that a State is utilising a PSC in a third State may in itself indicate a lack of capacity.⁴⁷²

Where the State is not exercising spatial jurisdiction the issue becomes more complex and requires that the ECtHR examine whether personal jurisdiction exists. The agents of a private company typically do not qualify as State agents under international law. However there are two prospective avenues for State liability for the actions of PSCs to arise in this context, namely the ECtHR's approach to the privatisation of State functions and de facto State agents.⁴⁷³

Where a private enterprise exercises functions which traditionally belonged to the State, the ECtHR has held the States responsible for the exercise of those functions. In *Costello Roberts v UK*, for example, a seven year-old boy was subjected to corporal punishment while attending an independent school and complained that this amounted *inter alia* to inhuman and degrading treatment or punishment. The ECtHR took the view that the State had an obligation to secure the right to education, which at the time included the administration of corporal punishment. It held that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.⁴⁷⁴ The Court went on to conclude that:

'in the present case, which relates to the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with Article 3 or Article 8 or both'.⁴⁷⁵

As PSCs can exercise functions, such as the use of force, which are typically undertaken by the State, there is a clear parallel to be drawn here.⁴⁷⁶

⁴⁷⁰ *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18 at [138].

⁴⁷¹ *Lopez Ostra v Spain* (App No 16798/90) ECtHR 9 December 1994; *Taşkin and Others v Turkey* (App No 46117/99) ECtHR 10 November 2004; *Fadeyeva v Russia* (App No 55723/00) ECtHR 9 June 2005.

⁴⁷² Christine Bakker, 'Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State' in Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011) 132, 139-140.

⁴⁷³ See discussion above in section IV D 2.

⁴⁷⁴ *Costello Roberts v UK* (1995) 19 EHRR 112 at [27].

⁴⁷⁵ *Costello Roberts v UK* (1995) 19 EHRR 112 at [28]; See also *Van der Mussele v Belgium* (App No 8919/80) ECtHR 23 November 1983 and *Ziemele* (n 454) 21-22.

⁴⁷⁶ *Ziemele* (n 454) 25; Joint Committee on Human Rights (n 291) 81.

The agents of PSCs may also qualify as *de facto* State agents in certain circumstances, thereby triggering the responsibility of the State.⁴⁷⁷ The case law on this at the ECtHR is extremely limited, but *Stocke v Germany* offers an illustrative example.⁴⁷⁸ There the applicant, who was a wanted criminal in Germany, alleged that German police had colluded with a police informer to trick him into boarding a plane, which then returned him to Germany where he was arrested. In the European Commission of Human Rights report it stated:

‘In the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to its territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who *de facto* acts on its behalf’.⁴⁷⁹

Thus, the European Commission of Human Rights accepted the possibility that private individuals could become *de facto* State agents and that the State could become liable for their actions under international law. While these examples offer some prospect of the ECtHR linking the State and PSC and holding it responsible for rights violations, there are far too many variables and uncertainties related to jurisdiction for the ECtHR to provide a reliable effective remedy against PSC action, especially in the extra-territorial sphere.

2. Transparency

The transparency of the ECtHR’s application system has been called into question. The overwhelming majority of applications to the ECtHR are rejected at the admissibility stage. In 2015, for example, out of the 45,576 applications disposed of by the ECtHR, 43,135 applications were declared inadmissible or struck out of the list of cases by a single judge, a committee or a chamber.⁴⁸⁰ The process by which the ECtHR rejects applications has been criticised for its lack of transparency. In practice applicants do not receive detailed responses from the court explaining why their applications have been rejected, often the only correspondence the applicant receives is a *pro forma* letter indicating what admissibility criterion has

⁴⁷⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 320.

⁴⁷⁸ *Stocke v Germany* (1991) 13 EHRR CD126.

⁴⁷⁹ *Ibid* at [168].

⁴⁸⁰ European Court of Human Rights, *Analysis of statistics 2015* (Council of Europe, 2016) 6.

been applied to reject their application, *ratione personae*, *ratione loci* etc.⁴⁸¹ Equally the decisions are not made public in any way. This generates problems both of legitimacy and transparency in the ECtHR.⁴⁸²

The majority of the cases are rejected on the grounds that they are ‘manifestly ill founded’,⁴⁸³ an opaque criterion which pertains to a range of different possible deficiencies in the application, such as the absence of sufficient evidence of a violation.⁴⁸⁴ This criterion is not formal, but rather substantive in nature, to the extent that its application requires a *prima facie* assessment to be made of the merits of the case.⁴⁸⁵ The opacity of the criterion creates a danger that it can be used as a tool to control the caseload of the ECtHR.⁴⁸⁶ This risk is arguably amplified by the ECtHR’s heavy reliance on single judge formations to reject applications, where committees of three judges would previously have dealt with inadmissible cases.⁴⁸⁷ In 2015, for example, single judges (aided by non-judicial rapporteurs) decided 36,314 of the cases.⁴⁸⁸ The combination of single judge procedures and the opacity of the manifestly ill-founded criterion give rise to a worrying development. As Gerards points out, a single judge may make a full assessment of the merits of the case and arrive at conclusions as to the reasonableness or proportionality of an interference with a Convention right, without giving any reasons for this and without there being any possibility for reconsideration or appeal.⁴⁸⁹

Admittedly, the ECtHR is overburdened with a plethora of inadmissible applications and it is understandable that they would rather not waste time giving reasons for each of the rejections, which would impose a further burden on the already overwhelmed system. However, while this may serve as an excuse, it cannot serve as a justification and the lack of transparency needs to be addressed if the ECtHR is to provide an effective human rights compliant remedy. It is difficult to reconcile these practices with the right to a fair trial and openness.⁴⁹⁰ As Gerards argues, the strong focus on speed and efficiency bears the risk of loss of quality and transparency of judicial reasoning, which was highlighted when a case rejected by the ECtHR as manifestly ill-founded was accepted by the UN Human Rights Committee.⁴⁹¹ The committee in turn discovered a relatively obvious violation of the investigation obligations related to the

⁴⁸¹ Helen Keller, Andreas Fischer and Daniela Kühne, ‘Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals’ (2010) 21 *European Journal of International Law* 1025, 1046.

⁴⁸² *Ibid* 1043; Ben Jones, ‘European Court of Human Rights: is the admissions system transparent enough?’ (*UK Human Rights Blog*, 27 January 2012) <<http://ukhumanrightsblog.com/2012/01/27/european-court-of-human-rights-is-the-admissions-system-transparent-enough-ben-jones/>> accessed 20 August 2015.

⁴⁸³ Keller, Fischer and Kühne, (n 481) 1043.

⁴⁸⁴ Jones (n 482); Janneke Gerards, ‘Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning’ (2014) 14 *Human Rights Law Review* 148, 156.

⁴⁸⁵ *Ibid* 155.

⁴⁸⁶ Keller, Fischer and Kühne, (n 481) 1046.

⁴⁸⁷ Gerards (n 484) 153.

⁴⁸⁸ European Court of Human Rights, *Analysis of statistics 2015* (Council of Europe, 2016) 4.

⁴⁸⁹ Gerards (n 484) 157.

⁴⁹⁰ *Ibid* 154.

⁴⁹¹ *Ibid* 149.

prohibition of torture and of cruel, inhuman and degrading treatment, which led the committee to criticise the ECtHR's lack of reasoning.⁴⁹²

It seems likely that only a tiny minority of cases will manage to satisfy the admissibility criteria and be accepted by the ECtHR, as PSC cases are likely to encounter significant difficulties at the admissibility stage.

3. Investigation and Fact-Finding

The ECtHR's investigatory and fact-finding capacity has both advantages and drawbacks. Initially the applicant must establish a *prima facie* case before the application will be accepted by the court and not dismissed as manifestly ill founded.⁴⁹³ Once a case is accepted the court has the power to examine witnesses and carry out on-the-spot investigations⁴⁹⁴ – unfortunately this was much more common in the past than it is nowadays.⁴⁹⁵ The court's current case load, the costs of fact-finding missions and potential delays arising from carrying out fact-finding missions have dissuaded the court from carrying out such missions in the recent past.⁴⁹⁶

The ECtHR may request assistance from the parties when it is gathering information, the Convention states that: 'The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities'.⁴⁹⁷ This entails an obligation to submit documentary evidence relating to the case, to identify, locate and ensure the attendance of witnesses, to comment on documents submitted to the Court and to reply to questions posed by the Court.⁴⁹⁸ Where the State fails in this duty it may be held responsible for a violation of Article 38. This obligation may be particularly important in the context of military operations and any possible case against a PSC where information may lie solely in the hands of the State.

The standard of proof demanded by the ECtHR, which is proof beyond reasonable doubt, represents a further barrier to its effectiveness. In the ECtHR's view, a reasonable doubt is 'a doubt for which reasons can be drawn from the facts presented and not a doubt raised on the basis of a mere theoretical possibility or to avoid a disagreeable conclusion'.⁴⁹⁹ The ECtHR points out that this standard is not the same as the

⁴⁹² Ibid 149 and 153.

⁴⁹³ Philip Leach, Costas Paraskeva, Gordana Uzelac, *International Human Rights & Fact-Finding: An Analysis of the Fact-Finding Missions Conducted by the European Commission and Court of Human Rights* (Human Rights & Social Justice Research Institute 2009) 17.

⁴⁹⁴ Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP, 2011) 55.

⁴⁹⁵ Leach, Paraskeva and Uzelac (n 493) 78-79.

⁴⁹⁶ Leach, Paraskeva and Uzelac (n 493) 59.

⁴⁹⁷ European Convention on Human Rights 1950, art 38.

⁴⁹⁸ Leach, Paraskeva and Uzelac (n 493) 13.

⁴⁹⁹ *Shamayev and Others v Georgia and Russia* (App No 36378/02) ECtHR 12 April 2005 at [338].

standard of the same name adopted in criminal trials,⁵⁰⁰ which would be completely unreasonable as the ECtHR is not trying to prove a criminal case.⁵⁰¹ Nonetheless the standard demanded by the ECtHR has been described by many of its own judges as 'inadequate, possibly illogical and even unworkable'.⁵⁰² It is a difficult burden for a single individual applicant, lacking comparable resources to the State, to satisfy.⁵⁰³

Erdal argues that when the ECtHR finds that the burden of proof has not been satisfied in a given case, it offers little guidance as to the nature of the reasonable doubt which prevented the court from being convinced, which compounds the problem for victims.⁵⁰⁴ The ECtHR itself seems to acknowledge the standard is too high when it says situations may arise where the 'rigour of this rule may be mitigated'.⁵⁰⁵ Taqi argues that the ECtHR sometimes relies extensively on circumstantial evidence meaning that two applicants can present virtually identical evidence and end up with opposite results.⁵⁰⁶ This generates the potential for significant inconsistency in the way the ECtHR handles cases. Of course by relying on circumstantial evidence the ECtHR also implicitly applies a lower standard of proof. This practice has prompted Claude to observe that while the ECtHR will not depart from the beyond reasonable doubt standard, 'it is increasingly changing its substance in order to lessen its rigidity and to make it more adequate to the circumstances of particular cases'.⁵⁰⁷ While this is a positive development, the standard of proof demanded by the ECtHR remains a significant stumbling block for many applicants and reduces the effectiveness of the ECtHR as a remedy overall.

4. Speed

⁵⁰⁰ *Nachova v Bulgaria* (2006) 42 EHRR 43 at [166]; *Mathew v Netherlands* (App No 24919/03) ECtHR 29 September 2005 at [156].

⁵⁰¹ Ugur Erdal, 'Burden and Standard of Proof in Proceedings under the European Convention' (2001) 26 European Law Review 68, 76; Irum Taqi, 'Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach' (2000) 24 Fordham International Law Journal 940, 983.

⁵⁰² See the dissenting opinion of 8 judges in the context of in *Labita v Italy* (2008) 46 EHRR 50.

⁵⁰³ Taqi (n 501) 983; Sonja Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer 2010) 126.

⁵⁰⁴ Erdal (n 501) 74-75.

⁵⁰⁵ *Varnava and Ors. v Turkey* (App No 16064/90) ECtHR 18 September 2009 at [182].

⁵⁰⁶ Taqi (n 501) 986, for further criticism of the consistency of the ECtHR's assessment of evidence see Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275, 280-283. The Inter-American organs have little compunction about relying on circumstantial evidence where appropriate, see *Velasquez Rodriguez v Honduras* Series C No 4 IACtHR 29 July 1988 at [124] and *Godínez-Cruz v Honduras* Series C No 8 IACtHR 20 January 1989 at [127].

⁵⁰⁷ Ophella Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' (2010) 5 Intercultural Human Rights Law Review 407, 427.

While the length of time the ECtHR takes to process a given application will vary depending on the type of case, the ECtHR endeavours to deal with cases within three years after they are brought.⁵⁰⁸ The Court has a filtering system in place to sift through cases and place them on the correct procedural track.⁵⁰⁹ It also has a priority system in place, which ensures that the most pressing cases are dealt with as swiftly as possible.⁵¹⁰ It is likely that any case concerning the actions of a PSC, which makes it past initial admissibility hurdles, will be extremely complex and raise fundamentally novel issues for the court, placing it higher in the order of priority.⁵¹¹ However, the complexity of the issues involved and the fact that it may need to be heard by a Grand Chamber of the ECtHR could mean it takes longer to deal with. The fact that the case will already have had to exhaust domestic remedies before coming to the ECtHR and that the ECtHR may take a long time to deal with it means that the ECtHR is unlikely to provide a sufficiently expeditious remedy to victims for the purposes of human rights law.

5. Redress

The remedial regime at the ECtHR is perhaps its strongest attribute. It aims to ensure that any violations have ceased and that the injured party is put, as far as possible, in the same situation as they enjoyed prior to the violation.⁵¹² While discretion is often left to the contracting State as to how it can remedy a violation, there is scope for the court to issue specific recommendations on how to remedy a violation in certain circumstances.⁵¹³ Furthermore, the court can order a State that has violated the Convention to pay just satisfaction to the applicant.⁵¹⁴

The ECtHR also has the capacity to issue interim relief under Rule 39 of the Rules of Court. Interim measures are defined in the Rules of Court as: ‘any measure which the Court considers should be adopted by the parties to a case before the Court’.⁵¹⁵ They are designed to maintain the *status quo* between parties to a case pending a determination of the merits of a case by the ECtHR. These measures are most commonly used in the context of expulsions from the contracting State’s territory, whether via

⁵⁰⁸ European Court of Human Rights ‘The ECHR in 50 Questions’ (ECHR, February 2014) <http://www.echr.coe.int/Documents/50Questions_ENG.pdf> accessed 18 September 2015.

⁵⁰⁹ European Court of Human Rights, ‘Filtering Section speeds up processing of cases from highest case-count countries’ (ECHR, 2011) <http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf> accessed 18 September 2015.

⁵¹⁰ European Court of Human Rights, ‘The Court’s Priority Policy’ (ECHR, 2010) <http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf> accessed 18 September 2015.

⁵¹¹ Such a case would likely fall into priority category 2 or 3, which pertain to important questions of general interest and so called core rights cases under articles 2, 3, 4, and 5(1).

⁵¹² Committee of Ministers of the Council of Europe, ‘Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements’ (adopted by the Committee of Ministers on 10 May 2006) Rule 6(2).

⁵¹³ See *Hutten-Czapska v Poland* (2007) 45 EHRR 4 at [239] and *Broniowski v Poland* (2005) 40 EHRR 21 at [194].

⁵¹⁴ European Convention on Human Rights 1950, art 41.

⁵¹⁵ Rules of Court of the European Court of Human Rights 2010, Rule 39.

deportation, extradition or detainee transfer.⁵¹⁶ The relevance of these to PSC complaints will be limited, but they could potentially be used to prevent transfers of individuals from PSC-run premises to other jurisdictions or to prevent PSCs transporting people outside the jurisdiction of the State because of human rights concerns, which could relate to the actions of PSC guards.⁵¹⁷

The judgments of the ECtHR are binding on the contracting States,⁵¹⁸ and enforcement of the European Court of Human Rights' decisions is supervised by a specific body in the Council of Europe known as the Committee of Ministers. The Committee monitors whether just satisfaction has been paid, individual measures demanded by the ECtHR have been complied with and any general measures aimed at preventing new violations or putting an end to continuing violations have been put in place.⁵¹⁹ The Convention also features further measures aimed at ensuring the compliance with the judgments. The Committee of Ministers can refer any issues they have with interpretation of judgments back to the ECtHR for further guidance and where the Committee has doubts about whether a State has complied with a judgment it may refer the matter to the ECtHR to evaluate.⁵²⁰

The ECtHR does not have an appellate structure as such. There is scope for the ECtHR to refer judgments to a Grand Chamber of the court, which comprises seventeen judges rather than the usual seven in a normal chamber. Either the applicant or the State can request a referral to the Grand Chamber within three months of the judgment. The Grand Chamber can, in turn, arrive at a different decision to the chamber that first rendered the judgment. However there are a number of limitations to this system. Firstly, in order to be accepted the case must raise important interpretative issues or questions of general importance and secondly, this process is only available for judgments of the court and not admissibility decisions,⁵²¹ although the ECtHR has been known to reinstate cases that have been struck off the list on very rare occasions.⁵²² In light of our conclusion above that any possible cases against PSCs will struggle to get past the admissibility stage at the ECtHR, the possibility of referral to a Grand Chamber will be of limited utility.

⁵¹⁶ See, for example, *Cruz Varas and Ors. v Sweden* (App No 15576/89) ECtHR 20 March 1991; *Soering v United Kingdom* (1989) 11 EHRR 439; *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE11.

⁵¹⁷ BBC News, 'G4S guards cleared over Jimmy Mubenga death' (BBC, 16 December 2014) <<http://www.bbc.co.uk/news/uk-england-30494548>> accessed 18 September 2015.

⁵¹⁸ European Convention on Human Rights 1950, art 46(1).

⁵¹⁹ Committee of Ministers of the Council of Europe, 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' (adopted by the Committee of Ministers on 10 May 2006) Rule 6(2).

⁵²⁰ European Convention on Human Rights 1950, art 46(3) and 46(4).

⁵²¹ *Gerards* (n 484) 156; European Convention on Human Rights 1950, art 43.

⁵²² *Paladi v Moldova* (App No 39806/05) ECtHR 10 March 2009.

6. Preliminary Findings

The ECtHR is the pre-eminent human rights court in Europe, it has a high level of compliance with its rulings among contracting States and a robust enforcement system. However, it is of limited utility in providing an effective remedy for human rights violations perpetrated by PSCs. As applications can only be made against States and not PSCs themselves, it will be challenging to hold States vicariously responsible for the actions of PSCs or for their failure to properly regulate the actions of PSCs. When this challenge is added to the difficulty of establishing the extra-territorial application of the Convention, the problem becomes even more acute. This prompted the Council of Europe, the inter-governmental body which oversees the ECtHR, to recommend the introduction of a new Council of Europe treaty for PSCs.⁵²³ While the Parliamentary Assembly of the Council of Europe proposed that the Committee of Ministers should look at the feasibility of elaborating a complementary legal instrument, such as a convention or an additional protocol to the European Convention on Human Rights for business and human rights violations.⁵²⁴ However, these proposed changes are yet to turn into concrete actions and if the ECtHR does have an impact in this field it is likely to come in the form of improving the remedies available to victims of human rights violations which have been perpetrated by PSCs.

⁵²³ Council of Europe Parliamentary Assembly, 'Recommendation 1858 on Private military and security firms and the erosion of the state monopoly on the use of force' (adopted on 29 January 2009) at [12].

⁵²⁴ Council of Europe Steering Committee for Human Rights, *Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues* (CDDH (2012) 012) 17.

VI. Conclusion

This case study has revealed that there is no panacea when it comes to providing remedies for human rights abuses perpetrated by Private Security Companies. Instead at the operational, national and international levels we have an interwoven tapestry of remedies, each with its own benefits and drawbacks. This dense thicket of remedies is not conducive to providing effective remedies or a clear path for victims to seek redress when they suffer human rights abuses at the hands of a PSC.

At the outset, the UNGPs cited effective judicial mechanisms as the core of the remedial structure for business and human rights generally. However, the foregoing analysis of judicial mechanisms at both national and international level revealed a number of issues, which impacted upon their effectiveness. The study revealed, in particular, that there were severe issues with the accessibility of these remedies. At the ECtHR, the admissibility criteria and the jurisprudence governing extra-territorial jurisdiction create the narrowest of windows through which applications could pass. While the UK judicial system, notwithstanding its powerful options for redress and record of compliance, provided a less effective remedial avenue because it was extremely costly and time-consuming to litigate cases in the UK courts. Overall, these avenues seemed ill-suited to provide human rights remedies to victims of human rights abuses perpetrated by PSCs.

The non-judicial remedies were problematic in different ways. In principle, these remedies offered a much more accessible avenue for redress than the costly and time consuming judicial remedies. In practice, however, the remedies were less than effective. At the national level, the NCP system of remedies generated very inconsistent results. Many NCPs suffered from a lack of independence, which undermined their effectiveness. Furthermore, the mechanisms for redress available to the NCPs left a lot to be desired. The NCPs had limited options where the parties to a specific instance refused to co-operate or engage with the process and even where a final statement was issued and plan of remedy agreed between the parties, there was little follow up from the NCPs to ensure that the agreements were implemented. At the international level, the ICoCA is a promising prospect for remedy, but it is perhaps too early in its lifetime to accurately assess its effectiveness. The ICoCA will need time to bed down and flesh out its operating procedures before we can properly judge whether it will provide an accessible remedy to victims of human rights abuses.

Finally, the operational level grievance mechanism analysed in this report had a surprising level of sophistication. The compliance structure established under the PSC 1 standard seemed to be very deeply embedded in the organisation and the standard seems to be as much about engineering a robust corporate compliance structure as it is about guaranteeing human rights protection. The operational level remedy had a great deal to commend it, not least its ability to transcend jurisdictions and of the remedies analysed here it arguably comes closest to providing an effective remedy. At the same time, there are genuine concerns over the transparency of the remedial structure, which may again depend on further developments at the ICoCA to resolve.

The problem of holding non-State actors responsible for human rights abuses remains an ongoing concern for the global political and legal agenda. While the international community has been broadly receptive to the messages of John Ruggie and others, the third pillar remains sorely neglected and in need of serious building work. The analysis of PSC regulation and remedies here has illustrated the variety of problems, from operational-level through to international level, which victims can experience in trying to have their grievances dealt with in a fair and transparent manner.

This sector sits at a very uneasy juncture in the field of business and human rights. The right to an effective remedy in business and human rights is already weak and the PSC sector in particular is not well regulated. The EU, for its part, is increasingly utilising PSCs in its crisis management operations, including common security and defence policy missions.⁵²⁵ It should utilise its role as a supra-national actor and consumer of PSC services to improve the regulation of this sector and the remedies on offer. The EU can do a great deal more than it currently is doing to ameliorate the problems identified in this case study.

Firstly, as was noted above, the EU should act upon the recommendations arising from the PRIV WAR project.⁵²⁶ The PRIV WAR project offered a number of possible options for EU action in this field from introducing a Directive harmonising national measures regulating PSCs to non-legally binding instruments like a Council recommendation with guidelines for MSs on domestic regulation of PSC services or a Council Strategy Document with guidelines on the export of private security services to third States. The EU could also take action to improve access to legal services across the EU and improve the accessibility of EU MSs judicial systems to claims of violations of IHRL by businesses. EU legislation on conflict of laws has already made significant improvements in this field.

Secondly, if the EU is committed to supporting the ICoC and the ICoCA, it should take a number of decisive actions to support it. The EU should encourage EU-based PSCs to join the ICoC and make an express commitment to only contract with PSCs that abide by the conditions of the ICoC as others, such as the UK and US, have already done. It could also incorporate meaningful human rights conditions into its contracts with PSCs that are not mere 'tick the box' exercises. The EU should also actively encourage the 26 EU MSs that have not yet become members of the ICoCA to join the body, this would go some way toward balancing the membership of ICoCA, which is currently skewed toward PSCs. As an active member of the ICoCA advisory board it should also use its influence to improve transparency among the members of the ICoC, in particular by opposing the adoption of stringent confidentiality and disclosure rules.

Thirdly, the EU could make greater use of its role in other international organisations such as the UN and the OECD. The EU should engage with the UN Office of the High Commissioner for Human Rights' Accountability and Remedy Project, which aims to bolster the third pillar of the UNGPs. The EU should

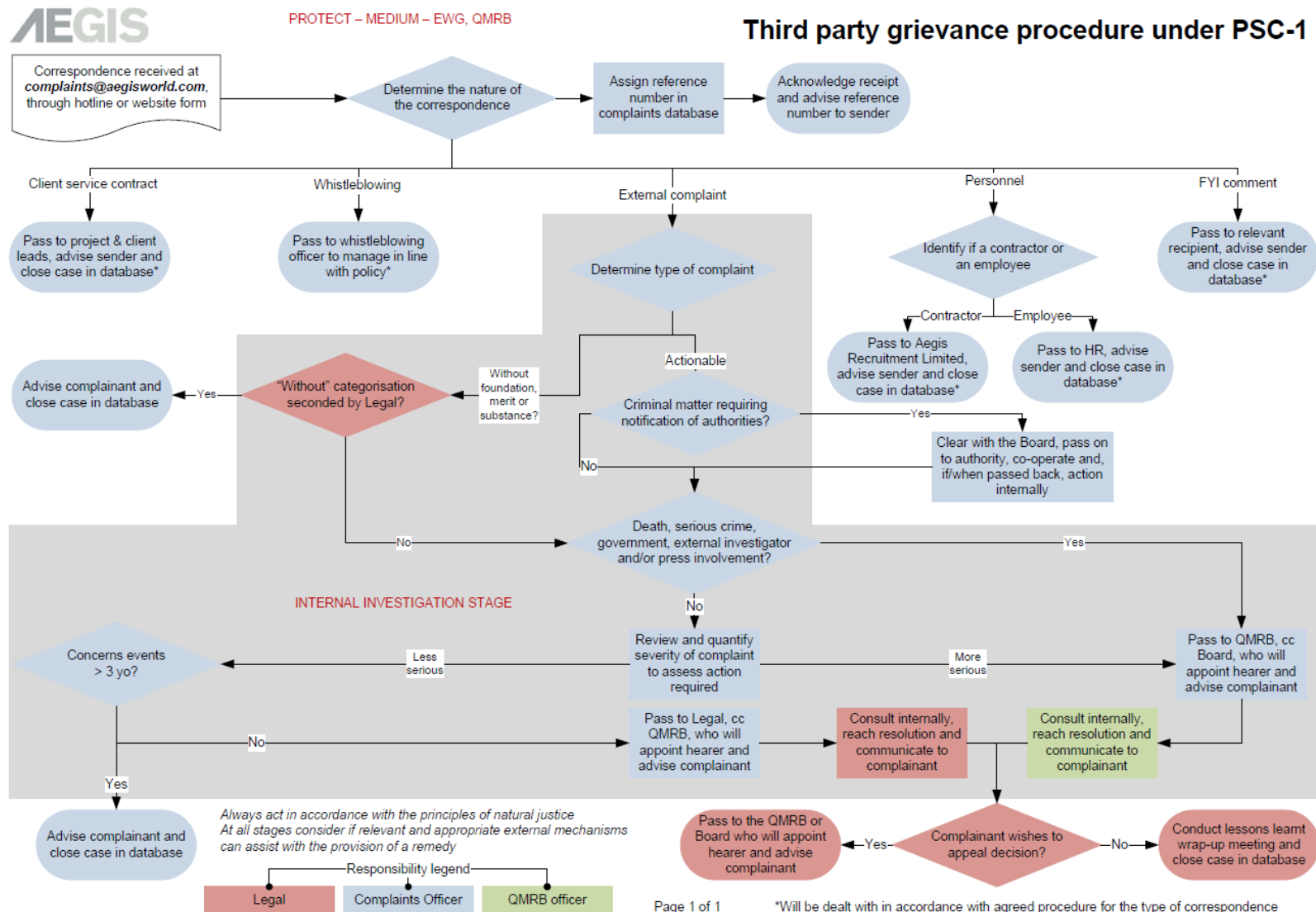
⁵²⁵ Jochen Rehl and Galia Glume (eds), *Handbook on CSDP Missions and Operations The Common Security and Defence Policy of the European Union* (Directorate for Security Policy of the Federal Ministry of Defence and Sports of the Republic of Austria 2015) 200.

⁵²⁶ See section I C.

encourage MSs to engage with this project and abide by its outcomes.⁵²⁷ While at the OECD, the EU should work to improve the NCP system. It should encourage greater co-operation between the EU members that are also members of the OECD, support and encourage capacity building in NCPs and promote their independence more generally. While the problems are clear, the solutions are less clear cut, but the EU has a great deal of capacity to improve the situation on both the national and international levels.

⁵²⁷ UN Office of the High Commissioner for Human Rights, 'OHCHR programme of work to enhance accountability and access to remedy in cases of business involvement in human rights abuses' <<http://www.ohchr.org/EN/Issues/Business/Pages/OverviewOfProjects.aspx>> accessed 10 February 2016.

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