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**LEGAL ISSUES ARISING FROM THE POSSIBLE INCLUSION OF PRIVATE  
MILITARY COMPANIES IN UN PEACEKEEPING**

**DISSERTATION**

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*For my father. He would be proud...*

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## **I) Introduction**

The main aim of this dissertation is to explore the legal issues arising from the possible inclusion of Private Military Companies (PMC) as a military component of United Nations (UN) peacekeeping. The thought of private military contractors conducting combat-related activities traditionally reserved for public authorities, especially at the international level, is thought provoking. It raises complex political questions, especially in light of historical trends toward the national and international regulation of military activities, and presents itself as complicated when building upon its legal implications.

Since the establishment of the UN in 1945, the states controlling international peace and security protection mechanisms have been reluctant to provide the UN with sufficient resources, let alone autonomous tools, that would allow its rapid reaction to situations that require its presence, either as a mediator, confidence-builder, security guarantor or even as a state or nation builder. In fact, the idea of peacekeeping (as it is known today but also during its early years) was not originally envisaged for the UN, but developed through practice, which was marked by a constant quest for neutrality and willing states with the appropriate military capacities, that has particularly proliferated since the end of the 1980s. In this context the various ideas of stand-by UN forces trained to conduct peacekeeping and able to react in a timely manner, have been voiced, but also zealously rejected. The main reasons for indifference towards this idea can be found in the fear of the autonomy of the world organization, the rise of the costs such developments would entail, its inefficient and inadequate management practices and the threat of abuse of such powers.

The potential use of PMCs in UN military peacekeeping structures is, of course, not the sole way to improve UN peacekeeping in the wider role of the Organization's contribution to the world's peace

and security. It seems, however, an interesting strategy that could tackle the challenges that burden the traditional approaches to peacekeeping, which rest upon the principle of the exclusive role of a state as a contributor of troops.<sup>1</sup> This is a time-consuming process, which provides for sometimes late reactions to situations which require prompt responses. One of the arguments supporting PMC-peacekeeping involvement is that this solution would be both cost- and time-effective. A market approach, building on a competitive and growing PMC-industry, might reduce the costs of peacekeeping and provide the high-quality service entities willing to undertake the necessary measures required by the regulator. The latter is an essential component of a successful policy and should not be underestimated. PMC involvement could, furthermore, provide a solution to the factor that often plays a primary dissuading role for governments not to commit themselves to UN engagement, namely the threat of casualties when they send troops on a UN peacekeeping mission. The role of US public opinion and the policy shift of the US government during its involvement in Somalia in the 1990s is a well-known case of this. In short, thinking of this policy option might increase the capacity of the UN to accomplish its peacekeeping work.

The dissertation aims at taking a step forward and exploring the legal implications, consequences and limitations if such a policy option were to be chosen. The bulk of the work conducted here will not aim at arguing in favour of such an option, but will touch upon the legal questions arising from it, and indeed, there are many. The topic is based upon the interaction of actors from the public and private spheres, both conducting governmental functions in an extraterritorial context. Furthermore, it is a topic involving the interaction of various bodies of international law, on many occasions in an undefined manner. Lastly, it is a situation without a clear-cut legal precedent, calling for the

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<sup>1</sup> Christopher Rochester, *White Paper: A Private Alternative to a Standing United Nations Peacekeeping Force* (Washington: Peace Operations Institute, 2007).

application of peacekeeping-related practice and allowing for some analogies, but leaving space for innovative thinking.

The organization of my work follows these lines: I first clarify the main concepts I will use in this dissertation namely, *peacekeeping* and *a private military company*. The second part then outlines the legal framework applicable to PMC-peacekeeping in detail: the two scenarios for PMC-inclusion are defined, the legal subjects involved are identified and the applicable substantive rules of international law are surveyed. Emphasis is placed on the rules related to UN-peacekeeping and applied in analogy at the end of each section regarding either private contractors or the two hypothetical scenarios. Next, the two scenarios are tested with rules of international responsibility for wrongful acts. The conclusion outlines the major finding and legal limitations accompanying the possible use of PMCs in UN peacekeeping.

## **II) Terms and Working Definitions**

This section defines the two crucial concepts of this work, namely a *private military company* and a *United Nations peacekeeping force*. The purpose of this exercise is not to arrive at a definition that would definitively settle the classification issues, but to outline the scope of this work and clearly define the limits of its operational applicability. This is crucial since my aim is to construct a legal picture for the potential inclusion of PMCs in peacekeeping operations, not as mere logistical or technical support, but as an actual combat force mandated by the UN to perform protection activities of a military nature. Focusing on a currently fictional situation creates uncertainties by default, which can be partially accommodated by the precise definition of terms. Neither of the two terms, however, has an unambiguous and widely recognized definition which would easily serve legal purposes, although one could perhaps claim that peacekeeping is characterized by a greater degree of legal clarity due to its substantial degree of practice and the fact that its initiation is inherently dependant on relevant international law provisions. This initial focus on the definition of terms is of additional utility as it points to the underlying issues causing doctrinally divergent international law debates, although limited space demands a concise analysis of the issue.

### **A) A UN Peacekeeping Force**

It is preferable to first turn to the understanding of the terms *peacekeeping* and *peacekeeping force* for several reasons: The concepts are not new, they operate within a clear and relatively well-established legal framework, and they serve as a basis for the theoretical incorporation of private military companies, defined later in this paper. A maximalist understanding of peacekeeping, as employed and referred to by specialists in the field, denotes “the multidimensional management of a complex peace operation, usually in a post-civil war context, designed to provide interim security and assist parties to

make those institutional, material, and ideational transformations that are essential to make peace sustainable.”<sup>2</sup> The term, nowadays often used interchangeably with *peace support operations* or even with *peacebuilding*, has undergone considerable evolution since it was first used in 1956.<sup>3</sup> This evolution is characterized by its partial detachment from the UN and the differentiation of three generational paradigms of peacekeeping.<sup>4</sup>

The so-called *first generation* of peacekeeping encompasses a consent-based interposition of lightly-armed forces under the UN authority with a mandate to monitor, report and engage in hostilities only in self-defence after a truce has been reached. The personnel involved are almost exclusively military, as are their functions.<sup>5</sup> The *second generation* of peacekeeping refers to multidimensional operations for the purpose of implementing complex and multidimensional peace agreements; it generally includes law-enforcement activities such as police and civilian tasks and is, in a more complex way, an element of crisis management.<sup>6</sup> Consequently, the involvement of personnel other than military is crucial. The *third generation* of peacekeeping’s military component is comprised of a variety of low-level military and protection operations and even enforcement activities without explicit consent,<sup>7</sup> blurring the line between peacekeeping and peace enforcement.<sup>8</sup> An extended comprehensive

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<sup>2</sup> M. Doyle and N. Sambanis, “Peacekeeping operations”, in T. Weis and S. Daws (eds), *The Oxford handbook on the United Nations*, (Oxford: Oxford University Press, 2007), 323-348 at 32.

<sup>3</sup> The then UN Secretary-General Hammarskjöld and the former Canadian foreign minister Pearson invented the term for the purpose of the establishment of the interposition United Nations Emergency Force (UNEF I) between Egypt and Israel. M. Bothe, “Peacekeeping”, in (B. Simma et al (eds), *The Charter of the United Nations: A Commentary*, (Oxford: Oxford University Press, 2002), 648-700 at 681.

<sup>4</sup> This paragraph draws from Doyle and Sambanis, supra note 2. For a comprehensive description of UN peacekeeping generations see also M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations*, (The Hague: Martinus Nijhoff, 2002), at 42-54.

<sup>5</sup> Typical examples are UNEF I and II, UN Disengagement Observer Force (UNDOF) in Golan, UN Interim Force in Lebanon (UNIFIL) from 1978 etc.

<sup>6</sup> Examples: UN Angola Verification Missions I, II and III (UNAVEM), various UN Missions in Haiti (UNMIH, UNSMIH, UNTMIH, MIPONUH), UN Advance Mission in Cambodia (UNAMIC, UNTAC) etc. See Bothe, supra note 3 at 682.

<sup>7</sup> Imposing order without local consent; non consent distinct arrangements (no fly zones); exercise of force to implement the terms of a comprehensive peace agreement from which parties defected. Sambanis and Doyle, supra note 2, at 327-331.

<sup>8</sup> Some make an elementary distinction that peacekeeping operations are not “‘peace enforcement’ [...], i.e., international sanctions that imply ‘action by air, sea or land forces as may be necessary to maintain or restore international peace or



operational strategy involving the authoritative assistance in administrating and re-building states with the aim of assuring sustainable peace is required.<sup>9</sup> The role of military functions and personnel in this contemporary understanding of peacekeeping, which also extends beyond the activities of UN-agents and increasingly relies on regional and non-governmental actors, is complementary to other, non-military activities. However, noting the underlying importance of security guarantees for the conduct of non-military aspects of modern peacekeeping operations, the persistently crucial role of an authoritative military component has to be recognized. One can therefore agree with the lowest common denominator observation that “essentially peacekeeping involves deployment of armed forces under UN control to contain and resolve military conflicts.”<sup>10</sup> This can be confidently affirmed as a cross-cutting characteristic of all peacekeeping generations.

Furthermore, the institutional affiliation of these forces to the UN entails very specific rules for their establishment and operation. UN peacekeeping forces were originally an ad hoc solution for a disfunctionality or even collapse of the UN peace and security assurance system, failing to work along the provisioned UN Charter Chapter VII rules in their entirety.<sup>11</sup> The need to separate UN-authorized peacekeeping from Article 42 enforcement measures<sup>12</sup> or Chapter VI measures for peaceful settlement of disputes<sup>13</sup> results in reference to peacekeeping, which is sometimes referred to as the *Chapter VI and a half* action.<sup>14</sup> Through the creation and authorization of peacekeeping operations the UN

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security’ under the terms of article 42 of the UN Charter.” J. Saura, “Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations”, 58 *Hastings Law Journal* (2007) 479 at 481.

<sup>9</sup> The doctrinal strategy was provided by the UN Secretary-General in his report *Agenda for peace* (UN Doc. A/47/277-S/24111, 17 June 1992).

<sup>10</sup> M. N. Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 1108.

<sup>11</sup> The reference here is of course to inapplicability of UN Charter Chapter VII measures during the time of Cold War which not only prevented the UN from military engagement but also rendered inapplicable the implementation of Charter articles 43 to 47. These would offer a plausible legal and operational basis for the implementation and conduct of peacekeeping action as it has evolved through time.

<sup>12</sup> Taken by the UN or its Members on behalf of the UN in their role of restorer of international peace and security

<sup>13</sup> Methods for peaceful settlement of disputes among countries are listed in Article 33 of the UN Charter.

<sup>14</sup> The action is interplay of the Chapters VI and VII. According to the former, any dispute or situation that might endanger international peace and security can be brought to attention to Security Council or General Assembly (Article 35(1)), and the latter may “recommend appropriate procedures or methods of adjustment”, which can, at least on paper, include also

Security Council,<sup>15</sup> or exceptionally the General Assembly (UNGA),<sup>16</sup> *de facto* mandates a Chapter VI action to aid the warring parties in their dispute settlement. However, the Chapter VI set-up is upgraded with a military component, which is (ideally) mutually reassuring and equipped with more or less extended Chapter VII powers. The latter refers to the extent to which the peace-keepers are mandated to use force in order to carry out their mandate. This is essentially a situation-specific characteristic of a mission, therefore making generalizations difficult. One could confidently claim, however, that recent practice has gone beyond the pure “self-defence” character of peacekeeping in the direction of peacekeepers being authorized “to use all necessary means to carry out its mandate.”<sup>17</sup> Certain discretion for international armed forces to use force can also be inferred from a further characteristic of peacekeeping, commonly referred to as its element, namely that it is usually based on the consent<sup>18</sup> of States and armed factions.<sup>19</sup> Despite being a standard practice expressing the *bona fide* of warring parties, the consent can have a very limited value on the ground. In any case, it should not be seen as a blanket authorization for the use of force, particularly as such UN operations are deployed in order to keep or assist in maintaining conditions for peace rather than provide them.

Finally, one needs to explore the essential link between the force and the Organization that has authorized its deployment. The control of the force for its operations is in the hands of the UN chief

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action (Article 37(2)). It is, however, Chapter VII which provides the Security Council with powers to take decisions that its members are bound to accept and carry out (Article 25), which include restrictive measures including the use of force.

<sup>15</sup> This is a well established practice by now, confirming the Council’s primary responsibility for the maintenance of international peace and security. It creates subsidiary organs under Article 29.

<sup>16</sup> Such action can in theory be authorized by the UN General Assembly (GA), according to the *Uniting for Peace* doctrine (see UN GA Res. 377(V), UN Doc. A/RES/377, 3 November 1950), which, however, did not refer to the peacekeeping, but enforcement action. Only in exceptional cases (UNEF I, UN Security Force in West New Guinea (UNSF) / Temporary Executive Authority (UNTEA)) was the peacekeeping force established by the UN GA, under Art. 22.

<sup>17</sup> Saura, *supra* note 8, notes, that in 2007 out of the six operations based on Chapter VII, only the UN Mission in Liberia (UNMIL) was not expressly authorized to use force along these lines.

<sup>18</sup> C. Greenwood, “International Humanitarian Law and United Nations Military Operations”, 1 *Yearbook of International Humanitarian Law* (1998) 3 at 10; B. Tittmore, “Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations”, 33 *Stanford Journal of International Law* (1997) 61 at 77; Saura, *supra* note 8, at 482.

<sup>19</sup> U. Palwankar, “Applicability of International Humanitarian Law to United Nations Peacekeeping Forces”, 294 *International Review of the Red Cross* (1993) 227 at 228.

administrative officer, the Secretary-General,<sup>20</sup> to whom such forces are responsible according to the chain of command principle.<sup>21</sup> The Secretary-General, supported by the Secretariat and the Department for Peacekeeping Operations (DPKO) has the role of executive director. He is supposed to play the steering role of the force within its mandate provided by the Security Council through its resolutions. But these mandates are often vague and in their transformation into practice the command structures are given *de facto* discretion, which is limited by the pre-established practice and rules of international law applicable to peacekeeping operations. This said, one can propose the following understanding of the term as it will be used here: *A UN peacekeeping force is a formation of a military character, which is legally established and mandated to conduct its activities by the UN Security Council and operates according to the chain of command principle, and is thus ultimately responsible to the UN Secretary-General.*

## **B) A Private Military Company (PMC)**

Although not a novelty, the integration of private contractors in military-related activities at national and international levels has proliferated considerably since the late 1990s,<sup>22</sup> obviously creating an attractive policy option as well as considerable academic and media attention. Serious analysis in this area has often been frustrated by the lack of agreement as to what PMCs actually do,<sup>23</sup> resulting in an agreement that “there is no commonly agreed definition of what constitutes a ‘private military company’ or a ‘private security company.’”<sup>24</sup> A distinction between the two concepts, building upon

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<sup>20</sup> See UN Charter Articles 97 and 100(1).

<sup>21</sup> See particularly part IV below. See also S. Gordon, “Icarus Rising and Falling: The Evolution of UN Command and Control Structures”, in D.S. Gordon and F.H. Toase (eds), *Aspects of Peacekeeping*, (Portland: Frank Cass, 2001), 19-41.

<sup>22</sup> See J. Messner and Y. Gracielli, *State of the Peace and Stability Operations Industry: Survey 2007*, (Washington: Peace Operations Institute, 2007) for an overview of the industry.

<sup>23</sup> S. Chesterman and C. Lehnardt, “Introduction”, in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 1-9, at 3.

<sup>24</sup> E.C. Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law,” 88 (863) *International Review of the Red Cross* (2006) 525, at 529.

the nature of engagement differentiation,<sup>25</sup> seems to be prevailing. It is, however, of limited value as the reality on the ground appears to be that many companies offer a broad spectrum of services.<sup>26</sup> Furthermore, associating private military companies solely with offensive activity and security companies only with defensive activity makes little sense, as the line is extremely blurred<sup>27</sup> and case-specific, or even irrelevant from the perspective of international humanitarian law (IHL). For the purpose of IHL, an *attack* is an act of violence against the adversary, regardless of its being carried out offensively or defensively and irrespective of the territory on which it is conducted.<sup>28</sup>

PMCs can and do perform a wide array of activities on behalf of virtually all active participants of international relations.<sup>29</sup> This functional diversity makes classification difficult and stimulates defining the activities rather than the entity itself.<sup>30</sup> They are first distinguished on the ground of their impact, either between those aiming to alter the *strategic* landscape where PMCs are involved and those aiming at *local/immediate impact* only. It is fair to note that such a distinction is much clearer in theory than in practice, making it dangerous to undermine the broader impact of small-scale activities. A similar classification, which still allows placing the categories of PMCs on the impact-scale, distinguished between the following four types of activities: environment-altering *military operations*

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<sup>25</sup> By which private *security* companies are to engage only in defensive and protection operations, as opposed to offensive manoeuvres conducted by a narrower category of private *military* companies. Chesterman and Lehnardt, *supra* note 23, at 2; F. Schreier and M. Caparani, "Privatising Security: Law, Practice and Governance of Private Military and Security Companies," *DCAF Occasional Paper No. 6* (2005), at 26; B. Perrin, "Promoting Compliance of Private Security and Military Companies with International Humanitarian Law," 88 (863) *International Review of the Red Cross* (2006) 613, at 614; D. Brooks, "Protecting People: The PMC Potential. *Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*", 25 July 2002, at 2-3, available at <http://www.hoosier84.com/0725brookspmcregs.pdf>, last accessed 1 June 2008.

<sup>26</sup> Gillard, *supra* note 24.

<sup>27</sup> The typical examples are the *hot pursuit* and *offensive defense* situations: An attack on a military entity by another can lead to a counterattack of the former for defense purpose, in order to chase away the original attacker. Whether the reacting entity (or its activity) should be seen as offensive or defensive remains unclear.

<sup>28</sup> L. Doswald-Beck, "Private Military Companies Under International Humanitarian Law", in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 115-139 at 115; also Additional Protocol I to Geneva Conventions (AP I), Art. 49.

<sup>29</sup> States being their primary clients followed by multinational corporations and increasingly also international organizations, non-governmental humanitarian or development agencies, communities and individuals.

<sup>30</sup> This classification draws from K.A. O'Brien, "What Should and What Should Not Be Regulated?", in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 29-48, at 40-41.

by private actors;<sup>31</sup> *military-support operations*, with strategic impact but not altering the environment alone;<sup>32</sup> *defensive/protective security operations*;<sup>33</sup> and *non-lethal security operations*.<sup>34</sup> Although far from perfect, bringing some order into this classification gives at least some overview of the scope of activities the PMCs may provide. Similarly to peacekeeping forces, multi-functionality may be and often is their characteristic.

After briefly acknowledging what activities private military entities *can* perform (at least in theory), one has to note that in practice the distribution of these activities is very uneven. However, although direct combat engagement of these private entities currently presents only a small segment of the industry's activity on the ground - rather the exception than the rule - the conduct of combat activities has, unsurprisingly, been perceived as the most contentious development, as reflected in the debates surrounding PMCs.<sup>35</sup> As is often repeated, combat activities have traditionally been the exclusive domain of a State, which enjoys a near monopoly over the lawful use of force.<sup>36</sup> From an international system-wide perspective, the use of military (that is of national military forces, which are also included in peacekeeping operations) is controlled by politically accountable leadership, responsible for the regulation of these forces in accordance with national and international rules. The usage of private (and potentially multinational) entities entering into contractual relations with public entities other than

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<sup>31</sup> These operations, defensive and offensive, include operational combat support (logistics, air-support, intelligence etc.); peacekeeping and peace-enforcement; military-advisory services and training; and intelligence services in support of the hiring entity's security objectives.

<sup>32</sup> Professionalization or integration training and logistics.

<sup>33</sup> Protection of both, large-scale installation and asset protection and small-scale personnel protection.

<sup>34</sup> This category should include immediate/local impact activities such as private intelligence support (tactical, law enforcement and other non-national security related), law enforcement and policing in countries in transition; transport; paramedical services; humanitarian-aid convoy protection; refugee protection; administration and logistics; other non-frontline services.

<sup>35</sup> O'Brian, *ibid*, proceeds that consequently, "[t]oo much of the international debate around regulating PMCs has focused on *atypical*, but high-profile companies ... rather than on the broader spectrum of privatized military and security activities" (emphasis added).

<sup>36</sup> Chesterman and Lehnardt (*supra* note 23, at 1), referring to internal (inferred from Weber's theory), but also external aspects (UN Charter). These arguments have in common the overarching (and ideal) public accountability of officials, contrary to the corporate nature of PMCs. But for survival of the industry, the highest possible degree of public accountability seems inevitable, although not through the existing regulation (A. Leander, "Regulating the Role of Private Military Companies in Shaping Security and Politics," in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 49-65, at 56-58.

a government (which traditionally exercised military oversight and arms control) complicates the control of these entities, even more so because of their *raison d'être*. Thus, to focus on a segment of the industry with war-waging potential presents a legitimate choice due to its potentially crucial impact on international security. Furthermore, this choice is confirmed by the extremely rapid pace with which the related “non-core activities”<sup>37</sup> of many armed forces were outsourced to these entities in a mere two decades.

The final step in the exercise of defining a *private military company* (PMC) for our purpose should therefore keep in mind the following: First, as our understanding of peacekeeping operations is rather traditional in the sense of focusing on their military component, the PMCs that will be considered here should fulfil the criteria of at least possessing the *ability* to conduct combat activities. The ability to conduct such activities does not presuppose that they actually do so (as this depends on the mandate under which the operations are conducted). It also does not contain a qualitative judgment in the sense of the lesser ability of some peace-keepers, which, although regretful, has been a reality in the past. This presumption (the ability to conduct combat activities) seems plausible as it would also apply to the national contingents provided for the purpose of peacekeeping operations. Second, the *de facto* multifaceted role of PMCs, manifested in the range from combat, through protection to training activities is the next relevant characteristic of private entities considered here<sup>38</sup>. Thirdly, PMCs are private corporate and legal entities, national or transnational, disconnected from public authorities in the sense that the latter can exercise only limited control over their activities. PMCs enter into contractual relations<sup>39</sup> with these public authorities, national or international, and should not be

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<sup>37</sup> Schreier and Caparanim, *supra* note 25, at 4.

<sup>38</sup> Similarly to peace-keepers whose activity can range from security services for international and humanitarian staff to combat services as a cease-fire enforcer, depending on the mandate and the environment they work in.

<sup>39</sup> A contract defines mutual obligations between the two entities and should, foremost, be a direct way for a client to require a private contractor (and its employees) to respect certain standards and avoid unintended external effects. M. Cottier, “Elements for Contracting and Regulating Private Security and Military Companies,” 88 (863) *International Review of the Red Cross* (2006) 637 at 638. For guidelines on principles governing these contractual relations see

equated with individual private actors, usually referred to as mercenaries.<sup>40</sup> *A PMC therefore is a private corporate entity, capable of undertaking a wide range of military activities in an international setting, including direct combat engagement, hired by a public authority on a contractual basis.*

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resolution *Contracts Concluded by International Organizations with Private Persons*, adopted in 1977 in Oslo by of the Institute of International Law.

<sup>40</sup> The focus here is on PMCs as corporate entities, which are, exactly for the reason of their corporate character, subject to some degree of oversight and accountability, opposite to individuals involved in selling their military services and skills on an ad hoc basis, creating a mercenary group. The distinction is, however, again fluid and one can identify the cases when individuals working for a PMC might (although unlikely) fall within a definition of a *mercenary* (either under Art. 47 of the API, the OUA or the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries).

### III) Legal Framework for PMC Inclusion in UN Peacekeeping Forces

After outlining the scope of this research by providing working definitions of the two crucial terms used (peacekeeping force and PMC) I now turn to identifying the normative framework applicable during their interaction. This interaction is presumed according to the two possible scenarios (or modes of engagement) resulting from the potential inclusion of PMCs in the peacekeeping operations of international organizations (IOs). One is a PMC seconded as part of a peacekeeping contingent by a state, and the other a PMC as part of a peacekeeping troop hired directly by an IO. The former mode has been partially tested in reality (although not in a UN forum),<sup>41</sup> but the latter, at least to this author's knowledge, is still waiting to make its inaugural appearance.<sup>42</sup> Identifying and particularly putting in order the applicable rules for both scenarios (which often overlap) is a challenge as sources are numerous.

In dealing with this obstacle, this part is organized in the following manner:<sup>43</sup> I commence with a basic inquiry of the legal subjects in question and their ability to assume rights and duties from the perspective of international law. Then, with analogy to standard peacekeeping as an established practice, the applicable rules are assessed in a holistic manner. The assessment commences with an analysis of the UN Charter as the basic international legal source for peacekeeping and continues with an overview of the peacekeeping-specific international legal sources. They are then supplemented with general rules of international humanitarian and human rights law, which override specific rules by introducing the humanity-based restraints of peacekeeping. These rules form a system within which the specificities of potential PMC inclusion in peacekeeping are considered. The two scenarios for

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<sup>41</sup> In 1998 the United States contracted the company DynCorp to the OSCE Verification Mission in Kosovo.

<sup>42</sup> This does not mean, however, that IOs have not been working with private contractors, particularly security firms.

<sup>43</sup> It builds on M. Bothe and T. Dörschal, "The UN Peacekeeping Experience", in D. Fleck (ed), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001), 487-506.



such an inclusion, to which we first turn, are treated separately within these subgroups only when such differentiation is necessary. The chapter provides the necessary background for the responsibility-related discussions of Section IV, although it avoids a detailed discussion of substantive rules.

### **A) Scenarios and Modes of Engagement**

Before I answer the question ‘from which sources is the law obtained?’, the two potential scenarios for PMC inclusion in peacekeeping should be looked at more closely. They are, at least for the time being, hypothetical constructions, due to a lack of state (or IO) practice. They are, however, crucial for creating an image of what this study is about. The *first* option assumes that a PMC is seconded to an IO (in our case the UN) as peacekeeping troops (either as an individual national contingent or a part of it) by a member state of this organization. This secondment could theoretically be performed jointly by two or more states, or even by another IO, leading to an extremely complicated web of legal relations. In any case, the result of providing a PMC-based military contingent for the purpose of peacekeeping operations within the UN framework would be the incorporation of this entity into the structures under the joint command of the Organization, therefore *de jure* becoming its integral part. The *second* possible scenario envisaged is one which, contrary to the first case, presupposes a direct contractual link between the PMC and the IO. If it is the government in the first scenario, which hires the company and then hands it over to the international entity that will (ideally) exercise command-control over the company; the second scenario lacks this indirect element. The PMC is therefore hired directly by an IO and incorporated into peacekeeping forces. Although the process would in practice probably go along very different lines – for example *who* will choose *what* PMC for *which* purpose? – the result would greatly resemble the first scenario: incorporation of a PMC in the structures and under joint command of the Organization, forming its integral part.

Notwithstanding this, the two approaches do differ in many ways. The applicable law is not necessarily the same or it is not enforced in the same manner. For example, the PMC seconded by a government might be under stricter scrutiny to comply with a national treaty-based commitment or a certain national law than a directly hired PMC. Furthermore, the rules of attribution of acts to an entity and consequently the determination of responsibility for (wrongful) acts and measures following might differ considerably. The role of sending-state's responsibility is, for example, much clearer in the first scenario than in the second. Lastly, the differences between scenarios produce dissimilarities in the criminal responsibility of PMC-peacekeepers that are held liable for wrongful acts they have committed, already in the identification of *ratione materia* or in the adequate forum-determination phase.

## **B) Subjects of International Law Relating to PMC-Peacekeeping Engagement**

The past six decades saw a remarkable shift from the traditional public international law perspective in recognizing that entities other than states can bear rights and duties under international law. The international legal personality, although derived,<sup>44</sup> now seems indisputable for IOs.<sup>45</sup> Traditional peacekeeping forces composed of national contingents are considered to be a part of the institutional apparatus of the Organization and therefore form its subsidiary organ.<sup>46</sup> These national contingents, which are considered to be an organ of the troop-sending state prior to integration, are put under the control and command of the UN (from the Secretary-General down to an individual soldier) to act

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<sup>44</sup> H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, 4<sup>th</sup> revised ed. (Leiden: Martinus Nijhoff, 2003) at 989.

<sup>45</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion, ICJ Reports 1949, at 179: "...the Organization [UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality."

<sup>46</sup> Subsidiary organ of the UN is a) created by, or under the authority of, a principal organ of the UN, which b) may determine or modify its membership, structure and terms of reference and c) can terminate it. The subsidiary organ, however, d) necessarily possesses a certain degree of independence from its principal organ. D. Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs", 67 *British Yearbook of International Law* (1997) 413, at 416.

within a mandate provided by the UN principal organ, almost exclusively the Security Council.<sup>47</sup> This incorporation of the contingent therefore transforms the nature of its personality based on the effective control principle, rendering the official acts of those forces attributable to the United Nations. Although, as will be seen below, this transformation does not completely divest the state of responsibility for acts committed by these forces, it does engage UN international responsibility. The application of both scenarios for PMC inclusion in UN peacekeeping would not produce different results, presupposing that integrated peacekeeping would be subject to the approval and authority of the UN principal organ. The PMC, although a private entity, would in any case be considered a subsidiary organ presumably under effective control of the Organization, therefore being a liable subject of international law.

Such a determination is independent from the involvement or recognition of other subjects of international law relevant for both scenarios of PMC-peacekeeping inclusion, particularly states linked to the operation: PMC-sending, -hiring or -registering states, but also the host state of the peacekeeping operation. All these bear certain rights and obligations that can trigger international responsibility. It is possible, however, that their capability to perform their rights and duties is considerably limited due to the limitations in performance of their sovereign governmental function.<sup>48</sup>

Furthermore, it is sometimes considered (through direct or indirect reference to international rules) that the wide category of other non-state actors may attain a status comparable to that of subjects of

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<sup>47</sup> It is imperative to separate peacekeeping from military operations from those undertaken by states or groups of states, still undertaken under a mandate of the UN. Somehow ironically, that “UN action” is privatized in a different way. See J. Quigley, “The ‘Privatization’ of Security Council Enforcement Action: a Threat to Multilateralism?”, 17 *Michigan Journal of International Law* (1996) 249.

<sup>48</sup> If, hypothetically, the peacekeeping force is deployed into *failed* or *collapsed* state, the de facto ability of such subject to exercise its rights and duties is extremely limited. This would entail a rather awkward situation in which a proper international legal person does not possess the prerequisite capacities to act. State collapse refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart, causing disruption manifested “by the combination of violent conflict, fragmentation of authority and humanitarian disaster” (A. Yannis, *State Collapse and the International System: Implosion of Government and the International Legal Order From the French Revolution to the Disintegration of Somalia* (Geneva: Institut universitaire de hautes études internationales, 2000) at 122).

international law.<sup>49</sup> It is argued that they often have the capacity to perform activities, which can be attributed to them and for which they can be held accountable. Despite taking into consideration the approach that there are certain entities, which are recognized by international law and endowed with similar (but fewer) capacities than states,<sup>50</sup> they can not be equated with classical subjects of international law or be considered on equal terms in the international responsibility debate. Nevertheless, one should not ignore the pragmatic approach which recognises that particularly two categories of these non-state actors – individuals and corporations<sup>51</sup> – possess the capacity to act. Therefore, the question is if this capacity to act is in any way regulated or affected by rules of international law which confer rights and duties on these entities directly without an intermediary role of the state. This question is rather quickly answered in the affirmative with a survey of relevant bodies of international law such as international human rights or humanitarian law,<sup>52</sup> introducing the concept of individual criminal responsibility that supplements the international responsibility of states and international organizations. The views of analogous limited international legal personality of national or transnational corporations are, for the time being, rather isolated.<sup>53</sup>

### **C) Rules of International Law Generally Applicable to the PMC-Peacekeeping Engagement**

Before continuing with a detailed investigation it is worth considering how these various relevant legal provisions relate to one other by sketching the framework. The UN Charter forms the basis of this

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<sup>49</sup> For example *de facto* regimes and peoples that represent national liberation movements, non-state armed actors, multinational companies, or even individuals. The general international law doctrine (such assessment is by definition simplifying and distorting) stays sceptical regarding the non-state actors' subjectivity under international law. The latter is *international*, therefore state-centred and these same states fear losing the power of creating it by expanding the concept of subjects. The debate therefore becomes dogmatic and dysfunctional. For an overview of insights on the topic see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 59-83.

<sup>50</sup> Such approach is particularly feasible in order to overcome the doctrinal capacity-subjectivity debate. See D.P. O'Connell, *International Law*, 2<sup>nd</sup> ed. (London: Stevens and Sons, 1970), at 81-82.

<sup>51</sup> One cannot deny corporations the capacity to act since joint action is one of the reasons for which they are established by individual persons.

<sup>52</sup> See below, particularly parts III(3)(a) and (b).

<sup>53</sup> See for example Clapham, *supra* note 49, at 79.

framework, under which the peacekeeping operation (and the peacekeeping force as a UN subsidiary organ) is established, mandated, and operated. Its vagueness requires further internal UN regulations *de facto* enabling its operation. As the mandate refers to the activity of the UN on the territory of a sovereign state, which (according to the established practice) consented to such activity in good faith, the necessary link between the two - UN and the host state - is established. Both entities are obliged to fulfil their international obligations. First, these obligations derive from the mandate which provides a basis for the peacekeeping force deployment. Second, their relation is regulated by the *status of forces agreement* (SOFA) or further agreements, defining the special rights, immunities, privileges, jurisdictional and claims issues etc. for the peacekeeping force on the territory of the host state, shortly regulating their status. Similar agreements (in terms of functions) are concluded between the force contributing states and the Organization, establishing a legal link between the subjects of international law.

The function of a SOFA and forces-contributing agreements is therefore twofold: it is a legal arrangement enabling the exercise of the operation and a legal instrument providing for protection against the mistreatment of the Organization's individual agents. In the latter function, a SOFA is to be read together with the two relevant multilateral Conventions (see below). The protection against maltreatment is, however, a wider concept which includes the obligations of subjects involved particularly under international human rights law (IHRL) and international humanitarian law (IHL). IHL, applicable when a peacekeeping operation is conducted during an armed conflict, offers a general legal framework applicable at the time of armed hostilities. These two bodies of law do not only extend the scope of rights and duties in substance, but bring in additional subjects which are bound by them. Those include, among others, state contributors of military contingents for the peacekeeping forces and non-state actors such as PMCs. Adding to this various contractual arrangements, UN internal rules, national legislation (of the host state, the PMC-registration state and potentially

personnel-origin state) and relevant provisions of international criminal law, the legal picture is given a somewhat more coherent structure.

### 1) The UN Charter as the Basis for Peacekeeping Normative Framework

Notwithstanding the mode of engagement of the PMC into UN peacekeeping forces, there are numerous provisions of the UN Charter applicable to it in analogy to the *traditional* peacekeeping troops, foremost because the Charter is a constituting document of the international legal system<sup>54</sup> and the basis of the UN legal framework.<sup>55</sup> Keeping in mind these functions of the Charter, we can distinguish between two types of provisions: the general rules, defining the basic scope and modalities of the peacekeeping activity, and the operational rules concerned with relations within the UN structure and limited status rules of peacekeeping.

The general rules are of fundamental importance as they define the basic scope of the peacekeeping activity such as the red lights for Organizations decisions for an engagement into the internal affairs of its members. Furthermore, they also determine the scope within which the specific normative framework is then built. The starting points for these general rules are the purpose and principles of the United Nations. First, the peacekeeping action must be seen in line with and should be conducted for the fulfilment of the UN's purpose to maintain international peace and security, for which appropriate measures should be taken.<sup>56</sup> Second, while pursuing this action the States and the UN should act in accordance with the basic principles enshrined in Article 2 of the Charter.<sup>57</sup> Concretely, when

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<sup>54</sup> S. Szurek, "La Charte des Nations Unies : constitution mondiale?", in J.P. Cot and A. Pellet (eds), *La Charte des Nations Unies : Commentaire article par article*, 3<sup>rd</sup> ed. (Paris: Economica, 2005), 29-68.

<sup>55</sup> A note of caution is needed here. As any other international treaty the Charter should be read as a whole (a net of interrelated provisions), but in the light of its subsequent practice which made some parts obsolete.

<sup>56</sup> Art. 1(1).

<sup>57</sup> As to what extent these rules also exist independently see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports, at 96-97, para 181.

conducting, authorizing or thinking of the peacekeeping action, the UN and its member states should act in good faith, respect each other's territorial integrity and independence, settle their disputes peacefully, support the UN in its action and refrain from threat or use of force or intervention, if inconsistent with Charter provisions. These principles constitute, among others, the basis for one of the most significant characteristics of peacekeeping operations - their consensual nature. Although practice shows that operations' host states are generally reluctant to admit international peacekeeping forces to their territory and do so only after international pressure had been exercised, the deployment is almost exclusively subject to their consent.<sup>58</sup> Consent is of crucial importance as it establishes a quasi contractual relationship between the host state, Organization and other participating actors. The situation is, of course, more difficult in the case of failed states or non-state parties on the territories of a given state.

The operational rules, labelled so that their reference to peacekeeping is already more concrete can, in principle, distinguish between the following aspects: rules relating to the establishment of the peacekeeping operations,<sup>59</sup> to their mandate and the rights and obligations of capacity holders involved in these operations, either of public entities or of individuals. If the Charter is, on the one hand, indisputably a basis for the establishment of mandate rules for peacekeeping, it is, on the other, very modest in the rights and duties approach, which is limited to references to special protection rules of international privileges and immunities.

The mandate rules distinguish between substantive powers (to deal with a certain situation), formal powers (to adopt decisions) and organizational powers (creation and functioning of the peacekeeping

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<sup>58</sup> The form of consent can vary from a proclaimed statement, Security Council resolution or an international agreement.

<sup>59</sup> Partially dealt with above in the section on working definition of a peacekeeping force.

unit) derived from the Charter in relation to peacekeeping.<sup>60</sup> The Charter and subsequent practice have confirmed the Security Council's near exclusive rule in the decision-making process leading to the establishment and mandating of peacekeeping operations.<sup>61</sup> This has been the case notwithstanding its inclusion within Chapter VI (situations that might endanger international peace and security) or Chapter VII (situations posing an immediate threat to or breach of international peace and security). Since the determination for the latter situation is subject to a Security Council decision (Article 39), which is also the sole organ of the UN in a position to make legally binding recommendation for action under Chapter VII,<sup>62</sup> it seems plausible to conclude that the Charter supports the Council's primacy in relation to peacekeeping.<sup>63</sup> This is supported by the increasing reference to Chapter VII in resolutions establishing peacekeeping forces and their expanding mandates, which include peace enforcement. Furthermore, one could also refer to recent practice.<sup>64</sup>

The *mandate*, operationally formulated in a Security Council resolution, should define the purpose and functions of the peacekeeping operation and any other fundamental matters in its relation, such as its time limit.<sup>65</sup> On a technical level it can be enriched by reference to other documents, the Secretary-General's report being a standard example, which describe the proposed action in more detail.<sup>66</sup> The Security Council's decision is subject to the proscribed procedural rules, binding internally for the

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<sup>60</sup> The analysis is rendered difficult as these aspects are often not clearly enough distinguished. Bothe, *supra* note 3, at 684.

<sup>61</sup> The power of action is enshrined in Art. 24(2), which further refers to Purposes and Principles of the UN, and the "specific powers granted to the Security Council for the discharge of [peace and security maintenance] duties laid down in Chapters VI, VII, VIII, and XII."

<sup>62</sup> According to Art. 25 the Security Council decisions are binding and to be carried out by the Member States, subject to *lex speicalis* limitations of the Charter, according to which the same organ can only give recommendations (for example Chapter VI). In relation to maintenance of peace and security the GA can only give non-binding recommendations (Art. 11(2)), refer the situation to the Security Council (11(3)). But see *Uniting for peace*, *supra* note 16). The implications of this are wide as they confer duties members states to make available to the UN "armed forces, assistance, and facilities ... for the purpose of maintaining international peace and security." (Art. 43(1))

<sup>63</sup> See also limitations to GA action in relation to maintenance of international peace and security: "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion." (Art. 11(2), second sentence)

<sup>64</sup> The recent authorization for re-mandating the UN operations in Sudan took place only after support was given by all permanent members of the Security Council.

<sup>65</sup> This has become a recent practice in order to prevent self-perpetuation of operations that lost the backing of the relevant majority of the Security Council.

<sup>66</sup> Bothe and Dörschal, *supra* note 43, at 488.



Organization. Its external legal character is determined by the Charter provision upon which it is based.

Concerning peacekeeping-related organizational powers other than the force's establishment and mandate, the Charter presumes the involvement of the UN administrative organ on the basis of Chapter XV. The Secretariat is comprised of a Secretary-General as chief administrative officer and the staff required for the functioning of the Organization; the Secretary-General performs "such other functions as are entrusted to him by these organs."<sup>67</sup> In the case of peacekeeping operations this includes the administration of subsidiary organs which the Security Council established, according to Article 29, for the performance of its peace and security maintenance functions. Considering the fact that combat forces integrated in peacekeeping operations constitute a part of the institutional apparatus of the UN regardless of their origin (being a national contingent, PMC seconded by a state or a PMC hired directly by the UN), one could argue that provisions of the UN Charter relating to the staff of the Organization provide fundamental principles applicable to UN peacekeepers. First, they make the Secretary-General *de facto* the highest operational authority of the peacekeeping force,<sup>68</sup> bearing in mind the inapplicability of Article 47 under which the Military Staff Committee was to be established.<sup>69</sup> S/he, as well as the other staff that includes peacekeepers, are to act independently, and are to receive instructions only from the Organization; *a contrario*, the UN Member States undertake not to influence them in the discharge of their responsibilities.<sup>70</sup> The staff should be appointed, with due regard to the highest standards of efficiency, competence, and integrity, by the Secretary-General

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<sup>67</sup> The Secretary-General acts in this capacity for all principal organs of the UN (Art. 98).

<sup>68</sup> Art. 97.

<sup>69</sup> The Charter assumed its role in forming the plans for application of armed forces (although under Chapter VII, see Art. 46) and to "advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament." One could easily envisage peacekeeping operations falling within its scope, if such a subsidiary organ would ever assume its function. Considering this has not been the case, it is hard to conclude what the implications of its practice would be.

<sup>70</sup> Art. 100.

under regulations established by the General Assembly.<sup>71</sup> The same article also alludes to equitable geographic representation. Considering the practice of voluntary troop contribution accompanied by reluctance for engagement, one is more likely to apply this provision as an obligation than a right of the member states. Acquiring sufficient troops and resources is, at least for Chapter VII action, partially acknowledged by the Charter, which obliges states to actively participate in the UN action.<sup>72</sup> This is poorly applied in peacekeeping practice, as Organization has always been struggling to acquire sufficient resources. The mobilization role of the Secretary-General plays a crucial role in resolving this problem and expands his Charter-based function to that of an advocate for the Organization's peacekeeping. Finding alternative solutions to national engagement, while not proscribed by the Charter, could be seen as a duty of the chief administrative officer of the Organization.

To complete the Charter's reference relevant to peacekeeping operations, one has to touch upon its contribution to the rules relating to the rights and obligations of peacekeeping-related actors. It must be admitted that these references are surprisingly modest and disproportional to the role the UN has dedicated to some of these approaches during its existence.<sup>73</sup> The Charter generically concentrates on its staff and confers the 'special status' upon it, deriving from the functional approach of the law of diplomatic privileges and immunities.<sup>74</sup> This leads to the recognition that the special status of international staff is imperative for the exercise of the Organization's functions, subject to limitations by the functional necessity test. The Organization shall, according to Article 105, enjoy in the territory

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<sup>71</sup> Art. 101, which refers to a large body of internal regulations that we discuss below, particularly under heading III.4. In practice the Secretary-General has been given a wide discretion in the organization of the Secretariat (although the vote of confidence is usually sought), partially reflected in its constant reorganization.

<sup>72</sup> See Arts. 25 and 43(1)

<sup>73</sup> The reference to human rights is a classic example. The Charter establishes the Organization as a promoter of fundamental human rights (see Arts 13, 55(c) and 62) and reaffirms its faith in them (The Charter Preamble), but it never expressly recognizes or subordinates to them.

<sup>74</sup> There are important differences among the laws of diplomatic protection accorded to states and IOs. The former is much older, customary based and firmly enshrined in a nearly universal 1961 Vienna Conventions on Diplomatic Relations; the latter, although based on the principles of the former, is young and largely treaty-based, differentiates among IOs and departs from the reciprocity principle. See O. Engdahl, *Protection of Personnel in Peace Operations: the Role of the 'Safety Convention' against the Background of General International*, (Leiden, Boston: Nijhoff, 2007), at 120-132.

of each of its Members only “such privileges and immunities as are necessary for the fulfilment of its purposes.” The special protection is pronounced, but the reference to general protection and duties, particularly the fulfilment of its human rights obligations, is absent.

The Charter, as indicated, contains a wide range of principles applicable to various aspects of peacekeeping. It, most importantly, provides the basis for UN peacekeeping engagement by defining the decision structures for its establishment, authorization, mandate, basic rules of engagement and some hints as to the status and rights (but less duties) of its personnel. However, it remains quiet on details and consequently on the majority of questions which pop-up with the potential inclusion of PMCs in this activity. This is understandable, as many of the Charter’s arrangements are of an indicative nature and only indirectly applicable. It should therefore be read together with relevant provisions derived from multilateral agreements, international custom including Organization’s practice and its internal regulations.

## **2) Specific Rules Relating to Peacekeeping Forces on the Ground**

The need for the special character of the Organization’s agents on the ground has been enshrined in the Charter and is summed-up by a functional requirement for special status, safety-related provisions and regulations regarding jurisdictional matters. Beyond the functionality reasons already outlined above, the special status is conferred upon the Organization’s personnel on the ground due to the very nature of the peacekeeping operations, which are usually conducted in a lethal environment. This implies that personnel, particularly peacekeepers as part of a military component, are likely to get engaged in situations where force will be used by it and against it. Determination of status, ideally conducted before deployment, is crucial as it determines the rules, their applicability and modalities for enforcement between the three main capacity holders involved - the UN, the host state and the

contributing state. It is regulated primarily by the following three sources: the bilateral agreements on the status of forces, which are based on relevant UN peacekeeping practice, the Convention on the Privileges and Immunities of the United Nations<sup>75</sup> and the UN Safety Convention.<sup>76</sup>

### **(a) Convention on the Privileges and Immunities of the United Nations**

The General Convention pre-dates peacekeeping and was applied to military components of peacekeeping operations only through constant reference to it and incorporation of its provisions in bilateral SOFAs.<sup>77</sup> Notwithstanding its limitations,<sup>78</sup> it is directly applicable to UN staff (officials and experts on missions) and subject to UN Secretary-General's decision confirmed by the General Assembly.<sup>79</sup> The latter took a decision in 1946 granting privileges and immunities "to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates."<sup>80</sup> This category, however, excludes the members of national contingents of the peacekeeping forces. Although these are under the command and control of the Organizations and constitute its organ, the SOFA of the first peacekeeping operation in 1956 established the practice of placing those troops under the individual SOFA regimes. The specificities of these in relation to the military staff, most notably the exclusive criminal jurisdiction of the sending state for acts committed, are discussed later.

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<sup>75</sup> Hereafter referred as the General Convention, adopted by the UN GA Res. 22(I), 13 February 1946, UN Doc. A/RES/1/22. The Convention confirms the UN juridical personality and defines its capacities (Art. I); extends protection over the UN property, funds and assets (Art. II); confers certain immunities and privileges to Members' representatives (Art. IV); exempts UN officials from legal process, taxation, immigration duties (Art. V) and UN experts on missions from arrest, legal process etc. for acts performed in the official capacity (Art. VI); and provides for UN *laissez-passer* (Art. VII).

<sup>76</sup> Convention on the Safety of United Nations and Associated Personnel, UN GA Res. 59(LIX), UN Doc. A/RES/49/50.

<sup>77</sup> UN Model Status of Forces Agreement, UN Doc. A/45/594, 9 October 1990, para 3, footnote 4; see also paras 25-26.

<sup>78</sup> There are several practical issues that limit the Convention's application. It is, first, subject to ratification by the State on which territory the peacekeeping forces have been deployed. Second, even if the host State gives its consent to be bound, it can still express its reservations to apply the Convention partially only.

<sup>79</sup> Art. V, Section 17.

<sup>80</sup> *Privileges and Immunities of the Staff of the Secretariat of the United Nations*, UN GA Res 76(I), UN Doc. A/RES/76/1.

Exclusion of national contingents from the Convention's scope of application would clearly encompass the nationally seconded PMCs. But it would not hinder its possible applicability for the PMC staff hired directly by the Organization, as long as they are regarded as UN staff. In this case much would depend on the conditions of a contract according to which the PMC and its staff would be operating, particularly regarding the modes of their recruitment. The GA limiting provisions – excluding locally recruited personnel on the hourly basis – is narrow. Although one can imagine reasons for which a PMC might consider recruiting its staff locally,<sup>81</sup> it seems plausible to expect that the UN would be reluctant to engage local staff *en masse* for military tasks. This would be detrimental to the impartiality of the peacekeeping force and therefore not in accordance with its mandate. Whether the same rationale is applicable to PMCs, which are often multinational companies that recruit on a global scale, is less clear. If local recruitment were the case only exceptionally, one might easily argue that it would not threaten the impartiality of the force and would be, for the reasons stated above, even preferred for its operationality. The indicator that such practice might cause certain problems is occasional host state reluctance to recognise privileges and immunities to UN staff of its nationality.<sup>82</sup>

Furthermore, the Convention is unclear about how one should treat the private contractors and their personnel contracted by the Organization. As its applicability is subject to the Organization's recognition of who constitutes its staff, the view of the UN Office of Legal Affairs (UNOLA) in relation to civilian contractors for UN peacekeeping operations from 1995 is, at most, important. When it addressed the question of whether these can be understood as “experts on missions”, UNOLA

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<sup>81</sup> Most notably the knowledge of and familiarity with the local environment, culture and language. These conditions are not only preferred but often a prerequisite for the employment in the field.

<sup>82</sup> Although such demands have usually been made in connection with taxation issues, the practice might be particularly detrimental for an independent functioning of the operation, recent example being UN Mission in Ethiopia and Eritrea (UNMEE). It has been the constant position of the UN, however, to uphold the privileges and immunities of all officials so categorized by the UNGA.

referred to the ICJ Advisory opinion,<sup>83</sup> which provided the ground for its understanding of private contractors outside the category. Its negative decision was reasoned primarily on the commercial nature of the functions performed by these contractors<sup>84</sup> and the fact that they did “not qualify as ‘members of UNAVEM III, as they [were] not part of the civilian, military or police components.’”<sup>85</sup> One has to note, though, that the analogous application of this reasoning is inaccurate. The functions performed by the PMC contractor falling within our definition would be fundamentally different, closer to that of a UN security guard, which is regarded as an expert on mission.<sup>86</sup> However, some are of the opinion that international immunities never apply to a contractor as a matter of right, except in light of special arrangements.<sup>87</sup> This, nevertheless, does not provide a final answer as it does not determine if an agreement between the PMC and the Organization is sufficient for the establishment of such an arrangement. Although the host-state is the entity which should preferably consent to special rights being conferred, it is the UN’s responsibility to decide who constitutes its staff and who will benefit from special status.<sup>88</sup> It is safe to conclude, therefore, that in the case of the inclusion of a PMC in the provisions of a further agreement between the UN and the host state would have to regulate and clarify the status of such personnel.<sup>89</sup>

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<sup>83</sup> In the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion, ICJ Reports 1989, p. 177, at 194 para 48) ICJ, inter alia, indicated that: “[experts on mission]... have been entrusted with mediation, with preparing studies, investigations or finding and establishing facts”.

<sup>84</sup> See the Memorandum from the Legal Counsel to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, 407 *United Nations Juridical Yearbook* (1995).

<sup>85</sup> Question of whether Contractors’ personnel could be considered as ‘experts on missions’ – Article VI, section 22 of the 1946 Convention on the Privileges and Immunities of the UN. Memorandum to the Director, Field Administration and Logistics Division/Department of Peacekeeping (FALD/DPKO), 23 March 1998, para 8, available online at [http://untreaty.un.org/cod/UNJuridicalYearbook/texts/1998\\_extracts\\_legalopinions.pdf](http://untreaty.un.org/cod/UNJuridicalYearbook/texts/1998_extracts_legalopinions.pdf), last accessed 1 June 2008.

<sup>86</sup> In the Memorandum of the Director of the Field Operations Division, Office for General Services, 4 September 1992, 479 *United Nations Juridical Yearbook* (1992), the UN guards, having special service agreements with the UN, should according to the opinion of the UNOLA, be regarded as experts on mission.

<sup>87</sup> C.W. Jenks, *International Immunities*, (London: Stevens and Sons, 1961) at 143-144.

<sup>88</sup> The immunities and privileges can and should be waived by the UN Secretary-General (Art. 47(b) of the Convention) if they “impede the course of justice” and if this would be “without prejudice to the interests of the United Nations.”

<sup>89</sup> This is supported by scepticism whether the Convention has gained a status of a customary international law. Solely its provisions would be insufficient to provide the basis for status of peacekeeping forces on the ground (Engdahl, supra note 74, at 147-149). A general acceptance for customary rule is probably only valid for the UN staff because of the constant treaty practice granting immunity to that organization. Subject to consent a state has given for the presence of UN to fulfil its functions on its territory, that state is obliged to extend the necessary privileges and immunities to enable the Organization to achieve its objectives.

## (b) Status of Forces Agreements

Individual *status of forces agreements* (SOFA) aim to facilitate the implementation of the operation's mandate and deal with issues of status, privileges and immunities of UN peacekeeping personnel in further detail. They include detailed logistic and technical provisions, jurisdictional provisions and dedicate more attention to safety-related issues. The practice has, to a great extent, followed the logic and provisions of a prototype SOFA agreement for UNEF in 1956,<sup>90</sup> which was supplemented as a reference by the 1990 issuance of a UN Model SOFA by the Secretary-General.<sup>91</sup> The most relevant developments in these agreements since their initiation have included reference to the binding character of international humanitarian law for UN peacekeepers in the 1990s, provisions on safety and security of personnel<sup>92</sup> and recently the inclusion of provisions relating to employment and status of contractors.<sup>93</sup> A SOFA is a bilateral legal arrangement between the UN and the host state of which the force contributing state is only a beneficiary, although the agreement contains provisions almost exclusively relevant to it. Due to the complex legal picture accompanying UN peacekeeping deployment, the conclusion of a SOFA should clarify the applicable rules for subjects involved, particularly in relation to the consent of the host state.<sup>94</sup> Whether it presents a necessary prerequisite is, however, a different question, considering its occasional absence in practice or negotiation and entry into force only after deployment with retroactive effect. Its relatively immutable structure since its introduction together with the general acceptance of the prototype provisions of the UN Model would

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<sup>90</sup> *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, 9 October 1958, UN Doc. A/3943, see para 134.

<sup>91</sup> See supra note 77. This presents the main reference here, if not otherwise indicated.

<sup>92</sup> Including the key provisions of the Safety Convention, see for example UN Mission in Support of East Timor (UNMISET) SOFA, 20 May 2002, 2185 UNTS 367.

<sup>93</sup> Engdahl, supra note 74, at 202.

<sup>94</sup> It is affirmation, defines responsibilities and is able to address specific issues.

speak in favour of its customary status, at least until a *lex specialis* SOFA is concluded and derogates from the general SOFA rules.<sup>95</sup>

SOFAs offer a multi-layered approach to the status of peacekeeping personnel, referring to the above Convention and providing for special provisions in these agreements. Special diplomatic protection is conferred upon the high-ranking members of the operation.<sup>96</sup> Further a distinction is made between the civil component and the military component of an operation. The civil component comprised of members of the UN Secretariat,<sup>97</sup> military observers, UN civilian police and civilian personnel other than UN personnel<sup>98</sup> is covered by functional immunities comparable to those of the Convention.<sup>99</sup> The civilian personnel assigned to a military component are subject to the same regime as other members of the civilian component over which jurisdiction is shared in accordance with the relevant provisions of the SOFA.<sup>100</sup> The “military personnel of national contingents,” on the contrary, are subject to privileges and immunities only as provided in the Agreement<sup>101</sup> and a particular jurisdictional regime. The latter, which confers exclusive jurisdiction with respect to any criminal offence committed by these personnel in the territory of the host state to the troop-sending states,<sup>102</sup> is somehow controversial, but probably “the most important principle in the status Agreement.”<sup>103</sup> It is exclusive also due to the fact that it does not allow the Secretary-General the right to waive the special

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<sup>95</sup> For example, when calling upon the host states to conclude agreements with the Secretary-General within 30 days, the Security Council has determined that “pending upon the conclusion of such agreements, the model status-of-forces agreement of 9 October 1990 (A/45/594) shall apply provisionally. SC Res. 1509, UN Doc S/RES/1509(2003); SC Res. 1545, UN Doc S/RES/1545(2004).

<sup>96</sup> Art. 24.

<sup>97</sup> Art. 25, falling under Convention Article V and VII, considered as ‘officials’

<sup>98</sup> Art. 26, falling under Convention Article VI, considered as ‘experts on mission’

<sup>99</sup> Art. 46. It includes reference to local population and refers to immunity from “legal process in respect of words spoken or written and all acts performed by them in their official capacity” with durable effect.

<sup>100</sup> Most notably Arts 40, 47(a), 49, 51, 52, 53, 54 etc.

<sup>101</sup> Art. 27

<sup>102</sup> Art. 47(b). See for example UN Mission in the Central African Republic (MINURCA) SOFA, 8 May 1998, 2015 UNTS 734, para 50(b); or UN Mission in Sierra Leone (UNAMSIL) SOFA, 4 August 2000, 2118 UNTS 190, para 51(b) etc.

<sup>103</sup> These are the words of Secretary-General Hamarskjöld, (*Summary study*, supra note 90, at para 163).



rights of military personnel.<sup>104</sup> Apart from the functional argumentation that this provision is essential for the successful recruitment by the United Nations of military personnel from its Members States and for the independent exercise of their functions, it paves the way for addressing the jurisdictional vacuum in which criminal offenders would escape prosecution by both the host state and the participating state. It is a necessity, however, not to abuse this exceptional rule of immunity to escape the jurisdiction of local courts<sup>105</sup> or not to extend it unnecessarily.<sup>106</sup> As a SOFA is a UN-host state agreement, there exists a requirement for the Secretary-General to obtain such assurances from the sending states,<sup>107</sup> either in the form of troop-contributing agreements or memorandums in the form of exchange of letters.<sup>108</sup> This creates a positive obligation of the sending state, which might be hindered in its implementation by factors such as variety of legal systems,<sup>109</sup> insufficiency of sending states' domestic legislation<sup>110</sup> or by the potential decision of the host-state to withhold its consent for the operation. If arrangements between the host and sending state for implementation of jurisdictional provisions are made, they should take into consideration the relevant SOFA provisions.

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<sup>104</sup> The waiver right of the Secretary-General is usually not explicitly states in SOFAs (or UN Model SOFA), but it is inferred from the incorporation of the Privileges Convention.

<sup>105</sup> The special status and certain privileges are not granted for the benefit of the individual concerned; some machinery for prosecuting the offenders of local law would be preferable and local law should be taken into consideration (D.W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, (London: Stevens and Sons, 1964) at 437-438), especially if the crime committed in the host state was not a criminal offence in the contributing state.

<sup>106</sup> Only in Congo was such jurisdiction extended to civilian members of military component, see UN Operation in the Congo (ONUC) SOFA para 9 (27 November 1961, 414 UNTS 229). However, the recent practice of non UN-command operations such as International Security Assistance Force (ISAF) in Afghanistan extended exclusive criminal jurisdiction for some elements of national personnel such as “supporting personnel, including associated liaison personnel.” See *Military and Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, Annex A, January 4 2002, 41 ILM 1032 (2002), Arts. 1-4.

<sup>107</sup> Art. 48 and note h/ to this article of the UN Model SOFA.

<sup>108</sup> See Article VIII, para 25 of the Model Contribution Agreement between the UN and Participating State Contributing Resources to the United Nations Peace-keeping Operation, (in *Note by the Secretary-General: Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment*, UN Doc. A/50/995, 9 July 1996, annex).

<sup>109</sup> Different offences treated differently in different legal systems can have for consequence that one member of the peacekeeping force is subject to different laws and sanctions than the other in the same situation for the same acts.

<sup>110</sup> As raised by the Secretary-General in 1958 already, “national laws may differ in the extent to which they confer in courts martial jurisdiction over civil offences in peacetime, or confer on either military or civil courts jurisdiction over offences abroad. Some provide only for trial in the home country, thus posing practical questions about the submission of the evidence” (*Summary study*, supra note 90, at para 137).

SOFAs are a tool leaving a wide array of possibilities for the regulation of contractors. Their situation is somehow special as they are, as understood in the light of current practice and their support function to peacekeeping operations, not entitled to benefit from privileges and immunities of the Convention. The situation is paradoxical as they are employees of their respective international service agencies and companies (therefore not staff member, employees or agents of the United Nations), but perform functions of UN operations, which were previously conducted by personnel regarded as agents of the UN. However, providing functions for the Organization should provide such personnel with legal protection.

The question that remains is whether such protection is, based upon practice or any instrument, pre-existent or whether inclusion in a SOFA, calling for special consent of the host country, is required. According to UNOLA, the inclusion of international contractual personnel under a SOFA would require additional support by the General Assembly urging that the government concerned should grant such personnel functional immunity<sup>111</sup> and legal protection.<sup>112</sup> The latter should, according to the Secretary-General and UNOLA, be included in SOFAs, but this has been accepted with reluctance by host-states, which seemed to be given ultimate discretion in the matter,<sup>113</sup> leaving aside the private contractors for the time being from this special regime. Similarly there is no decision of the General Assembly which would endorse such special protection.

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<sup>111</sup> Engdahl, *supra* note 74, at 165.

<sup>112</sup> This should extend to immunity from legal process in respect of words spoken and written in all acts performed by them in their official capacity, as well as entitlement to repatriation in times of international crisis. *Report of the Secretary-General: Use of civilian personnel in peacekeeping operations*, para 32, UN Doc. A/48/707(1993)

<sup>113</sup> See UNOLA *Memorandum to the Assistant Secretary-General for Peacekeeping Operations*, *supra* note 84.

### (c) Convention on the Safety of UN and Associated Personnel

SOFAs of a later date included some, but limited, beneficial provisions regarding contractors,<sup>114</sup> which would be insufficient for the successful exercise of peacekeeping functions of a potential PMC operating under UN command. This is indirectly confirmed by the increasing emphasis placed on the need for more effective protection of UN personnel in peace operations from the 1990s onwards; the results of which have been the adoption of the Convention on the Safety of UN and Associated Personnel (CSUN) and its Optional Protocol.<sup>115</sup> Besides the additional<sup>116</sup> safety assurance provisions<sup>117</sup> applicable to personnel within its scope of application, the Convention elaborates on the meaning of the term ‘UN and associated personnel’ and their duty to respect the laws and regulations of the host (transit) state and to refrain from action incompatible with it.<sup>118</sup> UN personnel<sup>119</sup> and associated personnel<sup>120</sup> are defined with reference to *UN operations*; those are established by the competent UN organ and conducted under UN authority and control, either for the purpose of maintaining or restoring international peace and security, or following the Security Council and General Assembly declarations of the existence of exceptional risk of the personnel included in the operation.<sup>121</sup> This broad definition is narrowed by the partial exclusion of Charter Chapter VII

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<sup>114</sup> Freedom of movement, the provisions of supplies and services and permits and licenses. See UNMISSET SOFA (supra note 92), MINURCA and UNMIL SOFA (supra note 102), all para 12.

<sup>115</sup> The GA adopted the Protocol on 8 December 2005 (UN GA Res. A/RES/60/42, UN Doc. A/60/518)

<sup>116</sup> Bothe and Dörchal (supra note 43, at 499) are of opinion that it only makes more explicit what is already contained in instruments such as the General Convention or SOFAs, where O. Engdahl, “Protection of Personnel in Peace Operations”, 10 *International Peacekeeping* (2006) 53, at 54, emphasizes its contribution as a criminal law and enforcement instrument.

<sup>117</sup> States parties have negative and positive obligation to assure safety and security of the UN personnel (Art. 7), criminalize and enforce disrespect of this obligation in national their national law (Art. 9) and establish jurisdiction for punishment of such acts (Art. 10), supplemented by measures implementing *aut dedere aut prosequi* principle (Arts 13, 14 and 15).

<sup>118</sup> Art. 6, which in paragraph 2 obliges the Secretary-General to take all appropriate measures to ensure the observance of these obligations.

<sup>119</sup> This covers “members of the military, police or civilian components of a United Nation operation” and “other officials and experts on mission of the United Nations.” (Art 1(a))

<sup>120</sup> The peacekeeping PMCs could be considered to fall within the following two categories of the associated personnel: (i) Persons assigned by a Government or an IO with the agreement of the competent organ of the UN, or (ii) persons engaged by the Secretary-General of the UN to carry out activities in support of the fulfilment of the mandate of a UN operation. Art. 1(b)

<sup>121</sup> Art. 1(c)

operations with enforcement elements “in which any of the personnel are engaged as combatants against organized armed forces to which the law of international armed conflict applies.”<sup>122</sup> Besides the IHL-related problems, particularly the overlap of the Convention regime and non-international armed conflict IHL arising from this provision, the Convention becomes only partially applicable for newer generations of peacekeeping operations. Those, as indicated above, are almost always authorized under Chapter VII and blur the line between traditional peacekeeping and peace enforcement due to the inclusion of enforcement elements. In effect, the peacekeepers are easily engaged in a situation that confers upon them the status of combatant, even under the broadened conception of a UN operation established by the Optional protocol of the Convention.<sup>123</sup> It is self-evident that these limitations of the Convention would apply to PMC-peacekeeping regardless of the scenario of inclusion. Still, the Convention can be considered to establish at least non-opposing if not favourable conditions for PMC-peacekeeping inclusion: it does not preclude the status of private contractors integrated into peacekeeping forces nor does it distinguish between assurances which are conferred upon either of the two categories, the UN or associated personnel. The crucial criterion for linkage of personnel to the UN operation is reduced to the functional element to carry out the activities in support of the fulfilment of the mandate of an operation, regardless of the particular status of the supporting entity. The regime established by the Convention is, however, focused on protection matters and adds little to clarify the status arising from the incorporation of private entities in peacekeeping operations. The subordinate position of the Convention in these matters is expressed also in the provision which obliges the host state and the UN to conclude the status agreement as soon as possible, which should include “inter alia, provisions on privileges and immunities for military and police components of the operation.”<sup>124</sup> The Convention also turns to two other important bodies of

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<sup>122</sup> Art. 2(2)

<sup>123</sup> Namely, delivering humanitarian, political or development assistance in peacebuilding, or delivering emergency humanitarian assistance. Art. 2(1) of the Optional Protocol.

<sup>124</sup> Art. 4.

international law governing peacekeeping, namely international humanitarian law and international human rights law, to which it recognizes primacy by expressly stating that “nothing in this Convention shall effect [them]”.<sup>125</sup> It is the dimension of these general rules that govern peacekeeping operations to which I now turn in the light of the two scenarios.

### **3) General Rules Relating to Peacekeeping Forces on the Ground**

What are referred to as general rules relating to peacekeeping is primarily limited to two bodies of international law, IHL and IHRL, which operate independently of specific peacekeeping rules mentioned above. They serve a joint purpose in relation to peacekeeping by defining the basic humanity-driven restraints and assuring the protection for human beings affected by the peacekeeping activity, although one should immediately recognize their distinct modes of application.<sup>126</sup> In particular, human rights law is primarily concerned with how entities with human rights obligations treat those within its domain. Although its application can be subject to limitations during the times of public emergency for certain obligations,<sup>127</sup> it remains in force during times of armed conflict or occupation. The latter two are the precondition for the applicability of IHL,<sup>128</sup> which aims to restrain the conduct of warfare through the introduction of humanitarian concerns and limitations for all warring parties and individuals. The modalities of its applicability are dependant on the factual involvement of peacekeeping forces in hostilities and help determine its status. As a result the two

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<sup>125</sup> Art. 20(a)

<sup>126</sup> J. Cerone, “Human Dignity in the Line of Fire: The Application on International Human Rights Law During Armed Conflict, Occupation, and Peace Operations,” 39 *Vanderbilt Journal of Transnational Law* (2006) 1448 at 1453, identifies distinctions between the two also in subjects of obligations, the institutions competent to determine violations, the period of application, the scope of beneficiaries, the locus of application, the range of rights protected and the sources of obligation.

<sup>127</sup> For derogation clauses see the IHRL section below.

<sup>128</sup> See for example common Article 2 of 1949 Geneva Conventions in respect to International armed conflicts (IAC) and common Article 3 of 1949 Geneva Conventions with respect to non-international armed conflicts (NIAC).

bodies of law can operate simultaneously,<sup>129</sup> keeping in mind that the more widely applicable IHRL must take into consideration the *lex specialis* standards of IHL.<sup>130</sup> Furthermore, their mutually reinforcing relationship is often mentioned, as one can help to overcome weaknesses of the other.<sup>131</sup> Thus the rights and duties of actors involved in peacekeeping, including the PMCs in their various capacities or individual PMC personnel, should not be seen in isolation from IHRL and IHL. However, the difficulty lies in the determination of precise rules applicable to these complex legal situations which involve a variety of non-state actors. Major specificities and hindrances to their applicability to peacekeepers, particularly if those would be privately contracted are now examined.

#### **(a) International Human Rights Law**

The embeddedness of human rights in the inter-state structure of the international legal system, mirrored in the proliferation of international treaties to which parties are exclusively states,<sup>132</sup> has resulted in the state-centric view that IHRL is mainly about “the way states treat those within its domain.”<sup>133</sup> This quickly proves inadequate to comprehend human rights obligations in relation to UN peacekeeping. Speaking strictly legally and subject to attribution rules (see part IV(A) below) complications arise as the obligations in place are also that of a separate legal entity on behalf of which the peacekeeping troops act – the UN – which have to be combined with contributing state’s obligations arising from its retention of a certain degree of control and jurisdiction over the acts of its

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<sup>129</sup> *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 131, para 106.

<sup>130</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, at 240, para 25.

<sup>131</sup> P. Rowe, *The Impact of Human Rights Law on Armed Forces*, (Cambridge: Cambridge University Press 2006) at 3, who notes that treaty-based IHRL may be particularly useful for an individual to enforce his/her IHL-based rights; or the influence the IHRL had on recent IHL developments (see *Prosecutor v Tadić*, IT-94-1-AR 72, 2 October 1995, para. 97).

<sup>132</sup> Though this trend might be turned around with the accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms when the Reform Lisbon Treaty will enter into force.

<sup>133</sup> Cerone, *supra* note 126, at 1453.

troops. Furthermore, to prevent the detachment of human rights guarantees from an individual to whom they are supposed to serve originally, one has to go beyond the inter-entity approach.

To overcome the problem of lacuna of sources for UN human rights obligations several paths are in place. Particularly one can turn to the binding nature of customary international law,<sup>134</sup> even some *jus cogens* obligations,<sup>135</sup> and the practice arising foremost in the context of UN peacekeeping operations. As for customary international law, the usual argument for the customary nature of some widely endorsed or ratified IHRL instruments is made, in particular the Universal Declaration and the two general human rights Covenants.<sup>136</sup> Obligations such as the prohibition of torture or inhumane or degrading treatment, the prohibition of all forms of discrimination, the prohibition of arbitrary deprivation of life, unlawful detention, slavery etc. are regularly referred to as attaining customary nature. Furthermore, the practice-based reference to human rights obligations of the organization is inferred from obligations incorporated in IHL obligations<sup>137</sup> and from the constant manifestations of the Organization and its institutions<sup>138</sup> to the need for respect of human rights or their active acknowledgement in UN training materials and internal rules.<sup>139</sup> These obligations are also confirmed

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<sup>134</sup> Following the reasoning that if custom is obligatory for states, those cannot simply divest themselves of such obligations when they empower the IO to act (Clapham, *supra* note 49, at 109). Moreover, the sole debate over the capacity of IOs (above, part III(B)) presupposes obligations of such capacity holders. There is little support for reasoning that IOs would not be bound by custom before expressing their consent, primarily due to their intergovernmental nature. One can with confidence refer to.

<sup>135</sup> Recognition of some human rights obligations as *jus cogens* obligations is referred to, for example, by A. Bianchi, “Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion,” 17 *European Journal of International Law* (2006) 881 at 913, 915; or see also Human Rights Committee, *General Comment 29 (States of Emergency (Article 4))*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001).

<sup>136</sup> Namely ICCPR and ICESCR, but also more specific instruments such as Convention on the Rights of the Child or the International Convention on the Elimination of All Forms of Racial Discrimination etc.

<sup>137</sup> See Secretary-General’s bulletin, *infra* note 160.

<sup>138</sup> See UN High Commissioner for Human Rights (UNHCHR) *Recommended Principles and Guidelines on Human rights and Human Trafficking*, referring in Guideline 10 to obligations and prohibitions on human trafficking for peacekeepers. UN Doc. E/2002/68/Add.1, 20 May 2002; see also *Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ST/SGB/2003/13, 9 October 2003

<sup>139</sup> See for example “Ten Rules – Code of Personal Conduct for Blue Helmets”, particularly rule 5 referring to respect and regard of human rights for all (UN Department of Peacekeeping Operations Training Unit, 1997).

indirectly in claims against the UN peace operations by third parties.<sup>140</sup> Lastly, it would be somehow odd and incoherent, if their respect would not be obligatory for the organization, which has the promotion and encouragement of respect of human rights and fundamental freedoms enshrined in its Charter.<sup>141</sup> It seems more accurate that this would call for a stringent approach by which the UN is obliged to be subject to the highest possible human rights standards.

The sources of a sending state's human rights obligations – apart from customary rules – are easier to determine, however the problem arises with the specificities of their application. The first specificity arises from the fact that acts of a state, if satisfying the attribution rules, are almost exclusively *extraterritorial*, as peacekeeping missions are conducted abroad. This calls for recourse to the effective control principle in order to trigger the obligations arising from the major human right treaties. While it was initially argued that the scope of beneficiaries is limited to those within a state's territory or subject to its jurisdiction, the jurisprudence of several international judicial and quasi-judicial bodies has now clearly established the basis for extraterritorial application of states' human rights obligations abroad, particularly in the context of peacekeeping,<sup>142</sup> but subject to differences in regimes established by various instruments,<sup>143</sup> particularly regional.<sup>144</sup> However, support for a single standard for all

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<sup>140</sup> Such practice has been pertinent and persistent since the outset of peacekeeping activities. Although these claims are not limited and would normally not be labelled human rights claims, they relate mostly to “non-consensual use and occupancy of premises, personal injury and property loss or damage as result from combat operations”. *Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations peacekeeping operations*, UN Doc. A/51/389, 20 September 1996, para 3; and also UN Doc. A/51/903 (1997). See also Clapham, *supra* note 49, at 115-118 and D. Shraga, “UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage,” 94 *American Journal of International Law* (2000) 406 at 409-412.

<sup>141</sup> See UN Charter, Article 1(3). Additionally, the preamble as a normative basis “reaffirms faith in fundamental human rights.”

<sup>142</sup> The Human Rights Committee held in its *General Comment 31(Nature of the General legal obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Add.13, May 26, 2004, para 10) that “[a] State Party must respect and ensure the rights laid down in the Covenant [ICCPR] to anyone within [its] power or effective control, even if not situated within the territory of the State Party... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”

<sup>143</sup> The ICJ (*Legal consequences of the Construction of a Wall*, *supra* note 129, at 111) endorsed the logic of extraterritorial application, however under different thresholds: While the ICCPR “is applicable in respect of acts done by State in the



human rights treaties can also be found.<sup>145</sup> After recognizing that human rights obligations of states abroad do not vanish, the question of their range and level arises, which is again, to a certain extent, shaped by the fact that state is acting extraterritorially. The level of obligations depends on the degree of the control the state exercises. Inferring from this it is arguable that “human rights obligations requiring the adoption of affirmative measures may be more limited in an extraterritorial context,”<sup>146</sup> although keeping in mind the positive obligations arising from the tasks that the state pledged itself to fulfil in accordance with the mandate of the peacekeeping mission.

On the other hand, the level of human rights obligations also depends on the state’s consent to such obligations, which might be temporarily adapted due to specificities of the situation through the derogation clauses. Under certain conditions, namely during times of public emergency threatening the life of the nation, the range of some human rights obligations<sup>147</sup> of a state are subject to the derogation regime, however only “to the extent strictly required by the exigencies of the situation, provided that

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exercise of its jurisdiction outside its own territory”, the International Covenant on Economic, Social and Cultural Rights (CESCR) extraterritorial application requires territorial control (ibid, at 112); but the Court was unclear which of the two standards it applied for Convention on the Rights of the Child (CRC).

<sup>144</sup> The jurisprudence of the European Commission and Court of Human Rights (ECtHR) has been particularly rich in this respect (see for example *Loizidou v. Turkey* (preliminary objections), n. 15318/89, 310 ECtHR (series A), at 62.) although somehow inconsistent, especially when referring to the regional application (*espace juridique*) principle. See *Banković case* (*Banković et al. v. Belgium and others*, n. 52207/99, [2001] ECHR 970, 19 December 2001, at 80), afterwards *de facto* overturned by *Issa case* (*Issa v. Turkey*, n. 31821/96 [2004] ECHR 629, 16 November 2004, at 74).

<sup>145</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Reports 2005, p.116, at 216, where the Court first refers to the Wall Case “that international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” and then to IHRL treaties that do not necessarily include clauses on their extraterritorial effect, such as African Charter on Human and Peoples’ Rights (ACHPR) of 27 June 1981 or CRC.

<sup>146</sup> Cerone, *supra* note 126, at 1498.

<sup>147</sup> Some obligations are non-derogable. See *International Covenant on Civil, Political Rights* (ICCPR), adopted 16 December 1966, UN GA Res. 2200 (XXI), UN Doc. A/6316 (1966) Art. 4(2), referring to the following rights from which derogation cannot be made: right to life (Art. 5), prohibition of torture or to cruel, inhuman or degrading treatment or punishment (Art. 7), prohibition of slavery and servitude (Art 8(1) and 8(2)), *nullum crimen, nulla poena sine praevia lege principle* (Art. 15), right to recognition as a person before law (Art. 16)) and right to freedom of thought, conscience and religion (Art. 18). one might potentially argue that there are further guarantees arising directly from international law and particularly international human rights law, for which derogations are not permissible even though they might not be explicitly mentioned in the Conventional system. This goes in line with reasoning presented by the Human Rights Committee, *General Comment 29*, *supra* note 135, paragraphs 13-17.

such measures are not inconsistent with their other obligations under international law.”<sup>148</sup> Although derogations are theoretically possible, considering they are declared in accordance with the foreseen procedures, it is rather unlikely for a State under a treaty regime to derogate from its obligations when involved in multinational forces as it would have considerable difficulties in showing that the circumstances in which its national contingents are deployed for multinational force *threaten the life of its nation*.<sup>149</sup> This is so because the engagement in armed conflict through a peacekeeping contingent deployment is conducted on a voluntary basis, which foresees risks associated with such deployment.

This dimension of states’ human rights obligations in the context of possible PMC-peacekeeping is relevant particularly for a scenario, which assumes the secondment of PMCs as part of national contingents. It offers a relatively clear and broad framework of human rights obligations that regulate their conduct even in the case of absence of specific further rules as these become quasi state entities which need to abide by sending states’ international obligations, but also its national rules. These would altogether oblige a sending state to assure that the conduct of a seconded peacekeeping PMC is in accordance with a state’s international obligations and standards and that disrespect of these is, in accordance with established practice of status of forces agreements which presupposes its exclusive criminal jurisdiction, properly dealt with (i.e., punished, prevented in the future).

The second scenario of PMC peacekeeping involvement raises issues which are more difficult to resolve than in the case of the secondment. As outlined above the main problem does not lie in the absence of applicable rules – PMC hired directly by the UN would of course be subject to the human rights obligations of the UN, even though these obligations are not conventional in nature and

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<sup>148</sup> ICCPR, Art. 4(1). That armed conflict is a public emergency does not seem to be disputed. F. Pocar “Human Rights under the International Covenant on Civil and Political Rights and Armed Conflict, in L.C. Vohrah et al. (eds) *Man’s Inhumanity to Man: essays on international law in honour of Antonio Cassese*, (The Hague: Kluwer Law International, 2003) 729-740 at 730.

<sup>149</sup> Rowe, *supra* note 131, at 248-249

therefore less clearly introduced and dispersed.. The major problem and shortcoming of such an approach is, namely, the limited capacities of the UN to *enforce* these rules. One has to recall that to avoid the legal vacuum, in practice the sending state assumes the responsibility for law enforcement in relation to its national contingents, which are parts of a peacekeeping force. No customary solution exists that would provide a solution for this second scenario – the UN is not a “sending state”, it possesses neither capacity nor powers to perform its law enforcement functions.

For these reasons, we are compelled to identify a functional substitute for the “sending state” concept,<sup>150</sup> meaning the authority willing and able to take over these law-enforcement obligations. One possible way is to turn to the origin of the PMC. As the PMC is, in this scenario, a private corporate entity which enters into contractual relations with an international public entity independently of the will of any state, the closest approximations to the “sending state” concept are either “state of registration of PMC” or “PMC export licensing state.” The relation of these two to the UN would, however, be different as they do not automatically assume responsibility for infringement of its international human rights obligations by private entities, even more if these infringements are exercised abroad, outside the scope of their effective control, usually their territory. Although some states might possess legislation and machinery to prosecute individuals and companies for wrongdoings abroad, this is separate from war crimes often limited to those acts committed in an official capacity.<sup>151</sup> However, even if such an option exists, it is insufficient due to the unsatisfactory guarantees that such an action will actually be undertaken,<sup>152</sup> or that it will be comprehensive in terms

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<sup>150</sup> This detachment appears in a similar manner in the following section on IHL.

<sup>151</sup> For example, although the US War Crimes Act (18 U.S.C. § 2441), the Torture Statute (18 U.S.C. § 2340), the Military Extraterritorial Jurisdiction Act (MEJA 2000, amended 2005, 18 U.S.C. § 3261, 18 U.S.C. § 3267(1)(A)) and the USA PATRIOT Act (18 U.S.C. § 7 (9)) provide options for prosecution of contractors abroad, only the first two are extendable to acts outside of the official capacity. See also <http://www.amnestyusa.org/annualreport/2006/provisions.html> , last accessed 1 June 2008.

<sup>152</sup> Even if this is so a PMC might off-shore its activity or simply dissolve and reconstitute itself as in the case of South Africa-based Executive Outcomes in 1990s. See P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca: Cornell University Press, 2004) at 3-4.

of *ratione personae* or *ratione materiae*.<sup>153</sup> If we are to see the positive obligations of states to ensure respect for human rights in a very broad manner, an indirect source of human rights obligations can be linked to the introduction and enforcement of an appropriate national licensing or export regime.<sup>154</sup> This is currently not the case almost universally as the existing licensing regimes are more about bringing human rights concerns into an approval process than about the accountability of PMCs.<sup>155</sup>

Two further options exist to engage IHRL concerns into our discourse and are relevant for both scenarios. *First*, the PMC-peacekeeping entity should take into consideration the laws of the host state; *second*, it should also be aware of its corporate obligations under international law.<sup>156</sup> The implication of the host state laws on human rights guarantees is relevant as it offers a possible applicable normative framework, subject to limitations arising from functional immunities, which provide for restricted jurisdictional powers of the host state. Bearing in mind that the activity of a peacekeeping PMC will be conducted on the territory of the host state offers a well-established basis to define law, under the condition that it meets the minimal international standards. These, in effect, can be supplemented by international obligations by corporate entities. Namely, IHRL developments have forwarded the idea of obligations of non-state actors such as individuals and corporations, incorporated in the main IHRL treaties<sup>157</sup> or expressed as soft law or voluntary provisions making reference to

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<sup>153</sup> For example the question of covering the nationals of other states in the first case and the question of which the applicable human rights in the second.

<sup>154</sup> For a recent overview see M. Caparini, "Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services", in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 158-179.

<sup>155</sup> South Africa, for example, does not grant an approval to PMC if this would "result in the infringement of human rights and fundamental freedoms in the territory" where the firm would operate. *Ibid.* See also section IV.B and C for *due diligence* obligations of states.

<sup>156</sup> See E. Mongelard, "Corporate Civil Liability for Violations of International Humanitarian Law," in 88 (863) *International Review of the Red Cross* (2006) 665, at 668-673.

<sup>157</sup> The Universal Declaration of Human Rights (UDHR) reminds "that every individual and every organ of society" should keep it constantly in mind, making it applicable to non-state actors such a companies. L. Henkin, *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, (Versoix, International Council on Human Rights Policy, 2002) at 52; in a similar manner the ICCPR and ICESCR in their joint article 5(1) deprive any group or person of any "right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized" in the Covenants.

IHRL and IHL standards.<sup>158</sup> Although, as noted above, these will not give rise to international responsibility in the same way as with established subjects of international law such as states and IOs, they will play a role in determining individual or corporate liability for actions in which the PMCs are engaged, despite the lack of clear mechanisms provided by international law for their enforcement. If enforcement is undertaken, it is most likely to happen at the domestic level of the PMC registration state.

### **(b) International Humanitarian Law**

It is currently uncontested that peacekeeping forces are subject to IHL if the conditions for its applicability are met. To what extent, however, remains controversial.<sup>159</sup> The issuance of the Secretary-General's bulletin in 1999<sup>160</sup> introduced some clarity, but rightly noted that it did not constitute an "exhaustive list of principles and rules of international humanitarian law" binding upon peacekeepers.<sup>161</sup> Among others, the UN undertook "to ensure [through SOFAs] that [its] force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel" and that "members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments," even if

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<sup>158</sup> See for example multiple references to respect for human rights in *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (UN Sub-Commission on the Promotion and Protection of Human Rights, 26 August 2003, UN Doc E/CN.4/Sub.2/2003/12Rev.2): "Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law." See also International Labour Organization (ILO) *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (3<sup>rd</sup> ed. Geneva, International Labour Office, 2001, para. 8) or OECD Guidelines for Multinational Enterprises ("Enterprises should ... [r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." At II, General policies, Revision 2000, OECD.

<sup>159</sup> Bothe and Dörschal, *supra* note 43, at 499

<sup>160</sup> *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, 6 August 1999.

<sup>161</sup> *Ibid*, Section 2.

SOFAs are not concluded.<sup>162</sup> Furthermore, it noted that, without prejudice to the rules mentioned above, military personnel remain bound by national law throughout the operation.”<sup>163</sup> According to the bulletin, the applicability of IHL is foreseen for situations where peacekeepers are actively engaged as combatants, also “in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.”<sup>164</sup> Although the bulletin reference elucidates the general principle of IHL applicability for peacekeepers, a return to the investigation of some basic IHL assumptions is needed in the light of our PMC inclusion, particularly the nature of the armed conflict and personnel status under IHL.

The UN is not a traditional party to conflict,<sup>165</sup> but this does not divest it from respecting IHL. Recalling the Martens Clause – whatever is not expressly prohibited in the IHL corpus is not necessarily permitted therein – allows us to fit UN peacekeeping operations within IHL although they were not originally contemplated by these instruments. If we add to this that past and present practice of UN peacekeeping operations shows that they are mostly deployed in situations and territories, which require triggering IHL for other actors; mandated under Chapter VII, which might compel them to use force in certain situations; and comprising of several thousand troops under responsible military command, it is hard to understand why they would not be bound by the same IHL rules, which are applicable to parties to the conflict from the very beginning of the peacekeeping mission.<sup>166</sup> The differentiation reasoned by the introduction of a special regime, which is due to the neutral character and consensual deployment of peacekeepers, assuring them of special protection similar to that of

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<sup>162</sup> Ibid, Section 3.

<sup>163</sup> Ibid, Section 2.

<sup>164</sup> Ibid, Section 1 (1.1).

<sup>165</sup> At least not in the sense of 1949 Geneva Conventions or Hague law. Due to the undisputable customary nature of these rules, including almost in entirety 1977 Additional Protocols, this section, if not noted otherwise, draws from those.

<sup>166</sup> Saura, *supra* note 8, at 490 and 502.

civilians in their functional peacekeeping capacity.<sup>167</sup> This should, however, not lessen their obligation to comply with IHL.<sup>168</sup> The Organization apparently consents to this in situations where individual members of its peacekeeping troops are considered combatants (see above). Conferring this status entails rights and duties arising from it,<sup>169</sup> limited to an international armed conflict (IAC). However, even if recent UN peacekeeping engagement is conducted mainly in non-international armed conflict (NIAC) situations, UN involvement provides an element that internationalizes these situations,<sup>170</sup> at least with respect to UN involvement, and renders a more comprehensive set of rules relating to IAC applicable,<sup>171</sup> despite the fear that non-state actors might be less capable of abiding by these rules.<sup>172</sup> Consequently, the abovementioned inconsistencies of IHL and the Safety Convention become less clear.<sup>173</sup> It seems, in effect, that the factors transforming peacekeepers from a category of protected personnel into combatants determine their status under IHL. But this is an approach that has to be taken with extreme caution, as it should not lead to inconsistency with the basic IHL principle of separation of *jus in bello* from *jus ad bellum* rules.

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<sup>167</sup> Bothe, *supra* note 3, at 681-683, notes that “although an armed conflict between other parties may take place at the same time, [peacekeepers] enjoy the status of civilians.” Similarly, the SG Bulletin (Section 1, 1.2) defines their status “as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.”

<sup>168</sup> “They may be considered ‘civilians’ worthy of special protection, but at the same time, they are not mere passersby. They belong to a public organization with a mandate involving actions in the thin line between war and peace. Saura, *supra* note 8, at 503.

<sup>169</sup> Particularly the right to take part in hostilities and the right to prisoner of war (POW) status (see Article 4 of GCIII and Articles 43-45 of API).

<sup>170</sup> D. Bowett, *supra* note 105, at 509, notes that it is difficult to see how hostilities in which the United Nations are involved can be regarded as “not of an international character.” The SG Bulletin is silent about this, treating situations unitary, regardless of the nature of the conflict.

<sup>171</sup> The presence on an international troop, however, does not change the nature of conflict between the two warring parties. Their mutual rights and obligations are, in the absence of other rules, determined IHL applicable in NIAC. Nevertheless, the peacekeeping force is involved in an IAC, rules for which it is obliged to respect in all circumstances.

<sup>172</sup> Although the rationale for IHL applicability rests on mutual assurances, its legal obligations do not depend reciprocal assurances. The UN practice in this respect is, however, divergent, derogating from this principle in the case of Somalia (see Saura, *supra* note 8) and fails to take into consideration this basic IHL principle. For counter view see A. Faite “Multinational Forces Acting Pursuant to the Mandate of the United Nations: Specific Issues on the Applicability of International Humanitarian Law,” 11 *International Peacekeeping* (2007) 143 at 147.

<sup>173</sup> *Supra*, around note 121-122. Accordingly there is not more overlap between the Safety Convention and IHL applicable to NIAC because the UN personnel inclusion triggers applicable IAC IHL.

A similar risk persists when IHL is applied in relation to PMCs. Although the debate on IHL obligations of non-state actors follows the IHRL logic (see previous section) and introduces additional possibilities to confer legal obligations, particularly in light of individual criminal responsibility, the proliferation of PMCs produced a debate depicting a legal vacuum where there is none.<sup>174</sup> This image of lawlessness portrays PMCs in additionally negative light, close to that of a legal discrepancy and a publicly unattractive option. This negative image, which also results from their limited regulation, may therefore be transformed into the automatic rejection of appropriate status for PMC personnel for inherently the same reasons that this is done for recently vastly growing number of ‘unlawful or unprivileged combatants’,<sup>175</sup> namely failing to distinguish between *jus ad bellum* and *jus in bello* rules. One needs to avoid, for a moment, normative judgements and recall the *raison d’être* of IHL, which recognizes that what counts is a *de facto* link or belonging of PMCs to public entities that initiate their involvement in situations of applicability of IHL.<sup>176</sup> Given that original<sup>177</sup> or softened<sup>178</sup> conditions to achieve the combatant status under modern IHL, which gives access to POW status as a determinant of the factual legality of a combatant, are relatively easy to achieve, there are various views regarding PMC-agents’ entitlement to such status. The more stringent approach requires the ability of the public entity concerned to exercise criminal jurisdiction over such forces, which also need to be within its army’s chain of command.<sup>179</sup> The less stringent understanding follows the rationale of loosening the

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<sup>174</sup> L. Doswald-Beck, *supra* note 28, at 115.

<sup>175</sup> See for example K. Doermann, “The legal situation of ‘unlawful/unprivileged combatants’”, 85 (849) *International Review of the Red Cross* (2003) 45.

<sup>176</sup> J. Pictet, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War*, Vol. III, (Geneva: International Committee of the Red Cross, 1960), at 57; or *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions* (Geneva: CUDIH, 2005), at 30; but see Gillard, *supra* note 24, at 533, for opposite view.

<sup>177</sup> In our case either formally incorporated into the army (GCIII 4.A.1) or being members of other militias belonging to a Party to a conflict fulfilling four conditions ((a) being commanded by a person responsible for his subordinates, (b) having a fixed distinctive sign recognizable at a distance, (c) carrying arms openly and (d) operating operation in accordance with the laws and customs of war (GCIII 4.A.2)).

<sup>178</sup> Additional protocol I, Arts. 43 and 44, equating within members of a belligerent party subject to an internal disciplinary system; they are required to distinguish themselves from the civilian population and carry their arms openly during commission and preparation of their military engagement if to count on the POW status.

<sup>179</sup> M. Schmitt, “War, International Law and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 5 *Chicago Journal of International Law* (2005) 511.



provision of the first Additional protocol, which broadens the combatant category and takes into consideration the factual linkage to the public entity, determined also by the contractual nature of the PMC-entity relation.<sup>180</sup>

Regardless of the approach taken, IHL confers on the belligerent the obligation to ensure respect of its rules, which includes its enforcement and jurisdictional measures. Stringent demands for such supervision might prove difficult in the case of PMCs, though, if they do not amount to grave breaches.<sup>181</sup> If the hiring entity is a state, it might not be in a position to exercise its jurisdiction for several reasons already specified above or due to specific jurisdictional exemptions. The problem is only aggravated if the hiring entity is the UN, considering the lack of an internal criminal or court system to address IHL violations. In line with established peacekeeping practice, the jurisdictional requirements need to be either retained by States in order to achieve the effective enforcement of IHL, even where an operation is conducted entirely under the organization's command and control.<sup>182</sup> Alternative options are ad-hoc mission-specific arrangements or recourse to the tools and institutions of international criminal law. In light of the current opposition to it and the structure of the global PMC industry, the latter possibility does not seem plausible for the time being.<sup>183</sup> Similarly, the former requires institutional developments and adaptations that are currently not envisaged.

In conclusion IHL plays a relevant role for both scenarios of PMC-peacekeeping inclusion as it confers rights and obligations on various capacity holders involved in these scenarios. However, its application is subject to various assumptions determining the status of the potential peacekeeping-PMC and its

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<sup>180</sup>L. Doswald-Beck, *supra* note 28, at 121: "Presumably there would be a form of responsibility to the state in that non-performance of the contract would result in liability in the form of breach of contract."

<sup>181</sup> See, for example, GCI (Articles 49-52), GCII (Article 51-53), GCIII (Article 129-132), GC (146-149). These imply not only universal jurisdiction, but also *erga omnes* obligation. For API provisions see Articles 11, 85, 86.

<sup>182</sup> Saura, *supra* note 8, at 503.

<sup>183</sup> One of course has in mind the US opposition and the hostile approach to undermine the functioning of the International Criminal Court combined with the US efforts to exempt its citizens and military personnel from its jurisdiction by avoiding extradition through bilateral agreements following Article 98 of the Statute of the International Criminal Court (ICC).

enforcement proves particularly difficult in relation to our second scenario of direct PMC-hiring by the IO.

#### **4) Other Sources of Law Applicable to Peacekeeping Forces and PMCs**

International law presents a further vast body of other rules which might affect or limit the conduct of peacekeeping operations by states or IOs or solely the activities of companies and private individuals. In combination with the rules referred to above one should not overlook the particular importance of international criminal law and the acts it criminalizes at the international level, whether those amount to international crimes<sup>184</sup> or international delicts.<sup>185</sup> These are supplemented by the stunning number of international treaties, which remove states' exclusive jurisdiction from some acts that they would normally have control over and confer upon them the obligation to either extradite or prosecute the perpetrators. There is no reason to believe that, apart from specific exemption provisions, the PMC peacekeepers would be excluded from these regimes. Notwithstanding this scenario, states retain the positive obligation to prevent such acts if it is within their capacity to do so. Domestic and national laws then supplement these provisions and often provide a prerequisite for their implementation and enforcement before national courts and authorities.

Taking into consideration the practice of modern peacekeeping, particularly the employment of national contingents and the SOFA-based exclusive jurisdiction of a sending state over the acts of its

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<sup>184</sup> On of the first definitions by the Nuremberg tribunals in 1948, stating that an international crime is "such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances" (*US v. List et al*, 19 February 1948, Trials of War Criminals Before the Nuremberg Tribunals under Control Council Law No. 10 (Washington, DC: US Government Printing Office, 1950) Vol. IX 1230, 1241).

<sup>185</sup> Distinction based on distinction by C. Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003) at 63, 121-122, but contrary to his opinion. The placement into one of the two categories is indeed a "value judgment". One can argue that the acts, despite not necessarily fulfilling the criteria of being "a product of state action or state-favoring policy" (*ibid*), are more and more seen as international crimes, confirmed by states' *opinio juris*.

troops, the role of national laws is all but trivial, particularly the laws of armed forces. On one hand they build on and incorporate the established principles of international law from above. On the other hand their role is complementary, since they introduce rules of engagement (RoE) for troops, rules governing the internal disciplinary systems and further substantial rules to which these troops need to abide by. These often contain specific provisions in the form of handbooks or manuals, which are applicable when contingents are contributed to multinational or peacekeeping forces. When operating under UN mandate the reference to applicable international law and terms of the mandate will probably be incorporated.<sup>186</sup> Such types of instruction are important in practice as soldiers will be rather inclined to follow directives from the authority to which they are accustomed, nevertheless sole reliance on these may also detract from the international character of the force.<sup>187</sup> To this end some joint core rules governing UN involvement are a prerequisite for the conduct of the peacekeeping operation under UN command and control and this core is provided via the internal rules of the UN. In the case of early peacekeeping operations<sup>188</sup> elaborated *force regulations* were issued by the Secretary-General, but recent practice distinguishes between the *operations plan* as a precise military interpretation of the mandate given to forces by the UN organs,<sup>189</sup> which is issued by the commander, and *rules of engagement*, which set the rules under which weapons and force may be used.<sup>190</sup> The latter represent one of the most contentious issues at stake, differing on a case by case basis, depending on the mandate of the operation, the states involved, and the need to strike a balance between

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<sup>186</sup> Rowe, supra note 131, at 228.

<sup>187</sup> Bothe and Dörschal, supra note 43, at 495.

<sup>188</sup> For example UNEF I, ONUC, UNSF or the UN Peacekeeping Force in Cyprus (UNFICYP).

<sup>189</sup> The operations plan addresses command and control structure of the peacekeeping force, procedures for assigning operational, administrative and civilian personnel, chain of command, authority of various levels of command, detailed description of specific missions of the peacekeeping forces as a whole and of its subunits, areas of responsibility of the various national contingents of the peacekeeping force, rules of information and accountability, relationships between the peacekeeping units and the government and local authority of the host country, combat readiness, intelligence and the security of the force, composition and missions at the reserves, rights, authority and the procedures in the conduct of searches and seizures of weapons and military equipment from private individuals, relationship with the mass media and other practical issues of the daily activities of force. Bothe and Dörschal, supra note 43, at 494-495.

<sup>190</sup> These cover the rules for carrying and restoring weapons and definitions of the possibilities and rules for the justifiably use of weapons including self-defence of peacekeeping personnel, defence of peacekeeping posts and facilities, support of other peacekeeping sub-units, enforcing compliance with the condition of demilitarized and buffer zones, and prevention of violent flare-ups that threaten the life and health of the population. Ibid, at 495

flexibility and legal certainty.<sup>191</sup> They should be “sufficiently robust and not force United Nations contingents to cede the initiative to their attackers.”<sup>192</sup> The basis for these rules is again, to some extent, unclear especially for possible PMC-peacekeeping involvement when the UN directly hires the company. The applicable RoE would be determined in line with the general mission RoE, the RoE of the national contingent into which the PMC would be incorporated and the established organizational *practice*. Furthermore, this practice is to be examined in congruence with the *internal rules* of the organization, such as decrees of the Secretary-General or General Assembly resolutions. These potentially cover a vast array of substantive questions (see above) to procedural rules such as internal liability claims procedures.<sup>193</sup>

Lastly, one should look at the heart of the legal relation between a PMC and the entity recruiting the company for the purpose of peacekeeping: the contracts between them. Apart from defining their mutual relation, these present a framework for the inclusion of obligations arising from various abovementioned sources of public international law but also ad-hoc solutions to questions of forum and jurisdiction for possible contractual breaches. Contractual provisions are considered a serious alternative for the regulation of PMC conduct,<sup>194</sup> although the risk for effective monitoring and actual enforcement, depending on the public entity (government or, in our case, also an IO) persists.<sup>195</sup> For this reason the inclusion of possibility for contract enforcement by third-parties, these being any other public or private entities or individuals, would present a viable and welcome option, subject to sufficient clarity of dispute settlement provisions of the contract. A brief overview of the current UN

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<sup>191</sup> A.P.V. Rodgers, “Visiting Forces in an Operational Context”, in D. Fleck (ed), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001) 533-560, at 548.

<sup>192</sup> *Report of the Panel on United Nations Peace Operations (Brahimi report)*, 21 August 2000, A/55/305 S/2000/809, at x.

<sup>193</sup> These rules can in limited cases, in combination with their practical application, provide for customary rules with external effect for the claimant. See K. Schmalenbach, “Third Party Liability of International Organizations”, 10 *International Peacekeeping* (2006) 33, at 50-51.

<sup>194</sup> See L.A. Dickinson, “Contracts as a Tool for Regulating Private Military Companies,” in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 217-238.

<sup>195</sup> One of the often cited negative examples is the US non-enforcement practice with regards to US contractors in Iraq involved in Abu-Ghraib prison interrogations or other cases of possible excessive use of force by private contractors.

general contractual conditions leads to the presumption that this is more likely to be the case when the contractual relation includes a governmental actor.<sup>196</sup> The inclusion of specific claim settlement rules in a SOFA also seems possible.

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<sup>196</sup> *United Nations General Conditions of Contract*, Section 16, refers only to the UN Commission on International Trade Law (UNCITRAL) Conciliation Rules.

#### IV) Responsibility Issues Arising from Acts of the PMC-peacekeeping Forces

The notion of responsibility in international law, which was traditionally confined to state responsibility<sup>197</sup> but later expanded (at least) to the responsibility of IOs<sup>198</sup> and individual responsibility for certain acts deemed criminal under international law,<sup>199</sup> encompasses the responsibility that subjects of international law incur for their wrongful acts under international law. Bearing in mind the difficulties with the debate on international law subjects, a pragmatic and more comprehensive approach was applied in the first part of the memoire, speaking rather of capacity holders that are able to assume rights and duties from international law. In line with this, one should acknowledge the arguments that responsibility for wrongful acts can potentially be incurred also by non-state actors. Following this rationale the PMCs, although not classical subject of international law, bear some international legal obligations. Furthermore, as responsibility is “the necessary corollary of a right,”<sup>200</sup> which a PMC is definitely able to infringe, direct PMC-responsibility issues are not trivial. However, since the study already builds on a hypothetical scenario, the examination of responsibility issues arising from PMC-peacekeeping will focus on aspects of state responsibility and of the

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<sup>197</sup> “State responsibility is a fundamental principle of international law, arising out of a nature of the international legal system and the doctrine of state sovereignty and equality of states. It provides that whenever one commits an internationally wrongful act against another state, international responsibility is established between the two. A breach on an international obligation gives rise to a requirement for reparation.” Shaw, *supra* note 10, at 694; see also *ILC Articles on State responsibility: Report of the International Law Commission on the Work of its Fifty-third Session*, A/56/10, 2001, hereafter referred as *ILC Articled on State Responsibility*.

<sup>198</sup> The topic was included in the programme of work of the ILC only in 2002 when Giorgio Gaja was appointed as the Special Rapporteur for the topic. The ILC has so far produced 45 draft articles. See *Responsibility of international Organizations: Report of the International Law Commission on the Work of its Fifty-ninth Session*, A/62/10, 2007, hereafter referred as *Adopted Draft Articles on IO Responsibility*.

<sup>199</sup> Based on S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005) at 226.

<sup>200</sup> Judge Huber in *Spanish Zone of Morocco claims* (2 RIAA, p. 615 (1923), p. 641), who continued that “[a]ll rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.” See J. Crawford, *The International Law Commission’s Articles on State Responsibility*, (Cambridge: Cambridge University Press, 2003) at 78.

responsibility of IOs.<sup>201</sup> The issue of individual criminal responsibility of PMC-peacekeepers touched upon only indirectly.

Already limiting oneself to an analysis of these aspects proves challenging: it includes a plurality of subjects and capacity holders, which are diverse and subject to a wide array of legal obligations. Consequently, this indicates that responsibility might not be exclusive but multilayered, bearing in mind the intrinsic linkage of actors such as states and IOs. Furthermore, if there is an agreement on an established body of practice and more or less agreed-upon rules on state responsibility, it is all but clear what the rules on responsibility of IOs are. This part therefore explores how the rules of international law as identified above and applicable to potential PMC-peacekeeping would interact and trigger the rules of international responsibility. The exercise, which is conducted on the basis of the two scenarios, can sometimes lead to several outcomes and anticipated solutions that aim to achieve at least some legal clarity, but often also raise new questions. The basic rules on responsibility are explained as one follows the first scenario and is then further elaborated if the need for adaptations is required by the second scenario.

### **A) General Issues of Attribution**

Before approaching the two scenarios, a few general issues of international responsibility are considered. First, the issue of responsibility for wrongful acts should be distinguished from attribution rules, which, although a part of the law of state and IO responsibility, only establish that there is an act for the purposes of responsibility, but say nothing about the legality of the conduct.<sup>202</sup> Whether

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<sup>201</sup> The rules for these are indeed the most developed and supported by practice. Limitation of space is another reason. The analysis relies heavily on the work of the International Law Commission (ILC).

<sup>202</sup> *ILC Articles on State Responsibility*, supra note 197, at 81. See Chapter II, also in *Adopted Draft Articles on IO Responsibility*, supra note 198,

international obligation was breached is then a separate question, treated by special rules.<sup>203</sup> Second, attribution rules are relatively clear when states act in an individual capacity, but become more complex in the context of collective action such as peacekeeping. Although it is, for example, uncontested “that the conduct of an organ of a State ... that is placed at the disposal of an IO shall be considered an act of the latter organization, if the organization exercises effective control over that conduct”,<sup>204</sup> the picture is more blurry in reality. I have demonstrated above that the sending state retains a significant degree of control over their national contingents, which are bound by its national laws and subject to the sending state’s jurisdiction. To complicate the situation even more, the contingent might be operating in a national and international capacity simultaneously. It is therefore important to assess the issue of attribution in light of the particular features – mandate, RoEs, SOFA etc. – of each operation.<sup>205</sup>

Next, as PMCs are originally not a public entity but a non-state actor, clarification whether their conduct can be attributed to a state or international entity is required. The answer is straightforward and positive in the case of state responsibility rules, when the (non-state) actor is acting on the instructions of, or under the direct control of, a state; or when it is exercising elements of governmental authority in the absence or default of official authorities; or when the conduct is subsequently adopted by a state.<sup>206</sup> General rules on attribution of conduct to an IO, as they currently read,<sup>207</sup> allow for a non-state actor’s conduct to be attributed to an IO subject to it being considered an organ or an agent of the IO. As it was demonstrated above (Section III.B, in line with the practice and regardless of the two scenarios), formal PMC incorporation into a peacekeeping force would result in it being

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<sup>203</sup> *Ibid*, Chapter III of both Draft articles.

<sup>204</sup> *Adopted Draft Articles on IO Responsibility*, Art. 5.

<sup>205</sup> Cerone, *supra* note 126, at 1457

<sup>206</sup> Draft Arts. 8, 9 and 11 of *ILC Articles on State Responsibility*.

<sup>207</sup> “The conduct of an organ or agent of an IO in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.” *Adopted Draft Articles on IO Responsibility*, Art. 4(1).



considered an organ of the organization, assuming its placement under command and control of the UN. And even if one opposes this approach, it is argued that the term *agent* comprises a PMC, which is under the direction and control of the organization.<sup>208</sup> As in the case of state responsibility, the conduct acknowledged and adopted by an IO as its own is attributable to it.<sup>209</sup> Furthermore, conduct attribution rules for both, states or IO, are without prejudice to the excess of authority or contravention of instructions.<sup>210</sup> However, this does not directly incur responsibility.

There is an additional aspect of responsibility and attribution rules, which presents some conceptual difficulties, namely a non-action or omission of action by an entity. Failing to act can constitute a breach of an obligation by a state and IO.<sup>211</sup> Or, when rules of international law require an entity to act, the omission of action will constitute a breach of its obligation. It is evident from this that the rules for attribution cannot be distinguished in the same way from the rules on responsibility for wrongful acts in the cases of omission. An examination of this option is particularly relevant as we have seen in the overview of substantial rules of international law applicable to possible PMC-peacekeeping that much positive action is required. Direct examples for this are the SOFA-based obligations of host states to provide for the protection of peacekeepers on their territory, exercise of jurisdictional obligations, and disciplinary measures of the contingent-providing states and their positive obligations under IHL or IHRL to steer their agents to abide by the rules of these bodies of law, or the positive obligations of the UN to train its staff in accordance with the required international IHL and IHRL standards.

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<sup>208</sup> For the purposes of paragraph 1, the term “agent” includes officials and other persons or entities through whom the organization acts. *Ibid*, Art 4(2).

<sup>209</sup> Draft Art. 7, *Adopted Draft Articles on IO Responsibility*.

<sup>210</sup> Draft Art. 7, *ILC Articles on State Responsibility*; Draft Art. 6 of *Adopted Draft Articles on IO Responsibility*.

<sup>211</sup> Draft Art. 2(a) of *ILC Articles on State Responsibility*; Art. 3(2)(a) of *Adopted Draft Articles on IO Responsibility*.

## B) The Secondment of the PMC by a State Scenario

The secondment of the PMC by a state to a peacekeeping operation creates a situation similar to regular peacekeeping as it presupposes the active role of a contributing state, which enters into a legal relation with the IO receiving a peacekeeping unit. It is therefore crucial to clarify the modalities of the state-PMC relation and the nature of the functions performed by a PMC.

If secondment means hiring and officially sending a PMC to take part in a peacekeeping operation, which has traditionally been a governmental function,<sup>212</sup> one view is that its acts are automatically attributed to the state. The first scenario assumes secondment in such a form, which is similar to a traditional *military contingent* contribution, which implies the continuing connection of an organized military group to the sending state. The latter should be able, in accordance with the established practice, to exercise criminal jurisdiction over the members of the seconded PMC-contingent, which would presumably even be a precondition for the IO to accept such secondment.<sup>213</sup> As such contribution of forces, comparable to the incorporation of armed factions into a regular army, would indicate a very straight-forward state-PMC relation, it is plausible to assume that the state would not only feel obliged to impose strict disciplinary rules, but also find it in its own interest in order to maintain the discipline of its forces for which it is responsible.

Softening the meaning of secondment by either assuming merely a financial or referential relation between the State and the PMC to be seconded to the peacekeeping operation proves to be a trickier

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<sup>212</sup> See Art. 5 of *ILC Articles on State Responsibility*: “The conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

<sup>213</sup> CUDIH, *supra* note 176.

case. It is the view of some that the well-established practice of states merely funding peacekeeping or referring a PMC to an IO and volunteering to fund its activities would not make their acts attributable to the state.<sup>214</sup> Although these conditions fall short of the classical conception of a sending state and implies only limited or no contractual relationship, or even no effective measures of control, the financing of a particular PMC, referring or recommending it, assumes some degree of inclusion of a state into a selection procedure.<sup>215</sup> It seems reasonable to assume that a state will finance or recommend only those entities whose action it approves or deems to be in accordance with its national standards and its international obligations, as it would otherwise face at least internal legal scrutiny. Along the same line, the question also arises whether actions, which cannot be clearly attributed to the state, can incur this state's responsibility due to its *due diligence* obligation under international law, which requires it to prevent, or at least respond to, the violations of international law. Whether such obligations exist is unclear.<sup>216</sup> But if a state financed or recommended a certain entity, it is logical to assume that it can withdraw its financial support, recommendation or even license (if one was issued subject to a PMC being registered in that state) when it learns of the wrongful conduct of a PMC. In this case it is not the private conduct itself, but the omission of action or an insufficient effort to prevent such action that might generate state's responsibility. The rules on State responsibility are clear in this respect: "[t]he state responsible for the internationally wrongful act is under an obligation ... to cease that act, if it is continuing;" even more, it should offer "appropriate assurances and guarantees of non-repetition, if circumstances so require."<sup>217</sup> This option is also particularly relevant for the second scenario, where the PMC would be hired directly by the UN and where the role of the state (of origin of the PMC) would be that of a possible silent regulator.

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<sup>214</sup> *Ibid*, 31. Western states often fund peacekeeping activities conducted by African states.

<sup>215</sup> Although in the *and Paramilitary Activities in and against Nicaragua* (ICJ, supra note 57, at 64-65), which included the financing of the guerrillas by the US, the ICJ concluded that for responsibility to incur, "it would in principle have to be proved that state had *effective control* [emphasis added] of the military and paramilitary operation in the course of which alleged violations were committed."

<sup>216</sup> See next section for follow-up on the *due diligence* concept.

<sup>217</sup> Art. 30, *ILC Articles on State Responsibility*.

The next step in determining the attribution of a PMC-peacekeeping action to the state (subject to the vagueness of their interrelation) is whether such action entails *an exercise of a governmental authority*. Although the concept is vague,<sup>218</sup> and the mere proliferation of PMCs weakens it even more, the reliance on the opinion of the ILC would entail that some activities – arguably law enforcement, engaging in combat, seizure of money, detention and interrogation etc. – are so commonly regarded as core government functions that their performance by PMCs would amount to the exercise of a governmental authority.<sup>219</sup> If a state will hire a private contractor to perform these actions on its behalf in a peacekeeping operation in which it takes part, the PMC action will therefore be attributable to it. However, the responsibility for these acts will be subject to the mandate of the operation, command and control arrangements existing between the UN and states, provisions of SOFAs or status of contributing forces agreements. The responsibility for any wrongful act will therefore have to take into consideration the interplay of the rules of state responsibility and the responsibility of the IO. For example, the division of responsibility is clearly different in the case when a wrongful act by the PMC is a consequence of commands or orders of a unit commander, which are discordant with the operation's RoE,<sup>220</sup> than if action is conducted under faulty orders issued by the overall operations commander - a UN high official. The latter case clearly incurs the international responsibility of the UN, as the organization exercised effective control over that conduct.<sup>221</sup> In the former case, however, the principles of excess of authority of an agent of the IO<sup>222</sup> (in this case the PMC-seconded by the

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<sup>218</sup> For its problematisation see C. Lehnardt, *Private Military Companies and State Responsibility*, International Law and Justice (IILJ) Working Papers 2007/02, at 7-9.

<sup>219</sup> ILC Commentary to Art. 5, *ILC Articles on State Responsibility*.

<sup>220</sup> Or of individual acts of peacekeepers are not in accordance with the internal disciplinary rules of the contingent. These acts will incur sending state responsibility.

<sup>221</sup> Art. 5, *Adopted Draft Articles on IO Responsibility*.

<sup>222</sup> Art. 6, *ibid*.

state) and the principle of direction and control exercised by a State over the commission of an internationally wrongful act by an IO, will have to be weighed.<sup>223</sup>

The answer to the question of responsibility for acts of the peacekeeping forces will therefore be answered simultaneously with the determination of who holds *effective control* over the peacekeeping forces.<sup>224</sup> This is, to an extent, determined by the division of powers between the hierarchical levels of the operation's overall structure,<sup>225</sup> which shifted from precedential high competences of the UN's administrative chief in early peacekeeping operations<sup>226</sup> to the more precise and tighter control of operations by the Security Council in present-day peacekeeping. This control is expressed through timely reporting demands, short-term mandate extensions and the increasing precision of the mandate. The question that persists is: does the supervisory role of the Security Council, derived from its central role as a collective security guarantor and therefore the source of authority vested in the peacekeeping force through the Secretary-General, amount to effective control? Due to realities arising from the implementation and operationalisation of its authority on the ground through these complex multidimensional operations,<sup>227</sup> the fact is that the retention of ultimate authority and control does not necessarily correspond entirely to the exercise of the operational command of the force. In a recent case *Behrami and Behrami v. France* before the European Court of Human Rights (ECtHR) concerning the accountability of some European states for the acts of their military personnel when

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<sup>223</sup> Art. 26, *ibid.*

<sup>224</sup> *Commentary to the Draft Art. 5 on IO Responsibility, Report of the International Law Commission on the Work of its Fifty-sixth Session, A/59/10, 2004.*

<sup>225</sup> Establishing organ Security Council), the Secretary-General, the commander in chief and his staff, separate national (or PMC) contingents' commanders and all the way to the individual soldier. *Bothe, supra note 3, at 687.*

<sup>226</sup> Who enjoyed a great degree of independence, even more due to the unanimity of the P5 Security Council members. In UNEF I the GA appointed commander-in-chief, but authorized the SG to issue all instructions and regulations or the functioning of the force (GA Res. 1001(ES-I), 7 November 7 1956, para 7.); in ONUC the Secretary-General was mandated to create a force and to appoint the commander in chief. It was his responsibility to act within the general framework of the mandate in order to implement it (SC Res. 145 (1960), para 5; SC Res 146 (1960), para. 6).

<sup>227</sup> Particularly the non-execution of article 43 of the Charter and the reliance on national contingents

participating in operations overseas,<sup>228</sup> the Court failed to distinguish between acts attributable to the UN (UNMIK) and Kosovo Force (KFOR), due to reliance on UN Security Council Resolution 1244, jointly providing a mandate for their action. The main fault of the ECtHR reasoning was the neglect of its own cognition that “it [is] essential to recall ... that the necessary ... donation of troops by willing TCNs [troop contributing nations] means that, in practice, those TCNs retain some authority over those troops”.<sup>229</sup> This authority is by default operation and situation specific, which the Court did not take sufficiently into consideration. As UN peacekeeping operations by default include stricter central command than peace operations of the mandated coalitions and alliances (as in the case of KFOR), the analogous application of the case should be considered with caution. To resort merely to decisions of the Security Council as the ultimate source determining the effective control of the UN peacekeeping force is therefore questionable, even more so if the international courts apply this reasoning for the purpose of determining the lack of their jurisdiction.<sup>230</sup>

This demands that closer attention be paid to the role of the other UN organ at the top of the operational chain of command, the Secretary-General. The Secretary-General gives general instructions and exercises political guidance but divests responsibility for military activities to the military commander-in-chief, appointed by the Secretary-General. The commander-in-chief is the top of the established military command hierarchy, recruits the members of his/her staff and has national contingent commanders and their units placed under his/her command; these national contingents

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<sup>228</sup> ECtHR in *Behrami and Behrami v. France* (no. 71412/01, [2007] 45 EHRR, 2 May 2007, at 121-151, but particularly 131-134). The applications relate to the failure of the French, German and Norwegian military contingents of the international security presence in Kosovo (KFOR) to comply with the European Convention on Human Rights during their participation in multinational security operations in Kosovo in 2000-2001, particularly in relation to their legacy of unexploded cluster bombs killing or injuring civilians and the failure of their removal.

<sup>229</sup> *Ibid*, para. 138.

<sup>230</sup> This was essentially the case with *Behrami and Behrami v. France* decision. The decision of the court was based on the reasoning that it lacks jurisdiction in the present case as the disputed violations of the European Convention on Human Rights were attributable to the United Nations, a non-party to the convention which, subsequently, can not be held liable for these acts.

presumably no longer serve a state, but the UN.<sup>231</sup> The effective control drawn from this hierarchical chain of command is closer to reality, yet limited due to the reluctance of national contingents to recognize de facto exclusive control of the UN for legal, but also purely political, reasons.<sup>232</sup> “[T]here is always a national override on foreign command of national contingents,” often referred to as *parallel command*.<sup>233</sup> The problem of peacekeeping is therefore precisely “the frequency with which national command is invoked”.<sup>234</sup>

In this regard one should recall that “while it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.”<sup>235</sup> The determination of legal responsibility for a wrongful act will heavily depend on the specificities of the case in the conduct of the operation: “In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party.”<sup>236</sup> In this manner any simplified interpretation of the rules on international responsibility, particularly the responsibility of IOs, which is often utilised as a tool providing for a corporate veil that divests states of their responsibility, should be avoided. This might lead to overlooking the real

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<sup>231</sup> Bothe, supra note 3, at 688, 691.

<sup>232</sup> For US practice see *Presidential decision Directive 25 (PDD-25)*, May 1994, Bureau of International Organizations Affairs, US Department of State, at v: “A. Our Policy: The President retains and will never relinquish command authority of the U.S. forces. On a case by case basis, the President will consider placing appropriate U.S. forces under the operational control of competent UN commander for specific UN operations authorized by the Security Council.” Reprinted in Bothe and Dörschal, supra note 43, at 504, footnotes 75-75.

<sup>233</sup> J.V. Arbuckle, *Military Forces in 21<sup>st</sup> Century Peace Operations*, (London: Routledge, 2006) at 121-123, who gives an example of the NATO doctrine, which the UN utilizes selectively precisely for the reason of the weakness of its joint command structure.

<sup>234</sup> Ibid. at 123.

<sup>235</sup> *Second Report on Responsibility of International Organizations* by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541, 2 April 2004, para 41.

<sup>236</sup> See UN Doc. A/51/389, supra note 140, at para 18.

violators of international law, particularly states or groups of states hiding behind IOs, and to watering down established standards or limiting judicial enforcement of the law.<sup>237</sup>

A necessary next step in the implementation of the international responsibility for wrongful acts (of states or IOs) is the invocation of such responsibility, which is, according to the existing and currently drafted<sup>238</sup> rules on international responsibility, the discretionary right of states and IOs. The practice of peacekeeping operations paved the way, however, for the factual implementation of responsibility rules that, irrespective of whether the responsibility for the breach of obligation is incurred by the contributing state or the UN, will be followed by the obligation of the respective entity to make restitution, provide for compensation or give satisfaction for damage or injury caused.<sup>239</sup> There is, namely, a general principle of liability law of IOs, taken from the widespread compensation practice of military operations of IOs, including both the combat-related and ordinary operational activities of UN forces,<sup>240</sup> that there exists a principal obligation to compensate harmful acts attributable to the IO. Therefore, the “refusal to pay compensation to individuals unlawfully damaged through negligence or intent would ... constitute a violation of international law.”<sup>241</sup> A specific characteristic of this responsibility is that it is limited: assuming that a peacekeeping operation on the territory of a host state is carried out for its benefit, this state is consenting to bear, at least in part, the consequences of

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<sup>237</sup> See *Behrami and Behrami v. France* (supra note 228, particularly paras 121-151), where the Court, for the purpose of determining its (non)jurisdiction, failed to distinguish between acts attributable to the UN (UNMIK) and KFOR, due to reliance on the UNSC Res. 1244, jointly providing mandate for their action. The main fault of the ECtHR reasoning was the neglect of its own cognition that “it [is] essential to recall ... that the necessary ... donation of troops by willing TCNs [troop contributing nations] means that, in practice, those TCNs retain some authority over those troops” (para. 138). This authority is by default operation- and situation-specific which the Court did not take sufficiently into consideration; furthermore, classical peacekeeping by default included stricter central command under the UN auspices that peace operations of the mandated coalitions and alliances as in the case of KFOR.

<sup>238</sup> For *ILC Articles on State Responsibility* see Art. 42; for *Articles on IO Responsibility* see *Sixth Report on Responsibility of International Organizations*, UN Doc, A/CN.4/597, 1 April 2008, draft Art. 46.

<sup>239</sup> See Arts. 38, 39 and 40, *Adopted Draft Articles on IO Responsibility*, and Arts. 35, 36 and 37 of *ILC Articles on State Responsibility*.

<sup>240</sup> See the two *Reports of the Secretary-General*, supra note 140. See also *Third-party liability: Temporal and Financial Limitations*, GA Res. 52/247, June 22, 1998. The issue is touched upon in detail in the next part.

<sup>241</sup> Schmalenbach, supra note 193, at 51.



the organization's presence.<sup>242</sup> The limitation is dropped, however, if damage is caused by gross negligence or wilful misconduct. However, the organization, although assuming the responsibility vis-à-vis the third party, retains the right to seek reimbursement from the troop-contributing state for these or any other reasons for which the sending state might be held responsible.<sup>243</sup> The responsibility and liability are also dropped when a breach satisfies the criteria of operational necessity.<sup>244</sup>

Concluding from what has been said, the first scenario of PMC-peacekeeping inclusion raises similar issues to those of traditional national contingent involvement in UN-peacekeeping involvement. When determining responsibility for the wrongful acts committed by these peacekeepers, the principle of effective control of the force at the time of the commission of the act will be invoked. Keeping in mind, however, that the scenario assumes a prevailing role of the PMC-sending state in the process of the provision of the PMC to the UN, it is plausible to expect that their involvement would be subject to certain commitments by this state with regards to assurances for their lawful conduct. The closer these troops would be to the status of the sending state's army or forces incorporated into that army, the more extensive its responsibilities would be, subject to its agreements with the UN. In accordance with the established practice for regular peacekeeping the seconded PMC-peacekeepers would be subject to the criminal jurisdiction of the sending state, which would present an additional obligation on the same state to ensure its commitments to prosecute the violators. Due to these obligations the secondment would also imply stricter scrutiny to comply with a national treaty-based commitment or a certain national law.

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<sup>242</sup> Shraga, *supra* note 140, at 410. These limitations are also temporal and financial. See *supra* note 240.

<sup>243</sup> See Model Contribution Agreement, *supra* note 108: "The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Agreement. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims."

<sup>244</sup> See *infra*, part IV.C.

### C) PMC Hired for Peacekeeping Directly by the UN

The scenario for a direct hire of a PMC by the UN would result in the shift of attribution for their acts to the Organization in the majority of situations and this would, to a large degree, incur its responsibility. This would not, though, completely remove the responsibility of states linked to the PMC (states of registration or origin). The problems posed by the scenario are, however, connected to the obscurity of measures that arise from the wrongful conduct, which is in traditional peacekeeping dealt with through the obligations of the troop-sending state to assure the criminal prosecution of individual perpetrators.

Subject to the modalities of the contractual relationship established between the PMC and the UN, the established practice with regular national contingent peacekeepers and the need for operational control over the contractor's conduct, the PMC would need to be integrated into the structures of the Organization in order to achieve its alignment with other segments of the operation. They would, for this reason, be considered agents through which the Organization acts.<sup>245</sup> Taking into consideration that they would be performing identical functions to and alongside national contingents amounting to the exercise of governmental authority (as seen above), their acts would be attributable to the public authority, which would exercise effective control over their conduct. The assumption that the UN, as the entity that hires the PMC, would wish to maintain effective and operational control over the PMC is reasonable for the following two reasons: The first is entirely pragmatic and stems from the fact that the PMC is directly contracted by the UN and therefore answers solely to the Organization, without the state link as in the case of a national peacekeeping contingent.<sup>246</sup> As such it gives the UN some

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<sup>245</sup> Art. 4, *Adopted Draft Articles on IO Responsibility*.

<sup>246</sup> It is at this stage less important, whether such an option is currently feasible or politically acceptable, but its occurrence would for certainly give an additional leverage to the autonomy of the organization, which it would most unlikely hand over.

potential autonomy, which avoids the need for parallel command. The second reason is also pragmatic, but rests, to a large extent, on the essence of legal reasoning and international responsibility rules: since the UN can be held responsible for the acts that violate its international obligations, it would presumably wish to control its acts in order to avoid violations for which it can be held liable, especially as this liability can have serious financial consequences. Similarly to regular peacekeepers, this functional requirement for the treatment of potential peacekeeping-PMCs and their staff is detached from the current practice relating to private contractors in UN peace operations.<sup>247</sup> The analogy is, however, superfluous as they currently perform inherently different functions, falling short of the exercise of governmental authority.

The next issue raised with regard to the responsibility of the UN for the conduct of the hired peacekeeping-PMC, is the applicability of law. Previous sections indicated a potentially broad body of international law that places the UN under an obligation, which can be owed to one or more IOs, states or to the international community as a whole,<sup>248</sup> but also for the breach of rights that “accrue to any person or entity other than a State or an IO,”<sup>249</sup> that undeniably covers the area of breaches committed by peacekeeping forces and affecting individuals.<sup>250</sup> The previous parts pointed to potential problems that might stem from the fact that the UN is not a party to several international agreements and conventions that are usually a source of substantive international human rights and humanitarian law obligations. In regular peacekeeping this problem is avoided (or at least minimized) due to the fact that military personnel remain subject to their national rules, which almost at all times include obligations under basic international human rights and IHL instruments. In this case the PMC hiring scenario calls

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<sup>247</sup> These are neither fully integrated in the operational structures of the UN operations, they are not subject to the internal disciplinary system of the UN, nor do they enjoy the same functional privileges and immunities from the jurisdiction of the host state. See above, parts III.C.2.a.

<sup>248</sup> *Adopted Draft Articles on IO Responsibility*, Art. 36 (1)

<sup>249</sup> *Adopted Draft Articles on IO Responsibility*, Art. 36 (2)

<sup>250</sup> See *ILC Commentary to Art. 36 on IO Responsibility*. The ILC stated in the commentary that the consequences of these breaches are not covered by the Part II of the Draft Articles, although they are arguably similar to them. See *Report of the International Law Commission on the Work of its Fifty-ninth Session*, A/62/10, 2007, para 344.

for the identification of obligations applicable directly to the UN, for which resorting to customary rules is required, as already indicated above. In addition to these, the agreements of the Organization with the host state, other contributing states or IOs might help in pointing to the applicable obligations to which the UN would give consent to be bound. These are then transformed into the internal rules and regulations of the Organization, which by themselves do not provide the source of international obligations, but have a direct legal effect only internally, in accordance with the internal legal system of the Organization. Considering the principle of the inferiority of rules of the Organization to its international obligations,<sup>251</sup> the identification of the latter is crucial.

The contractual relation between the PMC and the IO is therefore only of secondary importance, defining their mutual obligations, but not inflicting on the IO additional substantive international obligations. It has a significant value, however, as it aids the Organization in meeting its international obligations by establishing the set of rules which apply mutually between the two contractual parties, obliging the PMC to exercise its conduct in accordance with the provisions of the contract, governed by private law, which should contain reference to internal organizational rules, but also to international obligations by which the UN is bound. Furthermore, the additional value of the contract in relation to the responsibility issues of the IO is its indicative role of the positive measures adopted by the IO in order to meet its international obligations. As seen above, international responsibility can be incurred for action, but also omission of action. The illegality of non-action is particularly relevant when it could prevent the occurrence of violations of international obligations or at least respond to the breach of obligations, but has failed to do so. To a certain extent, this can be inferred from the general rules on

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<sup>251</sup> Art. 35 of *Adopted Draft Articles on IO Responsibility* (Irrelevance of the rules of the organization) currently reads: “The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part,” this being “without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.”

the responsibility of IOs,<sup>252</sup> and is the most evident in cases of a repetition of the breach. The assurance for cessation is not a precondition for the positive obligation to arise, as what is actually sought is compliance with primary rules that were breached.<sup>253</sup> However, the assurances and guarantees of non-repetition may be regarded as a “new obligation that arises as a consequence of the wrongful act, which signals the risk of future violations.”<sup>254</sup> The prevention of sexual abuses by officials of the UN or by members of its forces is a classic example of obligations guaranteeing non-repetition of such acts.

Clear-cut articulation of what exactly due *diligence* means is, again, case specific, depending on circumstances<sup>255</sup> and on the level of applicable norms,<sup>256</sup> but should not be neglected in connection to private contractors, simply because “the State [or any other public entity, such as the IO] cannot absolve itself from responsibility by delegating its obligations to private bodies and individuals.”<sup>257</sup> After acknowledging that the decision to hire a contractor would require the UN to assure the lawful conduct of the PMC or at least to strive in this direction, the question remains whether similar obligations are to be expected from the state linked to this PMC in a manner which does not presuppose the attribution of the PMC conduct to that state. What is at stake here is the potential international responsibility of the state in which the PMC, which has violated existing international obligations (of the state or international obligation) through its conduct, is registered (the term *exporting state* is usually used). For responsibility to be incurred in this scenario, it should be established that the duties of this state, for example the respect for human rights or provisions of IHL,

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<sup>252</sup> Article 33, Cessation and non-repetition “The international organization responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”

<sup>253</sup> Commentary to Art 33, supra note 250, para 344, page 202 sub para 2-4.

<sup>254</sup> Ibid.

<sup>255</sup> A.V. Freeman, “Responsibility of States for Unlawful Acts of Their Armed Forces”, 88 *Recueil de Cours* (1955), 267-415, at 278.

<sup>256</sup> Lehnardt, supra note 218, at 18.

<sup>257</sup> ECtHR, *Costello Roberts v UK*, Judgement, 23 February 1993, n. 13134/87, para 27.

apply extraterritorially;<sup>258</sup> furthermore, the state must be able to exercise its authority over the private actor, which is extremely difficult when this actor is active abroad. Although the exporting state would be under an obligation to prevent the action of the PMC if directed towards the territorial integrity of another state,<sup>259</sup> it is rather unlikely that such an obligation would exist for the peacekeeping-PMC integrated into a UN peacekeeping force acting under a valid Chapter VII mandate of the Security Council. While the comprehension of the due diligence principle, which would compel the states to play a role of a regulating authority that would strictly supervise and monitor the conduct of PMCs registered with them for their activity abroad, is desirable and possible in theory, it is “important to note that to date no court has found a state to be responsible for failing to control its companies or nationals abroad [for their private conduct] under such circumstances.”<sup>260</sup>

Inferring from this that the entity most likely to be held responsible for the wrongful acts of the hired peacekeeping-PMC would be the UN, a more detailed look at the principles for the invocation of such responsibility seems in place. According to the proposed IO-responsibility rules this can be invoked by the injured state (or IO)<sup>261</sup> or even any other non-injured state (or an IO), provided that the obligation breached by the organization is owed to the international community as a whole;<sup>262</sup> such invocation may be accompanied by the claim for cessation of such acts and the obligation to provide reparations.<sup>263</sup> This offers, at least in theory, a few possible scenarios for the invocation of an organization’s responsibility for breaches of law caused by the PMC. A classic example would be the invocation by the host state for peacekeeping-related damages of its property or the gross violations of human rights or provisions of SOFAs by the PMC-peacekeeping contingent. The organization could

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<sup>258</sup> Lehnardt, supra note 218, referring to the UK Court of Appeal, *Al-Skeini and others, v. Secretary of State for Defence*, Judgment, 21 December 2005.

<sup>259</sup> *The Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in Accordance with the Charter of the UN*, UNGA Res. 2625 (XXV), 24 October 1970.

<sup>260</sup> Lehnardt, supra note 218, at 19.

<sup>261</sup> Art. 46, *Adopted Draft Articles on IO Responsibility*.

<sup>262</sup> Art. 51(2) and (3), *ibid*.

<sup>263</sup> Art. 51(4), *ibid*.

be held responsible by other members of the international community, such as states or IOs not directly involved or injured by the acts of the UN-hired PMC, in the case the breach of obligations the Organization owes to the international community as a whole. A PMC (or even a “normal” national peacekeeping contingent) systematically violating basic human right or IHL would (although unlikely) be an example of such conduct.

In addition to these theoretical considerations and similar to the PMC-secondment scenario (see above Section III.A) the established peacekeeping practice would also provide the basis for third-party liability claims against the Organization, offering a real-time tool for an injured party to obtain compensation for damages. If the assumption is that the UN General Assembly-endorsed provisions for limited liability of conduct-related and ordinary operational activities of UN forces<sup>264</sup> are applicable *mutatis mutandis*, the question is to what extent they overlap or are in contradiction with the responsibility principles just quoted. Limited or shared liability draws its essence from the consent given by the host-state for the peacekeeping presence. The limitation is not applicable for damage caused by gross negligence or wilful misconduct; for which the UN would be responsible in that case. However, it is equally inapplicable in the way that it divests the Organization of the responsibility in the cases of *operational necessity*, a concept developed in the practice of peacekeeping by analogy to military necessity but wider in scope.<sup>265</sup> In this case the United Nations incurs no liability for damage caused “from the necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate,” if such action satisfies the four cumulative conditions.<sup>266</sup>

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<sup>264</sup> See the two UN Secretary-General reports, *supra* note 240.

<sup>265</sup> *Military necessity* is limited to combat operations and is governed by the laws of war. The concepts are, however, conceptually similar as they serve “as an exemption from liability, or a legitimization of an act that would otherwise be considered unlawful.” UN Doc. A/51/389, *supra* note 140, para 13, footnote 5.

<sup>266</sup> The force commander holding the discretionary power to decide on the operational necessity of any given measure, must be convinced that such necessity exists; the measure itself must be strictly necessary and not just a matter of mere convenience or expediency; it has to be a part of an overarching operational plan and not the result of a rash individual action; and the damage inflicted must be proportional to what is strictly necessary to achieve the operational goal. *Ibid*, at 14; see also Schmalenbach, *supra* note 193, at 41-42.

The last few notes touch upon the issue of forums, either from the perspective of competence to adjudicate claims settlement involving third-parties and the United Nations or from the perspective assuring that violators of law, who act on behalf of the Organization, get punished for breaches they have committed. The dispute settlement practice of peacekeeping operations undertaken so far would once again prove to offer a solid background with the case of PMC-peacekeeping integration, provided that they are properly incorporated in the relationship between the United Nations and the host country (through SOFAs liability clause) but also included in the terms of reference of the *local UN claims review boards*. These local administrative organs of the Organization, operating in the country of operation and reporting to the UNSG,<sup>267</sup> would probably not differ in the two scenarios of PMC inclusion, although they would need to take into consideration the differences between the modalities of the two scenarios.

The problem of jurisdiction over and the obligation to prosecute individual PMC-peacekeepers directly hired by the UN would, however, present a bone of contention that can hardly be resolved under the current customary or conventional rules relating to peacekeeping. The issue of individual criminal responsibility of the PMC-peacekeeper is a topic of its own, already partially addressed in the IHL and IHRL sections above, and that goes beyond the scope of this research. It is, however, crucial to touch upon this in the light of responsibility issues as the obligation for perpetrators of wrongful acts presents one of the most crucial obligations of public authorities (usually states!) under international law that give effect to the reparation measures that follow the responsibility for wrongful acts. The problem, of course, derives from the fact that in the scenario in which the PMC is hired directly by the

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<sup>267</sup> The UN has undertaken (in SOFAs, based on the Section 29 of the Privileges and Immunities Convention) to settle private-law claims by means of a standing claims commission. Although such standing claims commission has never been created, UN-based claims review boards were established, instead, in almost every peacekeeping operation. Shraga, *supra* note 140.



UN, the concept of the sending state is substituted by the *sending international organization*, which, under current circumstances, is unable to guarantee the exercise of criminal jurisdiction over the individuals involved in its operations. It has to be reiterated that such a commitment, made by the peacekeeping contributing states, is principal, as it presents a precondition for the host-state to accept the presence of peacekeepers and also of sending states to commit them. The rights and duties of the UN, as well as its functions and structures, are not identical to those of a state.<sup>268</sup> However, the peacekeeping record of the UN confirms that the Organization can be empowered to perform certain governmental functions such as the exercise of military power. It is consequently under obligation to perform these functions in accordance with its obligations arising from such exercise, including the assurance of the implementation of disciplinary, prosecution and penal measures for individual perpetrators. Inferring from this, the hiring of the peacekeeping-PMC by the UN scenario would require the determination of procedures and measures that would secure the effective implementation of justice for these military personnel, particularly determining jurisdiction, but preferably also explicating the law that would serve as a basis for such measures. The primary responsibility for this would lie in the hands of the Organization as the main entity responsible for the conduct of such a force.

It is unclear how the Organization would tackle this issue, but it would, due to reasons similar to those that present the basis for functional immunities of the UN in host countries, presumably wish to avoid the primary jurisdictional role of the host state.<sup>269</sup> The alternative would require the consent of the host state and it should be stipulated in the operation's SOFA or in an agreement with any further entity affected by it, including potentially the PMC, the PMC-exporting state or states, of which the PMC

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<sup>268</sup> Or as the ICJ stated in 1949 (*Reparation for Injuries* Advisory opinion, supra note 45, at 179), when recognizing the international personality of the UN: "That is not the same thing as saying that it is a State, which is certainly no, or that its legal personality and rights and duties are the same as those of a State."

<sup>269</sup> One must not forget that the role of the host state is not trivial, as there exists a possibility for its exercise of jurisdiction under contemporary system, subject to the concept of the contributing state and the UN, especially in off-duty issues.

personnel are nationals.<sup>270</sup> Few possible options, however, present themselves. A pragmatic solution would be to have recourse to the disciplinary and criminal procedures of one of the contributing states taking part in the operation at stake. Although this would require a special agreement between the UN and the state willing to exercise such jurisdiction, the pragmatism of the solution lies in the use of a judicial system already in place. Another possibility is for the UN to resort either to the existing forums of international criminal justice such as the International Criminal Court or to the internal justice-administration procedures of the Organization. Both these options would first require the modification and adaptation of the existing procedures and institutional mechanisms. The ICC-option would preferably seek for its jurisdiction on the basis of Article 13(b) of the Court statute, calling for the reference of the situation in which crimes covered by the statute may have been committed to the Court by the UN Security Council. But it would be relatively narrow in scope, covering only the most serious international crimes. The use of internal UN justice mechanisms such as the *claims tribunals* or administrative tribunals is, however, even more sub-optimal, as these are not, in essence and nature, the organs of criminal prosecution, lacking adequate procedures, competences and resources. As the internal structures of the organization are subject only to gradual and non-revolutionary change which is, if at all, highly likely to take longer than the procedures related to mandating PMC-peacekeepers, it is plausible to expect that the applied solution would be *ad-hoc*, mixing elements of the established national procedures with the indispensable elements of international criminal justice. The pressing urge to deal with such issues would, however, aid in further developing the mechanisms of the latter, which might subsequently lead to the development of effective disciplinary and criminal procedures applicable to all subjects involved in international peacekeeping.

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<sup>270</sup> Especially the latter case indicates to the additional potential body of law that would be applicable, namely the law of consular protection.

## V) Conclusion

This dissertation explored the most pertinent legal issues that would arise from the possible inclusion of PMCs as a military component of the UN peacekeeping. The core of the research was a detailed outline of the legal framework applicable to PMC-peacekeeping and the exploration of issues of international responsibility of related international law subjects. This exercise was conducted on the two most likely scenarios to provide a basis for PMC-inclusion in these operations - the secondment of peacekeeping PMC by a government or a direct hiring of the company by the UN - and it relied on the established peacekeeping practice as the fundamental source of legal principles and rules applied in the analysis. Considering that the situations dealt with were without a clear-cut legal precedent, the resort to these analogies was the only way to forward the topic, notwithstanding the need for occasional presumptions and inventions. Particularly the following notable issues require attention or restatement:

*First*, one can conclude with confidence that there exists a certain detachment between the current use and status of private contractors in UN operations and the modalities which would be required for the implementation of the two hypothetical scenarios presented, namely the utilisation of PMCs as security-providing and combat forces under UN control and command. Subject to the functional necessity test to determine the special status, rights and duties of international staff incorporated in UN operations, the peacekeeping-PMCs would need to be included in the overall legal regime applicable to the UN forces on the territory of the host-state. Current practice relating to private contractors, including private military and security companies, is reluctant to handle them along the same lines as other personnel included in peacekeeping operations. For this reason one is also awaiting precedent cases and further practice, either of international organizations and states, particularly of host states.

*Second*, both core parts of the analysis indicated that there currently exists a firmer case for the implementation of the first scenario that assumes an active role of states as providers of PMC-peacekeepers as seconded entities, similar to that of the national peacekeeping contingents. This conclusion was somehow expected, taking into consideration the analogy of the approach with established peacekeeping practice. Furthermore, the international conventional rules, which nowadays are numerous compared to other sources of international law, are set down primarily to regulate the conduct of states and less of IOs. The fact that the UN is not a party, for example, to some major IHL and IHRL conventions renders certain aspects of their applicability difficult and unclear. Since the second scenario assumes the primary role and responsibility of the UN and recognizes that obligations of states are smaller (or at least less clear, as with the *due diligence* concept) its precise conceptualisation would require clearer primary (i.e. substantive) rules, as well as defined secondary (i.e. responsibility) rules. For these reasons any further clarification and implementation of the second scenario will depend on a more precise investigation of current practice, but even more on the development of further rules, either positive or through practice.

The *third* and final concluding comment deals with the assessment of the rationale of the international responsibility debate. This work focused primarily on responsibility issues arising from PMC-peacekeeping inclusion that concern states and IOs, and devoted less attention to issues of individual international criminal responsibility. Determining which international legal subject bears responsibility for wrongful acts committed by its agents is clearly relevant. It has therefore been analysed in detail, coming to the conclusion that every such analysis has to take into consideration the specificities of the inspected situation, such as the determination of the effective control of the PMC at the time of the execution of a wrongful act and the obligations of international subjects connected to these PMCs (UN as a hiring entity, states as entities sending, steering, registering, regulating or even hosting such companies) with the enforcement of applicable rules. Notwithstanding this, one has to overcome this

approach and recognize that, in its essence, international wrongful acts are not committed by public authorities, but individuals. It is therefore crucial to emphasize the issue of individual criminal responsibility of PMC-peacekeepers (and some day potentially also the corporate responsibility of PMCs) for wrongful acts committed during the performance of their duties (and also off-duty), which for practical reasons of finding and sanctioning the violators of the established norms plays a crucial supplementary role to the issues of international criminal responsibility of states and IOs. The application of principles of international criminal law, combined with IHL and IHRL enforcement mechanisms and procedures, leading to the acknowledgement of the concept of international criminal responsibility, should therefore play a constituent component of the analyses of responsibility issues connected with the possible inclusion of PMCs in the UN or other forms of international peacekeeping. From the analysis above one can, again, infer that the current international legal framework and practice favour the option of PMC state-secondment to that of direct hiring of a PMC by the UN. The latter option will, if ever applied, require a progressive development of enforcement rules relating to individual international criminal responsibility for wrongful acts.

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## VII) List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
AP (I, II)	Additional Protocols I and II (1977) to Geneva Conventions of 1949
CESCR	Covenant on Economic Social and Cultural Rights
ECtHR	European Court of Human Rights
GC (I-IV)	Geneva Conventions (I-IV) of 1949
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
IHL	International Humanitarian Law
ICTY	International Criminal Tribunal for the former Yugoslavia
IO(s)	International organization(s)
ISAF	International Security Assistance Force
KFOR	Kosovo Force
MINURCA	UN Mission in the Central African Republic
MIPONUH	UN Civilian Police Mission in Haiti
NIAC	Non-international Armed Conflict
ONUC	UN Operation in the Congo
PMC(s)	Private Military Company(ies)
POW	Prisoner of War
RoE	Rules of engagement
TCN	Troop contributing nations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMIC	UN Advance Mission in Cambodia
UNAMSIL	UN Mission in Sierra Leone
UNAVEM	UN Angola Verification Mission
UNCITRAL	UN Commission on International Trade Law
UNDOF	UN Disengagement Observer Force
UNEF	UN Emergency Force
UNFICYP	UN Peacekeeping Force in Cyprus
UNIFIL	UN Interim Force in Lebanon
UNMEE	UN Mission in Ethiopia and Eritrea
UNMIH	UN Mission in Haiti
UNMIK	UN Mission in Kosovo
UNMIL	UN Office of Legal Affairs
UNSF	UN Security Force in West New Guinea
UNSMIH	UN Support Mission in Haiti
UNTAC	UN Transitional Authority in Cambodia
UNTEA	UN Temporary Executive Authority
UNTMIH	UN Transition Mission in Haiti