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**The Role of Private Military Security Companies in the New  
Generation of UN Peacekeeping Missions**

Master Thesis in International Law

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## List of abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
CambUP	Cambridge University Press
CJInt'lL	Chicago Journal of International Law
ColumJTransnat'lL	Columbia Journal of Transnational Law
CUP	Cornell University Press
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DDR	Disarmament, Demobilization and Reintegration
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
EO	Executive Outcome
FMA	Foreign Military Assistance Act
FPIF	Foreign Policy in Focus
GJIL	Georgetown Journal of International Law
GPOI	Global Peace Operations Initiative
IHL	International Humanitarian Law
IHRL	International Human Rights Law
Int'IP	International Peacekeeping
Int'IRRC	International Review of the Red Cross
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
ICI	International Charter Incorporated of Oregon
ICJ	International Court of Justice
ICoC	International Code of Conduct
ICoCA	International Code of Conduct Association
ICRC	International Committee of the Red Cross
IPOA	International Peace Operations Association
ISOA	International Stability Operations Associations
ITAR	International Traffic in Arms Regulation
JCSL	Journal of Conflict and Security law
JMAS	Journal of Modern African Studies
MONUC	UN Organization Mission in the Democratic Republic of the Congo
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of the Congo
MPRI	Military Professional Resources Inc.
NGO	Non-governmental Organization
NIAC	Non International Armed Conflict
Notre-DameJInt'l&CL	Notre-Dame Journal of International & Comparative Law
NwJInt'lHR	Northwestern Journal of International Human Rights
NYUJInt'lL&P	New York University Journal of International Law and Politics
ODS	Oxford Development Studies
ONUC	UN Operation in the Congo
OUP	Oxford University Press
PAE	Pacific Architects and Engineers
P&Int'IR	Peacekeeping & International Relations
PMC	Private Military Company
PMSC	Private Military Security Companies

PR	Policy Review
RevAPE	Review of African Political Economy
SInt'IJSD	Stability: International Journal of Security and Development
SOFA	Status of Forces Agreement
SSR	Security Sector Reform
StanJInt'lL	Stanford Journal of International Law
UK	United Kingdoms
UN	United Nations
UNDP	UN Development Program
UNDPKO	UN Department of Peacekeeping Operations
UNDSS	UN Department of Safety and Security
UNEF	UN Emergency Force
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNMIL	UN Mission in Liberia
UNMOGIP	UN Military Observer Group in India and Pakistan
UNOPS	UN Office for Project Services
UNPROFOR	UN Protection Force
UNSC	UN Security Council
UNTSO	UN Truce Supervision Organization
USD	United States Dollar
WFP	UN World Food Program
TCC	Troop Contributing Country
TWQ	Third World Quarterly
YbKInt'IHL	Yearbook of International humanitarian law

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Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Reports 2004

Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) ICJ Reports 1986

Prosecutor v Aleksovski (Judgement) ICTY-IT-95-14/1-T (25 June 1999)

Prosecutor v Kayshema and Ruzindana (Judgement) ICTR-95-1-T (21 May 1999)

Reparations for injuries suffered in the service of the United Nations (Advisory Opinion) ICJ Reports 1949, 149

Tadic case (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Judicial Reports 1994-1995 ILR 105 (1997)

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ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31

ICRC, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85

ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135 (Third Geneva Convention)

ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287

ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV E.1

Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363

Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica (22 November 1969)

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter") (27 June 1981) CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982)

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950) ETS 5



## **Introduction**

In recent years, the United Nations has been urged by several influential Member States to carry out its programs in high-risk environments. In light of the security challenges that these new circumstances have created, the UN has undergone a shift in its operations, bending the traditional concept of peacekeeping mission towards a more robust approach, involving the proactive use of force in defense of the mandate rather than the mere defensive posture. As part of these “hard measures”, the UN has increasingly expanded its relationship with the business sector. In the last decade, Private Military and Security Companies (PMSCs) provided a high number of services to UN missions around the globe, from the protection of personnel and buildings to escorting relief-convoys, demining operations and personnel training. Today, the private military and security industry is increasingly involved in the core business of peacekeeping operations and is eager to further expand its contribution. One of the most recent proposals in this sense has been that the UN should evaluate the potential use of PMSCs to serve as UN Rapid-Reaction Force. This paper will examine this proposition by analysing the legal and regulatory framework governing PMSCs’ conduct when operating within the context of peacekeeping operations, by assessing and establishing the critical areas, and subsequently by identifying the decisions that the UN would have to take in order to ensure that the RRF operates under the highest possible standards. After having outlined the path that brought to the current transnational private security industry, this paper examines the evolution of UN Peacekeeping operations and the role that PMSCs have played along this way. The second part focuses on the current multi-layered legal and regulatory framework, including with regard to PMSCs’ activities within peace operations and identifies the shortcomings that imperatively need to be addressed. Moreover, the third part addresses the situation of the Rapid Reaction Force, analyzing the necessary steps that the United Nations would have to follow in order to guarantee that the private Rapid Reaction Force would be held accountable in case of their infringement of international law provisions. Lastly, in the conclusion the challenges and benefits of the RRF will be reviewed in light of the political implications involved.

## Part I: PMSCs' use by the United Nations

### A. The rise of PMSCs: from archers and slingers to modern transnational companies

The state's monopoly over violence is the exception in world history, rather than the rule,<sup>1</sup> and private armed groups have fought wars or supplemented regular armies for as long as there have been war and insecurity. In fact, the first documented reference of mercenaries takes us back to the reign of King Schulgi of Ur (ca 2094–2047 BC) in Mesopotamia, when outside fighters were **paid** to serve in its army.<sup>2</sup> Hiring private soldiers was a general practice among Greek city-states as well, that used to recruit not only specialized warriors, but also entire naval units.<sup>3</sup> Centuries later, hired troops filled some voids characteristic of the feudalism system, the backbone Europe's middle age. To engage in a military campaign, feudal overlords had to resort to their vassals, which were obliged to provide troops for a limited period of time. To avoid mobilizing their subjects and thereby lose the necessary workforce and money, the vassals were given the chance to pay a tribute to the overlord who could then use it to bring in private soldiers.<sup>4</sup> As a consequence, any medieval army had in its ranks private soldiers and the market for hired soldiers grew considerably. Mercenaries began to organize themselves in groups composed of skilled warriors, forming the first military organizations, named "free companies", that rented themselves to the highest bidder.<sup>5</sup> These companies evolved into permanent military organizations, engaged with more and more complex and detailed contracts and soon became massively powerful. When the King of France fought against them in 1362, his feudal army was overwhelmed and he lost the battle. In 1445, King Charles VII succeeded in reaching consensus among the bourgeois class and hired some of the companies to defeat the others ones present in the territory.<sup>6</sup> At the end of its endeavour, instead of ending its contracts, the King kept the companies on his payroll, establishing the first standing army in Europe since centuries.<sup>7</sup> After the Swiss Cantons united themselves into a country in 1291, the Swiss mercenaries became a kind of national industry consisted of men hiring out their services to the most disparate parties throughout Europe. The Swiss mercenaries gained soon an excellent reputation in Europe and fought in many battles for centuries to come. In addition, a contingent of

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<sup>1</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 19.

<sup>2</sup> Ibid 20.

<sup>3</sup> Ibid 21.

<sup>4</sup> Ibid 22.

<sup>5</sup> Ibid 24.

<sup>6</sup> Ibid 26.

<sup>7</sup> Ibid.

Swiss mercenaries began serving the Pope in the 14<sup>th</sup> century and it is currently the only remaining Swiss mercenary troop in the world.<sup>8</sup> During the 17<sup>th</sup> century, the European military sector was dominated by entrepreneurs providing forces to governments or rulers who needed them in exchange for immense remunerations. At the beginning of the 19<sup>th</sup> century, the French Revolution and then the Napoleonic wars concluded the period in which the “free companies” played an important role in conflicts and war.<sup>9</sup> Regular troops guided by national interests rather than driven by money became the rule and in the following centuries mercenaries were an exception. Still, the latter found a market in performing their services towards private companies, two of which – the English East India Company and the Dutch East India Company – used to employ private soldiers to protect their businesses around the globe.<sup>10</sup> These businesses were operative in extremely unstable geopolitical contexts, i.e. in countries with very weak or even without government and had therefore to resort to private soldiers to ensure the protection of their outposts.<sup>11</sup> However, from the end of the 19<sup>th</sup> century and throughout the two world wars, private soldiers did not play a pivotal role in the conflicts. The Westphalian state-centered system had prevailed and international norms against mercenaries began to emerge. Once predominant players, by the 20<sup>th</sup> century the free companies had largely disappeared. In their place, ex-soldiers were hired individually and once again the foremost figure of the private military market.<sup>12</sup> In fact, despite the steady decline of free companies, the conflicts deriving from both cold war and decolonisation reignited the use of individuals acting as mercenaries. Private armed contractors were ideal partners for the two superpowers, which engaged them for their proxy wars in Asia, South America and Africa. In addition, they were particularly suitable for both the pursuit of the interests of large multinational corporations keen on exploiting natural resources in Africa and the European states’ wish to maintain their influence in the countries that were once under their control.<sup>13</sup>

In the last couple of decades however, and in particular after the end of the Cold War, the world has experienced the evolution of a new phenomenon: the birth of a veritable industry that makes use of the capitalistic logic to fill the security vacuums that the States do or do not want to face. The essential difference of the new era as compared to the mercenaries of the 20<sup>th</sup> century is the corporatization of military services. To explain the development of the private military and security industry two fundamental changes that occurred in the second part of the last century have to be borne in mind: the emergence of “new wars” and the transfer of assets and services from the public

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<sup>8</sup> Ibid 26–27.

<sup>9</sup> Ibid 29–30.

<sup>10</sup> Ibid 35.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 37.

<sup>13</sup> Ibid.

sector to the competitive markets of the private sector.<sup>14</sup> While the end of the cold war surely is at the heart of PMSCs' emergence, it served primarily as a catalyst for these long-term trends that supported the transfer of military services from the public to private entities.

Significant shifts in the international security environment led into the development of a new type of war, characterized by low intensity and asymmetric conflicts. "New Wars"<sup>15</sup> are marked by an unprecedented technological advancement and by the fact that States are no longer the only actors holding the monopoly over both war violence and the use of force. Contemporary conflicts involve a network of states and non-state actors, such as regular armed forces, terrorists, warlords, armed groups and, indeed, PMSCs.<sup>16</sup> Technological advances have played a compelling role in shaping the contemporary conflicts and were material to the emergence of PMSCs. The increasing complexity of modern warfare has required appropriate responses that the private sector has been eager to provide. Although the means employed on the battlefield have always evolved in the course of the centuries, never before has humanity experienced such a transformation as the one we have seen since the end of the cold war. The level of technology that is being used by national armies and private actors today has reached such a level of complexity that regular armies often do not possess the technical capabilities to design and manufacture the weapons that the private sector, in contrast, is able to acquire, develop and maintain. In fact, private corporations offer modern war equipment in packages that include maintenance, training and sometimes even private personnel actually operating the product, such as in the case of drone operations.<sup>17</sup> In other words, at times the soldiers simply do not possess the skills needed to maintain or to merely handle the weapons.

In conjunction with the above-mentioned transformations of the way that war is conducted, the last decades of the 20<sup>th</sup> century were characterized by a gradual shift towards the belief in the superiority of the marketplace in addressing the needs of the state.<sup>18</sup> The vigorous programme of denationalization and privatization that the Thatcher government undertook in the UK in the 1980s and the failures of command economies in the Soviet bloc led the world into a new era in which many countries around the globe followed the British example.<sup>19</sup> The global trend to outsourcing also appeared in the security sector. The state abandoned some of the previously "untouchable areas", among which the guarantee of security and protection, not only at a domestic level, but also in its foreign efforts. In order to preserve their national defense manufacturing industries that were

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<sup>14</sup> Ibid 49.

<sup>15</sup> M Kaldor, 'In Defence of New Wars' (2013) 2(1) *SInt'lJSD* 1.

<[http://eprints.lse.ac.uk/49500/1/\\_lse.ac.uk\\_storage\\_LIBRARY\\_Secondary\\_libfile\\_shared\\_repository\\_Content\\_Kaldor\\_M\\_Kaldor\\_Defence\\_new\\_wars\\_2013\\_Kaldor\\_Defence\\_new\\_wars\\_2013.pdf](http://eprints.lse.ac.uk/49500/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Kaldor_M_Kaldor_Defence_new_wars_2013_Kaldor_Defence_new_wars_2013.pdf)>

<sup>16</sup> Ibid 2.

<sup>17</sup> See for example the case of Selex ES at Part I.D.3 of this paper.

<sup>18</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 66.

<sup>19</sup> Ibid 67.

under threat because of the escalating costs of research and development, numerous countries decided to undertake the path of denationalization and sold them to private corporations.

The decrease in national armies' defense budgets and the widespread demilitarization that followed the dismantling of the Soviet Union and the end of the Cold war flooded the market with trained military professionals and cheap military equipment. An excessive amount of military material was sold across the world to everyone – not only states – who could afford it: warlords, armed militias and PMSCs. The oversupply of dislocated military skilled labour created a cheap and wide offer for the private sector to choose from. It should moreover be underlined that simple soldiers were not the only actors left jobless, but officers and Special Forces kept company with them.<sup>20</sup> In addition, the end of the bipolarity that had dominated the world since the end of the Second World War wiped out the global order that had once been determined by the two superpowers and left several states once in the sphere of influence of the US and the Soviet Union without any support. The outcome is the striking weakness of a number of countries in the developing world. Large parts of the territory of some states have never been truly under government control and in others the political authority is the principal source of the instability.<sup>21</sup> Weak states that were already lacking stable political structures became increasingly incapable of governing their territories and resorted to PMSCs, which offered fast and effective solutions to their security concerns.

All of these factors, if taken together, created an environment in which PMSCs could thrive, leading them towards great deals and success and resulting in a global, multi-billion dollar industry

## **B. Defining private military and security companies**

Private Military and Security Companies are often referred to as employers of “modern mercenaries” or “mercenary firms”, composed of bullies and associated with human rights violations.<sup>22</sup> By contrast, the private military and security industry has sometimes availed itself of euphemistic labels such as “security and risk management companies” or “risk mitigation companies”.<sup>23</sup> These depictions of PMSCs either as evil corporations or as harmless services providers are both inaccurate and fallacious and stand in the way of an informed discussion on the use of the private sector in the battlefield, how to regulate its operations and on the spectrum of its

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<sup>20</sup> Ibid 53.

<sup>21</sup> Ibid 55.

<sup>22</sup> José L. Gómez del Prado, ‘A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors’ (2011) 1 *Notre-DameJInt'l&CL* 1, 4.

<sup>23</sup> See for example G4S Website <<https://www.specialisttraining.g4s.com/training-courses/course-outline/risk-management/>> accessed 4 December 2016.

impact. The industry is heterogeneous and comprises large transnational companies selling their services all around the globe that are often in the center of media attention and smaller firms that operate locally and tend to be unnoticed. The companies perform a wide array of services on behalf of their clients, such as (armed and unarmed) guarding, VIP protection, security training, risk assessments, transportation as well as logistical services. The activities that the companies provide, rather than the actor conducting them, have been in the focus of the classification efforts in recent years. The 2008 Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflicts, created on an initiative of the Swiss Government and the ICRC, reiterates international law standards applicable to PMSCs and identifies PMSCs as “private business entities that provide military and/or security services, irrespective of how they identify themselves”.<sup>24</sup> A similar approach is taken by another initiative, aimed as well at enhancing regulation of the industry: the International Code of Conduct for Private Security Providers (ICoC) focussing, however, on private security companies (PSCs) providing security – non military – services.<sup>25</sup> When referring to its own contracting, the United Nations tends to avoid the term PMSCs, too, and resort to the less threatening PSC, leaving out the “military” part. Opposing this trend was the UN Working Group on the Use of Mercenaries by adopting the definition of PMSCs rather than PSC in the context of its discussion as to the use of private security by the UN.<sup>26</sup> The terminology used by the rest of the UN, while convenient for the Organization, that would like to soften the military aspect of the companies that are regularly contracted, fail to grasp the broad scope of services that these private companies offer to the market. Delineating the boundaries between military companies and security companies is a tough task as the businesses are usually conglomerates offering security in addition to military services. Therefore, in accordance with the interpretation of the UN Working Group and the Montreux Document, for the purpose of this work the term PMSC will identify a private corporate entity, able to provide a broad spectrum of both security and military activities, including direct combat.

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<sup>24</sup> ‘The 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) Preamble (9.a) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>25</sup> International Code of Conduct for Private Security Services Providers (9 November 2010) (ICoC) Definitions: ‘Private Security Companies and Private Security Services Providers’.

<sup>26</sup> See for example United Nations General Assembly (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’ (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338.

### C. Current use of PMSCs in UN peacekeeping operations

Several calls of influential member states to carry out programmes in high-risk environments led the United Nations to adopt a new strategic vision in 2010.<sup>27</sup> In order to support the delivery of UN mandated programmes and activities in these challenging situations, this involved, inter alia, a shift in the Organization's security management policy from a "when-to-leave" to a "how-to-stay" approach.<sup>28</sup> Unfortunately however, this shift and the resulting numerous attacks suffered by the UN were not followed by the necessary efforts by Member States to provide for the security of UN personnel and assets on the field.<sup>29</sup> Therefore, the UN has seen itself forced to resort to other partners to mitigate these risks: Private Security and Military Companies.

In order to provide security for its premises, personnel, property and activities, the UN bases its security arrangements on two principles: first, the host government's responsibility to ensure the safety of UN operations, and second the unified and decentralised security management system of the Organization.<sup>30</sup> Pursuant to the 1994 Convention of the Safety of UN and Associated Personnel,<sup>31</sup> signatory states are obliged to prevent attacks on UN peacekeeping staff and to investigate in case that such attacks take place while under the 2005 Optional Protocol,<sup>32</sup> this responsibility is further extended to include all other UN operations. Unfortunately, many States in which the peacekeepers are dispatched are neither part to the Convention, nor to the Protocol<sup>33</sup> and even if they were, because of their unstable context and weak governmental structures, they are likely to prove incapable of meeting the stringent security requirements that the UN is imposing. After the attacks on the UN headquarters in the Canal Hotel in Baghdad in 2003, the Secretary-General established an independent panel of experts to conduct an assessment of the UN security management system in Iraq.<sup>34</sup> The concluding report pointed out a general lack of observance and implementation of the relevant security regulations and procedures and concluded that the current

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<sup>27</sup> UNGA 'Safety and Security of United Nations and associated personnel: Report of the Secretary-General' (3 September 2010) UN Doc A/65/344, 2.

<sup>28</sup> Ibid; see further 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338, 4.

<sup>29</sup> Ibid. 4–5.

<sup>30</sup> See UN Independent Panel on the Safety and Security of UN Personnel in Iraq, 'Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq' (20 October 2003) 3.

<sup>31</sup> Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363.

<sup>32</sup> UNGA 'Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel' (6 January 2006) UN Doc A/Res/60/42.

<sup>33</sup> Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (SSR Paper 3, DCAF, Geneva 2011) 21.

<sup>34</sup> See UN Independent Panel on the Safety and Security of UN Personnel in Iraq, 'Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq' (20 October 2003) 1.

security management system was dysfunctional, thereby suggesting an urgent reform.<sup>35</sup> As a result, in 2005 the UN established the new Department of Safety and Security (DSS), representing today the second pillar of the security arrangements of the UN. However, both principles have proved to be difficult in their application,<sup>36</sup> and the UN had to consistently resort to external security in order to compensate these shortcomings.

The extent of PMSCs' employment by the UN has been the object of speculation for a long time. The Organization has been reluctant in sharing information on the issue until 2012, when for the first time the Secretary-General presented a report to the General Assembly on the UN use of private security.<sup>37</sup> Starting 2012, a number of other documents have been published, allowing the public to understand the size of UN's contracting activity with PMSCs. According to the information published by the Organization and several independent reports, PMSCs are being routinely employed by several offices, programmes, divisions and departments of the UN. Currently, the largest UN agency clients of PMSCs include the Children's fund (UNICEF), the World Food Program (WFP), the High Commissioner for Refugees (UNHCR), the UN Development Program (UNDP) and the UN Procurement Division, which contracts their services for all peacekeeping missions.<sup>38</sup> Peacekeeping operations, together with UN special political missions, employed over 5'000 armed guards in 2012, for some USD 40 Mio worth of contracts according to the Report of the Advisory Committee on Administrative and Budgetary Questions.<sup>39</sup> Despite having brought some new information that was very welcomed, the Report still failed to assess the full extent of PMSCs' involvement in peace operations, because it reported only private companies employed directly by the missions themselves. In fact, besides being contracted directly by the Organization, PMSCs are being deployed within UN operations indirectly, notably hired by Member States: the personnel that composes the US contingent of UN civilian police for example is entirely made up by private contractors.<sup>40</sup> In addition, PMSCs can also provide their services pursuant to a UN request but their remuneration is paid Member States: in Iraq, senior UN officials were protected by private contractors of Aegis and Global Risk, though allegedly paid by Member

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<sup>35</sup> Ibid Executive Summary.

<sup>36</sup> Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (SSR Paper 3, DCAF, Geneva 2011) 22.

<sup>37</sup> UNGA 'Report of the Secretary-General: Use of Private Security' (22 October 2012) 67<sup>th</sup> Session, UN Doc A/67/539.

<sup>38</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 45–46.

<sup>39</sup> UNGA 'Report of the Advisory Committee on Administrative and Budgetary Questions' (7 December 2012) 67<sup>th</sup> Session, UN Doc A/67/624, Annex I and Annex II.

<sup>40</sup> Interestingly, till 2004 every US police officers taking part in the UN Civilian Police programme was provided by a single company, DynCorp International. See Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 7.



States.<sup>41</sup> Finally, PMSCs can also be involved in UN operations by means of subcontracting. In this case, private contractors tasked by the UN to carry out non-security related parts of an operation deem the context to be too insecure and resort to PMSCs' armed security.<sup>42</sup>

## 1. Spectrum of the services outsourced by the UN to PMSCs

The services provided by PMSCs to the UN are numerous and range from unarmed and armed security to intelligence gathering, demining, and even troops training. Despite the widespread lack of transparency within the UN over the exact details of the contracts, thanks to several news articles, studies and official reports, it is possible to sketch a list of the main services that the private sector is offering to the UN.

- The UN often resorts to unarmed guards to provide security for its buildings, vehicles, staff and residences around the world. Although seemingly non-problematic, these duties can result in severe PR-related issues for the UN. Sometimes, UN-hired PMSCs do not provide their services exclusively to the Organization, but also to private multinationals, and can therefore be active with armed men in other contexts in the same region.<sup>43</sup> This could lead the population to consider the armed guards protecting private businesses as being part of the UN mission and therefore their actions as UN actions.
- The UN is employing armed security guards in a number of missions as well. Usually, their primary objective is to provide “static” security for buildings or personnel, but they can also be engaged in mobile responses when necessary.<sup>44</sup> Private armed guards are increasingly escorting UN convoys carrying supplies or food.<sup>45</sup>
- Though armed and unarmed security are the most notorious services provided by PMSCs, the UN contracts them also for training, risk assessment and consultancy. The Global Peace Operations Initiative (GPOI), a US-led effort designed to train peacekeepers and police troops for UN peacekeeping operations in Africa, has been outsourced to several PMSCs.<sup>46</sup> The US based Northrop Grumman Information Technology, MPRI and Blackwater USA, helped train thousands of troops that have been deployed to peacekeeping operations all

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<sup>41</sup> James Cockayne, ‘Commercial Security in Humanitarian and Post-Conflict Settings: An Explorative Study’ (International Peace Academy, New York 2006) 10.

<sup>42</sup> Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (SSR Paper 3, DCAF, Geneva 2011) 13.

<sup>43</sup> Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 24.

<sup>44</sup> *Ibid* 25.

<sup>45</sup> *Ibid*.

<sup>46</sup> Nina M Serafino, ‘The Global Peace Operations Initiative: Background and Issues for Congress’ (CRS Report No RL32773) (Washington DC: Congressional Research Service, 2009) 6.

around the world.<sup>47</sup> Furthermore, thanks to the outsourcing of risk assessment and consultancy services, PMSCs have acquired great influence over the UN, in some cases even shaping their security understanding. Apparently, the entire structure of the UN DSS has been designed based on a comprehensive study of security requirements that was conducted by a specialized private security firm.<sup>48</sup>

- Logistics: The UN has reportedly contracted with PMSCs for the provision of the necessary equipment to conduct peace operations, such as helicopters, armoured vehicles, airplanes and the support-personnel such as pilots and mechanics.<sup>49</sup> Moreover, UN personnel have been ferried across Haiti along with troops and humanitarian supplies, by the International Charter Incorporated (ICI) of Oregon.<sup>50</sup> The same company supported the UN in Sierra Leone by providing it with helicopters<sup>51</sup> and both PAE and ArmorGroup supplied MONUC with logistical services.<sup>52</sup>
- DDR and SSR: Disarmament, demobilization and reintegration programmes (DDR) are designed to lead former combatants back into civilian life or into the host country's new security apparatus that security sector reforms (SSR) help to create. Despite the critical importance of DDR in the effort of developing well-trained security forces and the crucial role of implementing SSR, such as police and judicial reform in the context of post conflict operations, the DPKO and the Department of Field Support are increasingly unable to recruit civilian specialists in these sectors.<sup>53</sup> The impact of PMSCs in DDR and SSR seems to grow year by year and some companies are now even focussing on their peace-building capabilities instead of promoting their armed services.<sup>54</sup>
- Other services: besides very specific contracts, the UN sometimes engages in contractual agreements with PMSCs with a very broad range of actions, without indications on the exact services they perform. Under these contracts, PMSCs have been used by the UN to provide demining services, telecommunications, police training, drones<sup>55</sup> and have also helped with

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<sup>47</sup> Nina M Serafino, 'The Global Peace Operations Initiative: Background and Issues for Congress' (CRS Report No RL32773 – Update June 11 2007) (Washington DC: Congressional Research Service, 2007) 18 (fn 28).

<sup>48</sup> See UNGA 'Comprehensive management audit of the Department of Safety and Security: Report of the Office of Internal Oversight Services' (26 September 2008) 63<sup>rd</sup> Session, UN Doc A/63/379, 7.

<sup>49</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 26.

<sup>50</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 183.

<sup>51</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 26.

<sup>52</sup> Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (SSR Paper 3, DCAF, Geneva 2011) 39.

<sup>53</sup> Ibid 35.

<sup>54</sup> Ibid 36.

<sup>55</sup> See for example the case of Selex ES at Part I.D.3 of this paper.

the organization of national elections and much more.<sup>56</sup> Despite appearing to be uncontroversial, giving a closer look to these services shows a much more questionable reality. Under the rubric “translation” for example, employees of the firm CACI were involved in the torture of detainees in the well-know Abu-Ghraib prison in Iraq and under the rubric “aviation”, DynCorp acted on behalf of the CIA and was a prime contractor for the US programme of “extraordinary rendition”, involving kidnapping and torturing of perceived terrorists.<sup>57</sup>

## 2. The identity of the companies employed by the UN

Tracking these companies is a difficult task since commercial mergers are constant and name changes occur often. The exact number and the names of the companies involved in UN Peacekeeping Missions have been for long the object of speculations. In fact, within the UN organization itself there have been some actors that pushed for transparency. The UN Working Group on the Use of Mercenaries (UN Working Group), created in 2005 by the UN Commission on Human Rights<sup>58</sup> was tasked with investigating the UN’s use of PMSCs.<sup>59</sup> The UN Working Group pointed out how difficult it was to access official information and, whilst acknowledging that since the end of 2012 this situation had shown significant improvements, it still criticized the report of the Secretary-General to the General Assembly of October 2012, noting that it was incomplete and did not provide any useful information on the names or even number of the PMSCs employed by the UN.<sup>60</sup> According to the information received directly by the UN Working Group, and thus not contained in the official reports of other UN organs, the UN Working Group was able to indicate that some 30 PMSCs were involved in peacekeeping and special political missions in 2014.<sup>61</sup> Among them there were small local companies and big transnational corporations with local subsidiaries, like G4S, Securitas, DynCorp and Saladin.

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<sup>56</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 26.

<sup>57</sup> Ian Cobain and Ben Quinn, ‘How US firms profited from torture flights’ *Guardian* (London 31 August 2011) <<https://www.theguardian.com/world/2011/aug/31/us-firms-torture-flights-rendition>> accessed 08 November 2016.

<sup>58</sup> UN Commission on Human Rights, ‘Human Rights Resolution 2005/2: The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination’ (7 April 2005) UN Doc E/CN.4/RES/2005/2.

<sup>59</sup> UN Human Rights Council, ‘Mandate 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’ (28 March 2008) UN Doc A/HRC/Res/7/21.

<sup>60</sup> 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’ (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338, 6.

<sup>61</sup> *Ibid* 5.

a) *G4S*

G4S is the industry leader and has been a stable partner of the United Nations for many years, despite its poor performances and abuse cases. G4S employs some 610'000 people in more than 100 countries<sup>62</sup> and provides a variety of services – from risk consultancy and assessment to buildings' and personnel's security – to a wide clients base, composed mainly by governments. The company operates and maintains security systems in the Middle East, including the Ofer prison in the West Bank and other facilities dedicated to detention and interrogations in the region. Human rights organisations have called for their shut down, documenting systematic torture and ill treatment of Palestinian prisoners, including children.<sup>63</sup> Following increasing pressure by civil society organisation fiercely condemning G4S involvement, UNICEF followed UNHCR in terminating its contract with G4S.<sup>64</sup> Still, in 2015, the UN had around 40 contracts with G4S, 26 of which for unspecified “Public order and security and safety services”. These contracts were signed with several local subsidiaries of G4S, from Djibouti to Austria, from Hong Kong to Kenya and Zambia, and amounted to a total of some USD 7 Million.<sup>65</sup>

b) *DynCorp International*

DynCorp is an American PMSC specialized in training, flight operations, intelligence and security. The UN has made extensive use of DynCorp's services from 2008 to 2011, mostly for unspecified “consultancy services”<sup>66</sup>, notwithstanding DynCorp's involvement in one of the most notorious cases of sexual abuses in a UN mission.<sup>67</sup> DynCorp provided police officers to the UN international police task force in Bosnia. An American police woman hired by DynCorp discovered that a number of UN officers, several of them employed by DynCorp, were involved in sexual

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<sup>62</sup> G4S Website <<http://www.g4s.us/en-US/Who%20we%20are/Key%20Facts%20and%20Figures/>> accessed 5 December 2016.

<sup>63</sup> –, ‘G4S must end its complicity in Israel's abuse of child prisoners’ *Guardian* (London 4 June 2014) <<https://www.theguardian.com/world/2014/jun/04/g4s-complicity-israel-abuse-child-prisoners>> accessed 5 December 2016.

<sup>64</sup> –, ‘UNICEF terminates service of security contractor that operates in Israel’ *Jordan Times* (Amman, Jordan 1 March 2016) <<http://www.jordantimes.com/news/local/unicef-terminates-services-security-contractor-operates-israel>> accessed 5 December 2016.

<sup>65</sup> UN Office for Project Services (UNOPS) ‘2015 Annual Statistical Report on United Nations Procurement’ (June 2016) 316–628.

<sup>66</sup> See UNOPS ‘2008 Annual Statistical Report on United Nations Procurement’ (July 2009) 277; UNOPS ‘2009 Annual Statistical Report on United Nations Procurement’ (July 2010) 277; UNOPS ‘2010 Annual Statistical Report on United Nations Procurement’ (July 2011) 263; UNOPS ‘2011 Annual Statistical Report on United Nations Procurement’ (July 2012) 268.

<sup>67</sup> Antony Barnett and Solomon Huges, ‘British firm accused in UN “sex scandal”’ *Guardian* (London 29 July 2001) <<https://www.theguardian.com/world/2001/jul/29/unitednations>> accessed 2 December 2016.

abuses, forced prostitution and sex trafficking.<sup>68</sup> As a consequence of this, DynCorp dismissed several of the employees but no one was further punished.<sup>69</sup> Nevertheless, DynCorp remained involved in UN peace operations and was active particularly in Africa, where it conducted the complete re-establishment of the Armed Forces of Liberia within the United Nations Mission in Liberia (UNMIL) framework.<sup>70</sup>

### c) Askar Security Services

Since 2012, MONUSCO has made extensive use of Askar Security's services, engaging it first for unarmed security to protect its liaison offices in Kampala and the logistics base in Entebbe, both in Uganda,<sup>71</sup> and then throughout the years for various security services. In 2013, Askar was awarded a USD 300'000 contract for "Security and personal safety"<sup>72</sup>, in 2014 it provided "Guards Services"<sup>73</sup> for a total of some USD 135'000 and in 2015 it performed "Public order and security and safety services" as well as "Transportation services" for the UN.<sup>74</sup> Like G4S and DynCorp international, Askar Security has been the object of a fair number of abuse allegations as well. The most prominent involved the exploitation of a number of contractors Askar had recruited, trained and then contracted to other PMSCs active in the Iraqi conflict and the company's inadequate vetting process.<sup>75</sup> As regards the latter, due to the fierce competition of other recruiters from neighbouring countries, Askar was no longer addressing military and police veterans but, as an Ugandan Journalist stated, "Anyone could go"<sup>76</sup>

As laid out in this section, PMSCs are hired by the UN in a number of peace operations. While the increased reliance of the Organization on PMSCs is first a consequence of the emergence of the industry itself that has given the UN a "respectable" private partner, the quick evolution and professionalization that peacekeeping operations have undertaken is another major cause of this strong involvement of the private sector.

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<sup>68</sup> Ibid.

<sup>69</sup> Nisha Lilia Diu, 'What the UN Doesn't Want You To Know' *Telegraph* (London 6 February 2012) <<http://www.telegraph.co.uk/culture/film/9041974/What-the-UN-Doesnt-Want-You-to-Know.html>> accessed 2 December 2016.

<sup>70</sup> Sean McFate, 'Outsourcing the Making of Militaries: DynCorp International as Sovereign Agent' (2008) 36 *RevAPE* 645, 646.

<sup>71</sup> Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 8.

<sup>72</sup> UNOPS '2013 Annual Statistical Report on United Nations Procurement' (July 2013) 338.

<sup>73</sup> UNOPS '2014 Annual Statistical Report on United Nations Procurement' (October 2015) 548.

<sup>74</sup> UNOPS '2015 Annual Statistical Report on United Nations Procurement' (June 2016) 612.

<sup>75</sup> Alain Vicky, 'Cheap Help from Uganda' *LeMondeDiplomatique* (Paris May 2012) <<http://mondediplo.com/2012/05/05uganda>> accessed 28 November 2016.

<sup>76</sup> Ibid.

## **D. The evolution of UN peacekeeping operations**

Since the first interposition force during the Suez crisis in 1956, peacekeeping operations have come a long way. The UN has seen a gradual evolution of its role of maintaining and establishing peace around the world and its operations have become large, complex multifunctional efforts, charging peacekeepers with protecting civilians, facilitating peace processes, electoral assistance and much more.<sup>77</sup> Alongside UN forces, PMSCs have taken part to the expansion of the Organization's sphere of action, carrying increasingly complex tasks and becoming an integral part of every major UN operation.

### **1. Peacekeeping principles**

Throughout the 1940s the UN set up several observation and supervision missions in Greece, Kashmir, Korea and Indonesia.<sup>78</sup> Two main factors prompted the UN to establish these missions as measures to keep the peace. The first was the decolonisation: in fact, the two first official UN mission, the United Nations Truce Supervision Organization (UNTSO) in Palestine, and the United Nations Military Observer Group in India and Pakistan (UNMOGIP) have been ignited by the withdrawal of the British colonial forces in India and Palestine and the crisis that followed. The second factor was the block of the Security Council due to the tensions between the US and the Soviet Union from 1947 onwards, that virtually inhibited the Organization to implement the UN Charter's system of collective security.<sup>79</sup> In 1956, following the attack on Egypt by the British, Israeli and French armies, the General Assembly decided to bypass the Security Council – at the time incapacitated by the French and British vetoes – and tasked UN Secretary-General Dag Hammarskjöld to form a military force to intervene in the conflict.<sup>80</sup> The 5<sup>th</sup> of November 1956, with Resolution 1000, the General Assembly accepted Hammarskjöld's recommendations and approved the establishment of UNEF, the first official “peacekeeping operation”.<sup>81</sup> Two years later, in 1958, Hammarskjöld presented a report on UNEF containing what have been considered as being the three founding principles of UN peacekeeping from then on:<sup>82</sup> (i) the consent of the Member

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<sup>77</sup> See UNGA ‘Report of the Panel on United Nations Peace Operations’ (21 August 2000) 55<sup>th</sup> Session UN Doc A/55/305 vii-ix, 3-5.

<sup>78</sup> Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (5<sup>th</sup> edn CambUP, Cambridge 2009) 35.

<sup>79</sup> Ronald Hatto, ‘From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations’ (2013) 95 Int’l JRR 495, 500.

<sup>80</sup> Ibid 502.

<sup>81</sup> Ibid 496.

<sup>82</sup> UNGA ‘Summary study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General’ (9 October 1958) 13<sup>th</sup> Session UN Doc A/3943.

State party to the conflict,<sup>83</sup> (ii) the impartiality of the force,<sup>84</sup> and (iii) the non-use of force except in cases of self-defence.<sup>85</sup> Every peacekeeping operation set up during the Cold War – with the notable exception of the UN operation in Congo (ONUC)<sup>86</sup> – fully complied with these principles.<sup>87</sup>

## **2. After the end of the Cold War: from traditional peacekeeping to “robust” operations**

The end of the Cold War represented a turning point for UN peacekeeping operations, which increased in number and became multifunctional. The establishment of the Department of Peacekeeping Operations (DPKO) and its associated structures in 1992 reflected the increased importance of peacekeeping, providing the necessary structure for the successful expansion of the operations’ functions. The new, expanded mandates of multi-dimensional operations and the role that PMSCs played along the way are exemplified in the UN intervention in the former Yugoslavia. In 1992 the Security Council called upon its Member States to take “all necessary measures” to deliver humanitarian aid to Sarajevo and throughout Bosnia and Herzegovina.<sup>88</sup> Between 1992 and 1995, the UN Protection Force (UNPROFOR) relied on several PMSCs to fulfill its mandate in the former Yugoslavia; among them were DynCorp and Defence System Limited (DSL). DSL, a UK based PMSC, provided UNPROFOR with 425 staff members who carried out a number of functions, including security officers assigned to crime prevention, crime detection, protection and border security.<sup>89</sup> DSL personnel were fully integrated into the UNPROFOR organisation, wearing “civilian pattern UN uniform with UN badges and identification papers”.<sup>90</sup> As the mission grew, DSL began carrying out operational peacekeeping tasks, “with DSL drivers in armoured vehicles, maintained and fuelled by DSL support teams, out of bases constructed and maintained by DSL and co-ordinated by DSL planners in Zagreb”.<sup>91</sup>

The same year as the UN Protection Force was set up, following the success of the intervention against Iraq in 1991 and at the request of the Security Council, Secretary-General Boutros Boutros-Ghali was asked to prepare a document detailing his “analysis and recommendations on ways of

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<sup>83</sup> Ibid [155]–[156].

<sup>84</sup> Ibid [166]–[167].

<sup>85</sup> Ibid [179].

<sup>86</sup> See Part I.D.3 of this paper.

<sup>87</sup> Ronald Hatto, ‘From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations’ (2013) 95 Int’l IRRC 495, 503.

<sup>88</sup> UN Security Council (UNSC) Res 770 (13 August 1992) UN Doc S/RES/770.

<sup>89</sup> UK Select Committee on Foreign Affairs, ‘Private Military Companies’ (HC 922, 2002) Minutes of Evidence, Appendix 6 [75].

<sup>90</sup> Ibid [77].

<sup>91</sup> Ibid [76].

strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping”.<sup>92</sup> His report, *An Agenda for Peace*, was published in June 1992 and contained some major conceptual changes from traditional peacekeeping and a departure from the basic principles described above. First, Mr. Boutros Boutros-Ghali undermined arguably the most important of the three fundamentals of peacekeeping – namely the consent of the parties – by letting the door open for future intervention without the host state’s consent.<sup>93</sup> The second pillar, the non-use of force except in self-defence, was also reconsidered.<sup>94</sup> In this regard, Mr. Boutros-Ghali’s idea was to deploy additional, so called “peace enforcement units”<sup>95</sup> on the field in the event that the traditional “peacekeeping units” were unable to carry out the task. The operations in Somalia, Bosnia and Rwanda followed this new approach, forfeiting the consent of the parties, behaving in a way that was perceived to be partial and making use of force other than in self-defence.<sup>96</sup> The traumatic experiences of the UN in those three missions in particular were taken into account by Boutros-Ghali when in 1995 he published the *Supplement to an Agenda for Peace*.<sup>97</sup> In his *Supplement* Boutros-Ghali, underscoring the new tasks that internal conflicts had imposed on the Blue Helmets, stressed the importance of diplomacy instead of the use of military power in order to ensure the success of the missions.<sup>98</sup> Boutros-Ghali noted that the conflicts that the UN was asked to resolve had deep roots and that their resolution necessitated the establishment of a political process, enabling the parties to build the necessary confidence and to find negotiated solutions.<sup>99</sup> Subsequent peacekeeping efforts build up on Boutros-Ghali considerations, and the wave of missions set up at the end of the 1990s and in the beginning of the new century were tasked with expanded mandates. The missions in Sierra Leone, East Timor and the Democratic Republic of the Congo conducted disarmament, demobilization and reintegration (DDR) operations and security sector reforms (SSR) targeting the police and the army of the host governments.<sup>100</sup> In the landmark *Brahimi Report*,

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<sup>92</sup> UNSC ‘Note by the President of the Security Council’ (31 January 1992) UN Doc S/23500, 3.

<sup>93</sup> See UNGA ‘An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping’ (17 June 1992) 47<sup>th</sup> Session UN Doc A/47/277, S/24111 [20] “Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned”. The “hitherto” seemed to recognise implicitly that it was now going to be possible to mobilize UN forces without the consent of the host state. See Ronald Hatto, ‘From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations’ (2013) 95 Int’l IRRC 495, 507.

<sup>94</sup> UNGA ‘An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping’ (17 June 1992) 47<sup>th</sup> Session UN Doc A/47/277, S/24111 [43].

<sup>95</sup> *Ibid* [44].

<sup>96</sup> See UNGA ‘Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations’ (3 January 1992) 55<sup>th</sup> Session UN Doc A/50/60, S/1995/1 [34].

<sup>97</sup> *Ibid* [77]–[80].

<sup>98</sup> *Ibid* [36].

<sup>99</sup> *Ibid*.

<sup>100</sup> For Sierra Leone see UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270; For East Timor see UNSC Res 1246 (11 June 1999) UN Doc S/RES/1246; For the DRC see for example UNSC Res 1711 (29 September 2006) UN Doc S/RES/1711.



Peace Operations were said to entail three main activities: conflict prevention and peacemaking (through diplomacy and mediation), peacekeeping (through interposition as buffers, ceasefire observation and demilitarization), and peace-building (through training and technical assistance).<sup>101</sup> As highlighted in the UN Peacekeeping operations Principles and Guidelines of 2008 (later updated in 2010), the boundaries between the different missions have become increasingly blurred and, as experience has shown, multidimensional UN peacekeeping operations are required, and forced by the circumstances, to bear the burden of a multitude of peace-building responsibilities.<sup>102</sup> In order to fulfill their mandates in more hostile environments, where the consent of the warring parties has not always been assured, peacekeeping operations increasingly relied on the private sector and progressively shifted their defensive approach towards a more aggressive conduct. In fact, while Boutros-Ghali did indeed reconsider his initial thought as to more “aggressive” operations, the shift took place nonetheless. Peace enforcement and “robust” peacekeeping represent today the new frontier for UN peace operations: as a matter of fact, recently established UN peace operations, such as MINUSMA in Mali and MINUSCA in the Central African Republic, operating in highly volatile environments follow the new approach of the UN as they include very robust mandates.

An example of both the evolution that UN peacekeeping missions have been through and of the role that PMSCs had within this process, is the UN intervention in Congo, which particularly in recent years has moved from a mostly observation-oriented mission to a “robust”, multi-dimensional operation.

### **3. The UN involvement in Congo, the Intervention Brigade and PMSCs’ role**

The conflict in the Congo is long and complex, involving numerous state and non-state armed actors. The UN has been present in the region since the 1960s and its involvement in the country has been long-standing and has evolved throughout the years along the conflict itself. The United Nations Operation in the Congo (ONUC), established in 1960, had the initial mandate of ensuring the withdrawal of Belgian forces and of assisting the government in maintaining law and order. The mandate was revised in 1961 to permit UN troops to use mass force against mercenaries and the rebels<sup>103</sup> in order to prevent the secession of the Katanga Province, financed, orchestrated and

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<sup>101</sup> See UNGA ‘Report of the Panel on United Nations Peace Operations’ (21 August 2000) 55<sup>th</sup> Session UN Doc A/55/305, 2-3.

<sup>102</sup> UN Department of Peacekeeping Operations (UNDPKO) and UN Department of Field Support (UNDFS) ‘United Nations Peacekeeping Operations: Principles and Guidelines’ (2008) 28.

<sup>103</sup> The UN Operation in the Congo (ONUC) was mandated to “take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel”. See UNSC Res 169 (24 November 1961) UN Doc S/RES/169.

supported with mercenaries by foreign parties.<sup>104</sup> After the withdrawal of UN forces in 1964, Congo failed to remain united and between 1965 and 1997 the country experienced numerous crises. Precisely because of these crises, in 1999 the UN returned to Congo for another Peacekeeping Operation. This time, however, it would stay much longer. The UN Organization Mission in the Democratic Republic of Congo (MONUC) was established in 1999 with the initial aim of observing the ceasefire and the disengagement of foreign forces and rebel groups.<sup>105</sup> Confronted with a bloody conflict, the mission was steadily enlarged and its mandate expanded. MONUC evolved from a traditional peacekeeping operation to a full-scale multi-dimensional peace operation, that included the supervision of the ceasefire's implementation, the verification of force disengagement and redeployment, the provision of support for humanitarian work and civilian protection.<sup>106</sup> In 2006, after the first general elections in Congo in 46 years, the mandate was further expanded, and MONUC was asked to implement "multiple political, military, rule of law and capacity-building tasks ... including trying to resolve ongoing conflicts in a number of the DRC provinces".<sup>107</sup> Forced by such an unstable environment, throughout the years MONUC made extensive use of PMSCs services. In 2001, MONUC hired PAE for the provision of food, fuel and water, despite its history of being accused of overcharging.<sup>108</sup> PAE has proven to be an integral part of the UN mission in Congo during the protests that followed the massacres of 2005. Following the incapacity of the UN to protect civilians from the fights among different armed militias,<sup>109</sup> in June 2005 Congolese students attacked UN associated personnel and facilities in protest.<sup>110</sup> UN personnel fled from the city and reached the local airport, one of the six that PAE was managing for MONUC.<sup>111</sup> PAE contractors planned, developed and executed the evacuation of the personnel and then stayed on the ground to complete their mandate. It shall be stated at this point that, apparently, the possibility of an evacuation was included in the contract between PAE and MONUC.<sup>112</sup> PAE was not the only PMSC supporting MONUC: ArmorGroup provided security and logistics to the mission<sup>113</sup> and a

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<sup>104</sup> See 'ONUC Background' <<http://www.un.org/Depts/DPKO/Missions/onucB.htm>> accessed 11 November 2016.

<sup>105</sup> UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270; See also 'MONUSCO Background' <<http://www.un.org/en/peacekeeping/missions/monusco/background.shtml>> accessed 11 November 2016.

<sup>106</sup> See UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279; UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493; UNSC Res 1565 (1 October 2004) UN Doc S/RES/1565.

<sup>107</sup> See 'MONUSCO Background' <<http://www.un.org/en/peacekeeping/missions/monusco/background.shtml>> accessed 11 November 2016.

<sup>108</sup> Pratap Chatterjee, 'Darfur Diplomacy: Enter the Contractors' (21 October 2004) <[www.corpwatch.org/article.php?id=11598](http://www.corpwatch.org/article.php?id=11598)> accessed 11 November 2016.

<sup>109</sup> Ibid.

<sup>110</sup> Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (SSR Paper 3, DCAF, Geneva 2011) 17.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid (fn 50).

<sup>113</sup> UK Select Committee on Foreign Affairs, 'Private Military Companies' (HC 922, 2002) Minutes of Evidence, Appendix 6 [80].

part of the peacekeepers deployed by MONUC stem from the GPOI training programme.<sup>114</sup> PMSCs were later involved in the UN effort that followed MONUC, the UN Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), established by the Security Council in 2010.<sup>115</sup> The new mission received broad powers and was authorized to use “all necessary means” to protect civilians, humanitarian personnel and human rights defenders and to support the DRC’s government in its stabilization and peace consolidation efforts. MONUSCO hired Saracen Uganda to provide security services in 2010 and 2011,<sup>116</sup> despite the allegations of illegal exploitation of natural resources reported back in 2001 to the Security Council.<sup>117</sup>

Despite its broad powers, MONUSCO did not succeed in its effort to support the government and the violence threatened to destabilize the entire Great Lakes region, encompassing parts of Burundi, Kenya, Rwanda, Tanzania, Uganda and the DRC. In response to several calls by these governments, in March 2013 the Security Council adopted Resolution 2098, extending the mandate of MONUSCO and creating a special “Intervention Brigade” able to carry out offensive actions, thereby stepping up the scale of violence that the Organization was ready to apply in order to secure its objectives.<sup>118</sup> In order to observe military personnel movements, Res 2098 gave also the formal go-ahead to expand the surveillance capabilities of the mission by deploying unmanned aerial system: drones.<sup>119</sup> The UN outsourced the programme to an Italian manufacturer that provided the surveillance planes, Selex ES.<sup>120</sup> The contract did not only included the drones; throughout its American subsidiary Selex Galileo,<sup>121</sup> Selex ES provided the UN with ground control stations, logistical support, and a team composed of pilots, mechanics and intelligence analysts experts.<sup>122</sup>

As shown in its involvement in Congo, the UN is increasingly asked to deploy its peacekeeping operations into more volatile environments, where there might be no peace to maintain; today, two

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<sup>114</sup> Nina M Serafino, ‘The Global Peace Operations Initiative: Background and Issues for Congress’ (CRS Report No RL32773) (Washington DC: Congressional Research Service, 2009) 2 (fn 2).

<sup>115</sup> See UNSC Res 1925 (27 May 2010) UN Doc S/RES/1925.

<sup>116</sup> See Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 29; In the meantime the website of the UN Procurement Division do not display the contracts anymore.

<sup>117</sup> UNSC ‘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, 102–103; Furthermore, in 2011 another report, this time by the UN Monitoring Group on Somalia, accused Saracen Uganda of breaking the arms embargo of the UN in the country: see UNSC ‘Report of the Monitoring Group on Somalia and Eritrea’ (18 July 2011) UN Doc S/2011/433, Annex 6.3.

<sup>118</sup> UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098.

<sup>119</sup> *Ibid* 7.

<sup>120</sup> Siobhán O’Grady, ‘How a U.N. Drone Crashed in Congo and Was Promptly Forgotten’ *ForeignPolicy* (10 September 2015) <<http://foreignpolicy.com/2015/09/10/how-a-u-n-drone-crashed-in-congo-and-was-promptly-forgotten/>> accessed 21 November 2016.

<sup>121</sup> *Ibid*.

<sup>122</sup> Leonardo website, ‘Selex ES fornirà all’ONU sorveglianza aerea basata su un sistema senza pilota per missioni di peace keeping’ (11 September 2013) <<http://www.leonardocompany.com/-/un-falco>> accessed 22 November 2016.

thirds of peacekeeping personnel are deployed in zones of ongoing conflicts.<sup>123</sup> Security services expenses grow accordingly: only in the UN mission in Congo, the costs have skyrocketed in the last years, from approximately USD 520.000 in 2006 to more than USD 6 Mio in 2011, while total costs for field missions' use of security services around the globe grew from USD 3.7 Mio in 2006 to an astonishing USD 26.4 Mio in 2011.<sup>124</sup> The primary beneficiary of the surge of the UN's security needs have been PMSCs, thereby getting progressively closer to the frontline of UN operations.

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<sup>123</sup> Hervé Ladsous (Head of the Department of PKO) 'Scale of United Nations Peacekeeping across Massive Distances in Midst of Conflict Matched by Operational Complexity, Department Head Tells Fourth Committee' (28 October 2014) UN Press Release GA/SPD/567.

<sup>124</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) Appendix II.

## Part II: The legal and regulatory framework for PMSCs hired by the UN

The spectacular rise of the Private Military and Security Industry and the increasing deployment of PMSCs by States and International Organizations have drawn the attention of observers, policymakers and interested actors to the growing role of private security on the battlefield and the related concerns. A number of NGOs and think tanks are alarmed that PMSCs operate without the necessary oversight, in a situation of lacking transparency and legal accountability as regards their activities.<sup>125</sup> As a consequence, PMSCs are perceived to operate in a legal vacuum and their abuses – including the most aberrant such as torture and murder – are thought to go regularly unpunished.<sup>126</sup> This perception is further corroborated by numerous scandals involving PMSCs' brutality, such as CACI's involvement in Abu Ghraib. The company had been hired by the US government to recruit intelligence analysts and interrogators for the infamous Abu Ghraib prison in Iraq.<sup>127</sup> Following the publication of pictures portraying naked detainees, tied and beaten by the guards, an internal US army report<sup>128</sup> found that CACI, together with another PMSC, was implicated in the abuses, with private contractors using dogs to scare prisoners and encouraging US soldiers to abuse them.<sup>129</sup> Furthermore, the investigation noted that the incidents were not isolated; instead, systemic management and training problems were identified, with a third of CACI's employees that had never received formal military interrogation training.<sup>130</sup> However, while military personnel were convicted in court, private contractors remained exempt, in part because at the time they enjoyed immunity from both US military justice and Iraqi courts.<sup>131</sup> On October 2016 however, a US federal court of appeal reinstated the case brought by four Iraqis against CACI that was previously dismissed in 2008 on the ground of a jurisdictional challenge.<sup>132</sup> While the abuses of CACI's employees are not an isolated case, the perception that private contractors operate in a legal

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<sup>125</sup> Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum and Rosa Luxemburg Foundation, New York 2012) 7.

<sup>126</sup> P W Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *ColumJTransnat'lL* 521, 521–532.

<sup>127</sup> Joel Brinkley and James Glanz, 'Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job' *NewYorkTimes* (New York 4 May 2004) <<http://www.nytimes.com/2004/05/04/world/struggle-for-iraq-civilian-employees-contract-workers-implicated-february-army.html>> accessed 2 December 2016.

<sup>128</sup> US Committee on Armed Services, 'Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan' US Senate (28 September 2010).

<sup>129</sup> Peter Beaumont, 'Abu Ghraib abuse firms are rewarded' *Guardian* (London 16 January 2005) <<https://www.theguardian.com/world/2005/jan/16/usa.iraq>> accessed 18 November 2016.

<sup>130</sup> *Ibid.*

<sup>131</sup> Christian Davenport, 'U.S. Appeals Court reinstates Abu Ghraib prison abuse case against CACI' *WashingtonPost* (21 October 2016) <[https://www.washingtonpost.com/business/economy/us-appeals-court-reinstates-abu-ghraib-prison-abuse-case-against-caci/2016/10/21/e53c43a6-97b5-11e6-bc79-af1cd3d2984b\\_story.html](https://www.washingtonpost.com/business/economy/us-appeals-court-reinstates-abu-ghraib-prison-abuse-case-against-caci/2016/10/21/e53c43a6-97b5-11e6-bc79-af1cd3d2984b_story.html)> accessed 18 November 2016.

<sup>132</sup> *Ibid.*

vacuum is misconceived: PMSCs and their staff are subject to a number of public international law branches. However, the extent of their accountability depends very much on their employer and how the contractual relationship under which they operate is structured. In this sense, while many initiatives – some of which driven by the private military and security industry itself – have pushed for the creation of legal and regulatory instruments that encompass PMSCs activities, the UN has not kept the pace and is lacking behind in controlling the conduct of its private partners. Luckily, the accountability of PMSCs’ employees hired by the UN does not depend exclusively on the contractual relationship with the hiring entity. In fact, whenever private contractors are operating in situations of armed conflicts their conduct is subject to the provisions of International Humanitarian Law.

### **A. PMSCs’ employees under International Humanitarian Law**

As noted above, PMSCs’ employees deployed in peacekeeping operations are getting increasingly closer to the heart of military operations in situations of armed conflicts and are therefore obliged to respect the provisions of international humanitarian law (IHL). However, the difficulty in applying IHL to PMSCs’ employees in the context of UN peace operations stems from the legal status of the contractors that needs to be determined on a case-by-case basis depending on the functions that they are tasked to carry out and their integration within the armed forces.<sup>133</sup> Under IHL, private contractors can fall into several categories; depending on the situation, they could be considered members of the armed forces according to Art. 43 of the Additional Protocol I of the Geneva Conventions; mercenaries under Art. 47 of the same Protocol, civilians, or “civilians accompanying the armed forces” within the meaning of Art. 4 A (4) of the third Geneva Convention. This categorization is crucial as it determines the rights and privileges of PMSCs’ employees and the legal consequences deriving from their conduct. Before embarking into the analysis of the private contractors’ status two preliminary observations are necessary. First, it should be noted that IHL is not concerned with the lawfulness or legitimacy of PMSCs per se. IHL only regulates their behaviours if they are active in an armed conflict. Second, the rules of IHL that apply to a given conflict depend on whether it is considered an “international armed conflict” (IAC), concerning a conflict between states, or a “non-international armed conflict” (NIAC), concerning a broader category of conflicts often taking place within a single state. As the UN acts primarily in support of state armed forces against organized armed groups – such as in the case of

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<sup>133</sup> Mirko Sossai, ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 197.

MONUSCO –the first conclusion that would be drawn is that peacekeeping operations are deployed in a context of NIAC. However, some have argued that the mere involvement of multinational forces in an armed conflict is sufficient to transform the conflict into an IAC,<sup>134</sup> or have characterized these types of conflict as “multinational NIAC”.<sup>135</sup> While the question as to the legal framework which should be applied to the conflicts in which UN peacekeeping are deployed is still debated, it should be stressed that most treaty-based applicable in IAC are also generally applicable in NIAC as customary law.<sup>136</sup> However, there still are some differences, in particular when it comes to the status of persons deprived of liberty.

### 1. Are PMSCs’ employees modern mercenaries?

In expressing their concerns about the PMSCs’ use by the UN, many commentators have argued that private contractors are the modern equivalent of mercenaries and should therefore be banned under international law.<sup>137</sup> In the context of an IAC, individuals could qualify as mercenaries according to the definition of Art. 47 of the Additional Protocol I to the Geneva Conventions. However, the definition contained in Art. 47 is very narrowly construed as it includes a number of cumulative conditions that are rarely fulfilled.<sup>138</sup> In particular, the requirements of being “recruited to fight”<sup>139</sup> and that of being “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict”<sup>140</sup> have been identified as difficult to be met by modern PMSCs’ staff.<sup>141</sup> In fact, PMSCs often recruit locally and in the majority of cases are hired to provide tasks that do not amount to “fight”. As a consequence private contractors do not usually fall

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<sup>134</sup> See for example Daphna Shraga, ‘The United Nations as an Actor Bound by International Humanitarian Law’ in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *The United Nations and International Humanitarian Law, Actes du colloque international à l’occasion du cinquantième anniversaire de l’ONU* (Pédone, Geneva 1995) 333; Claude Emanuelli, ‘Les forces des Nations Unies et le droit international humanitaire’ in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *The United Nations and International Humanitarian Law, Actes du colloque international à l’occasion du cinquantième anniversaire de l’ONU* (Pédone, Geneva 1995) 357 ff.

<sup>135</sup> See International Committee of the Red Cross (ICRC) ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (Report of the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, Geneva, October 2011) 10; see further Scott Sheeran and Stephanie Case, ‘The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo’ (International Peace Institute, New York 2014) 6.

<sup>136</sup> Tristan Ferraro, ‘The applicability and application of international humanitarian law to multinational forces’ (2013) 95 Int’l IRRC 561, 596.

<sup>137</sup> See for example Zoe Salzman, ‘Private Military Contractors and the Taint of a Mercenary Reputation’ (2008) NYUJInt’l L&P 853, 874.

<sup>138</sup> Louise Doswald-Beck, ‘Private military companies under international law’ in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007) 122.

<sup>139</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, Art. 47 (2)(a).

<sup>140</sup> Ibid Art. 47 (2)(e).

<sup>141</sup> Louise Doswald-Beck, ‘Private military companies under international law’ in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007) 122.

into the category of mercenaries under Art. 47 of the Additional Protocol I, which only applies in IAC. Furthermore, IHL is silent on the position of mercenaries in NIAC. However, since the only consequence of being a mercenary under Art. 47 is the loss of the status of combatant and prisoner of war and since these two status do not exist in NIAC, this does not represent an issue and should not be further analysed in the present paper.

## 2. PMSCs' employees as civilians or combatants?

In order to spare the civilian population from hostilities and their effects, IHL expects parties to an armed conflict to distinguish between the civilian population and combatants and between civilian objectives and military objectives. According to the rules on the conduct of hostilities, the civilian population enjoys general protection against the effects of hostilities, while combatants may be directly targeted. The distinction is therefore fundamental in ascertaining the rights and obligations of private contractors.

In the context of IACs, civilians are defined negatively as all persons who do not belong to the armed forces of a Party of the conflict.<sup>142</sup> According to Art. 43 (1) of the Additional Protocol I, the armed forces of a Party are all the organized forces, groups and units, which are under a command responsible to that Party for the conduct of its subordinates. Thus, all armed actors that show a sufficient degree of military organization and that belong to a Party of the conflict are regarded as part of the armed forces of that Party.<sup>143</sup> In order to “belong” to a Party of the conflict, PMSCs' employees need to be incorporated into its armed forces, either *de jure* through a formal procedure pursuant to national law, or *de facto* by being granted a “continuous combat function”.<sup>144</sup> While PMSCs may be hired by one of the Party of an IAC, the mere existence of a contractual relationship to provide assistance to the Party's armed forces is not conclusive.<sup>145</sup> Instead, possible indicators of such membership include: contractors being subject to military discipline and justice, being subject to the military chain of command and control, forming part of the military hierarchy, wearing forms of identification similar to those of ordinary members of the armed forces or wearing army uniforms.<sup>146</sup> Usually, PMSCs' staff are not subject to the recruitment procedures and formal

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<sup>142</sup> Additional Protocol I Art. 50(1).

<sup>143</sup> Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (International Committee of the Red Cross, Geneva 2009) 22.

<sup>144</sup> Ibid 39; the same interpretation appears in the Montreux Document: ‘The 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) Part I (7) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>145</sup> Emanuela-Chiara Gillard, ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’ (2006) Int’IRRC 525, 533.

<sup>146</sup> Ibid.



subordination such as regular soldiers and it is therefore indeed very rare that a PMSC would be considered formally incorporated into the armed forces of a Party through a *de jure* affiliation.<sup>147</sup> The examples of PMSCs being fully incorporated within national armed forces are very scarce today<sup>148</sup> and date back to the 1990s. Before fighting for the government of Sierra Leone in the civil war of 1995-6, Executive Outcomes personnel was formally integrated into the national armed forces,<sup>149</sup> just as Sandline personnel was considered as being into the Papua New Guinea army as “Special Constables” in 1997.<sup>150</sup> However, PMSCs and their employees could be considered part of the armed forces by virtue of a *de facto* incorporation, as defined in Art. 43 (1) of the Additional Protocol I.<sup>151</sup> The criterion that the units or groups are “under a command responsible” to a Party is critical in ascertaining and defining the status of the private contractors.<sup>152</sup> Although PMSCs usually fall outside the military chain of command and control, the notion of “command” under Art. 43 (I) is flexible. In fact, Art. 43 (I) does not call for the existence of a military chain of command, leaving open the possibility of another type of command, consisting, for example, of private individuals.<sup>153</sup> The standard of the “command responsible” requires a certain degree of oversight by the Party and would be met if the hiring entity established an appropriate supervision and control mechanism. This shall include specific provisions on the contracts regarding the respect of the law of international armed conflicts and the consequences of eventual violations, a reporting and supervision mechanism allowing the control of the contractors’ behaviour on the ground, and finally the exercise of criminal jurisdiction over the private security companies’ personnel.<sup>154</sup> While the practices of several States show a trend towards the exercise of wider jurisdiction over PMSCs’ personnel, the measures implemented often lack the necessary oversight and in particular the required control mechanism.<sup>155</sup> In addition, PMSCs perform increasingly complex functions that

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<sup>147</sup> Christian Schaller, ‘Private Security and Military Companies under International Law of Armed Conflict’ in Thomas Jäger and Gerhard Kümmel (eds), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (VS Verlag für Sozialwissenschaft, Wiesbaden 2007) 347.

<sup>148</sup> Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CambUP, Cambridge 2011) 84.

<sup>149</sup> Juan Carlos Zarate, ‘The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder’ (1998) 34 *StanJInt’lL* 75, 124.

<sup>150</sup> UK Foreign and Commonwealth Office, ‘Private Military Companies: Options for Regulation’ (HC 577, 2002) [6].

<sup>151</sup> Such recognition of *de facto* state organs is not unique in international law: in the *Nicaragua* case the ICJ acknowledged that groups may be treated as state organs even if they are not classified as such under domestic law: [1986] ICJ Report 1986 [109]–[110]; see further Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 74–78.

<sup>152</sup> Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CambUP, Cambridge 2011) 86.

<sup>153</sup> Mirko Sossai, ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 201.

<sup>154</sup> *Ibid.*

<sup>155</sup> Fort the US see Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CambUP, Cambridge 2011) 90.

require impressively convoluted contractual relationships, thus making it even more difficult to establish a clear chain of command. A similar complication arises in the event of a PMSC subcontracting part of its tasks. In this case the control that the Party may be able to exercise over the subcontractor is likely to be very weak, although some commentators argued that as long as the subcontractor is asked to carry out an integral part of the prime contract performance, it should be considered as acting on behalf of the Party, provided, of course, that the control that the Party exercises over the prime contractor has met the threshold of Art. 43 (I) Additional Protocol I.<sup>156</sup>

Private contractors might also be considered as “[p]ersons who accompany the armed forces without actually being members thereof”<sup>157</sup> and thus be excluded from the definition of combatant. The United States follow this approach and in the US Army Manual “Contractors on the Battlefield” it is stated that “[c]ontractors and their employees are not combatants but civilians ‘authorized’ to accompany the force in the field”.<sup>158</sup> Art. 4 (A)(4) of the Third Geneva Convention provides a list of persons who could qualify as civilians accompanying the armed forces, including “civilian members of military aircraft crews, war correspondents, supply contractors”<sup>159</sup> and requires that they “have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card”.<sup>160</sup> Allegedly, however, the last two requirements are not always met by PMSCs,<sup>161</sup> that are often subcontracted and thus might not enjoy the armed forces’ authorization. Furthermore, civilians accompanying the armed forces are not entitled to participate in the hostilities. Hence, PMSCs carrying out tasks that amount to direct participation in a conflict shall not be considered as such.<sup>162</sup>

The same observations in regard to the distinction between civilians and combatants of PMSCs’ employees apply, *mutatis mutandis*, in the context of a NIAC.<sup>163</sup> However, some peculiarities of NIACs have to be taken into account. States are loath to grant the privilege of combatants to insurgents and therefore in treaty law governing NIAC there is no reference to the term “combatant”, but instead Additional Protocol II uses the terms “civilian population” and “civilian”, declaring the loss of their protection if “they take a direct part in hostilities”. This suggests that also within a NIAC there are two categories of persons whose treatment is different under IHL. The

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<sup>156</sup> Michael N Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’ (2005) 5 CJInt’lL 512, 528.

<sup>157</sup> ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135, Art. 4 (A)(4).

<sup>158</sup> US Department of the Army, ‘Contractors on the Battlefield’ (3 January 2003) FM 3–100:21, 100–21.

<sup>159</sup> ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135 Art. 4 (A)(4)

<sup>160</sup> Ibid

<sup>161</sup> See Lindsey Cameron, ‘Private military companies: their status under international humanitarian law and its impact on regulation’ (2006) 88 Int’lRRC 573, 593 (fn 75).

<sup>162</sup> Ibid 539.

<sup>163</sup> Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (International Committee of the Red Cross, Geneva 2009) 39.

second category – the first being civilians – is sometimes called “fighters” (reflecting the remaining difference between IAC and NIAC) and sometimes “combatant”, like in the case of an IAC. While the concepts are still not defined in practice, it suffices to say that in the event that the above-mentioned conditions regarding the combatant status in IACs are fulfilled, private contractors would also be considered part of the forces of one of the Parties to a NIAC.<sup>164</sup>

### 3. Direct participation in hostilities

Despite the fact that PMSCs employees are more likely not to be considered part of the armed forces of a Party involved in the conflict, they could lose their civilian status if they participate directly in the hostilities.<sup>165</sup> While there is no definition of what constitutes “direct participation in hostilities” neither in IHL Treaties nor in international jurisprudence, there seems to be an emerging opinion among experts with reference to the constitutive elements of this notion. In order to be considered as a direct participation in hostilities, an act performed by PMSCs’ employees should meet three cumulative requirements. First, the act should be likely to adversely affect the military operations or military capacity of a party to an armed conflict; second, there must be a direct causal link between the act and the harm inflicted by it or by the coordinated military operation of which the act is an integral part, and third, the act must be designed to directly cause the intended harm in support of a Party and to the detriment of another.<sup>166</sup> The determination of the civilian or military nature of PMSC’s activity can be extremely difficult sometimes, and the same task could be regarded, on the one hand, as direct participation in hostilities or, on the other, as simple law enforcement operation depending on the perspective adopted. Against this backdrop, the defence of military personnel or military premises against criminal acts that are unrelated to the hostilities would not be considered as a direct participation in hostilities, but the defence of the same persons and objects against enemy attacks would indeed, although the attacks could well be difficult to differentiate from the PMSCs’ point of view.<sup>167</sup> It is undeniable that PMSCs are increasingly asked to carry out specific tasks that could amount indeed to direct participation, such as the defence of military objectives,<sup>168</sup> certain specific intelligence gathering operations<sup>169</sup> and rescue operations of

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<sup>164</sup> Ibid; See also Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 81–82.

<sup>165</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (ICRC and CambUP, Cambridge 2005) Rule 6.

<sup>166</sup> Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (International Committee of the Red Cross, Geneva 2009) 46.

<sup>167</sup> Ibid 38.

<sup>168</sup> Mirko Sossai, ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 207–210.

military personnel or even civilian and military hostages.<sup>170</sup> However, since some of the activities performed by PMSCs fall in grey areas, it is particularly important to favour a restrictive approach of the notion of “direct participation in hostilities”, consistent with the general rules of IHL on precautions and presumptions in situations of doubt.<sup>171</sup> Consequently, in case of doubt as to whether the PMSC’s specific conduct amount to a direct participation in hostilities, the general rule of civilian protection is presumed to apply, and the conduct should not qualify as “direct participation”.<sup>172</sup> Accordingly, the majority of scholars still believe that PMSCs’ employees should generally be considered as civilians under IHL.<sup>173</sup>

Also in this case the direct participation in hostilities of private contractors within a NIAC poses only marginally distinct legal issues from participation in IACs: PMSCs’ employees would qualify as civilians in the event that the requirements are not met, with the possibility of losing their civilian status in the same way as in the context of an IAC.<sup>174</sup>

#### **4. Legal consequences of the private contractors’ status**

##### *a) Consequences of the private contractors’ status on the battlefield*

Having determined that PMSCs’ might be granted combatant status, the consequence is specific attacks could be directed against them, unless they are considered to be *hors de combat* (i.e. when not taking part in the hostilities because of sickness, wounds, capture or by any other cause).<sup>175</sup> On the contrary, if they are considered civilians, they are protected against attacks unless they take part in hostilities, in which case they would lose the protection as long as their participation lasts. In the event of a private contractor considered to be a civilian performing an isolated act amounting to a “direct participation in hostilities”, it would thus regain the protection afforded to the civilian status

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<sup>169</sup> Ibid 210–211.

<sup>170</sup> Ibid 212.

<sup>171</sup> Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (International Committee of the Red Cross, Geneva 2009) 38.

<sup>172</sup> See Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 67; see also Nils Melzer, ‘Fourth Expert Meeting on the Notion of Direct Participation in Hostilities’ (27-28 November 2006) 69.

<sup>173</sup> Mohamad Ghazi Janaby, ‘The Legal Status of Employees of Private Military/Security Companies Participating in U.N. Peacekeeping Operations’ (2015) 13 *NwJInt’lHR* 82, 98; see also Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 80.

<sup>174</sup> See Michael N Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’ (2005) 5 *CJInt’lL* 512, 522; See also Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 81–82.

<sup>175</sup> ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, common Art. 3 (I).

as soon as the act in question is concluded.<sup>176</sup> The situation in which an entire company is being tasked to perform such activities however is more complicated. Should all the personnel of that company, regardless of their function, become a valid target to any attack or should only the ones who are mandated to take part directly in hostilities become such a target? According to several experts the loss of civilian protection against direct attack should not be based on the fact that a person is employed by a specific company alone, “but additionally on the function fulfilled by an individual member within the group”.<sup>177</sup> If that function requires a member to take direct part in hostilities on a regular or continuous basis, than the member would lose protection against direct attack for as long as that function is being fulfilled”.<sup>178</sup> This approach struck the right balance between an overly extensive cover that would have included all the company’s personnel even if they are not participating in the act, and overcoming the danger of having private contractors exploiting their civilian status claiming the benefit of immunity from attack whenever they drop their arms.

*b) Consequences of the private contractors’ status on his individual criminal liability*

At a domestic level, PMSCs’ employees who are not considered combatants could be held accountable and be prosecuted for the acts committed during the conflict.<sup>179</sup> Since only combatants have the right to participate directly in hostilities, PMSCs’ employees that qualify as civilians could be tried for the mere fact of having taken part in the fights.<sup>180</sup> However, since PMSCs usually operate in failed states or war zones, the territorially responsible state is often unable or unwilling to prosecute them and their staff.<sup>181</sup>

Irrespective of their legal status, private contractors culpable of sever infringements of IHL, in both international and non-international armed conflicts, can be held accountable pursuant to the universal jurisdiction of the Geneva Conventions’ war crimes provisions.<sup>182</sup> Theoretically, PMSCs’

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<sup>176</sup> Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 82.

<sup>177</sup> See Nils Melzer, ‘Third Expert Meeting on the Notion of Direct Participation in Hostilities’ (23-25 October 2005, Geneva) 82.

<sup>178</sup> Ibid.

<sup>179</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (ICRC and CambUP, Cambridge 2005) Rule 5.

<sup>180</sup> Charles Rousseau, *Le Droit Des Conflits Armés* (Pedone, Paris 1983) 68

<sup>181</sup> Katja Weigelt and Frank Märker, ‘Who is Responsible? The Use of PMCs in Armed Conflict and International Law’ in Thomas Jäger and Gerhard Kümmel (eds), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (VS Verlag für Sozialwissenschaften, Wiesbaden 2007) 383.

<sup>182</sup> ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135, Art. 129; Geneva Convention

employees could be prosecuted before any state or before any international tribunal that has jurisdiction. However, not all states have adopted legislations enabling them to prosecute individuals on the basis of universal jurisdiction and when they do, they usually link it to specific state-related conditions.<sup>183</sup> This obligation therefore has not been put into practice very often and the rare trials on the basis of universal jurisdiction have not been against members of PMSCs.<sup>184</sup>

In addition, regardless of their position as civilians or combatants,<sup>185</sup> private contractors could be taken to the International Criminal Court (ICC) for having committed war crimes, crimes against humanity and genocide according to Art. 5(1) of the ICC Statute provided that the crime occurs on the territory of a state party to the Statute or that the accused is a national of a state party. Particularly problematic in this regard is the fact that the US – despite being the country of origin of many private contractors – still refuses to ratify the ICC Statute and regularly arranges immunity treaties with the states in which its military forces and the PMSCs supporting them are operating. Nevertheless, according to Art. 13b of the ICC Statute, the SC, acting under Chapter VII of the UN Charter, may opt to refer a matter to the ICC Prosecutor even if it involves a PMSCs hired by the US. However, the scope of international criminal responsibility is limited to the most severe breaches and at the same time crimes of genocide and crimes against humanity entail such elements of either systematic or widespread commission of the crimes making them difficult to be carried out by PMSCs. If a PMSC's employee is tried before the ICC, it would be most likely for war crimes.<sup>186</sup> An undisputed condition for imputing war crimes to private contractors is the existence of a link between the agent and war, i.e. the illicit act might qualify as a war crime only if it is connected to an armed conflict.<sup>187</sup> To establish the existence of the nexus between criminal conduct and war, a case-by-case evaluation of the conduct of PMSCs' personnel is necessary. This should be implemented either with a particular eye to the objective context in which the conduct takes place (the criminal conduct must be committed because of the war)<sup>188</sup> or according to the subjective position of the private contractor (in this case it is assumed that a link exist whenever the

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Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, Art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, Art. 85; See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (ICRC and CambUP, Cambridge 2005) Rule 157.

<sup>183</sup> Louise Doswald-Beck, 'Private military companies under international law' in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007) 134.

<sup>184</sup> *Ibid* 135.

<sup>185</sup> Ottavio Quirico, 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 429.

<sup>186</sup> Corinna Seiberth, *Private Military and Security Companies in International Law* (Intersentia, Cambridge 2014) 115.

<sup>187</sup> Antonio Cassese, *Cassese's International Criminal Law* (Third Edition, Oxford University Press, Oxford 2013) 77.

<sup>188</sup> [1999] ICTY-IT-95-14/1-T [45]

perpetrator is connected at least *de facto* with a party to the conflict).<sup>189</sup> Accordingly, PMSCs' activities such as CACI's interrogations at Abu Ghraib or the killing of civilians by Blackwater's employees in Iraq could be prosecuted as war crimes.<sup>190</sup>

### *c) Consequences of the private contractors' status in case of capture*

Finally, the legal status of PMSCs' employees under IHL has implications over the POW status as well. In the context of IACs, if private contractors are considered combatants, the third Geneva Convention provides them with a wide range of protection for POW, defining their rights and setting down detailed rules for their treatment and eventual release. By contrast, civilians can not attain POW status in IACs but are protected by the fourth Geneva Convention and the first Additional Protocol thereto. A different conclusion has to be drawn in the case of "civilians accompanying the armed forces". While private contractors who have been granted the status of "civilians accompanying the armed forces" are commonly considered civilians as regards the conduct of hostilities, according to Art. 4 (A)(4) GC III in IAC they are entitled to POW status nonetheless.<sup>191</sup> Lastly, given that in situations of NIAC the POW status does not exist, private contractors who fall in the hands of the enemy maintain the basic guarantees provided under Common Art. 3 of the Geneva Conventions, in the Additional Protocol II thereto and – of course – under customary international law.<sup>192</sup>

## **B. International Human Rights Law applicable to the conduct of PMSCs**

While humanitarian law applies both to state and non-state actors and therefore even private contractors can infringe IHL, the application of human rights to PMSCs and their staff is far more controversial. PMSCs activities are indeed regulated by IHRL, although they are not directly bound by it. While under classic international human rights law codified in treaties private parties do not usually have obligations, in a number of states PMSCs are bound by human rights through

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<sup>189</sup> Ottavio Quirico, 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 431; [1999] ICTR-95-1-T [174] ff.

<sup>190</sup> Ottavio Quirico, 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 431.

<sup>191</sup> Knut Ipsen, 'Combatants and non-combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Third Edition, OUP, Oxford 2013) 105.

<sup>192</sup> Giulio Bartolini, 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 233.

national legislation. In addition, in certain circumstances, PMSCs may be acting as State agents, or – in the case of private contractors hired by the UN – as UN agents, thus binding the private contractors directly to respect the human rights obligations of the hiring entity.<sup>193</sup>

In addition to national legislations codifying human rights, Certain International human rights treaties express state parties obligations to ensure to all individuals subject to their jurisdiction the rights granted by the treaties. Under the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>194</sup> for example, individuals must be “protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons”<sup>195</sup> making it irrelevant whether PMSCs act as private companies or as entities exercising state power. Similar observations can be made with respect to the European Convention of Human Rights (ECHR),<sup>196</sup> the African Charter on Human and Peoples’ Rights (ACHPR)<sup>197</sup> and the American Convention on Human Rights (ACHR).<sup>198</sup> However, the applicability of IHRL to PMSCs’ employees poses a series of problems, which shall be given some attention. Firstly, as PMSCs operate in unstable environments and often during situations amounting to an armed conflict, the scope of applicability of IHRL may be limited due to the clauses for derogation during national emergencies that many human rights treaties contain. However, in unstable environments not amounting to an armed conflict, i.e. the situation in which many PMSCs operate, IHRL is fully applicable. Secondly, as PMSCs usually operates abroad, the extraterritorial applicability of IHRL may pose some challenges. As concerns the extraterritorial application of international human rights treaties, the jurisprudence of several international judicial bodies has established throughout the years the basis for the territorial application of states’ human rights obligations abroad. In its advisory Opinion on the *Palestina Wall* case, the ICJ agreed with the constant practice of the Human Rights Committee in regard to the extraterritorial application of the ICCPR and extended its applicability to circumstances where a state is in a foreign territory in the exercise of its jurisdiction.<sup>199</sup> In the *Bankovic Case* the ECHR held that the case-law of the Court had consistently demonstrated that the

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<sup>193</sup> ‘The 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) Statement 26e <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>194</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>195</sup> Human Rights Committee (HRC) ‘General Comment no 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13 [8].

<sup>196</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950) ETS 5.

<sup>197</sup> Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”) (27 June 1981) CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982).

<sup>198</sup> Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica (22 November 1969); See Federico Lorenzini and Francesco Francioni, ‘The Role of Human Rights in the Regulation of Private Military and Security Companies’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 57.

<sup>199</sup> [2004] ICJ Rep [108]–[111].



Convention applies extraterritorially when the State has “effective control of the relevant territory and its inhabitants abroad ... [and] exercises all or some of the public powers normally to be exercised by that Government”.<sup>200</sup> In the *Al-Skeini* case the Court went further and established jurisdiction not based on authority and control over the area but on control over the individuals who were killed by acts of British soldiers.<sup>201</sup>

In addition, PMSCs’ activities may be suited to generating the responsibility of the states concerned. It is beyond the scope of this paper to analyze the positive and negative human rights obligations of the states; it suffices to say that States have a threefold responsibility towards their international law obligations: to respect, protect and fulfill human rights<sup>202</sup> and that hiring states as well as host states and even home states have several obligations in this regard.

When hired directly by the UN, PMSCs’ obligations might originate from the human rights obligations of the Organization. While – as discussed above – the issue of IHRL application to UN peacekeeping operations is fairly controversial, the UN clearly accepts that it has human rights obligations in the context of peace operations.<sup>203</sup> In certain cases, private conduct is deemed to count as state conduct because the private actor has been authorized by the state entity to exercise governmental powers<sup>204</sup> or because the state has instructed, controlled or directed the private conduct.<sup>205</sup> In the same manner, PMSCs’ conduct might be well considered as UN’s conduct when it is attributable to the Organization. A PMSC might be regarded as an agent of the UN, thereby being bound by the obligations of the Organization. In the *Reparation case* the ICJ declared that an agent can be “any person who, whether paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts”.<sup>206</sup> This definition appears very broad and could include PMSCs. However, in contrast to this definition, the UN General Conditions of Contracts for Services stipulate that the contractor’s personnel “shall have the legal status of an independent contractor *vis-à-vis* the United Nations, and nothing contained in or relating to the Contract shall be construed as establishing or creating between the Parties the relationship of

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<sup>200</sup> [2001] APP no 52207/99 ECHR [71].

<sup>201</sup> [2010] App no 55721/07 ECHR [136].

<sup>202</sup> UN Office Of The High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publications, New York 2011) 14.

<sup>203</sup> UNDPKO and UNDFS, ‘United Nations Peacekeeping Operations: Principles and Guidelines’ (2008) 14; See also UNGA ‘Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces’ (5 March 2013) UN Doc A/67/775, S/2013/110.

<sup>204</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp. IV E.1, Art. 5

<sup>205</sup> Art. 8.

<sup>206</sup> [1949] ICJ Reports 1949, 149

employer and employee or of principal and agent”.<sup>207</sup> Against this backdrop, the UN International Law Commission has nonetheless been clear, stating that the definition of the term “agent” is based on the passage of the advisory opinion of the *Reparation case* cited above and should “cover all the entities through whom the organization acts”<sup>208</sup> Thus, PMSCs’ could be well deemed UN agents in certain circumstances.

The major shortcoming in the case of attribution of PMSCs’ conduct to the UN is the limited capacity of the Organization to enforce its human rights obligations. As the UN is not able to exercise criminal jurisdiction itself, when human rights abuses take place, the exercise of criminal jurisdiction is a matter of the host State or the State of nationality of the contractor in the event that such State has extended its jurisdiction to cover the particular case. The position of the UN on individual criminal accountability of the private contractors hired by the Organization has been that the involvement of the UN is limited to the cooperation “with national authorities to ensure criminal accountability”.<sup>209</sup>

### **C. Accountability of the corporation for unlawful PMSCs’ conduct**

It is beyond of the scope of this paper to analyze the corporate accountability of PMSCs in the event of human rights violations; it suffices to briefly sketch the current framework and to note the shortcomings. While corporations are not directly bound by IHL or IHRL, the implementation of human rights standards by states in their national legislation ensures their respect. Unfortunately, the majority of domestic regulations do not address the extraterritorial use of PMSCs – with the notable exception of South Africa and the US<sup>210</sup> – thus strongly limiting the effectiveness of controls.<sup>211</sup> However, PMSCs fall within the scope of the rapidly evolving international actions attempting to address the accountability and responsibility of business actors for human rights violations. Besides industry-specific responses that will be addressed below, these initiatives include the OECD’s Guidelines for Multinational Corporations and the UN’s Global Compact, trying to increase human rights due diligence obligations, corporate compliance with IHRL and

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<sup>207</sup> UN Office of Legal Affairs (OLA) ‘UN General Conditions of Contract: Contract for the Provision of Services’ (Revision April 2012) Section 1.1.

<[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/4205DDB770830BEEC1257AAF0039FE43/\\$file/2.4+Service+s+only\\_04-2012\\_eng.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/4205DDB770830BEEC1257AAF0039FE43/$file/2.4+Service+s+only_04-2012_eng.pdf)> accessed 2 November 2016.

<sup>208</sup> UNGA ‘Report of the International Law Commission’ (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 79.

<sup>209</sup> Stephen Mathias, ‘Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations’ in Benoît D’Aboville (ed), *Private Military and Security Companies: 35<sup>th</sup> Round Table on Current Issues of International Humanitarian Law (Sanremo, 6<sup>th</sup> – 8<sup>th</sup> September 2012)* (FrancoAngeli, Milano 2013) 127.

<sup>210</sup> See Part II.D of this paper.

<sup>211</sup> Corinna Seiberth, *Private Military and Security Companies in International Law* (Intersentia, Cambridge 2014) 117.

corporate accountability for human rights obligations. Despite laudable, these instruments share a voluntary, non-binding nature, do not offer enforceable mechanisms for protecting human rights and do not provide for enforceable remedies for those who have suffered human rights violations, making them unsuitable to ensure proper accountability of PMSCs' conduct yet.<sup>212</sup>

#### **D. National laws**

Mindful of the fact that the host state will frequently lack the capacity to control PMSCs' conduct, several states have attempted to regulate the conduct of PMSCs operating from their countries, with various degrees of success. Among them are some of the key exporting states, such as the United States – arguably also the most loyal PMSCs' client in the world – and South Africa, home to one of the best-known PMSC in history: the now defunct Executive Outcomes (EO).

Precisely as a result of the frustrations that the governments experienced with EO and other PMSCs employing ex Apartheid military personnel, South Africa has made one of the most direct attempts to regulate the industry in 1998, by enacting the Foreign Military Assistance Act (FMA).<sup>213</sup> The act is very comprehensive and encompasses a variety of military and military-related services, covering every activity in this regard performed by any natural person who is a citizen, a permanent resident or operating from within the country and all juristic persons registered or incorporated in South Africa. In an effort to obtain the greatest coverage, the FMA tackled the issue of PMSCs without trying to define the actors involved, but instead by regulating their activities. Therefore, even the most modern services provided by PMSCs are being contemplated. The FMA also provides for a licensing system which is composed of two steps: before entering into a contract with the client, the individual or the company is first required to obtain a license to offer the services and subsequently one to carry out these services.

The United States has a similar approach to the regulation of PMSCs as they regulate private security companies based on their activities and not on the definition of the actors. However, the US did not dedicate a separate code to PMSCs. Their activities are subject to the International Traffic in Arms Regulation (ITAR) that regulates both the export of defense-related articles (weapons and military equipment) and the services related thereto. Interestingly, unlike the FMA in South Africa, ITAR does not regulate the services performed by PMSCs to their own government, leaving therefore the US government essentially exempt from the regulation. By excluding the US

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<sup>212</sup> Sorcha MacLeod, 'The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Contractors to Account' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 359.

<sup>213</sup> P W Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *ColumJTransnat'lL* 521, 539.

government, ITAR has tremendously lost its efficacy in controlling the activities of PMSCs as the US is one of the most loyal clients on the market, as the Iraqi war has showed. The two-step licensing system provided by ITAR is similar to the one contained in the FMA. This system, however, is very complicated and both the companies involved and independent observers are not clear about the way the whole process works, since different offices and procedures are involved depending on the type of contract.<sup>214</sup> More importantly, the main shortcoming of ITAR is the weak parliamentary oversight: the US congress is informed by the State Department ahead of granting a license only if the contracts is worth more than USD 50 million and, once the company has received the license, for the whole duration of the contract there are no oversight or reporting requirements.<sup>215</sup> The threshold of additional scrutiny is thus easily avoidable by breaking up the contract into smaller segments. Besides ITAR, several other statutes originally thought for military personnel have been extended to apply to US contractors, providing jurisdiction for criminal offenses such as torture or murder. To give just a few examples: the Military Extraterritorial Jurisdiction Act of 2000 or the Uniform Code of Military Justice.

Despite FMA and ITAR being correctly considered a step in the right direction and a substantial improvement if compared to what has been done at the international level, national legislation suffers from at least three major intrinsic obstacles that precludes it from becoming the key long-term solution to the issues posed by the PMSCs.<sup>216</sup> First: PMSCs operate on a global scale, and usually have a relatively limited fixed infrastructure. Therefore, they enjoy a high degree of mobility, enabling them to transfer their offices into any country in the world that offers a more PMSC-friendly regulation. Second: the necessary means to monitor PMSCs activities on a national level are often insufficient and the political will to do so is lacking. For instance, in comparison to most Western states, South African Civil Society is much more limited in its capacity to oversee the activities of local PMSCs as a consequence of the secrecy that covered defence and security issues under the former apartheid regime.<sup>217</sup> But the difficulties concern even the most developed states. The US for example has expressed reluctance in pursuing American PMSCs involved in incidents or abuses. In 1998, an American PMSC supporting the Colombian government in its battle against the rebels by means of aerial surveillance, coordinated an airstrike on a village suspected to be a rebel stronghold, killing eighteen civilians, nine of whom were children. In relation to the

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<sup>214</sup> Deborah Avant, 'Privatizing Military Training' (2002) 7 (6) FPIF 1, 2.

<sup>215</sup> Ibid.

<sup>216</sup> Andrea Schneiker, 'National Regulatory Regimes for PMSCs and their Activities: Benefits and Shortcomings' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007) 415–416.

<sup>217</sup> Mariana Caparini, 'Domestic regulation: licensing regimes for the export of military goods and services' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, Oxford 2007) 178.

investigation that followed, a State Department Official of the embassy in Bogota was quoted stating “Our job is to protect Americans, not investigate Americans”.<sup>218</sup> More recently however, for what concerns the US, it seems that the government has shifted its approach in order to face the private contractors’ impunity that marked the first part of the Iraqi war. In fact the legal regime that allowed immunity to PMSCs’ staff in Iraq has been repealed in 2009 and has been replaced by a SOFA that do not allow the private contractors to elude local jurisdiction.

## **E. Soft Law**

Over the past years, some innovative instruments and organizations intended to regulate PMSCs have emerged at the international level, such as the Montreux Document, the International Code of Conduct for Private Security Service Providers (ICoC) and its Association (ICoCA). While directed at different actors, they all share the objective of enhancing PMSCs compliance with applicable rules of IHRL and IHL.

In 2008, 17 States supported the Montreux Document on Private Military and Security Companies<sup>219</sup> as a result of the tireless efforts in the course of an international process initiated by the Swiss Government and the International Committee of the Red Cross (ICRC). The input that ultimately encouraged the involved parties to address this regrettable situation is attributable to the fact that, up until then, there were virtually no comprehensive codifications as to PMSCs’ conduct. Although a total of 54 States has now joined the document<sup>220</sup> – which encompasses all relevant international legal norms and good practice for governments serving as home, contracting or territorial states to PMSCs as regards international humanitarian law and international human rights protection in the context of armed conflicts – none of its provisions is considered legally binding or directly enforceable. Against this backdrop and as a general remark, it shall nevertheless be emphasized that its scope is indeed fairly limited, focussing on armed conflicts and expressly not covering pre- and post- conflict environments,<sup>221</sup> where PMSCs are mostly deployed.

In 2010, in the wake of the Montreux Document, the Swiss Government launched a new

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<sup>218</sup> Christian T Miller, ‘A Colombian Town Caught in a Cross Fire: The Bombing of Santo Domingo Shows How Messy U.S. Involvement in the Latin American Drug War Can Be’ *Los Angeles Times* (Los Angeles 17 March 2002) <<http://articles.latimes.com/2002/mar/17/news/mn-33272/9>> accessed 29 November 2016.

<sup>219</sup> ‘The 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) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>220</sup> As per December 2016, see Swiss Federal Department of Foreign Affairs FDFA, ‘Participating States of the Montreux Document’ <<https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>> accessed 8 December 2016.

<sup>221</sup> ‘The 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) Preamble (5) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

initiative aimed at regulating and monitoring PMSCs' conduct through the creation of the International Code of Conduct for Private Security Providers (ICoC), certainly the most extensively supported code of conduct for PMSCs with some 700 private companies as signatories.<sup>222</sup> The ICoC outlines core human rights principles and sets out policy and management rules for companies, including vetting and training of personnel, weapon management and grievance procedures.<sup>223</sup> The code has a much broader scope of application than the Montreux Document: it applies to PMSCs involved in providing security services in “complex environments”,<sup>224</sup> whereby these “Complex environments” also include areas experiencing or recovering from unrest or instability, not only due to armed conflicts but also to natural disasters.<sup>225</sup> However, when the ICoC was created, it neither provided for an independent governance and oversight mechanism nor a complementary complaint system – that was created by the ICoCA only at the end of 2016 – enabling PMSCs to sign it and benefit from its good publicity yet virtually avoiding every control of their conduct.

In this sense the creation in 2013 of the ICoC Association has been crucial in promoting, managing and overseeing the implementation of the code. The association's remit includes the certification of PMSCs as to their conformity to the code's requirements, reporting, monitoring and assessing PMSCs' performance as well as handling complaints on alleged violation by its members.<sup>226</sup> Its final aim is to establish commonly-agreed principles for PMSCs by means of the constitution of a foundation with a view of integrate them into recognized standards and guaranteeing their concretization in governance and oversight mechanisms.<sup>227</sup> The ICoC issued a number of commitments that its signatories are bound to respect, inter alia the respect of humanitarian law, the protection of human rights, the interdiction to benefit from the prohibition to contract with, support or service governments or entities contrary to the UN Security Council's sanctions<sup>228</sup> and the explicit prohibition from benefiting or engaging in any form of sexual exploitation, human trafficking and forced labour.<sup>229</sup> In addition to the above, signatory companies are expected to implement the Code by incorporating its provisions in their own regulations and internal control and compliance management systems fostering the development of an appropriate apparatus to undertake strict selections and vetting processes of their personnel whilst not

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<sup>222</sup> See Swiss Federal Department of Foreign Affairs FDFA, 'Private security companies: the International Code of Conduct takes an operational dimension' (19 September 2009) Press Release <<https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-50311.html>> accessed 8 December 2016.

<sup>223</sup> ICoC Chapter F–G.

<sup>224</sup> ICoC Chapter D [13].

<sup>225</sup> For a comprehensive definition of „Complex environments“ see ICoC Chapter B.

<sup>226</sup> International Code of Conduct Association 'Mandate' <<http://www.icoca.ch/en/mandate>> accessed 8 December 2016

<sup>227</sup> ICoC Preamble.

<sup>228</sup> ICoC Chapter E [16]–[27].

<sup>229</sup> ICoC Chapter F [39]–[41].

neglecting to maintain the same ambitious standard when subcontracting such tasks.<sup>230</sup> The ICoC's three-pillared structure struck a balance between the differing views of the numerous actors involved, i.e. governments, private security industry representatives and civil society. Some among them expressed their criticisms as to these initiatives and self-regulations in general, arguing that they are mere indications of the failure of the concerned parties to establish formal regulation<sup>231</sup> and should thus be considered as the "lowest-common-denominator legislation".<sup>232</sup> In this regard, States have a shared responsibility marked by their incapacity to take action by agreeing to an international convention. Even though it is accurate to assume that the self-regulation of PMSCs was driven by a desire to rebalance their lack of legitimacy, these are merely small steps in the right direction, culminated with the establishment of the ICoCA which intensifies and structures the regulations, setting up a multi-stakeholder governance framework pursuant to which the industry will be subject to a monitoring system and to a complaint procedure open to victims of any wrongdoing.<sup>233</sup>

## **F. UN Policies, Guidelines and Agreements**

### **1. The new UN Guidelines**

Regrettably, the increased reliance on the PMSCs' services by the UN has not been accompanied by a comparable move forward in policies and procedures regarding their employment. Precisely the lack of coordination and the absence of dedicated guidelines were pointed out by the UN Working Group on the use of Mercenaries in several of its reports.<sup>234</sup> Until 2012 for example, each agency, fund and office contracted PMSCs on its own, applying its own standards and did not communicate its activities to the rest of the UN entities.<sup>235</sup> The only general standard at UN level was contained in one of the Annexes to the UN Field Security Handbook, requiring the contracted companies to be insured and licensed to provide armed guards and identifying as the ultimate goal the indemnification of the UN from any sort of claims.<sup>236</sup> The UN Working Group recommended

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<sup>230</sup> ICoC Chapter G [44]–[51].

<sup>231</sup> See for example Sarah Percy, 'Regulating the private security industry: a story of regulating the last war' (2012) 94 *Int'lRRC* 941, 954.

<sup>232</sup> *Ibid* 955.

<sup>233</sup> Anne-Marie Buzatu, *Towards an International Code of Conduct for Private Security Providers: A View from Inside a Multistakeholder Process* (SSR Paper 12, DCAF, Geneva 2015) 71.

<sup>234</sup> José L. Gómez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors' (2011) 1 *Notre-DameJInt'l&CL* 1, 62.

<sup>235</sup> Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 10.

<sup>236</sup> See UN Field Security Handbook (2006), Annex O 'Use of Armed Guards' O.2.1.

the Organization to establish effective selection and vetting systems and specific guidelines to regulate and monitor PMSCs' activities when employed by the UN.<sup>237</sup> Following the Working Group's recommendations, in 2012 the UN DSS issued a series of documents attempting to implement the much-needed coherence and standardization for the performance of security services to the UN. As a matter of fact, the DSS's system is comprised of four elements. First, the "UN Security Management System (UNSMS) Policy Manual",<sup>238</sup> containing a section dedicated to armed private security companies and setting out general policies for outsourcing armed security to PMSCs by UN agencies, programmes and funds, specifying that this practice may be considered "only when there is no possible provision of adequate and appropriate armed security from the host Government, alternate Member State(s), or internal United Nations system resources".<sup>239</sup> Moreover, the Policy Manual contains a number of requirements that the PMSCs need to fulfill in order to be contracted by the UN. These requirements are further specified in the second element of the system: the "Guidelines on the Use of Armed Security Services from Private Security Companies",<sup>240</sup> of the UNSMS Security Management Operations Manual, covering two types of security services, i.e. static and mobile protection, and providing for a set of mandatory requirements for PMSCs, involving a minimum five years experience providing armed security services, a valid license in their incorporation state, a license to carry and use weapons in the host state, the ability to comply with the scope of work, and ICoC membership.<sup>241</sup> Lastly, the Guidelines and the Policy Manual are complemented by the other two elements: a very detailed "Model Contract for the provision of armed security services"<sup>242</sup> and a "Statement of Works for the Use of Armed Private Security Companies"<sup>243</sup> containing specific advices on the content of the final contract between the company and the hiring entity.

Aware of the risk of having different members of the UN family applying the guidelines in a different manner, the system provides for a chain of accountability requiring the Under-Secretary-General for Safety and Security to approve every use of PMSCs by the UN. Despite being a significant advancement over the old standards of outsourcing, the expert panel convened in 2013 by the UN Working Group, identified several gaps and areas of improvement, including the lack of vetting of security contractors by the UN and the absence of an oversight mechanism to hold

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<sup>237</sup> UN Human Rights Council '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' (9 January 2008) UN Doc A/HRC/7/7 [60].

<sup>238</sup> See UN Department of Safety and Security (UNDSS), Security Policy Manual, Chapter IV Section I 'Armed Private Security Companies' (2012).

<sup>239</sup> Ibid Chapter IV, Section 1, A.3.

<sup>240</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012).

<sup>241</sup> Ibid Section F. 25.

<sup>242</sup> Ibid Annex B – Model Contract.

<sup>243</sup> Ibid Annex A – Statement of Works.



PMSCs accountable for violations committed by their personnel while hired by the UN.<sup>244</sup> Despite being invited to join the panel, unfortunately the UN DSS refused to participate, showing a split within the UN itself on the very issue.<sup>245</sup>

## 2. The UN Status of Forces Agreement

Before deploying a peacekeeping operation, the host country and the Troops Contributing Country (TCC) usually negotiate the Status of Forces Agreement (SOFA), codifying the immunity of the peacekeepers deployed. The privileges and immunities are usually extended to the operation as a whole, its property and its members,<sup>246</sup> establishing unique immunities for the peacekeepers.<sup>247</sup> The UN Model SOFA codifies complete immunity for actions performed by UN personnel in their official capacity, delegating the exclusive jurisdiction over military personnel in respect of any criminal offences to their respective participating states.<sup>248</sup> Until 2009, when a new SOFA between the Iraqi government and the US entered into force, similar provisions granted immunity from Iraqi law to private contractors operating in the country.<sup>249</sup> The UN Model SOFA however does not include any reference to PMSCs in its provisions and does not extend the immunity from local jurisdiction to private contractors employed by the UN<sup>250</sup>. Nonetheless, recent SOFAs included particular provisions addressed to private contractors who enjoyed a number of facilitations in relation to obtaining visas, exemption from taxes and duties on particular goods and freedom of movement.<sup>251</sup> These privileges however do not include any immunity from local jurisdiction, therefore subjecting contractors to the laws of the host State.

The current UN system regulating PMSCs hired by the Organization is deficient in many aspects and is not suitable for a comprehensive control of private partners providing security services. The next section will examine precisely these aspects in light of the proposed private RRF.

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<sup>244</sup> UNGA ‘Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination’ (20 August 2013) UN Doc A/68/339 [41].

<sup>245</sup> Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 10.

<sup>246</sup> UNGA ‘Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: U.N. Model Status of Forces Agreement for Peacekeeping Operations, Report of the Secretary-General’ (9 October 1990) UN Doc A/45/594 Annex Draft model status-of-forces agreement between the United Nations and host country [4].

<sup>247</sup> Ibid Section VI.

<sup>248</sup> Ibid [46]–[47].

<sup>249</sup> See Coalition Provisional Order 17, Section 4 (3) <[http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf)> accessed 2 December 2016.

<sup>250</sup> Stephen Mathias, ‘Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations’ in Benoît D’Aboville (ed), *Private Military and Security Companies: 35<sup>th</sup> Round Table on Current Issues of International Humanitarian Law (Sanremo, 6<sup>th</sup> – 8<sup>th</sup> September 2012)* (FrancoAngeli, Milano 2013) 122.

<sup>251</sup> Ibid.

### **PART III: The creation of a Private UN Rapid Reaction Force**

The privatization of an operation's armed forces or part of them is arguably the most controversial scenario as to the PMSCs' role within future UN peace operations. In 2003, Singer argued that there were three ways for this to happen:<sup>252</sup> first, PMSCs providing private protection to convoys and personnel on the ground. Second: a private Rapid-Reaction Force (RRF) could be constituted to be at the disposal of the mission shall a more "muscular" approach be deemed necessary. Third: the UN could temporarily outsource a peace operation in its entirety.

While the first option is now a consolidated reality – PMSCs are in fact routinely hired to provide armed escorts for convoys and VIPs – the second and third have not been yet implemented, but are increasingly being considered.<sup>253</sup> As previously mentioned, the UN is being increasingly asked by its Member States to perform multi-faceted missions and at the same time its forces are being deployed into more volatile environments. Within these complex multi-dimensional missions, soldiers with specialized capabilities are needed to perform the most various tasks in fulfilling their mandate. However, the countries with the most advanced armies in the world which maintain these capabilities, including but not limited to the United States, the UK, Germany, France and Japan, merely contribute with less than 3% of the more than 100'000 uniformed personnel deployed in peacekeeping operations at the time of writing.<sup>254</sup> Due to major failures, which catalyzed public attention in the 1990s, many Western countries became reluctant when placing their soldiers under UN command thereby preferring to operate through alternative channels, such as the ad hoc coalitions established in Iraq or most recently in Syria.<sup>255</sup> This implies that the difficulties the UN experiences in getting sufficient troops and an adequate equipment as well as a sound logistical support are constantly growing.<sup>256</sup> Unfortunately, peacekeepers from developing countries often arrive onto the field ill-trained and ill-equipped<sup>257</sup> and tend to prove to be incapable of coping with routine violence, hampering the effectiveness of the missions.<sup>258</sup> The inherent difficulties of multi-

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<sup>252</sup> P W Singer, 'Peacekeepers, Inc.' [2003] PR 59, 63–64.

<sup>253</sup> Tony Vaux and others, *Humanitarian Action and Private Security Companies: Opening the Debate* (International Alert, London 2002) 15.

<sup>254</sup> See UNDPKO 'Ranking of Military and Police Contributions to UN Operations' (31 August 2016) <[http://www.un.org/en/peacekeeping/contributors/2016/aug16\\_2.pdf](http://www.un.org/en/peacekeeping/contributors/2016/aug16_2.pdf)> accessed 20 November 2016.

<sup>255</sup> See Alex J Bellamy and Paul D Williams, 'Broadening the Base of United Nations Troop- and Police-Contributing Countries: Providing For Peacekeeping' (Providing for Peacekeeping, International Peace Institute New York 2012) 6.

<sup>256</sup> Cited in UN News Centre, 'UN to Strengthen Peacekeeping Efforts amid Rising Demand, Says Ban' (UN News Centre, 7 July 2009) <[www.un.org/apps/news/story.asp?NewsID=31383&Cr=Secretary-general&Cr1=peacekeeping](http://www.un.org/apps/news/story.asp?NewsID=31383&Cr=Secretary-general&Cr1=peacekeeping)> accessed 12 November 2016.

<sup>257</sup> See UNGA 'Report of the Panel on United Nations Peace Operations' (21 August 2000) 55<sup>th</sup> Session UN Doc A/55/305 [105]–[108].

<sup>258</sup> Cris McGreal, 'What's the point of peacekeepers when they don't keep the peace?' *Guardian* (17 September 2015) <<https://www.theguardian.com/world/2015/sep/17/un-united-nations-peacekeepers-rwanda-bosnia>> accessed 2 December 2016.

national missions such as for instance soldiers coming from different countries and backgrounds operating based on incongruous military doctrines and policies, using the most divergent communication systems and experiencing difficulties due to a difference in language further compound these challenges, leaving multi-dimensional operations suffer serious quantitative and qualitative deficiencies.<sup>259</sup>

In addition of not having the ideal force at its disposal, the U.N. continues to struggle to mobilize the necessary troops as promptly as each specific situation requires.<sup>260</sup> Recalling the UN inaction against the genocide that took place in Rwanda in 1994, former Secretary General Kofi Annan expressed his frustration based on the fact that according to General Dallaire, the commander of the UN Mission, a small force of 5'000 troops could have saved 500'000 lives.<sup>261</sup> The lack of a prompt response capability was later evidenced in the 2015 Report of the High-Level Independent Panel on Peace Operations identifying slow deployment as “one of the greatest impediments to more effective peace operations”.<sup>262</sup>

To address this problem, the Report recommended the establishment of a “small United Nations ‘vanguard’ capability” and the creation by the Secretariat of a “small dedicated regional strategic reserve contingent” to serve as vanguard for new missions.<sup>263</sup> By the same token, the Report suggested that such contingents be formed redeploying peacekeepers from other missions or by tapping into existing regional troops such as the E.U. Battlegroups and the African Standby Force.<sup>264</sup> The Report however failed to tackle the problem of political reluctance that developed countries showed in providing the necessary forces. In order to avoid the political component, many authors favour a robust rapid-reaction capability mechanism thanks to PMSCs’ engagement.<sup>265</sup> Even Kofi Annan confessed he had considered the possibility of a PMSC engagement for the terribly needed rapid reaction in the Rwandan refugee camp of Goma, but the plan was not ripe for being implemented at that time.<sup>266</sup>

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<sup>259</sup> See Christopher Spearin, ‘UN Peacekeeping and the International Private Military and Security Industry’ (2011) 18 Int’lP 196, 197.

<sup>260</sup> See UNGA ‘Report of the Panel on United Nations Peace Operations’ (21 August 2000) 55<sup>th</sup> Session UN Doc. A/55/305 [103]–[109].

<sup>261</sup> UN Secretary-General, ‘Secretary-General Reflects on “Intervention” in Thirty-Fifth Annual Ditchley Foundation Lecture’ (26 June 1998) UN Doc SG/SM/6613/Rev1.

<sup>262</sup> UNGA, ‘Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people’ (17 June 2015) 70<sup>th</sup> Session UN Doc A/70/95, S/2015/446 [195].

<sup>263</sup> Ibid [199].

<sup>264</sup> Ibid [202].

<sup>265</sup> Jared Genser and Clare Garvie, ‘Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force’ (2016) 16 CJInt’lL 439; see also Malcolm Patterson, ‘A Corporate Alternative to United Nations ad hoc Military Deployments’ (2008) 13 JCSL 215, 221.

<sup>266</sup> UN Secretary-General, ‘Secretary-General Reflects on “Intervention” in Thirty-Fifth Annual Ditchley Foundation Lecture’ (26 June 1998) UN Doc SG/SM/6613/Rev1.

The UN could use this capability to address two of the above illustrated issues it is facing, first by means of a Rapid Reaction Force (RRF) which could intervene immediately after the adoption of a SC resolution establishing a peace operation and before political consensus is reached as regards the contributing countries.<sup>267</sup> Second: a RRF could provide the necessary strength and reinforce an existing peace operation.<sup>268</sup> Such a rapid reaction force could resemble the composition of the Intervention Brigade in Congo and would provide the UN with the ability of responding to threats in a swift and much faster manner, avoiding an escalation of violence while creating a more stable environment for the multi-dimensional peacekeeping operation that would follow. In addition, the private RRF would not suffer from the issues that the command and control structures utilized during peacekeeping and peace enforcement operations have evidenced. Indeed, these structures have been largely ad hoc, lacked uniformity, and thus failed to provide a clear role of the UN in the direction and conduction of the operations, leading to potentially conflicting division of responsibility between the UN and the TCC.<sup>269</sup> Traditional peacekeeping operations suffer because of their multi-national aspect: the soldiers on the ground do not usually respond directly to UN authorities but report to their national commanders. While carrying out their tasks, the troops stay in their state's service but are additionally given the status of international personnel under the authority of the UN as well.<sup>270</sup> This dual nature is highly problematic. The commanders of the operation are assigned by UN organs and only take orders from these, but to control the troops, their orders are not issued directly but need to pass through the national commanders of the single contingents.<sup>271</sup> Sometimes, the national contingent commanders seek approval from their governments before implementing the orders of the operation commander, resulting in delays and orders that may be the result of negotiations between the governments.<sup>272</sup> This lack of clear and centralized top-down objectives results in being a material problem in light of the situation in which these forces operate.<sup>273</sup> For this very reason, PMSCs may be more effective since they could provide the UN with a centralized command structure, streamlining and integrating the command

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<sup>267</sup> UNGA 'Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people' (17 June 2015) 70<sup>th</sup> Session UN Doc A/70/95, S/2015/446 [199].

<sup>268</sup> Ibid.

<sup>269</sup> See Brian D Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1997) 33 *SJInt'lL* 61, 85.

<sup>270</sup> UNGA 'Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations' (23 May 1991) UN Doc A/46/185, Art. 7.

<sup>271</sup> Chia Lehnardt, 'Peacekeeping' in Simon Chesterman and Angelina Fisher (eds), *Private security, public order: the outsourcing of public services and its limits* (OUP, Oxford 2007) 213.

<sup>272</sup> Ibid 214; Nigel D White, 'Institutional Responsibility for Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 387; see further See Christopher Spearin, 'UN Peacekeeping and the International Private Military and Security Industry' (2011) 18 *Int'lP* 196, 197.

<sup>273</sup> See Christopher Spearin, 'UN Peacekeeping and the International Private Military and Security Industry' (2011) 18 *Int'lP* 196, 197.

over the troops – as exemplified in the case of Executive Outcome’s commander in Sierra Leone, who enjoyed unified command over all the troops<sup>274</sup>– thereby obviously increasing the RRF’s efficiency.<sup>275</sup>

### **A. Intervention of the RRF prior to the actual deployment of a UN peace operation**

The first method thanks to which the private sector could try to help UN peace operations to succeed is very far-reaching and aims to solve the most criticized point in the context of peacekeeping, i.e. the delay that often occurs between a Security Council resolution and the actual deployment of the forces. Traditional peacekeeping operations take an average of six months to be placed where there is a need for their protection,<sup>276</sup> i.e. far more than the recommended periods of 30 days for traditional mission and 90 days for complex missions contained in the Brahimi Report.<sup>277</sup> Mindful of the words of General Dallaire, commander of the UN Mission in Rwanda, rapidity in deployment can save thousands of lives. The PMSCs could be deployed much faster, engaging with the opposing parties at the outset of the acts of violence (and not after six months as regular peacekeepers) avoiding an escalation of the conflict, setting up the necessary infrastructure and creating a more stable environment in view of handing over the responsibility to the UN operation once the political consensus has been reached. During Rwanda crisis, this idea did began to grow not only at the UN but was spreading and being discussed within the US federal government as well, where it was suggested to hire EO to create a humanitarian corridor for the fleeing Rwandan Hutu refugee. Yet when the question of who shall have paid the bill was raised, the whole project was abandoned.<sup>278</sup>

On that very occasion, the industry assured to be ready to carry out the task. Executive Outcomes – for instance – performed a business assessment trying to evaluate their potential capacity to intervene in Rwanda in 1994. Once finalised, the company affirmed it had the capability to be on the ground with armed men within 14 days and to deploy 1’500 troops backed by air and fire support within six weeks to react to the genocide. It also stated that its six-months’ planned operation would have had a cost of USD 150 million, a minor expense if compared to the UN

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<sup>274</sup> Herbert Howe, ‘Private Security Forces and African Stability: The Case of Executive Outcomes’ (1998) 34 *JMAS* 307, 314.

<sup>275</sup> Paul McIvor, ‘Private Peacekeeping – Opportunity or Impossibility?’ (1998) 27 *P&Int’lR* 3.

<sup>276</sup> See UNGA ‘Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people’ (17 June 2015) 70<sup>th</sup> Session UN Doc A/70/95, S/2015/446 [198].

<sup>277</sup> See UNGA ‘Report of the Panel on United Nations Peace Operations’ (21 August 2000) 55<sup>th</sup> Session UN Doc A/55/305 [88].

<sup>278</sup> Elizabeth Rubin, ‘Army of One’s Own’ *Harper’s Magazine* (February 1997) 55.

operation UNAMIR II which was in action after the genocide at a cost of around USD 3 million a day.<sup>279</sup> For its operations, EO would have issued so-called “security islands” to provide safe heavens for thousands of refugees.<sup>280</sup> Its Rapid Deployment Brigade would have been rooted in three Rapid Deployment battalions for peace enforcement of 375 men each, a support battalion of 311 men for disaster relief, an Air wing consisting of an aircraft for surveillance, combat helicopters and two Boeings 727 for troop transportation.<sup>281</sup> Interestingly, EO’s Rapid Deployment Brigade resembles, though in smaller scale, the composition of the UN Intervention Brigade.

## **B. Intervention of the Rapid Reaction Force within existing peace operations**

While Genser and Garvie proposed an RRF that would primarily operate independently from a UN peace operation and would in fact hand over the control of the area when the mission has been deployed,<sup>282</sup> the same RRF could serve to address another long-standing problem of the Organization: the incapacity of UN peace operations to pursue their mandate effectively in violent environments.

The UN is confronted with extreme environments that demand a more coercive and aggressive approach. Unfortunately, blue helmets are usually unable or unwilling to provide it,<sup>283</sup> such as in the case of the UN peace operation in Congo. There, the UN Security Council recognized the lack of progress that the cycle of violence in the eastern DRC was causing and decided to expand the mandate of the mission by establishing the Intervention Brigade. The Brigade was created following a series of recommendations contained in a Special Report<sup>284</sup> of the Secretary-General and was given an unprecedented mandate to prevent the expansion of, neutralize and disarm armed rebel groups<sup>285</sup> by carrying out “targeted offensive operations, either on its own or jointly with FARDC [Forces Armées de la République Démocratique du Congo]”.<sup>286</sup> In order to carry out and support Congolese government offensive operations forces, the Brigade was staffed with 3096 troops and equipped with attack helicopters, long-range artillery, armoured personnel carriers,

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<sup>279</sup> P W Singer, ‘Peacekeepers, Inc.’ [2003] PR 59, 65.

<sup>280</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 185.

<sup>281</sup> For a scheme of the Rapid Deployment Brigade see P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 186.

<sup>282</sup> Jared Genser and Clare Garvie, ‘Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force’ (2016) 16 CJInt’IL 439, 448.

<sup>283</sup> P W Singer, ‘Peacekeepers, Inc.’ [2003] PR 59, 64.

<sup>284</sup> UNSC ‘Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region’ (27 February 2013) UN Doc S/2013/119.

<sup>285</sup> *Ibid* [60].

<sup>286</sup> *Ibid* [61]; see also SC Res 2098 (28 March 2013) UN Doc S/Res/2098, 7.

special forces and snipers.<sup>287</sup> Created in March 2013, the Brigade was dispatched in Congo only after several months, in July/August 2013, but immediately began fighting alongside FARDC against the rebel group M23.<sup>288</sup> Thanks to the massive support of the Brigade, M23 – the strongest armed group in the country – was defeated in a few months and in the beginning of 2014 the Congolese forces and the Brigade focussed on other armed opposition forces.<sup>289</sup> Over the past few years the Intervention Brigade has been widely hailed as a success leading to positive military results through the support of national troops in a way that MONUSCO was unable to do. However, while the result of the Brigade may be welcomed, MONUSCO was struggling to contrast the rebel groups since years and the SC did not provide the mission with the necessary tools to counterattack. In fact, a strong military unit in support of the operation in Congo had already been proposed a decade before instituting the Brigade. Ten years prior to the establishment of the Brigade, the International Peace Operations Association (IPOA),<sup>290</sup> aware of the challenges MONUC was facing in Congo, issued a Concept Paper presenting how the industry was ready to provide the mission with the necessary services that lacked to fulfill its mandate.<sup>291</sup> The IPOA Consortium, composed of well-known PMSCs such as PAE, MPRI and AirScan International, would have provided security and stabilization services (including but not limited to protecting civilians, UN personnel and deterring or interdicting armed factions undermining the UN mandate) humanitarian services (by providing mission security for humanitarian operations on the ground and by undertaking demining processes) and support to the NGOs (by establishing communications services and a 24-hour rapid rescue service).<sup>292</sup> It was estimated that the forces could have been deployed within 30 to 90 days and that the cost of the operation would have been only a fraction of what the UN would have had to pay for a similar operation if implemented through state forces.<sup>293</sup> The private sector was not unfamiliar to similar efforts: in 1993, notwithstanding the presence of the United Nations Angola Verification Mission II (UNAVEMII), the Angolan government, struggling to fight the rebels of the National Union for the Total Independence of Angola (UNITA), hired EO to recover the territory captured by UNITA and to train the Angolan army.<sup>294</sup> EO was able to deploy incredibly quickly,

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<sup>287</sup> Scott Sheeran and Stephanie Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (International Peace Institute, New York 2014) 2.

<sup>288</sup> Christoph Vogel, 'DRC: Assessing the Performance of MONUSCO's Force Intervention Brigade' *AfricanArguments* (14 July 2014) < <http://africanarguments.org/2014/07/14/drc-assessing-the-performance-of-monuscos-force-intervention-brigade-by-christoph-vogel/>> accessed 24 November 2016.

<sup>289</sup> *Ibid.*

<sup>290</sup> Now International Stability Operations Association (ISOA).

<sup>291</sup> IPOA 'Supporting the MONUC Mandate with Private Services in the Democratic Republic of Congo' (IPOA Concept Paper) (January 2003) < <http://www.hoosier84.com/030201ipoa-drc.pdf>> accessed 24 November 2016.

<sup>292</sup> *Ibid.* 3, 5-6.

<sup>293</sup> *Ibid.* 1.

<sup>294</sup> Sean Cleary, 'Angola - A case study of private military involvement' in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (Institute for Security Studies, Pretoria, South Africa 1999) 159.

beginning its operations after less than one month of signing the first contract with the government,<sup>295</sup> and conducted classic find, fix and destroy operations against the rebels.<sup>296</sup> In addition, EO acted as “force multiplier”, building up on Angolan national troops and providing the necessary skills backed with the contractor’s broad military experience.<sup>297</sup> In spite of being present in the territory with only around 550 men, EO succeeded in securing the entire oil region of Angola and the diamond producing areas, fighting along of, and operationally commanding the Forças Armadas Angolanas (the Angolan Army, hereinafter “FAA”).<sup>298</sup> At the same time, the company retrained the 16<sup>th</sup> Brigade of the FAA, making it able to inflict heavy losses upon UNITA and counter it.<sup>299</sup>

Although some critics overstate EO’s success in Angola, it has to be underlined at this point that the company played a fundamental role in the Angolan conflict, providing the national army with the necessary expertise and exploiting its knowledge of UNITA’s weaknesses.<sup>300</sup> More generally, EO’s operation in Angola has proven the industry’s ability to quickly mobilize a small unit of contractors and execute a precise mandate in a very effective manner.

Having outlined the two methods by which the private sector could help the UN in facing the challenges that modern peacekeeping has presented, the next part of this paper will examine the political and legal challenges that a private RRF would pose to the Organization.

### **C. Who decides? The Current system for PMSCs’ selection and the RRF**

Before 2012, each agency, department and entity of the UN had independently adopted its own position as concerns the use of PMSCs’ services as the Organization lacked the necessary overarching coordination and coherence for such a delicate action. One of the aims of the UN Guidelines on the use of armed security services was precisely to clarify the chain of accountability for decisions related to the use of PMSCs for armed security.<sup>301</sup> Under the new Guidelines the final

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<sup>295</sup> See Christopher Spearin, ‘UN Peacekeeping and the International Private Military and Security Industry’ (2011) 18 Int’l P 196, 203.

<sup>296</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 108–109.

<sup>297</sup> Ibid 109.

<sup>298</sup> Kevin A O’Brien, ‘Military-advisory groups and African security: Privatized peacekeeping?’ (1998) 5 Int’l P 78, 86; See also P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 109.

<sup>299</sup> See Sean Cleary, ‘Angola - A case study of private military involvement’ in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (Institute for Security Studies, Pretoria, South Africa 1999) 156.

<sup>300</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 110.

<sup>301</sup> Under the Guidelines, to enable the Designated Official, i.e. the Chief Security Adviser, the Security Adviser or the Chief of Security and Safety Services, to make a recommendation with regard to the need for armed security, the most senior UN security professionals advising the Designated Official must previously conduct a security risk assessment. In the event the Designated Officer or the Security Management Team identify strong reasons as to why the delivery of armed protection by the UN itself, its Member States or the Host Country is not feasible or preferable, the option to use



decision on the use of private armed security rests with the Under-Secretary-General for Safety and Security.<sup>302</sup> Despite eventually codifying a terribly needed chain of accountability, as some representatives of UN Staff Union reported, the current mechanism is complicated and multi-layered and therefore undermines individual accountability by involving various officials in the process.<sup>303</sup> This problematic system should not be implemented in the context of the RRF as the decision of its deployment would have to be taken promptly, and not after the lengthy process described above. Furthermore, while the decision on the use of PMSCs is taken by the Under-Secretary General of the DSS, the selection of the PMSC takes place at the operational level: each UN operation and entity has the authority to choose which PMSC will provide the services.<sup>304</sup>

Given the unique nature of a private RRF, its level of authority and its independence on the field, it goes without saying that such a mechanism cannot be used for the decision as to which companies will provide the forces for the RRF. The entity authorizing both the RRF and the establishment of the peacekeeping force should always be the Security Council, the UN body vested with the authority to take the necessary actions to ensure global peace and stability. However if the actor deciding on the specific PMSC that would provide the troops for the RRF would be the SC as well, there is a risk that the most developed states would try to influence the process in order to secure the award of a contract to PMSCs incorporated in their territory and that the whole process would collapse in front of a deadlock among SC members over the PMSC's nationality of incorporation. In order to avoid this, the decision should be ideally taken at the operational level, by an entity without any political motivation. Unfortunately, this solution is very unlikely to be concretized precisely because of the political implications that the PMSC's choice would have.

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an armed security company may be evaluated. See UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Art. 14 and 19.

<sup>302</sup> Ibid Art. 20.

<sup>303</sup> 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [28].

<sup>304</sup> Ibid [46]–[47].

## D. Legal challenges

### 1. A private Rapid Reaction Force under International Humanitarian Law

#### *a) The applicability of International Humanitarian Law to UN forces*

UN forces taking part in peace operations are placed under UN command and control and are thus considered to be an integral part of the institutional apparatus of the Organization, forming one of its subsidiary organs. Peacekeeping forces are composed of national contingents that pursuant to the “effective control” doctrine<sup>305</sup> renders their acts directly attributable to the UN, thereby triggering the UN’s international responsibility.<sup>306</sup> While most scholars share this position and hold that the “effective control” shall apply to determine institutional responsibility, some have argued that as the circumstance of peace operations are significantly different from those of state responsibility, the threshold should be adjusted accordingly. Due to the particular nature of the command structure of peace operations, it is unrealistic to expect the UN to exercise “effective control” over every aspect of the operation.<sup>307</sup> Thus, also when considering the attribution of acts of PMSCs to the UN the lack of this complete control should not be a bar to imputing responsibility<sup>308</sup> and therefore their conduct should be attributable to the Organization in the event that they are under its “overall control”,<sup>309</sup> a less stringent standard according to which the State (or in this case the UN) is responsible for the conduct of the persons acting, on whatever basis, on its behalf.<sup>310</sup> A private RRF would, as described before, be created by a SC Resolution and would be put under the authority and command of the Security Council, leading the latter and the whole UN to be accountable for the acts of the former. However, before addressing the practical legal obligations deriving from IHL to which the RRF would be subject, it is mandatory to set out a few key points with reference to the legal obligations of the UN itself.

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<sup>305</sup> The effective control test requires that the person who performed the wrongful acts have acted either in accordance with the state’s instructions or under its effective control, and that these instructions were given, or effective control exercised, in respect of each operation in which the alleged violations have taken place, and not generally in respect of the overall actions taken by the persons having committed the violations. See [2007] ICJ Rep [400]–[407].

<sup>306</sup> UNGA ‘Report of the International Law Commission on the Work of its Sixty-First Session’ (4 May–5 June and 6 July–7 August 2009) UN Doc A/64/10, 64–66.

<sup>307</sup> Nigel D White, ‘Institutional Responsibility for Private Military and Security Companies’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, Oxford 2011) 391.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*; see [2007] ICJ Rep [402].

In the past, the UN and its Member States have shown reluctance as to IHL's applicability to the actions of their forces when engaged in peace operations.<sup>311</sup> It has been pointed out that for the sake of their international legitimacy, peacekeeping forces had to be impartial, objective, neutral and concerned only with the maintenance of international peace and security and therefore cannot and should not be considered as a party to the conflict.<sup>312</sup> The same arguments have been put forward in recent years by some TCCs participating in the NATO operation in Libya<sup>313</sup> and even by the Secretary-General in regard to the UN intervention in Côte d'Ivoire in 2011.<sup>314</sup> Furthermore, some authors suggested that in light of the international legitimacy under which UN operations are conducted, the conditions triggering IHL's applicability might be different for UN forces.<sup>315</sup> The arguments in favour of a different IHL application to UN forces when they are pursuing an internationally supported "legitimate goal" must be strongly rejected. The distinction that some authors are trying to put forward is in clear conflict with the *raison d'être* of IHL, which tries to impose limits on the freedom of action of the belligerents, regardless of the cause for which they fight. The argument raises the following issues: are the rules governing relations between belligerents (*jus in bello*) autonomous, or is their application conditioned by the rules prohibiting the recourse to force (*jus ad bellum*)? On this issue scholarly analysis argues for the complete autonomy of *jus in bello* with regard to *jus ad bellum* and the consistent state practice confirms this conclusion.<sup>316</sup> The Preamble of the Additional Protocol I supports this autonomy:

The High Contracting Parties ...

*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to

<sup>311</sup> See Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 Int'IRRC 561, 563.

<sup>312</sup> Ibid.

<sup>313</sup> Ola Engdahl, 'Multinational Peace Operations Forces Involved in Armed Conflict: Who are the Parties?' in Kjetil Mujezinović Larsen, Camilla Gundahl Cooper and Gro Nystuen (eds), *Searching for a "Principle of Humanity" in International Humanitarian Law* (First Paperback Edition, CambUP, Cambridge 2012) 259. The author refers to a statement by the Norwegian prime minister to the effect that Norwegian soldiers could not be considered legitimate targets while participating in NATO operations in Libya, because they were on a UN mission.

<sup>314</sup> After two UN attack helicopters fired missiles at a military camp controlled by the defeated presidential candidate Laurent Gbagbo, UN Secretary-General Ban Ki-Moon was quoted saying: "Let me emphasise that UNOCI is not a party to the conflict. In line with its Security Council mandate, the mission has taken this action in self defence and to protect civilians." See Patrick Worsnip, 'Ban Ki-moon says U.N. not party to I. Coast conflict' *Reuters* (4 April 2011) <<http://www.reuters.com/article/uk-ivorycoast-un-ban-idUKTRE73364Z20110404>> accessed 23 November 2016.

<sup>315</sup> Paul Berman, 'When Does Violence Cross the Armed Conflict Threshold? Current Dilemmas' in *Proceedings of the 13<sup>th</sup> Bruges Colloquium: Scope of Application of International Humanitarian Law* (18–19 October 2012) 41.

<sup>316</sup> François Buignion, 'Just wars, wars of aggression and international humanitarian law' (2002) 86 Int'IRRC 523, 542–544.

the conflict...<sup>317</sup>

Irrespective of the fact that the UN is defending a just cause, if the conditions of IHL are met, its rules will immediately apply to UN forces taking part in the conflict.

However, as the UN is not party to any treaty stipulating IHL rights and obligations – including the Geneva Conventions and their Additional Protocols – the Organization is technically not bound by them. Per contra, as the International Court of Justice correctly noted in its advisory opinion to the *Reparation Case*, the UN is “a subject of international law and capable of possessing international rights and duties”,<sup>318</sup> including those stemming from customary international law.<sup>319</sup> The question therefore does not concern the application of IHL itself to the UN, but rather the scope of the UN’s obligations under customary international law. To clarify the matter, in 1999 the UN Secretary-General issued an internal instruction titled “Observance by United Nations forces of international humanitarian law”, commonly referred to as “the Bulletin”.<sup>320</sup> It articulates the “fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control”.<sup>321</sup> The provisions contained therein do not constitute an exhaustive list of the IHL principles and rules binding for military personnel, but set forth several obligations,<sup>322</sup> specifying that “The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement”<sup>323</sup> and that they “are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence”.<sup>324</sup> In addition to the Bulletin, the Model SOFA contains relevant obligations in respect to IHL. Despite not being contemplated in the Model SOFA, contemporary SOFAs since the UN Mission in Rwanda<sup>325</sup> further specify the obligations of UN forces, stating that peacekeeping operations are to be conducted “with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel”,<sup>326</sup> including “the four Geneva

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<sup>317</sup> Additional Protocol I, Preamble [5].

<sup>318</sup> [1949] ICJ Rep 149, 174.

<sup>319</sup> Katarina Grenfell, ‘Perspective on the applicability and application of international humanitarian law: the UN context’ (2013) 95 Int’l IRRC 645, 648.

<sup>320</sup> UN Secretary-General, ‘Secretary-General’s Bulletin: Observance by United Nations forces of international humanitarian law’ (6 August 1999) UN Doc ST/SGB/1999/13.

<sup>321</sup> Ibid Preamble.

<sup>322</sup> Ibid Section 2.

<sup>323</sup> Ibid Section 1.1.

<sup>324</sup> Ibid.

<sup>325</sup> Katarina Grenfell, ‘Perspective on the applicability and application of international humanitarian law: the UN context’ (2013) 95 Int’l IRRC 645, 649 (fn 21).

<sup>326</sup> Ibid; See for example the Status of Forces Agreement between the United Nations and the Government of the

Conventions of 12 August 1949, and their Additional Protocols of 8 June 1977...”.<sup>327</sup> The relevant principles of IHL are therefore being incorporated into the Rules of Engagement (RoE) of the forces on the ground and have to be applied when the conditions are met.

A different argument against the application of IHL to the UN is that it does not have a criminal justice system by which it could try and punish persons responsible for war crimes and could therefore not theoretically undertake certain essential steps to ensure compliance by its forces with IHL.<sup>328</sup> In fact, the wording of Art. 1 common to the four 1949 Geneva Conventions is clear on this regard and states that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.<sup>329</sup> Similarly, Rule 139 of Customary IHL requires that “Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control”.<sup>330</sup> Since the standard peacekeeping operations mechanism relies upon Member States’ contributions, this obligation usually lies within the various TCCs as they are delegated the task of sanctioning any violation.<sup>331</sup> The obligation of the UN in this sense is therefore maintained.

#### *b) Status and obligations of UN-hired RRFs’ employees*

After having ascertained that UN forces are subject to IHL, in order to define the particular legal obligations of a private RRF it is necessary to analyze the status of the UN-hired RRFs’ private contractors. Since the private RRF would be engaged in situations of armed conflicts and would be placed under the command and authority of the UN, PMSCs’ employees should be granted the status of combatants which, under Art. 43 (2) of the first Additional Protocol and Art. 4 (A) of the third Geneva Convention, is determined by membership in the armed forces or membership in militias or volunteer corps forming part of such armed forces, which are under a command responsible to that party for the conduct of its subordinates. In light of the obligation to guarantee

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Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS) No 48873 (entered into force on 8 August 2011) [6].

<sup>327</sup> *Ibid.*

<sup>328</sup> Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 3 *YbKInt’IHL* 3, 15

<sup>329</sup> ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, common Art. 1.

<sup>330</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (ICRC and CambUP, Cambridge 2005) Rule 139.

<sup>331</sup> UNGA ‘Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations’ (23 May 1991) UN Doc A/46/185 Art. 25; see also Roisin Burke, ‘Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity’ (2011) 16 *JCSL* 63, 70

respect of IHL the establishment of the RRF could represent a considerable issue. As stated above, the UN does not have a centralized criminal justice system and discharge the obligations to ensure compliance with IHL by the troops to the TCCs. This would not be the case with the RRF, since it would be directly hired by the UN. In order to achieve an effective enforcement of IHL in this case, the jurisdictional authority should be either retained by the states involved or exercised by the UN itself through the establishment of a comprehensive criminal justice regime. In addition to this, the establishment of such a system would solve many of the political and legal problems in relation to peacekeeping operations as concerns to the impunity of PMSCs' employees and of peacekeepers. The creation and practicability of this system will be discussed in the section dedicated to the RRF's accountability.

In international armed conflicts, RRF's employees will be lawful targets of attack and could potentially be detained by their adversaries as prisoners of war. Likewise, RRF's personnel subject to capture and detainment would be entitled to the protections of the Third Geneva Convention. By virtue of the combatant status that could be granted to the contractors, RRF's employees would be required to afford the protections laid down in Art. 3 of the Geneva Convention to all persons not participating in the conflict and in particular to any non-government force having "laid down its arms" or who is considered *hors de combat*, refraining from perpetrating violence, murder, torture and affording them the necessary judicial guarantees.<sup>332</sup> Additionally, same as the Intervention Brigade, in the event of a non-international armed conflict the RRF would be subject to the provisions of international humanitarian law applying to NIAC and the provisions of customary international law, including the requirement to distinguish between civilians and combatants when targeting attacks,<sup>333</sup> the prohibition of "methods and means of warfare calculated to inflict unnecessary suffering"<sup>334</sup> and perfidy.<sup>335</sup> Finally, the RRF would need to ensure that its staff abide by the principles contained in the Secretary-General's Bulletin, including the protection of civilian populations from attack,<sup>336</sup> the prohibitions and restrictions on the use of certain weapons and methods of combat,<sup>337</sup> the prohibition of attacking monuments, archaeological sites and places of

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<sup>332</sup> ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, common Art. 3 (1).

<sup>333</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (ICRC and CambUP, Cambridge 2005) Rule 1.

<sup>334</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (ICRC and CambUP, Cambridge 2005) Rule 70.

<sup>335</sup> See Devon Whittle, 'Peacekeeping in Conflict: The Intervention Brigade, Monusco, and the Application of International Humanitarian Law to the United Nations Forces' (2015) 46 *GJIL* 837, 859.

<sup>336</sup> UN Secretary-General, 'Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law' (6 August 1999) UN Doc ST/SGB/1999/13, Section 5.

<sup>337</sup> *Ibid* Section 6.2.

worship and objects indispensable to the survival of the civilian population,<sup>338</sup> and other specific requirements regarding the treatment of persons *hors de combat*, detainees and wounded.<sup>339</sup>

## 2. Immunities and IHL

UN peacekeepers benefit from legal protections against attacks under various legal regimes, including the Convention on the Safety of United Nations and Associated Personnel,<sup>340</sup> the Optional Protocol thereto<sup>341</sup> and the Rome Statute of the International Criminal Court.<sup>342</sup> Members of private RRFs could fall under the personal protection field of these rules and thus be granted immunity from attacks. Indeed, the Safety Convention applies to all the “persons engaged or deployed (...) as members of the military, police or civilian components of a United Nations operation”<sup>343</sup> and requires state parties to ensure – inter alia – that UN personnel, their equipment and premises are not made the object of attack,<sup>344</sup> and that intentional attacks against them or threats to commit such attacks are criminalized.<sup>345</sup> The convention further provides for criminal penalties in case of attacks against peacekeepers and establishes a system of universal jurisdiction over these attacks.<sup>346</sup> It is not hard to see that there is an inherent incompatibility between the Safety Convention and IHL. Whereas under the convention peacekeepers (and in this case RRF’s private contractors) cannot be attacked, the latter are considered combatants pursuant to IHL and accordingly they are not protected against attacks and other combatants cannot be punished for attacking them.<sup>347</sup>

Aware of this possibility, the drafters of the Safety Convention included an IHL-related exception: indeed, according to Art. 2, the protections afforded to peacekeepers do not apply “to a UN operation authorized by the Security Council as an enforcement action under Chapter VII (of the UN Charter) in which any of the personnel are engaged as combatants against organized armed

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<sup>338</sup> Ibid Section 6.6–6.7.

<sup>339</sup> Ibid Section 7–9.

<sup>340</sup> Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363.

<sup>341</sup> UNGA ‘Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel’ (6 January 2006) UN Doc A/Res/60/42.

<sup>342</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

<sup>343</sup> Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, Art. 1(a)(i).

<sup>344</sup> Ibid Art. 7(1).

<sup>345</sup> Ibid Art. 9(1).

<sup>346</sup> Ibid Art. 9–10.

<sup>347</sup> See Marco Sassoli, ‘International Humanitarian Law and Peace Operations, Scope of Application *Ratione Materiae*’ in G L Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations: Conference Proceedings, 31<sup>st</sup> Round Table on Current Problems of International Humanitarian Law* (San Remo 4–6 September 2008) 102.

forces and to which the law of international armed conflicts applies”.<sup>348</sup> Thus, in the case in which the RRF would be deployed pursuing an enforcement mandate under Chapter VII in the context of an International Armed Conflict, these immunities would not be granted. What however if the RRF is assigned to the same mandate, but within a NIAC? The exact interplay between IHL and the Safety Convention on this issue still remains unclear. The Safety Convention’s text and drafting history suggest that the peacekeepers should lose their protection only in case of an international armed conflict. Art. 2 of the Safety Convention refers only to international armed conflicts. A *contrario* this means the immunities would be granted to a RRF operating in a NIAC and it would therefore still be a crime to attack UN-associated personnel. This interpretation is also consistent with the will of the Convention’s drafters, that – mindful of the UN experiences in Somalia – wanted to protect UN personnel in the event of their capture, given the poor protection granted by the legal status of captured soldiers in non international conflicts compared with the prisoners of war status accorded in the case of international conflicts.<sup>349</sup> However, at the time of the drafting of the Safety Convention, it was not foreseen that the UN could engage in peace enforcement in NIAC.<sup>350</sup> A more logical interpretation for the Safety Convention in today’s context would be to exclude the protection both in IAC and in NIAC. Of the same opinion is the ICRC, that has been unmistakably clear on this very issue. According to Mr. Kellenberger, its former president, the immunities and protections conferred to peace-operations personnel – both in international and non-international conflicts – must not prejudice IHL’s fundamental principle of equality between belligerents, conferring equal rights and duties to both sides of an armed conflict.<sup>351</sup> Similarly, the definition of “war crimes” contained in the 1998 Rome Statute of the International Criminal Court includes attacks against peacekeepers “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”<sup>352</sup>

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<sup>348</sup> Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, Art. 2.

<sup>349</sup> Ola Engdahl, ‘The legal status of United Nations and associated personnel in peace operations and the legal regime protecting them’ in G L Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations: Conference Proceedings, 31<sup>st</sup> Round Table on Current Problems of International Humanitarian Law* (San Remo 4–6 September 2008) 129.

<sup>350</sup> Scott Sheeran and Stephanie Case, ‘The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo’ (International Peace Institute, New York 2014) 11.

<sup>351</sup> Jakob Kellenberger, ‘Keynote address’ in G L Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations: Conference Proceedings, 31<sup>st</sup> Round Table on Current Problems of International Humanitarian Law* (San Remo 4–6 September 2008) 36.

<sup>352</sup> Art. 8 (2)(b)(iii) and (e)(iii) of the Rome Statute.



### 3. A private Rapid Reaction Force under International Human Rights Law

As discussed above, PMSCs' employees could be bound by the UN's human rights obligations were they be considered as "agents" of the Organization. As the RRF would – as shown above – operate under a SC Resolution and be mandate by the very SC similarly as peacekeeping forces, its actions would be imputable to the Organization in the same way; as the United Nations Legal Counsel stated: "an act of a peacekeeping force is, in principle, imputable to the Organization".<sup>353</sup>

After having outlined the legal framework under which the RRF would operate, the next sections describes the elements that would be necessary for the implementation of an effective regulatory scheme for the RFF by the UN, starting with the creation of a new licensing process for PMSCs, outlining the main element that the model Contract for the RRF should incorporate and finally describing the monitoring system in place and the necessary improvements.

### 4. Licensing

#### *a) Licensing system under the current UN Guidelines*

The current selection process of the UN maintains a list of private companies licensed as "UN Secretariat Registered Vendors" that are eligible to contract with UN bodies.<sup>354</sup> This screening allows the UN to identify and eliminate from consideration companies that are under formal investigation, are suspended from or have been sanctioned by the UN or employ any former UN staff member who has dealt with the company in an official capacity.<sup>355</sup> Besides, the companies are required to ratify the UN Supplier Code of Conduct, addressing key issues of labour, human rights, protection of the environment and ethical conduct and requiring the adherence to the values enshrined in the UN Charter.<sup>356</sup> In order to be able to bid for the provision of services to the UN, private military and security companies are also required to be members of the International Code of Conduct, to count on five-years of experience at least in providing armed services, to be

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<sup>353</sup> See UNGA 'Report of the International Law Commission' (3 May–4 June and 5 July–6 August 2014) UN Doc A/59/10, 112 (This quote is from an unpublished letter of 3 February 2004 by the UN Legal Counsel to the Director of the Codification Division, UN Doc A/CN.4/545, Section II.G).

<sup>354</sup> UN Procurement Division (UNPD) 'UN Secretariat Registered Vendors' <<https://www.un.org/Depts/ptd/un-secretariat-registered-vendors>> accessed 4 December 2016.

<sup>355</sup> UNPD 'Pre-requisites for Eligibility' <[https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/prerequisite\\_for\\_eligibility.pdf](https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/prerequisite_for_eligibility.pdf)> accessed 4 December 2016.

<sup>356</sup> UNPD 'UN Supplier Code of Conduct' <[https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/2014/February%202014/conduct\\_english.pdf](https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/2014/February%202014/conduct_english.pdf)> accessed 4 December 2016.

currently licensed for providing these services in their “home state”, i.e. the place of registration or incorporation, to be currently licensed to engage as a PMSC and to import, carry and use firearms in the host state, i.e. where the UN requires them to operate.<sup>357</sup> PMSCs also need to conduct a screening of their personnel with regard to criminal convictions, encompassing any breach of international criminal or humanitarian law in order to confirm that the employees delivering the services for the UN offer regular trainings to personnel and staff with respect to the Use of Force Policy, the International Code of Conduct, human rights law in general and the prevention of sexual harassment.<sup>358</sup> In relation to the use of force and weapons, the PMSC is required to develop and implement its own Use of Force Policy, firearms and management procedures and “Weapons Manual” that need to be consistent with the national law of the place where the services are provided, with the ICoC and, to the extent possible, with the UN “Use of Force Policy” and the “UNDSS Manual of Instruction on Use of Force Equipment, including Firearms”.<sup>359</sup> In this regard, the PMSC’s Policies need to be at least as restrictive as the UN Policies themselves.

These procedures are a big step in the right direction and result in an improved system as compared than the one in place before 2012. This situation is however not flawless. The personnel screening process is limited to police and military services of the contractor’s current country of residence, employment and nationality. Private contractors operate around the world and tend to be deployed in several countries during their carrier, and not only where they live, where their employer is incorporated or where they were born. The current vetting system leaves therefore the acts of private contractors performed outside these three countries outside its scope of control. Furthermore, the background check merely covers the past five years,<sup>360</sup> neglecting virtually everything that the contractor has done before that time. In addition, the guidelines did not established internal comprehensive procedures for the selection and vetting of PMSCs and their personnel. Instead, they outsourced it to the governing body of the ICoC, the International Code of Conduct Association.<sup>361</sup> The system outlined above does not provide for a satisfactory control for armed security, and would definitely not be suitable for the RRF.

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<sup>357</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Section F.25.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid E. Art. 24 a.

<sup>360</sup> See UNDSS, Security Policy Manual, Chapter IV Section I ‘Armed Private Security Companies’ (2012) F. 27–28.

<sup>361</sup> 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’ (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [40].

## *b) A new licensing system necessary for the Rapid Reaction Force*

The standards for the selection of a PMSC maintained by the UN for armed services are being criticized both by UN entities<sup>362</sup> and independent observers.<sup>363</sup> A Rapid Reaction Force such as the one proposed here would need to be held to a much higher standard than the one applied to PMSCs providing “simple” armed security. The new licensing system would need to aim at obtaining a list of PMSCs ready to provide the UN, in a matter of weeks, with an operative unit composed of highly trained troops and fitted with the necessary vehicles, aircrafts and necessary equipment. Therefore, language abilities, trainings of soldiers, and the effective capacity of the company to supply the military apparatus for such a force, should be the primary focus of the process to efficiently provide for a ready-to-deploy unit. The UN should thus elaborate a new set of guidelines and policies that would apply only in the case of PMSCs serving as a Rapid Reaction Force. This “Peacekeeping Code”<sup>364</sup> shall mandate for a high level of experience and competence in the specific sector of “robust” peacekeeping, i.e. through police and military capabilities. Given the unique mandate of the RRF, the current Use of Force Policy and the Weapons Manual should be adjusted to the needs of the tasks. While the current PMSCs’ policies and manuals are designed to regulate and supervise PMSCs’ defensive behaviours, they would need to change dramatically in order to adequately guide and control the conduct of the private contractors in the field of an offensive military operation.

## **5. Equipment**

In order to assume the tasks of a RRF, PMSCs would need to demonstrate to own or to be able to provide the means necessary to carry it out despite its magnitude, i.e. heavy armoured vehicles, aircraft carriers, heavy artillery and helicopters. Although numerous PMSCs have claimed more than once throughout the years that they can supply their clients with such instruments, they usually resort to the governments of the countries in which they are operating to obtain them or they purchase or lease them on an ad hoc basis.<sup>365</sup> As the RRF would deploy in highly unstable areas, with weak or even absent governmental structures it shall nevertheless not be concealed that in such

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<sup>362</sup> See for example UNGA ‘Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination’ (20 August 2013) UN Doc A/68/339 [41].

<sup>363</sup> See Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 11.

<sup>364</sup> Jared Genser and Clare Garvie, ‘Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force’ (2016) 16 CJInt’IL 439, 469.

<sup>365</sup> Khareen Pech, ‘Executive Outcomes - A corporate conquest’ in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder: The Privatisation of Security in War-Torn African Societies* (Institute for Security Studies, Pretoria 1999) 88.

situations, promptly obtaining the necessary vehicles or aircrafts – by the government or by private dealers – could prove very difficult and detrimental to the rapidity in which the private RRF would be able to mobilize its forces on the field.

## 6. Vetting

Although PMSCs are naturally required to adequately vet and train the personnel that would be employed by the UN, both the screening itself and the project supervision by the Organization are being considered as too limited, with a lax oversight by the UN.<sup>366</sup> As noted by the Working Group, the Guidelines do not establish comprehensive internal procedures for the selection and vetting of PMSCs.<sup>367</sup> Instead, they overly rely on auto-certification and self-reporting, requiring the company to confirm in writing that it has conducted the screening and that only the personnel meeting the guidelines' standards will be engaged,<sup>368</sup> and to certify that each contractor has undergone the training, thereby demonstrating the necessary level of skills.<sup>369</sup> This kind of vetting process is definitely not adequate for screening the private RRF personnel. The firms recruit their staff first and foremost according to their preferences and needs, with little to no consideration to their background, and sometimes even their training.<sup>370</sup> Moreover, although language differences have been highlighted as one of the substantial difficulties that multinational peacekeeping operations have to tackle,<sup>371</sup> language barriers have proven to be a significant hurdle when assembling PMSCs' contingents as well. A US State Department audit of an American PMSC tasked with protecting the US embassy in Baghdad, Triple Canopy, highlighted severe language difficulties among its personnel, noting how the Spanish-speaking Peruvian supervisors were unable to communicate effectively with their Ugandan staff.<sup>372</sup> This situation would be further exacerbated by the considerable size of the RRF if compared to PMSCs' units that usually consist in troops in the low-hundreds. Furthermore, the UN currently only considers the conduct of the personnel to be hired under the specific contract, instead of the whole roster of the company. On this subject, the Montreux Document includes references to the PMSC's past conduct and the one of its personnel as well as the respect of the company for the welfare of its employees, thus expanding the scope of the

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<sup>366</sup> Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 11.

<sup>367</sup> 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [40].

<sup>368</sup> UNDSS, *Guidelines on the Use of Armed Security Services from Private Security Companies* (2012) Art. 29

<sup>369</sup> *Ibid* Art. 40.

<sup>370</sup> See Part I.C.2.d) of this paper

<sup>371</sup> See Christopher Spearin, 'UN Peacekeeping and the International Private Military and Security Industry' (2011) 18 *Int'IP* 196, 197.

<sup>372</sup> *Ibid* 200.

assessment and therefore amounting to a better judgment over the potential contractual partner.<sup>373</sup> It goes without saying that the new vetting process would need to implement similar provisions.

The lax oversight of the UN on the PMSCs' vetting process is somehow balanced by the fact that the Guidelines outsource many of the elements of control to the governing body of the ICoC, the International Code of Conduct Association.<sup>374</sup> After its establishment, the ICoCA instituted an oversight mechanism assessing and certifying whether PMSCs meet the requirements listed in the ICoC. While such an initiative should be welcomed, a further analysis of the control apparatus of the Association reveals that it is not a viable alternative to the establishment by the UN of internal comprehensive procedures for the selection and vetting of PMSCs. While the ICoCA is indeed in charge of certifying that the systems and policies by member Companies of the Association meet the Code's principles and standards, it is worth noting that only one sixth of the more than 700 signatories of the ICoC have actually become ICoCA members, leaving the rest virtually outside of the Association's reach. In addition, the ICoCA certification process operates in a manner that is complementary to, and not duplicative of, certification under existing recognized national and international standards.<sup>375</sup> This means that the Board defines the certification requirements based on national or international standards that are consistent with the ICoC and accepts requests for ICoCA certification based on these standards.<sup>376</sup> The company can obtain the certification from a private audit company that has to be accredited by a national accreditation body member of the International Accreditation Forum (IAF). This multi-layered system has become a not negligible cause of concern. While some national certification bodies work in close cooperation human rights specialists and competent auditors, others do not.<sup>377</sup> Hence, some PMSCs could be held to higher standards than others. In addition, the PMSC itself, once it has picked a standard, sets the scope for the certification that includes various boundaries, including but not limited to geographic ones.<sup>378</sup> As a result, a company conducting several contracts in different locations may apply for certification limited to a specific area.<sup>379</sup> While the implementation of the ICoCA and its certification procedures is still in process and its effectiveness still can prove itself, these limitations

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<sup>373</sup> 'The 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) Part II (6) and (13) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>374</sup> 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [40].

<sup>375</sup> ICoCA 'Articles of Association' Art. 11.2.4

<sup>376</sup> As of 1. November 2016, the Board has accepted the ANSI/ASIS PSC.1-2012 and the ISO 28007-1 (2015) as recognized standards: see ICoCA, 'Certification' <<https://www.icoca.ch/en/certification>> accessed 23 November 2016.

<sup>377</sup> Tina Linti, 'Multi-stakeholder self-regulation mechanism for PMSCs – good enough for the United Nations?' <<http://voelkerrechtsblog.org/multi-stakeholder-self-regulation-mechanisms-for-pmscs-good-enough-for-the-united-nations/>> accessed 21 November 2016.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

make the ICoCA an unsuitable partner for certification in the case of a private UN RRF. Consequently, as the UN Working Group pointed out, the ICoC Association could complement, but clearly not replace the role of the UN in such a critical task.<sup>380</sup>

In order to achieve the goal of a short list of capable, efficient, and human-rights sound companies that could send a RRF on the ground on behalf of the UN, the latter should thus expand the scope of the current Guidelines and replace the auto-certification process with a UN-led screening process, granting the independence and objectivity that the current system dramatically lacks of.

## **7. Contractual relationships between the RRF and the UN**

As noted above, PMSCs' accountability depends very much on how their contractual relationship with the hiring entity is structured. Each UN agency and organization wishing to contract PMSCs' services need to use the mandatory UN model contract previewed by the Security Management Operations Manual.<sup>381</sup> This model contract reports as contractual obligations the same requirements provided as selection criteria by the Guidelines, in particular the elements concerning the personnel training, the Use of Force Policy, the Firearms Management procedures and the Weapons Manual.<sup>382</sup> The UN Guidelines at present only cover the possibility of contracting with private companies for stationary protection of UN personnel, premises and property and for mobile protection of UN personnel and property, with the express objective of providing a visible deterrent and an armed response to repel any attack.<sup>383</sup> The present system is therefore not suitable for the mandate that a RRF would be asked to perform. It is necessary to create a new model contract that would need just some minor adjustments depending on the specific context in which the RRF would be deployed and the mandate contained in the SC Resolution. Using the current model contract as a base, it would be necessary to implement several specific instruments and provisions, whereby existing instruments of the UN framework, Member States' good practice and the soft law instruments described above should be of great help.

### *a) Respect for Human rights*

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<sup>380</sup> 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [40].

<sup>381</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Annex B – Model Contract.

<sup>382</sup> Emmylou Boddy, Anna Marie Burdzy and Nelleke Van Amstel, 'Putting Private Security Regulation into Practice: Sharing Good Practices on Procurement and Contracting 2015 – 2016' (Public-Private Partnership Series, DCAF, Geneva 2016) 30.

<sup>383</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Section C.

After CACI contractors were implicated in the notorious case of torture and abuses at Abu Ghraib, the US government not only failed to terminate its contract with the company, but even expanded its terms.<sup>384</sup> In view of the reluctance of hiring entities to terminate their contracts with PMSCs in the case of human rights violations, the model contract for the RRF should include specific provisions articulating the circumstances in which the UN could and shall take back control over the RRF depending on the degree and severity of failure to observe both International Human Rights Law and Humanitarian Law.<sup>385</sup> Such graduated and segmented takeover provisions would allow the UN to avoid the difficult decision to terminate the contract. Moreover, the model contract should contain the terms under which the engagement could be extended or terminated in view of the performances of the PMSCs.

In addition, as a way of promoting human rights law and humanitarian law and to foster PMSC's compliance, the contract should include "securities or bonds for contractual performance"<sup>386</sup>, "financial rewards or penalties and incentives"<sup>387</sup> and "opportunities to compete for additional contracts"<sup>388</sup> as suggested in the Montreux Document.

#### *b) Rules of Engagement*

In principle, the rules of engagement (RoE) for the RRF should adopt elements of traditional RoE used by Member States' regular armies, thus focusing on war-fighting rather than peacekeeping. Applying a clearer and more structured concept – such as the use of force against "hostile forces" instead of the use of force in response to "hostile acts" or "hostile intent" of armed groups against the mission or its mandate – allow for less interpretation from the side of the soldiers on the field and their officers, thus increasing their compliance and decreasing the possibility of incidents due to ambiguity.<sup>389</sup> Unfortunately, the RoE of the Intervention Brigade are not publicly

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<sup>384</sup> Laura A Dickinson, 'Contract as a Tool for Regulating Private Military Companies' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007) 224.

<sup>385</sup> *Ibid.*

<sup>386</sup> 'The 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) Part II (17.a) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>387</sup> *Ibid* [17b]; such proposals have come also from the industry itself: see for example Doug Brooks, 'Protecting people: The PMC potential: Comments and suggestions for the UK Green Paper on regulating private military services' (25 July 2002) 4 <<http://www.hoosier84.com/0725brookspmcregs.pdf>> accessed 25 November 2016.

<sup>388</sup> 'The 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) Part II (17.c) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>389</sup> Scott Sheeran and Stephanie Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (International Peace Institute, New York 2014) 5.

available, but according to some unconfirmed suggestions there might be in fact only one set of RoE for both the Brigade and the regular forces engaged in MONUSCO.<sup>390</sup> This should not be the case in the event of an RRF employed within a pre-existing UN operation. The RRF RoE would be largely based on the mandate of the SC, which would set the objectives and the means by which they should be reached. Assuming that the RRF would engage in a similar context in which the Intervention Brigade is now operating, the RoE of the RRF should provide the forces on the ground with the necessary flexibility to adjust their targets depending on the situation. This would inevitably include giving the RRF the responsibility to take strategic and operational decisions, including the addressee targeted by its attacks. The more the mandate is precise, the more restricted is the room for manoeuvre – and thus error – for the RRF. However, having too strict RoE would in turn hamper the company's effectiveness on the battlefield, endangering the mandate itself and the entire UN mission in the event the RRF is acting within an existing peace operation.

### *c) Subcontracting and replacement*

The issue of subcontracting would be of utmost importance in the case of a private RRF. A light approach on this point could carry the risk of a domino effect, with the prime contractor delegating its responsibilities, weakening the chain of command and thus the single contractor's accountability and jeopardizing the entire operation.<sup>391</sup> The UN Model Contract contains a provision on subcontracting in its General Conditions: subcontracting is permitted, first on the condition that the UN may review the qualification of the subcontractor and is entitled to reject it if it considers it not qualified, and second that the subcontract is in accordance with the terms and conditions of the main contract.<sup>392</sup> In addition, the rejection or the removal of any subcontractor is not deemed to entitle the prime Contractor to claim any denials of performances.<sup>393</sup> The same standard should apply in respect to subcontracting tasks of the RRF, with additionally precautions build in the contract, such as the precondition that the subcontractor should also be part of the restricted pool of PMSCs in the list mentioned above in order to avoid that the companies that could not meet the requirements of the licensing programme could participate in the RRF anyway.

The replacement of personnel by the contractor is explicitly enshrined in Art. 9.5 of the Model Contract, forbidding any replacement or withdrawal without prior consent of the UN and stipulating

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<sup>390</sup> Ibid 18.

<sup>391</sup> Emmylou Boddy, Anna Marie Burdzy and Nelleke Van Amstel, 'Putting Private Security Regulation into Practice: Sharing Good Practices on Procurement and Contracting 2015–2016' (Public-Private Partnership Series, DCAF, Geneva 2016) 28.

<sup>392</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Annex B – Model Contract, Annex A, Section 5.

<sup>393</sup> Ibid.



that the new contractor needs to be fully licensed and certified, properly trained and hold the qualifications and competencies as laid down in the main Contract.<sup>394</sup> As an additional safeguard, the contract stipulated with the PMSC for the provision of troops for the RRF should specifically foresee that the replacement has to be subject to the same rigorous vetting process as the personnel provided through the main contract.

#### *d) Identification of the personnel on the ground*

In order to allow for greater accountability, it is crucial that the single contractor is recognizable in the course of the mandate's performance. In the current model contract, all personnel are required to display UN issued identification within the premises of the UN.<sup>395</sup> The model contract for the RRF should additionally require the PMSC's personnel to be identifiable when they are carrying out activities related to the mandate and to be clearly distinguishable from the public authorities of the State in which they are operating, provided that this is consistent with the force protection requirements and the safety of the personnel.<sup>396</sup>

The model contract would be adjusted for the particular context within which the RRF would be mobilized and then be signed by the involved parties. The contract would report the duration of the engagement and its specific objectives authorized by the SC Resolution. The Contract should finally contain performance benchmarks as specific as possible, bearing in mind that by its very nature, the RRF should, and would, adapt to the changing context of the battlefield.

### **8. Monitoring RRFs' performance and ensuring its accountability**

The UK is highly optimistic about the monitoring of UN-contracted PMSCs. In 2002, arguing for a wider role of private contractors in UN missions, the UK government set forth that in fact, "[t]here would also be no difficulty in monitoring the performance and behaviour of a PMC employed by the UN".<sup>397</sup> This opinion was however far from reality at the time of its submission in

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<sup>394</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Annex B – Model Contract, Art. 9.5.

<sup>395</sup> Ibid Art. 11.2.

<sup>396</sup> 'The 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) Part II (16) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 22 November 2016.

<sup>397</sup> See UK Foreign and Commonwealth Office, 'Private Military Companies: Options for Regulation' (HC 577, 2002) [60].

2002 and is still so today. As illustrated before, the UN surely faces several challenges trying to monitor PMSCs.

#### *a) Monitoring*

Once engaged by the UN, PMSCs providing armed security services are subject to the authority and direction of the appropriate UN entity. PMSCs are subject to regular oversight and review by a Contracting Officer in the duty station where their services are provided with the aim of ensuring that the terms of the Contract are thoroughly respected.<sup>398</sup> The companies are subject to daily<sup>399</sup> and monthly on-site reviews,<sup>400</sup> including the UN's evaluation of the company's performance, control of the contract implementation and control of the personnel's compliance with the applicable standard of conduct.<sup>401</sup> This includes the ICoC, applicable national and international laws, the provisions on sexual exploitation and abuse by the employees and measures concerning child labour.<sup>402</sup> Despite the indisputable benefits that the new Guidelines have brought to the UN contracting system, some have expressed their concerns noting that the level of monitoring is still insufficient.<sup>403</sup> In fact, the UN Guidelines do not include any special provision on accountability for human rights abuses and the correlated effective remedies in case of violations. The lack of monitoring and oversight procedures, including in the event of human rights violations, has been pointed out even by entities within the UN itself.<sup>404</sup> The PMSC is required to “commit itself to hold its employees accountable for any violations of the United Nations standards of conduct and to ensure referral for criminal prosecution of any actions which constitute criminal offences under the

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<sup>398</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Art. 42.

<sup>399</sup> Daily reviews include, inter alia, inspection of equipment, firearms storage, the personnel's physical condition, the quality of response to day-to-day situations and an assessment of the conduct of the PMSCs' personnel by exploring the concerns raised by the final recipients of the security services. See UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Art. 45–49

<sup>400</sup> The monthly review is more comprehensive and is designed to assess the overall conduct of the PMSCs by reviewing all incident reports, all evaluations and analyses on the use of force, selected individual personnel performance reports and the training programme of the units. See UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Art. 51–55.

<sup>401</sup> Ibid Art. 44; See also Stephen Mathias, 'Regulating and Monitoring Private Military and Security Companies in united Nations Peacekeeping Operations' in Benoît D'Abouville (ed), *Private Military and Security Companies: Conference Proceedings, 35<sup>th</sup> Round Table on Current Issues of International Humanitarian Law* (San Remo, 6–8 September 2012) (FrancoAngeli, Milano 2013) 126.

<sup>402</sup> Ibid.

<sup>403</sup> See for example UNGA 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination' (20 August 2013) UN Doc A/68/339 [41]; see further See Lou Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations* (Global Policy Forum and Rosa Luxemburg Foundation, Bonn 2014) 11.

<sup>404</sup> 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' (21 August 2014) 69<sup>th</sup> Session, UN Doc A/69/338 [40].

laws of the host country”.<sup>405</sup> This provision shifts the burden of accountability to the PMSC, leaving the UN passively waiting for the company to do its job of auto-supervising itself. In this case as well, the UN outsources the process, relying on the ICoC Association to conduct part of the monitoring. The division of tasks between the UN and the ICoCA on this issue is not completely clear, and it is significant that it was not until September 2016, when the general assembly of ICoCA has taken place, that the procedures for the Reporting, Monitoring and Assessing Performance were created and implemented. It is therefore too early to perform a comprehensive assessment of the system. However, an analysis of the procedures that have been accepted by the General Assembly reveals that it would probably not be suitable for the RRF’s monitoring. As set forth in its Articles of Association (AoA), the monitoring system is composed of self-assessment reports written by the companies operating in the field.<sup>406</sup> In order to address potential issues or specific compliance concerns, the ICoCA Secretariat may enter into dialogue with the company, whereby the content of this discussion is supposed to remain confidential.<sup>407</sup> Field-based monitoring is envisaged in the system but only when the review of available information or a human rights assessment has identified the need for a stringent monitoring or a member of the Association has requested so.<sup>408</sup> This monitoring system lacks the necessary uninterrupted presence on the battlefield from the monitoring officers and is therefore unsuitable for the peculiarities of a RRF. Confidential bilateral discussions between the PMSC and the ICoCA cannot replace an in-depth examination by UN officers of the potential issues and compliance concerns over the contract. Moreover, given the presumably short deployment of the RRF, irregular field-monitors would not insure the necessary supervision by an independent authority over the RRF’s actions.

Such a hands-off approach by the UN is not satisfactory for the control of armed security and would definitely not be suitable in the case of a privatized RRF. The UN should therefore design a new monitoring programme dedicated to the RRF, including UN observers present on the field accompanying the private contractors along every operation to monitor their compliance with the terms of the contract. These officers should report to the UN directly and inform the command of any wrongful conduct of the PMSCs’ employees.

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<sup>405</sup> UNDSS, Guidelines on the Use of Armed Security Services from Private Security Companies (2012) Annex A – Statement of Works, Art. 24.

<sup>406</sup> ICoCA ‘Articles of Association’, Art. 12.2.2.

<sup>407</sup> ICoCA ‘Procedures, Art. 12: reporting, monitoring and assessing performance and compliance’, Section IV.

<sup>408</sup> Ibid.

## b) Accountability

While according to the ICRC civil liability of PMSCs is generally accepted, their criminal responsibility is quite disputed.<sup>409</sup> The companies themselves could potentially be sued in the states in which they are operating and provide for monetary compensations to the victims but the criminal responsibility of the firm itself is rare and limited in most states.<sup>410</sup> Private contractors on the contrary can be held individually culpable for their abuses before the courts of the state where the crimes have occurred, the state of nationality of the contractor, any other state if the crime falls under universal jurisdiction or in front of the ICC in the case of severe breaches of humanitarian or human rights law.

By being actively involved in an armed conflict, the private RRF would automatically enjoy unprecedented autonomy in the use of force. Such liberties need to be balanced and checked by a rigorous system of accountability. Under the current UN system, the Organization, the host country and the Troops Contributing Countries (TCCs) negotiate the Status of Forces Agreement (SOFA), codifying the legal protections that UN personnel should enjoy. As described above, privileges and immunities are usually extended to the operation's property, its funds and assets as well as its members,<sup>411</sup> and unique immunities are established for peacekeepers.<sup>412</sup> The UN Model SOFA and every Status of Forces Agreement since ONUC provide for an exclusively criminal and disciplinary jurisdiction over military contingent by the TCCs.<sup>413</sup> Unfortunately, TCCs have demonstrated to be reluctant in holding their troops accountable of alleged violations and thus the retention of exclusive criminal jurisdiction by the TCCs has often resulted in a situation of *de facto* impunity.<sup>414</sup>

As stated above, recent SOFAs included particular facilities for private contractors but did not mention any immunity from local jurisdiction, therefore subjecting them to the laws of the host State.<sup>415</sup> In the case of a RRF composed exclusively of PMSCs personnel acting in fact as peacekeepers, the question arises as to their immunity under the SOFA. The immunity granted in

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<sup>409</sup> ICRC 'The ICRC to Expand Contacts with Private Military and Security Companies' (8 April 2004) <<https://www.icrc.org/eng/resources/documents/misc/63he58.htm>> accessed 12 November 2016.

<sup>410</sup> Katja Weigelt and Frank Märker, 'Who is Responsible? The Use of PMCs in Armed Conflict and International Law' in Thomas Jäger and Gerhard Kümmel (eds), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (VS Verlag für Sozialwissenschaften, Wiesbaden 2007) 385.

<sup>411</sup> UNGA 'Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: U.N. Model Status of Forces Agreement for Peacekeeping Operations, Report of the Secretary-General' (9 October 1990) UN Doc A/45/594 Annex Draft model status-of-forces agreement between the United Nations and host country [4].

<sup>412</sup> Ibid Section VI.

<sup>413</sup> Roisin Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' (2011) 16 JCSL 63, 70.

<sup>414</sup> Ibid 92.

<sup>415</sup> See Stephen Mathias, 'Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations' in Benoît D'Aboville (ed), *Private Military and Security Companies: Conference Proceedings, 35<sup>th</sup> Round Table on Current Issues of International Humanitarian Law* (San Remo, 6–8 September 2012) (FrancoAngeli, Milano 2013) 126.

the Model SOFA would not provide for the necessary accountability: first because as previously pointed out, the countries or origin (TCCs) of the peacekeepers (or in this case of the private contractors) are often unwilling to prosecute their nationals, and second because in case of a private RRF the State in which the PMSC is incorporated may not even have jurisdiction over its employees since the companies often recruit from various countries around the world. To overcome this jurisdictional challenge, some scholars have suggested to amend the SOFA in order to grant jurisdiction to the home state of the company or the state of which the private contractor in question is a national,<sup>416</sup> while others proposed to avoid the extension of immunity normally granted to the peacekeepers to the any other entity, thereby giving jurisdiction over the RRF to the host country and the country in which the PMSC is incorporated and at the same time introducing an arbitration mechanism into the SOFA to address breaches or crimes falling outside of the contractually approved mandate.<sup>417</sup>

Despite the noble intent of diminishing private contractors' impunity by not granting them any of the immunities enjoyed by "classic" peacekeepers, this path is simply not viable. It is without doubt that peacekeepers committing serious violations need to be brought in front of justice to respond for their crimes. However, soldiers are deployed in volatile environments and they cannot be held to the same standard as the one that applies in a normal situation. However, the immunity granted to PMSCs personnel should in any case be limited to the acts committed pursuant to the SC mandate, and do not cover any acts exceeding the authority granted by such mandate. In addition, the states in which the RRF would be deployed could be unable to provide for a functioning judicial system, which would understandably disappoint the public opinion with the perceived impunity that the RRF would enjoy.

In order to avoid that the lack of political will to pursue private contractors violations leads to their impunity, the responsibility to administer the criminal justice system could be assumed by the UN itself. The peacekeeping mission would thus include a sort of "mobile court" within its system that would deploy where needed, i.e. where the RRF is active, in order to enhance direct witness accessibility and to enable a great deal of other advantages as to the collection of evidence.<sup>418</sup> As affirmed by the ICTY in the *Tadic* case, the Security Council retains the competence to establish an international criminal tribunal to serve the Council's principal function of maintaining and

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<sup>416</sup> Mohamad Ghazi Janaby, 'The Legal Status of Employees of Private Military/Security Companies Participating in U.N. Peacekeeping Operations' (2015) 13 *NwJInt'lHR* 82, 101.

<sup>417</sup> Jared Genser and Clare Garvie, 'Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force' (2016) 16 *CJInt'lL* 439, 476.

<sup>418</sup> See Malcolm Patterson, 'A Corporate Alternative to United Nations ad hoc Military Deployments' (2008) 13 *JCSL* 215, 225.

guaranteeing international peace and security.<sup>419</sup> Based on the aforementioned, the Security Council could *de jure* create a new criminal tribunal dedicated exclusively to the prosecution of RRF's members. Along the creation of a court, the establishment a criminal justice system requires the implementation of a broad framework of auxiliary structures. First of all, the tribunal would need to apply military law and regulations promulgated by the UN itself that do not exist today and should therefore be enacted. The military law and regulations should be enforced by an administrative system, such as for instance a pool of military lawyers and a dedicated unit of UN military police composed, *inter alia*, of investigators and forensic technicians. As noted by Patterson, these positions should be filled by individually recruited civil servants rather than by contributions of Member States in order to avoid influences by the states trying to push their own agendas.<sup>420</sup> Finally, to complement the judicial system, the UN should count on a dedicated – temporary – penitentiary system in order to allow for greater independency from the host state and to respect international standards.

### **E. Funding and costs of the RRF**

The hostile criticism, which is constantly directed against the costs of current peacekeeping operations, has naturally been reiterated towards the idea of a private RRF. Indeed, it is firmly believed that the private option could have the potential for a drastic decrease in administrative, training and insurance costs, thereby transforming peacekeeping into a cost-effective operation.<sup>421</sup> In a report for the US Senate, the US Committee on Appropriations noted that it was “aware that, in some cases, private companies can carry out effective peacekeeping missions for a fraction of the funding the United Nations requires to carry out the same mission”; further suggesting that the UN could “no longer afford to ignore the potential cost-savings that private companies with proven records of good services and good behaviour offer”.<sup>422</sup> When discussing the costs and benefits of a private involvement in peacekeeping, the contrasting experience between UN peacekeeping operations and the involvement of Executive Outcomes in Sierra Leone are the most cited examples.<sup>423</sup> In 1995, the government of Sierra Leone, backed by large multinationals interested in the country's natural resources, hired Executive Outcomes to help national troops in their battle

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<sup>419</sup> [1997] Judicial Reports 1994-1995 ILR 105 [38].

<sup>420</sup> See Malcolm Patterson, ‘A Corporate Alternative to United Nations ad hoc Military Deployments’ (2008) 13 JCSL 215, 225.

<sup>421</sup> See for example P W Singer, ‘Peacekeepers, Inc.’ [2003] PR 59; See further James Cockayne, ‘Commercial Security in Humanitarian and Post-Conflict Settings: An Explorative Study’ (International Peace Academy, New York 2006) 5.

<sup>422</sup> US Committee on Appropriations, ‘Departments of commerce, Justice, and State, the Judiciary, and related Agencies Appropriation Bill, 2005’ (15 September 2004) 108-344 (Report) 160.

<sup>423</sup> See for example P W Singer, ‘Peacekeepers, Inc.’ [2003] PR 59, 63.

against the Revolutionary United Front (RUF), that had made significant military gains in the end of 1994, including overrunning the three most important mining sites of the country.<sup>424</sup> Executive Outcomes deployed a battalion-sized unit of assault infantry and was able to evict the RUF from the peripheral district of Freetown, stabilise the diamond rich area and subsequently destroy the RUF headquarter within a couple of months, helping the government to reach the first tangible result since the beginning of the rebel war. The rebels were forced to sign a peace agreement, bringing the necessary stability to the region to hold the first election in over a decade.<sup>425</sup> After the departure of EO in 1997 however, the war restarted and the UN was forced to intervene in 1999, setting up a large and complex mission that took several years to reach a result comparable to the stability brought by EO's intervention.<sup>426</sup> The assumption that PMSCs can carry out the same task for a fraction of a price is based on the total costs of these two operations. While EO's presence in Sierra Leone lasted twenty-one months and cost the government an estimate of USD 35 Mio<sup>427</sup> the UN peace force totalled more than USD 2.8 Billion costs for a 7 years operation.<sup>428</sup> This staggering difference in the duration of the stay and its costs is further compounded by the means deployed on the ground by EO and the UN: EO deployed a total of some 350 men,<sup>429</sup> while the UN mission in Sierra Leone at one point counted more than 11700 staff members.<sup>430</sup> EO's experience in Sierra Leone has been described as a success and has proved to be cost-effective and efficient in reaching the goals set up in the contract with the government. However, the authors praising the success of EO in Sierra Leone in comparison to the longer and more expensive UN Mission (UNAMSIL) tend to omit a series of factors that should be taken into account of when assessing these two particular missions.

The UN force in Sierra Leone was larger for two reasons: first, in order to ensure permanent control, UN peacekeeping operations tend to entail the establishment of permanent outposts, inevitably inflating the number of troops necessary, but at the same time providing more stability. Second, EO did not only provide the government with direct combat actions, but acted in particular as force multipliers, providing training to government troops and local hunters and thus dramatically increasing their effectiveness on the battleground.<sup>431</sup> On the converse, UN

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<sup>424</sup> David J Francis, 'Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?' (1999) 2 TWQ 319, 325.

<sup>425</sup> Ibid 327.

<sup>426</sup> P W Singer, 'Peacekeepers, Inc.' [2003] PR 59, 63.

<sup>427</sup> David J Francis, 'Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?' (1999) 2 TWQ 319, 331.

<sup>428</sup> UNDPKO 'Sierra Leone – UNAMSIL – Facts and Figures'

<<http://www.un.org/en/peacekeeping/missions/past/unamsil/facts.html>> accessed 21 November 2016.

<sup>429</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 112–113.

<sup>430</sup> UNDPKO 'Sierra Leone – UNAMSIL – Facts and Figures'

<<http://www.un.org/en/peacekeeping/missions/past/unamsil/facts.html>> accessed 21 November 2016.

<sup>431</sup> P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (CUP, Ithaca 2003) 113.

peacekeepers do not usually build up their mission on local troops, and that is the fundamental reason why their numbers are much higher. In addition, the two mandates were quite different: EO entered the conflict with a peace-enforcing mandate as that they came in with the objective of regaining control over some areas and destroying the RUF headquarter acting as the brain of the operations while using local forces as the body. By contrast, UNAMSIL was mandated to keep the peace dictated by the peace agreement and assist the government in a DDR plan. Comparing the two mandates in order to underline the cost-effectiveness of PMSCs is therefore misleading because it does not consider the inherent differences among them. The difference in size and scope of the mission has been material in regard to the financial costs that they gave rise to. While the UN mission has substantially been more expensive as a whole, median costs per personnel were considerably lower, i.e. around USD 1'500 per month,<sup>432</sup> when compared with the median USD 4'700 for each EO's contractor. Furthermore, the official invoice of EO's services, amounting to USD 35 Mio, does not represent the total gain of EO's engagement in Sierra Leone seeing that the government allegedly agreed to grant broad and lucrative mining concessions in the Kono diamond fields as part of EO's remuneration.<sup>433</sup> In general, the price of the outsourcing contract does not cover all the expenses that the UN would incur. The hidden costs related to the use of PMSCs for the RRF would include the expenses resulting from the creation of the system described above, including the establishment of the judicial system, the draft of the new laws and regulation, screening and licensing costs, monitoring costs and sanctions costs. While the proponents of a private RRF do not usually take these costs into account, in order to conduct an informed discussion on the issue the UN definitely should.

Finally it should be stressed that the present analysis is not meant to show that PMSCs are not efficient or cost-effective compared to UN regular peacekeepers. On the contrary, the experience of Executive Outcomes in Sierra Leone illustrates that a private company accomplished to fulfil the agreed military objectives in a stunningly short period of time, allowing for a short-term increase in stability in the region. This is precisely the task that the RRF would be asked to carry out.

## **F. Who pays the bill?**

Every consideration regarding the establishment of the private RRF has to face the question of its funding, although a private RRF is likely to cost less than an ad-hoc force made up of

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<sup>432</sup> Jared F Lawyer, 'Military Effectiveness and Economic Efficiency in Peacekeeping: Public versus Private' (2005) 33 ODS 99, 104.

<sup>433</sup> David J Francis, 'Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?' (1999) 2 TWQ 319, 326.



contributions from the Member States. This has been correctly highlighted as one of the biggest setbacks of such a force.<sup>434</sup> In the current system, while the establishment of the operation and the scope of the mandate are decided by the SC, the financing of peacekeeping operations is a shared responsibility of all UN Member States. As can be imagined, even though they are legally obliged to pay their respective share they tend not to be very compliant with this obligation. As of June 2015, UN members owed nearly USD 4.8 billion in outstanding contributions to UN peacekeeping accounts.<sup>435</sup> Needless to say that without the necessary materials and personnel, peacekeeping operations are destined to fail their objectives. In order not to lose precious time to reach an agreement on the funds necessary for every RRF operation, the UN would have to create a dedicated “RRF-fund” that after every deployment would have to be reconstituted. The key issue here will therefore consist in whether big contributors would draw sufficient political and economical benefits from early operations. In such case the next RRF should not incur particular difficulties of being financed.

### **G. Are PMSCs ready for the job?**

While many commentators cite EO's operations in Angola and Sierra Leone as examples for the creation of private RRF, they usually do not consider the major changes that the industry has experienced since Executive Outcomes was the key player. EO's 2000-strong manpower pool was composed mostly of the former South African Defence Force's special operation forces.<sup>436</sup> They spoke the same language, operated under common operational structures, were trained by the same army, used the same equipment and were led into battle under pre-existing rank structures.<sup>437</sup> While former special operation operatives are still very important for PMSCs, they usually hold managerial or training roles and tend to be deployed on the field only in rare circumstances, such as in the context of VIP protection.<sup>438</sup> For the rest of their forces, PMSCs now prefer hiring locals. This is done for a number of reasons, including the opportunity to rely on local knowledge but also because of mere financial motives. To give an idea of the current scale, as of March 2011, of the approximately 90'000 contractors placed by the US government in Afghanistan, 46'000 were

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<sup>434</sup> See for example Malcolm Patterson, 'A Corporate Alternative to United Nations ad hoc Military Deployments' (2008) 13 JCSL 215, 229.

<sup>435</sup> UN Department of Public Information, 'UN Peacekeeping Operation Factsheet' (31 October 2015) UN Doc DPI/1634/Rev.174 <<http://www.un.org/en/peacekeeping/archive/2015/bnote1015.pdf>> accessed 2 December 2016.

<sup>436</sup> Christopher Spearin, 'UN Peacekeeping and the International Private Military and Security Industry' (2011) 18 Int'IP 196, 198.

<sup>437</sup> Ibid.

<sup>438</sup> Ibid 199.

locals, 24'000 were third-country nationals while only 20'000 were US citizens.<sup>439</sup> Modern private forces therefore do not show the same features that the well-established units of EO did back in the 1990s and thus their claims that they can provide with a “clearer chain of command, more readily compatible military equipment and training, and greater experience of working together than do *ad hoc* multinational forces”,<sup>440</sup> are not necessarily of great significance nowadays.

Additionally, while a private RRF would not be considered a large force in terms of involved personnel by any national army's point of view, PMSCs do not usually work in such large numbers. EO's presence in Angola amounted to 550 soldiers, whereas in Sierra Leone it was only made of a staff of 350 people. For these reasons, it could prove very difficult to form, over a few weeks, a troop of 2'000-3'000 units meeting the stringent requirements put forward by the licensing and contractual system articulated above.

Finally, while some proponents of a private RRF have highlighted the offensive capabilities of PMSCs, the industry itself – oddly enough – seems to become quite oriented towards a defensive approach. This is done primarily to distance itself from mercenaries, who apply violence offensively, whereas PMSCs conduct their operations in a reactive manner.<sup>441</sup> In Iraq, for example, despite the rise of the insurgent threat, ArmorGroup declined the opportunity to increase its firepower because “[a]s a publicly traded company, they didn't want to be perceived as a mercenary force”.<sup>442</sup>

Despite the industry's promises of its readiness to provide the UN with a RRF,<sup>443</sup> it appears that the private sector should implement some changes – above all a return to the combative approach that marked the sector in the 80s and 90s – before PMSCs become active in the offensive application of violence for the UN.

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<sup>439</sup> Moshe Schwartz and Joyprada Swain, ‘Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis’ (CRS Report No 40764) (Washington DC: Congressional Research Service, 2011) 10–11.

<sup>440</sup> Herbert Howe, ‘Private Security Forces and African Stability: The Case of Executive Outcomes’ (1998) 34 JMAS 307, 308.

<sup>441</sup> Christopher Spearin, ‘UN Peacekeeping and the International Private Military and Security Industry’ (2011) 18 Int'IP 196, 201.

<sup>442</sup> Steve Fainaru, ‘Iraq Contractors Face Growing Parallel War’ *WashingtonPost* (Washington 16 June 2007) <[http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061502602\\_3.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061502602_3.html)> accessed 1 December 2016.

<sup>443</sup> See (n 289)

## Conclusion

UN peacekeeping is constantly confronted with difficulties of qualitative and quantitative nature and pro-PMSCs arguments continue to have currency. The cost-effectiveness and flexibility that the private sector seems to offer are tempting and several actors argue for an increased involvement of PMSCs in peace operations. The UN's use of PMSCs' throughout the last decades has granted the companies with political and practical influence on peacekeeping operations and has not been matched by a significant control over their activities by the Organization, that still relies on auto-certification by the PMSCs and outsource some of the critical tasks of its oversight mechanism to external entities.

In light of this background, the creation of the UN Rapid Reaction Force staffed with private contractors on the one hand seems to be the logical next step within the evolution of PMSCs' involvement in UN operations, but on the other hand its conduct could easily elude the control of the Organization. As this paper has argued, although the private security industry does employ highly trained and capable individuals, the companies do not often possess the necessary collective abilities to carry out peace operations as stressed by some. Under present circumstances, the PMSC industry will have to face quite a challenge in responding as efficiently as Executive Outcomes did in its Africa operation. The company's ability to adopt an offensive approach in its operations, as done in the context of the Angolan and Sierra Leone civil war, cannot be found in modern PMSCs. However, as the industry is highly adaptable and could therefore change its approach to respond to the needs of the UN, this paper mainly focuses on the issues the UN would have to consider if and when contracting PMSCs for "robust" peacekeeping. The UN should apply some major adjustments in order to establish a control system enabling the organization to (i) have at its disposal a pool of highly capable PMSCs with proven records regarding human rights respect (ii) monitor the RRF's activities when it is deployed on the ground (iii) hold private contractors accountable for any eventual criminal conduct and (iv) terminate its contract with the RRF in the event of failures in meeting the established objectives.

While it would be possible to ensure that the RRF-operations are conducted in respect of UN standards in regard of IHL and IHRL, through the deployment of such a force the international community would outsource one of its fundamental duties. Aside from the technical challenges that such an endeavour would represent, the UN and its Member States should therefore seriously ask themselves if while drafting the Charter, its Founders had contemplated contract-forces and if it is not possible to find a political consensus over a more rapid deployment of traditional peace operations composed of Member States contributions. Furthermore, the RRF risks to be held

hostage by the Security Council in the event of conflicting agendas among its members, significantly hampering its effectiveness. Nonetheless, in light of the humanitarian crises that have not been addressed in a prompt manner over the years, the creation of the RRF could indeed represent a temporary solution, provided that it is timely and adequately funded and that while the Security Council is in charge of the establishment and the mandate of the RRF, the operational choices (first of all the choice of the PMSC) are left to other UN entities. While the RRF is far from embodying the ideal instrument by which the UN could ensure peace and stability around the world, the reality is that in the future, as the industry transforms itself and as the UN establishes the necessary oversight, it could well fit the Organization's needs.

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